

Advanced Felony Sentencing Seminar

Friday, August 10, 2012

Sessions in alternative locations (same presentation at all locations):

1:00 p.m. to 4:00 p.m.

Cooley Law School - Auburn Hills - LIVE

Simulcast at:

Cooley Law School - Ann Arbor
Cooley Law School - Grand Rapids
Cooley Law School - Lansing

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Presented by the Thomas M. Cooley Law School and the
Criminal Defense Resource Center of the
State Appellate Defender Office with
support through a generous grant from the
Michigan Commission on Law Enforcement Standards

About the Speakers

Danielle Walton has been an assistant prosecutor in the Oakland County Prosecutor's Office for the past 12 years. She has also served as an instructor at police academy as well as a special assistant prosecutor for the counties of Lapeer and Genesee. Before coming to Oakland County, she practiced in the Muskegon County Prosecutor's Office for six years.

She is with the appellate division which routinely deals with issues regarding sentencing. Previously, she filed an amicus brief on behalf of the Prosecuting Attorneys Association of Michigan regarding Michigan's sentencing guidelines. She appears on almost a monthly basis in the Court of Appeals and has argued a number of cases in the Michigan Supreme Court.

Anne Yantus, as managing attorney with the State Appellate Defender Office, specializes in plea and sentencing appeals in the trial and appellate courts of Michigan. She also teaches a criminal sentencing course at the University of Detroit-Mercy School of Law, and will begin teaching an appellate advocacy course there this fall. She is a frequent speaker on plea and sentencing matters, and in 2010 co-authored a chapter on circuit court sentencing for *Michigan Criminal Procedure*, a book published by the Institute for Continuing Legal Education. She currently serves on an MDOC workgroup considering revisions to Michigan's felony presentence report.

Advanced Felony Sentencing Seminar

Friday, August 10, 2012

Agenda

1:00 NEW Sentencing Guidelines Case Law

2:00 NEW Sentencing Decisions (Non-Guidelines)

****Including new USSC cases on fines, juveniles**

2:30 Pending Issues in the Michigan Supreme Court,
Court of Appeals, etc.

2:45 Break

3:00 HYTA, 7411, Boot Camp, Consecutive Sentencing, Enhancement

3:30 Q & A Period

ADVANCED FELONY SENTENCING SEMINAR

August 10, 2012

By: Anne Yantus

I. NEW CASE LAW – SENTENCING GUIDELINES

Application of Guidelines to HYTA?

No case law has yet approved application of the statutory sentencing guidelines to HYTA dispositions. *People v Khanani*, ___ Mich App ___ (Docket No. 301138, released for publication April 10, 2012).

Ten Year Gap:

Zero points should have been scored under PRV 1 where there was a ten-year gap between convictions. *People v Detloff*, 489 Mich 95; 798 NW2d 506 (2011).

PRV 2:

A felony conviction from Indiana remains a felony for purposes of scoring the Michigan sentencing guidelines even if the sentencing peculiarities in Indiana cause the sentence to mimic the sentence for a misdemeanor. *People v Meeks*, 293 Mich App 115; 808 NW2d 825 (2011).

An Indiana felony conviction for purchase of a stolen firearm with a value of \$175 most closely corresponds to the Michigan felony offense of receiving and concealing a stolen firearm rather than the misdemeanor offense of receiving and concealing stolen property under \$200. *People v Meeks, supra*.

PRV 5:

Two points are properly scored under PRV 5 for a conviction of minor operating a vehicle with any bodily alcohol content, i.e., zero tolerance provision under MCL 257.625(6). *People v Bulger*, 291 Mich App 1; 804 NW2d 341 (2010).

PRV 6:

No error in scoring five points for defendant's misdemeanor bond status – although the bond had been revoked – where the misdemeanor was still pending and therefore defendant had a relationship with the criminal justice system when he committed the instant offense. *People v Johnson*, 293 Mich App 79; 808 NW 2d 815 (2011).

OV 1:

Trial court committed plain error in scoring OV 1 for methadone that was not used against the child as a weapon. *People v Carr*, 489 Mich 855; 795 NW2d 12 (2011).

OV 1

Heroin that was not used as a weapon cannot support an assessment of 20 points for use of a harmful chemical substance. *People v Ball*, ___ Mich App ___ (Docket No. 303727, 6/19/12).

Where the weapon was found under the bedcovers at the time of the search warrant, and drugs were found in the bedroom but the defendant was not home, it was error to score five points for an implied or displayed weapon. *People v Nelson*, 491 Mich 869; 809 NW2d 564 (2012).

Fifteen points properly scored under OV 1 where both testimony at trial and information in the presentence report reflected defendant pointed gun at victim's face or brandished gun during robbery, even if jury convicted of unarmed robbery rather than armed robbery. *People v Harverson*, 291 Mich App 171; 804 NW2d 757 (2010).

OV 2:

Five points properly scored under OV 2 for nature of the weapon where testimony at trial and information in presentence report indicated defendant pointed gun at victim's face or brandished gun during robbery, even if jury convicted of unarmed robbery rather than armed robbery. *People v Harverson*, *supra*.

OV 3:

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, 100 points may be scored for the death of a "victim" as the co-perpetrator was a victim of the defendant's criminal activity (even if shot by the homeowner). *People v Laidler*, 491 Mich 339; ___ NW2d ___ (2012), reversing decision below at 291 Mich App 199; 804 NW2d 866 (2010).

The presence of a victim is a necessary prerequisite to the assessment of points under OV 3 in general, and in *Laidler* the victim's death "resulted" from the defendant's criminal actions. *Id.* But the Court notes its conclusion that the co-perpetrator was a "victim" is limited to OV 3 and might not apply to other variables. The Court also notes self-inflicted harm could be scored under OV 3. *Id.*

Ten points properly scored where the victim suffered an infection as a result of being raped. *People v McDonald*, 293 Mich App 292; 811 NW2d 507 (2011).

OV 4:

The Court finds error in the scoring of ten points under OV 4 where there was no record evidence of serious psychological injury resulting from the exhibition of a sexually explicit performance to a 12 year old girl. The trial court "may not simply assume that someone in the victim's position would have suffered psychological harm" *People v Lockett*, 295 Mich App 165; 814 NW2d 295 (2012). *See also People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003) (cannot assume serious psychological injury from forceful purse snatching).

The trial court did not err in scoring 10 points where the victim testified at trial she was nervous and scared during the bank robbery and her written impact statement indicated sleeplessness for weeks and a continuing fear of being robbed by her customers. *People v Earl*, ___ Mich App ___ (Docket No. 302945, 6/19/12).

OV 7:

Trial court erred in scoring 50 points where the defendant entered a gas station/party store, struck the clerk in the left side of the head with the butt of an airsoft gun and knocked him to the ground, struck another clerk on the head with the butt of the airsoft gun, took the money and fled. Neither victim suffered serious physical injuries and neither required medical attention. OV 7 requires “egregious conduct.” To satisfy the requirement that there be “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense,” there must be “conduct designed to cause copious or plentiful amounts of additional fear,” not simply “some fear-producing action beyond the bare minimum necessary to commit the crime” *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012), *leave granted* 491 Mich 934; 814 NW2d 294 (2012)

[Leave also granted in *People v Hardy*, 419 Mich 934; 814 NW2d 294 (2012), to determine “whether the trial court erroneously assessed 50 points . . . because the defendant racked a shotgun during the carjacking”].

Where defendant was present and armed during the commission of the offense, but did not commit, take part in, or encourage others to commit acts that amounted to sadism, torture or excessive brutality, it was error to score 50 points. The fact that defendant held a gun during the offense, and may have pointed it (although the evidence was conflicting on this point) was not enough to justify the assessment of 50 points. *People v Hunt*, 290 Mich App 317; 810 NW2d 588 (2010).

Fifty points were properly scored where defendant told the sexual assault victim to keep her eyes closed, suggested there were accomplices who knew who she was and had been watching her, and defendant made threats he would find her again in the future. *People v McDonald*, 293 Mich App 292; 811 NW2d 507 (2011).

OV 8:

Movement of the victim from a common area to the bedroom to effectuate the CSC crimes was found to be merely incidental movement on the facts of the case and did not amount to asportation under OV 8. *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010).

OV 9:

The trial court improperly scored 25 points for more than twenty victims of property loss where defendant pleaded guilty to vandalizing two school buildings. The community at large was not a direct victim of the crimes. *People v Carrigan*, ___ Mich App ___ (Docket No. 302090, 8/2/12).

It is proper to count the decedent, a passenger in the decedent’s car and the occupants of another car as victims under OV 9 where the individuals in both cars were part of the collision resulting from defendant’s drunk driving causing death. *People v Lechleitner*, 291 Mich App 56; 804 NW2d 345 (2010).

OV 9 improperly scored at 10 points in a case of first-degree criminal sexual conduct, reflecting 2 to 9 victims placed in danger of physical injury or death, where although two of the complainant’s friends were in the bedroom where the offense took place, nothing in the record

suggests that they were ever placed in danger. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010).

OV 9 was properly scored for multiple victims where the sentencing offense involved “K,” but there was evidence that “M” and “P” would sometimes spend the night at defendant’s home with “K,” and court finds reasonable conclusion from trial testimony that the other boys were in the home sleeping when “K” was assaulted. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

OV 10:

In order to score points under OV 10, there must be a vulnerable victim and the defendant must have exploited that vulnerability. This is true even when scoring for predatory conduct. *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008).

The susceptibility to injury need not be inherent in the victim, and victim vulnerability may arise from the personal characteristics of the victim or out of the victim’s relationships or circumstances. The defendant’s predatory conduct may also create or enhance the victim’s vulnerability. *People v Huston*, 489 Mich 451; 802 NW2d 261 (2011).

Defendant’s pre-offense conduct must be directed at “a victim,” rather than “the victim,” and may include circumstances where the defendant and co-defendant are lying in wait, armed, in a parking lot at night waiting for the first random person to come along. *Id.*

Predatory conduct does not mean any “preoffense conduct,” but rather those forms that are predatory such as lying in wait and stalking – as opposed to run-of-the-mill planning to effectuate a crime or escape without detection. *Id.*

Ten points may not be scored under OV 10 for exploitation of a “domestic relationship” where the parties previously dated but had neither a familial nor cohabitating relationship. The fact that the victim had left clothes at the defendant’s apartment did not establish a cohabitating relationship. *People v Jamison*, 292 Mich App 440; 807 NW2d 427 (2011). [Note: the court additionally concludes a present dating relationship, standing alone, would be insufficient unless there was cohabitation or a familial relationship.]

Error to score 10 points for abuse of domestic relationship when defendant and victim had a past dating relationship only. *People v Brantley*, __ Mich App __ (Docket No. 298488, 5/17/12) (following *Jamison*).

The Court affirms the scoring of 15 points for predatory conduct based on the defendant’s pre-offense conduct of picking up the 12 year old victim in his van during the early morning hours, driving to the store to purchase liquor, and driving to a city park where he parked the van and exhibited a sexually explicit performance to the minor. *People v Lockett*, 295 Mich App 165; 814 NW2d 295 (2012).

OV 11:

The Court of Appeals construes the phrase “same transaction” in the consecutive sentencing portion of the CSC 1 statute as “analogous” to the “arising out of” language found in OV 11, and

concludes that “same transaction” refers to something that grows out of a continuous time sequence and the events spring from each other and have a connective relationship that is more than merely incidental. *People v Ryan*, ___ Mich App ___ (Docket No. 301787, 2/14/12).

OV 12:

OV 12 is scored for *acts* that are separate from the sentencing offense; error to score for larceny that was necessarily part of sentencing offense of unarmed robbery. *People v Light*, 290 Mich App 717; 803 NW2d 720 (2010).

The crime group designation given to an offense by the guidelines controls for purposes of scoring OV 12, so when an offense is designated a crime against “public order” by the guidelines, it cannot be counted as a crime against the person under OV 12. *People v Wiggins*, 289 Mich App 126; 795 NW2d 232 (2010).

The court must score OV 12 before it scores OV 13, and cannot save conduct for the scoring of)V 13 when the conduct should have been counted under OV 12. *People v Bemmer*, 286 Mich App 26; 777 NW2d 464 (2009).

OV 13:

The sentencing offense must be one of the three or more crimes within a five-year period. *People v Nelson*, 491 Mich 869; 809 NW2d 564 (2012).

The offense categories (crime groups) determine how to score the offense variables and an offense designated a crime against public safety cannot be considered a crime against the person for purposes of scoring OV 13, even if the crime necessarily involved a person (such as assaulting a prison guard). *People v Bonilla-Machado*, 489 Mich 412; 803 NW2d 217 (2011).

Conspiracy is a crime against public safety and cannot be counted under OV 13 as a crime against the person by looking at the nature of the underlying offense. *People v Pearson*, 490 Mich 984; 807 NW2d 45 (2012).

Note: The following decision of the Court of Appeals has been overruled by the *Pearson* decision:

For crimes like conspiracy that have special scoring rules under MCL 777.18 and MCL 777.21(4), the court should consider the nature of the underlying offense when determining whether the offense is a crime against the person or property for purposes of scoring OV 13. *People v Jackson*, 291 Mich App 644 (2011) (overruled).

A juvenile adjudication constitutes “criminal activity” even if there is no “conviction,” and therefore it is proper to score OV 13 for a juvenile adjudication. *People v Harverson*, 291 Mich App 171; 804 NW2d 757 (2010)..

The trial court did not abuse its discretion in scoring OV 13 at 0 points where although the defendant had been convicted of two felonies against a person within the five-year period, the evidence was insufficient to show that he committed a third felonious criminal act against a person where the defendant admitted he had been accused of criminal sexual conduct against another individual but he had not been charged nor convicted of that conduct and the prosecution

did not introduce any testimony to support the allegation. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010).

No error in using dismissed 2008 bank robbery charge where presentence report indicated defendant was identified by a parole agent for this offense and prosecutor presented a surveillance photo as further evidence. *People v Earl*, ___ Mich App ___ (Docket No. 302945, 6/19/12)

NOTE: Effective 04-1-09 there is a new 25-point category in OV13 for scoring a pattern of felonious criminal activity “directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang.” But there is no longer a 10-point assessment for membership in an organized criminal group. [A gang is defined as a group of 5 or more people that identifies itself with some unifying method of membership identity, defined membership criteria, and an established command structure. MCL 750.411v.]

OV 14:

The Court finds no clear error in scoring 10 points for a leadership role where the defendant was 35, the co-defendant was 18, the defendant owned and drove the van that was used to pick up the girls and used as the location for the sexual acts, and defendant presumably was the one who purchased the liquor used during the offense. *People v Lockett*, 295 Mich App 165; ___ NW2d ___ (2012).

OV 15:

Offense Variable 15 is a *McGraw* variable and the scoring is specific to the conduct relating to the sentencing offense. Where defendant was convicted of possession with intent to deliver less than 50 grams of cocaine for less than a gram of cocaine found in his car, and the prosecutor dismissed a higher charge of possession with intent to deliver over 50 grams for 64 grams of cocaine found in a nearby motel room, it was error to score 50 points for the cocaine found in a motel room even if the two offenses occurred simultaneously. *People v Gray*, ___ Mich App ___ (302168, rel’d 6/5/12).

OV 19:

Leave to appeal denied after leave to appeal granted and oral argument heard on whether OV 19 properly scored where defendant threw away evidence and denied guilt. *People v Cooley*, 490 Mich 985; 807 NW2d 46 (2012).

OV 19 may be scored for aggravating conduct that occurs after the sentencing offense is completed; ten points properly scored where defendant threatened witness days after the manslaughter offense was completed. *People v Smith*, 488 Mich 193; 793 NW2d 666 (2011).

OV19 was properly scored on the basis that the defendant asked others to dispose of the knife used to stab the victim and to lie about his whereabouts in an attempt to create a false alibi. *People v Ericksen*, 288 Mich App 192; 793 NW2d 120 (2010).

OV 19 may be scored for the same facts leading to the defendant's perjury conviction. *People v Underwood*, 278 Mich App 334; 750 NW2d 612 (2008).

GUIDELINES DEPARTURES:

The Michigan Supreme Court recently reversed a departure sentence concluding the trial judge had a valid reason to depart following a probation violation, but "failed to articulate any rationale to justify imposition of the longest possible minimum sentence." *People v Harrington*, 490 Mich 876; 803 NW2d 691 (2011).

The trial court properly departed based on the "psychological injury suffered by the victim's family members and the likelihood of the defendant reoffending. . . ." *People v Corrin*, 489 Mich 855; 795 NW2d 13 (2011).

The legislative sentencing guidelines apply when the defendant is sentenced as a second CSC offender under MCL 750.520f (requiring a 5-year mandatory minimum term). Any minimum sentence above five years and also above the guidelines range must be viewed as a departure for which the trial judge must give substantial and compelling reasons. *People v Wilcox*, 486 Mich 60; 781 NW2d 784 (2010).

There was no error in failing to depart downward from the guidelines range where the trial judge sentenced at the bottom of the range, the judge considered the totality of the circumstances, and there was no error in the scoring of the guidelines or reliance on inaccurate information. *People v Roberts*, 292 Mich App 492; 808 NW2d 290 (2011).

II. NEW FROM THE MICHIGAN LEGISLATURE

False Statement to Peace Officer during Criminal Investigation:

Effective July 20, 2012, there is a new crime of knowingly making a false statement to a peace officer during a criminal investigation. MCL 750.579c; 104 PA 2012. The maximum penalty ranges from 93 days (if the investigation involves a serious misdemeanor), 1 year (investigation of a high-court misdemeanor or felony with a maximum penalty of less than 4 years), 2 years (investigation of a felony punishable by four years or more), and 4 years (investigation of a number of serious crimes listed in the statute).

False Pretenses Penalties Increased:

Effective January 1, 2012, there are increased value threshold amounts for the crime of false pretenses. 201 PA 2011, amending MCL 750.218. The new penalties are:

False pretenses \$20,000 to \$49,999 (15 year max, Class C, max fine of \$15,000 or three times the value . . .)

False pretenses \$50,000 to \$99,999 (15 year max, Class C, max fine of \$25,000 or three times the value . . .)

False pretenses \$100,000 or more (20 year max, Class B, max fine of \$35,000 or three times the value . . .)

Expungement:

Effective June 23, 2011, the expunction statute was amended to allow expunction of one eligible offense even if the individual has two minor offenses in addition to the one eligible offense. “Minor offense” is defined as a misdemeanor or ordinance violation for which the maximum possible sentence is not more than 90 days, for which the maximum possible fine is not more than \$1,000 fine, and committed by an individual not more than 21 years old. MCL 780.621, 2011 PA 64.

Parole Amendments:

Effective March 31, 2011, inmates with a final deportation order may be paroled after serving one-half of the sentence, although this provision is not available to those serving sentences for first- or second-degree murder, first-, second- or third-degree CSC and those sentenced as an habitual offender. 2010 PA 223, amending MCL 791.234b.

III. NEW CASE LAW (NON-GUIDELINES)

CSC 1st – 25-Year Mandatory Minimum Term:

The mandatory minimum term of 25 years for CSC first-degree involving a victim under the age of 13 is not cruel or unusual punishment. *People v Benton*, 294 Mich App 191; ___ NW2d ___ (2011). The Court was not persuaded the penalty is unduly harsh as applied to a female schoolteacher with no prior record who engaged in a purportedly consensual sexual relationship with a 12-year old student.

The Court of Appeals found “constitutionally deficient” performance where defense counsel failed to inform the defendant that he faced a mandatory 25-year minimum sentence for CSC first involving a victim under the age of 13, and instead told the defendant he faced up to 20 years and likely would receive a minimum term of five to eight years. The court concluded correct information on the mandatory minimum sentence was “essential to enable the defendant to make an informed decision whether to accept the prosecution’s plea offer or proceed to trial.” *People v Douglas*, 296 Mich App 186, 196; ___ NW2d ___ (2012).

Lifetime Electronic Monitoring:

Before accepting a guilty or no contest plea, the trial court must advise the defendant of mandatory lifetime electronic monitoring for first- and second-degree CSC where lifetime monitoring applies. Lifetime monitoring is part of the sentence itself and is a direct consequence of the plea. *People v Cole*, 491 Mich 325; ___ NW2d ___ (2012). *See also* Amendment to MCR 6.302(B)(2)(2) (effective June 20, 2012).

Defendants convicted of first-degree CSC, and defendants convicted of second-degree CSC involving a victim under the age of 13, are subject to mandatory lifetime electronic monitoring if the crime was committed when the defendant was 17 years of age or older. *People v Brantley*, ___ Mich App ___ (Docket No. 298488, 5/17/12). *But see People v King*, ___ Mich App ___ (Docket No. 301793, 7/31/12) (disagreeing with *Brantley* that lifetime monitoring applies to all CSC first-degree convictions and requesting special panel). See MCL 750.520b(2)(d); MCL 750.520c(2)(b); MCL 750.520n(1) and MCL 791.285 (all effective 8-28-06).

Monitoring is not required for a defendant convicted of second-degree CSC with a victim under the age of 13 if the sentence imposed is jail and/or probation. The lifetime monitoring provisions were intended for those released on parole and/or discharged from a prison sentence. *People v Kern*, 288 Mich App 513; 794 NW2d 362 (2010).

Consecutive Sentencing:

Two consecutive sentences of 25 to 50 years imprisonment, effectively resulting in a 50-year minimum term, found proportionate where the victim suffered “horrific abuse at the hands of her father” due to continued sexual assaults when the victim was 11 years old. *People v Ryan*, 295 Mich App 388; ___ NW 2d ___ (2012).

Consecutive sentencing is permitted for two CSC first-degree convictions that arose out of the same incident, one involving vaginal penetration and one involving fellatio. The language in the CSC 1 statute permitting consecutive sentencing for “any other criminal offense arising from the same transaction” does not limit the other offense to a non-CSC offense *People v Ryan, supra*.

Under MCL 768.7a(1) (the statute permitting consecutive sentencing for escapes and crimes committed while incarcerated), the phrase “has become liable to serve” does not apply to “sentences arising out of contemporaneous acts giving rise to offenses tried together in one trial.” In other words, when the defendant, who was serving a jail sentence, has become liable to serve two new sentences for crimes committed during that earlier jail incarceration, neither new sentence preceded the other and thus consecutive sentencing between the subsequent two offenses is not permitted under MCL 768.7a(1) (although the two sentences would be consecutive to the previous jail term). *People v Williams*, 294 Mich App 461; 811 NW2d 88 (2011).

Jail Credit:

Where the defendant is convicted simultaneously of two offenses and was held in jail for both at the same time, and where both sentences must run concurrently, jail credit is appropriate against both sentences. *People v Williams*, 294 Mich App 461 n. 3; 811 NW2d 88 (2011).

Although a defendant who commits a felony offense while on parole must serve a consecutive sentence, once the parole period expires and if the defendant is still unable to post bond for the new offense, credit would be appropriate. *People v Williams, supra*.

Defendant is entitled to credit for time spent incarcerated in the county jail as a condition of probation against a later sentence for probation violation. *People v Oliver*, 489 Mich 923; 797 NW2d 134 (2011).

The Michigan Supreme Court reaffirms that a defendant is entitled to credit for the number of good-time days awarded against an earlier jail sentence when he is later sentenced to prison on the same case following a violation of probation. *People v Lackey*, 490 Mich 1000; 807 NW2d 321 (2012). The Court also remanded to the trial court to determine “whether defendant was awarded credit for ‘trustee days,’ and whether his sentence should be credited for those days as well.”

Where the defendant absconded on bond *after* sentencing (while on bond pending appeal), he was entitled to credit for time served in custody once re-arrested, even if he was being held by federal authorities for a federal charge that ultimately resulted in concurrent sentencing. As the instant sentence began on the date defendant was taken into custody after absconding, it was irrelevant for credit purposes when the federal sentence began. *People v Jones*, 488 Mich ____; 792 NW2d 748 (2011).

Tanner Rule:

The two-thirds rule of *People v Tanner*, 387 Mich 683 (1972), does not apply when the maximum sentence is life or any term of years. *People v Washington*, 489 Mich 871; 795 NW2d 816 (2011) (court disavows earlier conflicting order in *People v Floyd*, 481 Mich 938 (2008), and affirms earlier statements in *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n. 14 (2006), and *People v Harper*, 479 Mich 599, 617 n 31 (2007). See also, *People v Lewis*, 489 Mich 939; 798 NW2d 15 (2011) (same).

Habitual Offender Enhancement:

A prior adult conviction for which the offender received a juvenile sentence (as he was 16 years old at the time of the offense and the trial court had discretion to impose an adult or juvenile sentence following waiver to the circuit court) could be used to support enhancement under the habitual offender statutes. *People v Jones*, ____ Mich App ____ (Docket No. 303753, 6/19/12).

Holmes Youthful Trainee Act:

The trial judge should consider the defendant’s age and the seriousness of the crime when determining whether to place an individual on HYTA status. Where the defendant committed a similar offense while on bond pending sentencing for the instant matter, and the trial judge acknowledged feeling “frightened” by the defendant’s actions but granted HYTA because of the defendant’s supportive parents, it was an abuse of discretion to grant HYTA status. *People v Khanani*, ____ Mich App ____ (Docket No. 301138, released for publication April 10, 2012).

Probation Violation Warrant:

The trial court may not revoke probation based on a warrant filed after the probation period has expired. The “probation period” refers to the actual term set by the court, not the statutory maximum period of probation, and the probation terms expires so long as there is no order extending it. The Court also reaffirms that so long as the warrant is filed within the period of probation, revocation may occur after the term has expired. *People v Glass*, 288 Mich App 399; 794 NW2d 49 (2010).

Defendant-Probationer was not illegally arrested pursuant to an arrest warrant that was signed by the judge and probation agent, but not subscribed under oath and affirmation, because MCL 764.15(1)(g) permits arrest without a warrant when a peace officer has “reasonable cause” to believe there has been a violation of probation, and the Fourth Amendment does not require a search warrant to search a probationer’s home and therefore would not require a warrant to arrest a probationer. *People Glenn-Powers*, __ Mich App __ (Docket No. 301914, 5/8/12).

Probation Revocation:

Trial court failed to make sufficient findings of fact of a violation of probation that was premised on a failure to maintain employment “as directed by” the probation officer where the court adduced no evidence regarding how or when the probation officer directed the minor defendant to seek employment and the Michigan Supreme Court questioned whether a condition of probation that the defendant attend high school and maintain employment of 30 hours per week would be legally possible given the restrictions of Michigan’s youth employment law, MCL 409.11. *People v Kumasi*, 489 Mich 863; 795 NW2d 149 (2011).

Financial Penalties:

Under MCL 769.1k, the trial court has the authority to order reasonable court costs, which may be a flat fee and may consider overhead costs, without calculating the precise costs for each felony case. But there must be some concrete basis for the figure and “there must be a reasonable relationship between the costs imposed and the actual costs incurred by the trial court.” *People v Sanders*, __ Mich App __ (Docket No. 303051, 5/29/12).

The circuit court may not assess costs against the prosecution in a defendant’s criminal appeal as there is no statutory or court rule authority for such costs. *People v Rapp*, __ Mich __ (Docket No. 143343, 143344, 7/27/12), *affirming* 293 Mich App 159; 809 NW2d 665 (2011).

Where there was no record evidence to support the order of costs of prosecution of \$1,235, and there was no way to determine whether the costs (following a jury trial) were based on impermissible charges such as the prosecutor’s wages, the matter was remanded for a hearing to determine the appropriate costs. *People v Dillworth*, 291 Mich App 399; 804 NW2d 788 (2011).

The trial court did not clearly err in ordering restitution to Blue Cross Blue Shield for the loss of its investigator’s time that was spent investigating defendant’s prescription fraud activities even if the BSBS investigator was a salaried employee and Blue Cross would have incurred the cost of the investigator’s salary regardless of the defendant’s misconduct. *People v Allen*, 295 Mich App 277; __ NW2d __ (2012).

Effective April 1, 2012, the crime victim rights fee and state costs apply to all misdemeanor offenses and ordinance violations (not simply “serious” and “specified” misdemeanors, and also adding ordinance violations to the mix). The crime victim rights fee is \$130 for a felony, \$75 for a misdemeanor or ordinance violation, and \$25 for a juvenile disposition. The state costs are \$68 for a felony (including a juvenile felony), and \$50 for a misdemeanor or ordinance violation (including a juvenile misdemeanor or juvenile ordinance violation). PA 293, 294, 295 and 296 of 2011, amending in particular MCL 780.905 (crime victim rights fee) and MCL 769.1j (state costs), MCL 712A.18m (juvenile state costs).

Note: Effective December 16, 2010, the crime victim rights fee was increased to \$130 for felony case, \$75 for misdemeanor cases, and \$25 for juvenile cases (this is per case, not per count). 280 PA 2010; 281 PA 2010, amending MCL 780.904 and 780.905. The assessment was increased in part to fund a new statewide trauma system

The crime victim rights fee is neither restitution nor punishment and therefore the increased \$130 fee may be applied retroactively to crimes committed before the effective date of the increase.

People v Earl, ___ Mich App ___ (Docket No. 302945, 6/19/12)

Sentence Agreements:

The trial court does not have the authority to vacate the plea at the time of sentencing when it disagrees with a sentence recommendation or sentence agreement. Instead, the correct remedy is to offer plea withdrawal to the defendant pursuant to MCR 6.310(B)(2) (or extend the same to the prosecutor when the prosecutor is the aggrieved party, see *People v Siebert*, 450 Mich 500 (1995). To the extent MCR 6.310(B)(2) conflicts with the decision in *People v Grove*, 455 Mich 439 (1997) – which decision allowed the judge to reject the plea itself - the *Grove* decision has been superseded by court rule. But the Supreme Court finds no plain error on the facts of the case before it, although in the future the error will be considered plain error. *People v Franklin*, ___ Mich ___; 813 NW2d 285 (2012).

Sexual Delinquency:

Defendant is entitled to a separate hearing (although not necessarily a separate jury) on the charge of being a sexual delinquent and it was error for the trial court to rely on defendant's no contest to the charge of indecent exposure without conducting a hearing on the sexually delinquent enhancement provision. The Court also finds double jeopardy precludes conviction of aggravated indecent exposure and indecent exposure based on the same set of facts. *People v Franklin*, ___ Mich App ___ (Docket No.296591, 7/3/12).

Separate juries are not necessarily required where defendant is charged as a sexual delinquent in addition to another sexual offense; the proper analytical framework is that set forth in MCR 6.120(B). *People v Breidenbach*, 489 Mich 1; 798 NW2d 738 (2011).

Where defendant is sentenced for gross indecency as a sexually delinquent person, a single conviction and sentence is appropriate under MCL 750.338b because MCL 750.10a is a definitional statute only and does not provide for a separate conviction and sentence. *People v Craig*, 488 Mich 861; 788 NW2d 13 (2010).

Effective February 1, 2006, MCL 750.335a was amended to provide that gross indecency committed by an individual who is at the time a sexually delinquent person "is punishable by imprisonment for an indeterminate term, the minimum which is 1 day and the maximum which is life." The previous statute provided that the court "may" sentence a sexually delinquent person to an indeterminate term of one day to life imprisonment. MCL 750.335a. 2005 PA 300.

Note: In *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007), the Supreme Court held that under the previous statutory language ("may be punishable by"), the legislative sentencing guidelines applied. The Court expressed no opinion as to whether the legislative sentencing guidelines apply to the amended version ("is punishable by" an indeterminate sentence which is 1 day to life). The *Buehler* court also held that when the

guidelines provided for a prison cell recommended range under the old version of MCL 750.335a, probation would constitute a downward departure from the guidelines and is not be permitted absent substantial and compelling reasons.

SORA Advice before Plea:

Defense counsel must provide advice to the defendant prior to the guilty plea that sex offender registration will be a consequence of the plea (if SORA is applicable), and failure to give this advice affects whether the plea is knowingly made. Although not deciding whether SORA consequences are collateral or direct, the Court concluded advice on the consequences of SORA must be given as sex offender registration is a “particularly severe consequence” that is intimately related to the criminal process and because registration is an “automatic result” for certain defendants. *People v Forville*, 291 Mich App 363; 804 NW2d 878 (2011).

SORA Ineffective Assistance of Counsel:

Defense counsel’s failure to inform defendant he faced a mandatory minimum term of 25 years if convicted of first-degree CSC, and his erroneous advice that defendant would not be able to live with his children if required to register as a sex offender, caused defendant to reject the plea bargain to a lesser offense and amounted to ineffective assistance of counsel. *People v Douglas*, ___ Mich App ___ (Docket No. 301546, 4-12-12).

SORA Recapture Provision:

An individual previously convicted of a listed offense for which he or she was not required to register, but who is convicted of any other felony on or after July 1, 2011, must now register under the new recapture provision of MCL 28.724(5). This includes individuals assigned to youthful trainee status prior to October 1, 2004, if the person is convicted of any other felony on or after July 1, 2011. MCL 28.722(b)(ii)(b).

SORA –Timing of Catch-all Decision:

The trial court may not amend the sentence (here, the order of probation) to include sex offender registration under the catch-all provision some 20 months after sentencing. *People v Lee*, 489 Mich 289; 803 NW2d 165 (2011).

Removal from Sex Offender Registry:

To file a timely petition for removal from the sex offender registry under MCL 28.728(c)(4), a juvenile offender adjudicated prior to October 1, 2004, must file the petition before October 1, 2007, or within three years of discharge from court jurisdiction. Where the instant juvenile was adjudicated in 1999, and the court terminated jurisdiction in 2000, the petition for removal was untimely in 2008. Moreover, with limited exceptions not applicable to this defendant, there is no opportunity for removal from the registry for juveniles convicted of CSC fourth-degree. *In re M.S.*, 291 Mich App 439; 805 NW2d 460 (2011) (formerly *In the Matter of Seligman*).

SORA – Registration of Homeless Offenders:

Homeless individuals must register under the Sex Offender Registration Act. There is no exception for those who do not have a street address or domicile. SORA requires registration of the individual's residence or domicile, and residence may refer to a park or vacant house. If an individual has difficulty identifying their new residence or domicile (if they are kicked out of a shelter, for example), the person is nevertheless obligated to notify authorities of the change in residence/domicile. Any difficulty verifying the truthful information provided by a homeless person is the responsibility of law enforcement and does not negate the responsibility of the individual to appear and report. Where Dowdy never attempted to report for sixteen quarters after being kicked out of a homeless shelter, prosecution for failure to report and failure to notify was appropriate. *People v Dowdy*, 489 Mich 373; 802 NW2d 239 (2011).

SORA - Cruel and Unusual Punishment:

It is not cruel and unusual punishment to require sex offender registration for the crime of child enticement, although the crime contains no sexual component, as a) the SORA statutes require registration for some crimes in order to protect the safety and welfare of children even where there is no sexual component, b) because sex offender registration is not punishment, and c) because the *Dipiazza* case is distinguishable. *People v Fonville*, 291 Mich App 363; 804 NW2d 878 (2011).

In *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), the Court of Appeals held that sex offender registration on a public registry for an 18 year old offender who successfully completed HYTA for a Romeo and Juliet relationship violated the Michigan constitutional ban on cruel or unusual punishment.

But in a decision limiting *Dipiazza* to its facts, the Court of Appeals recently held SORA is not punishment, nor cruel or unusual punishment, as applied to a juvenile offender adjudicated of second-degree CSC involving a non-consensual act against an unwilling victim, even if it could be said the defendant had completed all rehabilitation programs and was non-dangerous. The indirect consequences of public registration under SORA such as harassment, assault, job loss eviction and dislocation are not punishment. *In re T.D.*, 292 Mich App 678; ___ NW2d ___ (2011).

IV. NEW DECISIONS OF THE UNITED STATES SUPREME COURT

Apprendi and Fines:

The rule of *Apprendi v New Jersey*, 530 US 466 (2000), applies to the imposition of criminal fines. *Southern Union Co v United States*, ___ US ___; 132 S Ct 2344 (2012).

Note: some potential application in Michigan where statutory maximum fine is "3 times the value" of property stolen, embezzled, burned, etc.

Juveniles and Mandatory Life without Parole:

The Eighth Amendment forbids a *mandatory* sentence of life in prison without possibility of parole for a juvenile offender convicted of homicide. *Miller v Alabama*, 567 US ___; 132 S Ct 2455 (2012). While a sentence of life without parole for a juvenile offender convicted of homicide is not categorically prohibited, the sentencing authority must consider the offender's "youth and attendant characteristics" before imposing this penalty. 132 S Ct at 2471. The Court made clear "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." 132 S Ct at 2469.

The decision in *Graham v Florida*, 560 US ___ (2010), involved a categorical ban on mandatory life sentences without parole for a juvenile convicted of a non-homicide offense, but in *Miller* the Court set out a test of "individualized sentencing" for juveniles convicted of homicide offenses. 132 S Ct at 2466, n. 6. The Court noted that a life sentence for a juvenile offender is "especially harsh . . . because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" 132 S Ct at 2466, quoting *Graham v Florida*, 560 US at slip op 19-20.

"Youth matters" when imposing the most serious sentences. *Miller*, 132 S Ct at 2471. "[C]hildren are constitutionally different from adults for purposes of sentencing." 132 S Ct at 2464. Juveniles have "diminished culpability." *Id.* "[T]he case for retribution is not as strong with a minor as with an adult." 132 S Ct at 2465, quoting *Graham v Florida* at slip op 20-21.

The juvenile offender is different because children lack maturity and have an undeveloped sense of responsibility, they are more vulnerable to negative influences and peer pressure, their character traits are less fixed, and they have greater prospects for reformation. 132 S Ct at 2464. Moreover, they have limited control over their environment and "lack the ability to extricate themselves from horrific, crime-producing settings." *Id.*

The adolescent brain has not fully matured "in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." 132 S Ct at 2464 n. 5.

Retroactivity:

It is unresolved whether *Miller* is retroactive. However, 1) in the companion case of *Jackson v Hobbs*, 567 US ___; 132 S Ct 2455 (2012), the Supreme Court invalidated the sentencing scheme of mandatory life without parole for a juvenile convicted of homicide who raised the argument on collateral review by means of a state habeas corpus petition; 2) the Fifth Circuit has found the earlier decision in *Graham v Florida* to be fully retroactive, *In re Sparks*, 657 F3d 258 (CA 5, 2011); 3) the State of Florida has conceded retroactivity of *Miller* under state law and potentially federal law as well. *Gonzales v State*, Case Number 1D12-3153 (State's Response to Petition for Writ of Habeas Corpus, 7/18/12). But see *Summerlin v Schriro*, 545 US 348 (2004) (decision in *Ring v Arizona*, 536 US 584 (2002), that the jury rather than the judge must make factual determination whether defendant is eligible for the death penalty, does not apply retroactively).

From the Sixth Circuit re: Graham:

Consecutive, fixed-term sentences that amount to the functional equivalent of life without parole (i.e., 89 years' imprisonment imposed on a 16-year old offender convicted of rape, aggravated robbery and kidnapping) are not unconstitutional under *Graham v Florida* for a juvenile offender who commits a non-homicide offense. The case was decided on collateral review and the Sixth Circuit concluded it could not grant relief under AEDPA as the last state court decision was final before *Graham* was released and *Graham* was limited to juvenile offenders sentenced to "life" without parole for non-homicide offenses. But the Court noted a split among several state courts on whether a "de facto" life sentence without parole for a juvenile convicted of a non-homicide offense violates the Eighth Amendment. *Bunch v Smith*, ___ F3d ___ (CA 6, 10-3426, 7/6/12).

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ADVANCED FELONY SENTENCING SEMINAR

August 10, 2012

By: Danielle Walton

I. HOLMES YOUTHFUL TRAINEE ACT –MCL 762.11-762.16

1. Holmes Youthful Trainee Act or “HYTA” allows for dismissal of a criminal offense at the end of a successful probationary period.
2. A defendant must commit the offense on or after his/her 17th birthday but before his/her 21st birthday. MCL 762.11(1). HYTA is applicable even if the crime is a continuing offense and continues beyond the defendant’s 21st birthday, however. See: *People v Gow*, 203 Mich App 94; 512 NW2d 34 (1993).
3. The defendant must plead guilty to the offense. MCL 762.11(1); *People v Dash*, 216 Mich App 412; 549 NW2d 76 (1996).
4. A defendant can receive HYTA for more than one offense. *People v Khanani*, ___ Mich App ___; ___ NW2d ___ (2012); *People v Giovannini*, 271 Mich App 409; 722 NW2d 237 (2006).
5. HYTA does not apply to life offenses, major controlled substances offenses, traffic offenses, and certain criminal sexual conduct offenses. MCL 762.11(2). (For instance HYTA does not apply to CSC 1st through 4th degree except CSC 3rd, if the victim is between 13-15, and CSC 4th, if the victim is between 13-16 and the actor is 5 or more years older than that other person.)
6. A court shall not assign a defendant to HYTA if any of the following apply:
 - a. The defendant was previously convicted of or adjudicated (as a juvenile) for a listed offense for which registration is required under SORA. MCL 762.11(3)(a).
 - b. If a defendant is charged with a listed offense for which registration is required under SORA and the individual fails to prove by clear and convincing evidence that he or she is not likely to engage in further listed offenses. MCL 762.11(3)(b).
 - c. The court determines that certain listed aggravating factors were present. MCL 762.11(3)(c).
7. In deciding whether to assign defendant to HYTA, a trial court should consider the seriousness of the offense as a factor on an equal footing with the defendant's age. *Khanani, supra*.

8. The question of whether the sentencing guidelines apply has not been decided by the courts. *Id.* The judicial sentencing guidelines previously did not apply to those assigned to HYTA. *People v Spicer*, 216 Mich App 270; 548 NW2d 270 (1996).
9. If HYTA is revoked, the conviction is entered, the case is set for sentencing and the guidelines are applicable. MCL 762.12.
10. If a defendant is assigned to HYTA and the penalty for the underlying offense is more than a year, there are three sentencing options:
 - a. not more than 3 years in the MDOC,
 - b. not more than 3 years probation (including the option of requiring participation in a drug treatment court). All the normal conditions of probation, including a jail term, would be applicable. MCL 762.13(1)(b); MCL 771.3(2)(a).
 - c. not more than 1 year in the county jail. MCL 762.13.
11. If a defendant is assigned to HYTA and the penalty for the underlying offense is one year or less, the defendant must be placed on probation for no more than 2 years. MCL 762.13.
12. HYTA also applies to a defendant over age 14 if jurisdiction has been waived by the family court. See: MCL 762.15; MCL 764.2.
13. It appears that the court should close any hearings conducted after the grant of HYTA. *People v Bobek*, 217 Mich App 524; 553 NW2d 18 (1996).

II. MCL 333.7411

1. MCL 333.7411 (7411) is an alternate sentencing option for drug offenses. A defendant is eligible if he or she has no other convictions under Article 7, the Controlled Substance Act (*not the Public Health Code in general*) or an equivalent federal or drug offense in another state. MCL 333.7411(1).
2. A defendant is eligible upon either conviction *or* guilty plea of possession of under 25 grams of a schedule 1 or 2 controlled substance or other specifically listed controlled substance. A defendant is also eligible upon either conviction *or* guilty plea of use of a controlled substance or possession/use of an imitation controlled substance for a second time. MCL 333.7411(1). See also: *People v Austern*, 121 Mich App 831; 329 NW2d 508 (1982).
3. The court defers the case without entering a judgment of guilt and places the defendant on probation. Upon successful completion of probation, the charge is dismissed. There is only one discharge and dismissal allowed. MCL 333.7411(1). However, defendant can

receive 7411 for simultaneous offenses. *People v Ware*, 239 Mich App 437; 608 NW2d 94 (2000).

4. Upon successful completion of 7411, the record is nonpublic with only certain individuals who have access. MCL 333.7411(2). However, defendants are not entitled to have their fingerprint and arrest cards destroyed. *People v Benjamin*, 283 Mich App 526; 769 NW2d 748 (2009).
5. Upon violation of probation, the court enters an adjudication of guilt and proceeds with sentencing. MCL 333.7411(1).
6. However, before being assigned to HYTA for a second imitation controlled substances offender, the defendant must undergo screening and assessment to determine whether he/she is likely to benefit from rehabilitative services. The defendant must pay for the screening, assessment and rehabilitative services and failure to complete a program shall be considered a violation of the terms of the probation. MCL 333.7411(5).

III. SPECIAL ALTERNATIVE INCARCERATION

There are three different types of boot camp, county boot camp, boot camp served as a condition of probation, and boot camp served during a prison sentence. MCL 771.3b; MCL 771.234a [Public Act 239 of 2012].

County Boot Camp:

1. If a county has a county boot camp program, the county boot camp is a program for convicted felons who would normally have been eligible for a jail sentence of between 6 and 12 months. MCL 771.3b(3).
2. When the guidelines call for an intermediate sanction, (with a maximum of 18 months or less) one of the specific conditions that can be imposed is boot camp. MCL 768.31(b)(i)(v); MCL 769.34(4)(a).

Boot Camp as a Condition of Probation:

1. The court also, as a condition of probation, may order boot camp. MCL 771.3(2)(n); MCL 771.3b.
2. Boot camp is allowed for all probationary sentences except for certain listed offenses. MCL 771.3b(1)(17). Those crimes include:
 - a. crimes involving child sexually abusive material (MCL 750.145c),
 - b. criminal sexual conduct first, second and third degree (MCL 750.520b, 520c, 520d),

- c. assault with intent to commit criminal sexual conduct (MCL 750.520g),
 - d. arson of a dwelling house, real property, or insured property (MCL 750.72, 73, 75), or
 - e. an attempt to commit any of the listed offenses.
3. In order to be eligible for boot camp all of the following requirements must be met:
- a. The defendant has never served a sentence of imprisonment in a state correctional facility. (The probation officer must make this determination.) MCL 771.3b(a),(4))
 - b. The defendant would likely be sentenced to imprisonment in a state correctional facility. MCL 771.3b(2)(b),(4).
 - c. The guidelines upper limit is 12 months or more, unless the felony guidelines do not apply or the reason for consideration is that the defendant violated probation. MCL 771.3b(2)(c). This is a mandatory requirement. *People v Cooper*, 252 Mich App 515; 652 NW2d 524 (2002).
 - d. The defendant is physically able to participate in boot camp. MCL 771.3b(2)(d).
 - e. The defendant does not appear to have any mental disabilities which would prevent participation. MCL 771.3b(2)(e).
 - f. The defendant must consent. MCL 771.3b(6).
4. If after the defendant has been sentenced to boot camp and the Department determines that he or she doesn't meet the eligibility requirements, the defendant shall be returned to the court for resentencing. MCL 771.3b(5).
5. A person shall be placed in boot camp for a period of not more than 120 days. MCL 771.3b(8).
6. The order of probation may also require that a defendant who successfully completes boot camp also complete an additional period of not more than 120 days of residential treatment. MCL 771.3b(9),(10).
7. Upon completion of boot camp the defendant must be placed on probation for a period of not less than 120 days. MCL 771.3b(12).
8. If a defendant does not successfully complete boot camp, he/she is eligible for a probation revocation. MCL 771.3b(13). He/she is eligible for a probation violation if he/she does not work diligently or disobeys the rules of boot camp. MCL 798.16. In

People v Hite, 200 Mich App 1; 503 NW2d 692 (1993) the Court found that the defendant was eligible for sentence credit for time spent in boot camp. (However, the question depends on whether the boot camp is for rehabilitative purposes or for incarceration which is primarily at issue if any counties establish county boot camps. See: *People v Resler*, 210 Mich App 24; 532 NW2d 907 (1995)).

9. An individual may only be sentenced to boot camp on one occasion unless the reason for the previous failure to complete boot camp was due to medical problems. MCL 771.3b(15),(16).
10. The victim must be given notice if the Department determines that defendant meets the eligibility requirements for boot camp. MCL 780.763a.
11. The defendant must also give a DNA sample. MCL 791.233d.

Boot Camp served during a Prison Sentence.

1. A prisoner sentenced to an indeterminate term of imprisonment shall be considered for boot camp if he/she meets certain eligibility requirements.
 - a. The prisoner's minimum sentence does not exceed 24 months for breaking and entering or home invasion (MCL 750.110,110a) if the violation involved any occupied dwelling house. The prisoner's minimum sentence does not exceed 36 months for any other crime. MCL 791.234a(2)(a). These requirements are mandatory. See: *People v Cooper, supra*.
 - b. The prisoner has never previously been placed in boot camp (as a prisoner or probationer) unless he or she has been removed from boot camp previously due to medical reasons. MCL 791.234a(2)(b).
 - c. The prisoner is physically able to participate in the program. MCL 791.234a(2)(c).
 - d. The prisoner does not appear to have any mental disability that would prevent participating in the program. MCL 791.234a(2)(d).
 - e. The prisoner is serving his or her first prison sentence. MCL 791.234a(2)(e).
 - f. At the time of sentencing the judge did not prohibit participating in the program in the judgment of sentence. MCL 791.234a(2)(f).
 - g. The prisoner is otherwise suitable for the program as determined by the Department. MCL 791.234a(2)(g).

- h. The prisoner is not serving a sentence for operating under the influence causing death or serious bodily injury (MCL 257.625(4),(5)), animal fighting (MCL 750.49), arson of a dwelling house, real property, or insured property (MCL 750.72, 73, 75), setting fire to mines (MCL 750.80), assault with intent to commit murder (MCL 750.83), assault with intent to maim (MCL 750.86), assault with intent to rob while armed (MCL 750.89), attempted murder (MCL 750.91), burglary with explosives (MCL 750.112), child abuse (MCL 750.136b), crimes involving child sexually abusive material (MCL 750.145c), solicitation to commit murder (MCL 750.157b), bestiality (MCL 750.158), prison or jail escape (MCL 750.193, 195), crimes involving explosive devices (MCL 750.207), threats to extort money (MCL 750.213), first degree murder (MCL 750.316), second degree murder (MCL 750.317), death as a result of dueling (MCL 750.319), manslaughter (MCL 750.321), death due to explosives (MCL 750.327, 328), discharging a firearm resulting in death (MCL 750.329), indecent exposure (MCL 750.335a), gross indecency (MCL 750.338, 338a-338b), kidnapping and child enticement (MCL 750.349-349a, 350), mayhem (MCL 750.397), perjury (MCL 750.422), poisoning (MCL 750.436), attempting to wreck a railroad (MCL 750.511), criminal sexual conduct first, second and third degree (MCL 750.520b, 520c, 520d), assault with intent to commit criminal sexual conduct (MCL 750.520g), armed or unarmed robbery (MCL 750.529, 530), carjacking (MCL 750.529a), bank robbery (MCL 750.531), treason (MCL 750.544), or any attempts to commit any of the listed offenses. MCL 791.234a(2).
 - i. A prisoner has not been sentenced as an habitual offender. MCL 791.234a(2).
 - j. A prisoner who has been convicted of possession or possession with intent to deliver controlled substances who has a previous specified drug conviction, may not be placed in boot camp until the prisoner served any mandatory minimum. MCL 791.234a(3).
 - k. The prisoner must consent to boot camp and its rules. MCL 791.234a(5).
- 2. The sentencing judge may prohibit a prisoner's participation in boot camp by specifically so indicating in the judgment of sentence. MCL 791.234a(4).
 - 3. If the judge specifically allows the prisoner's participation he may be placed in boot camp after the Department determines his eligibility. MCL 791.234a(4).
 - 4. If the judgment of sentence is silent, after the Department determines that a prisoner is eligible, the Department must contact the sentencing judge or successor judge, the prosecutor and any crime victim if the victim has filled out a notification form. The Department may not place the prisoner into boot camp unless the judge agrees in writing after reviewing any victim statement which is submitted. MCL 791.234a(4).

5. The Department must also plan for the prisoner's release. MCL 791.234a(6).
6. A prisoner may be placed in prison boot camp for a period of not less than 90 days or more than 120 days. MCL 791.234a(7).
7. After a prisoner is discharged he or she shall be placed on parole for not less than 18 months or the balance of the prisoner's minimum sentence whichever is greater. MCL 791.234a(9). Also, the prisoner must participate in the Michigan prisoner reentry initiative. MCL 791.234a(12).

IV. MANDATORY vs DISCRETIONARY CONSECUTIVE SENTENCING

Consecutive sentencing is mandatory in the following circumstances:

1. Conviction for prison and jail escape or escape from lawful custody (if the underlying offense was a felony). MCL 750.193, 195, 197.
2. Convictions for felony firearm and the underlying felony. MCL 750.227b.
3. A conviction for prisoner taking a hostage. MCL 750.349a.
4. Conviction of any crime (felony or misdemeanor) committed while in prison or escape from prison (MCL 768.7a(1)), conviction of any felony committed while on parole. MCL 768.1a(2).
5. A conviction for a major controlled substance offense committed while another felony charge is pending. MCL 768.7b. (A major controlled substance offense is possession with intent to deliver a schedule 1 or 2 controlled substance (MCL 761.2; MCL 333.7401(2)(a)) or possession of over 25 grams of a schedule 1 or 2 controlled substance (MCL 761.2; MCL 333.7403)(a)(i)-(iv)).

Consecutive sentencing is discretionary in the following circumstances:

1. A drug lab conviction and any other conviction arising out of the same transaction. MCL 333.7401c(5).
2. Convictions for a major controlled substance offense and any other felony. MCL 333.7401(3). (A marijuana offense even if enhanced under MCL 333.7413, does not count as a felony. *People v Wyrick*, 474 Mich 947; 707 NW2d 188 (2005)). The term "another felony" includes any felony for which the defendant has been sentenced either before or simultaneously with the controlled substance offense defendant is being sentenced for. *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995).
3. Multiple convictions under the Medicaid False Claims Act. MCL 400.609(2).

4. Multiple convictions under the Condominium Act. MCL 559.258.
5. A conviction for animal cruelty and any other conviction. MCL 750.50(7).
6. A conviction for resisting and opposing and any other conviction arising out of the same transaction. MCL 750.81d(6), MCL 750.479(7).
7. A conviction for first degree home invasion and any other conviction arising out of the same transaction. MCL 750.110a(8).
8. A conviction for juror bribery and any other conviction. MCL 750.119(3).
9. A conviction for juror intimidation and any other conviction. MCL 750.120a(6).
10. A conviction for witness bribery or intimidation and any other conviction. MCL 750.122(11).
11. Convictions for using the internet or a computer to commit a crime and the underlying crime. MCL 750.145d(3) & MCL 752.797(4).
12. A felony conviction for embezzlement by agent and any other conviction if the victim was 60 years old or older, a vulnerable adult, or a nonprofit or charitable organization. MCL 750.174(12).
13. A conviction under the Explosives/Bombs Chapter and the underlying offense if the victim is a "vulnerable target." MCL 750.212a.
14. A conviction for representing oneself as a police officer to commit a crime and any other conviction arising out of the same transaction. MCL 750.215.
15. A conviction for unlawful representation as a firefighter or emergency service personnel and a conviction arising out of the same transaction. MCL 750.217f(4).
16. Convictions for wearing body armor during the commission of a crime involving violence and the underlying crime. MCL 750.227f.
17. A conviction for various felonies related to gang involvement and the underlying crime. MCL 750.411u(2).
18. A conviction for assisting a gang in committing a felony and any other crime arising out of the same transaction. MCL 750.411v(4).
19. A conviction for making a materially false statement in a DNA petition and the term of imprisonment the individual is presently serving. MCL 750.422a.

20. A conviction for poisoning food/drink and a crime arising out of the same transaction. MCL 750.436(4).
21. A conviction for providing labor through force/fraud/coercion and any other conviction. MCL 750.462j(4).
22. A conviction for taking a weapon from a police officer and any other conviction arising out of the same transaction. MCL 750.479b(4).
23. A conviction for evidence tampering or obstructing an investigation and any other conviction. MCL 750.483a(10).
24. A conviction for assault while imprisoned in jail. MCL 750.506a.
25. A conviction for criminal sexual conduct first degree and any other conviction arising out of the same transaction. MCL 750.520b(3).
26. A conviction for carjacking and any other conviction arising out of the same transaction. MCL 750.529a(3).
27. Multiple convictions for deaths arising out of the same transaction for listed offenses. MCL 769.36.
28. A conviction for a felony while another felony charge is pending. MCL 768.7b.

V. SENTENCE ENHANCEMENT MCL 769.10-MCL 769.13

1. If a defendant has been convicted of one previous felony/attempt to commit a felony and the underlying offense has a penalty less than life, the defendant's maximum may be elevated 1 ½ times the statutory maximum for the underlying conviction. If the penalty is life, the maximum penalty is life or any term of years. MCL 769.10(1).
2. If a person has been convicted of two previous felonies/attempts to commit felonies and the underlying offense has a penalty of less than life, the defendant's maximum may be elevated two times the statutory maximum. MCL 769.11(1) If the penalty is life, the maximum penalty is life or any term of years. MCL 769.11(1).
3. If a person has been convicted of three felonies/attempts to commit felonies and the underlying offense has a penalty of five years or more or for life, the defendant's maximum is life or any term of years. If the penalty is under five years, the defendant's maximum is 15 years. MCL 769.12(1).
4. These prior felonies could occur in the same transaction. *People v Gardner*. 482 Mich 41; 753 NW2d 78 (2008). The prior felony convictions must occur before the commission of the underlying offense.

5. As long as the defendant's conviction was as an adult, even though he was eventually sentenced as a juvenile, the prior can be used for enhancement. *People v Jones*, ___ Mich App ___, ___ NW2d ___ (2012).
6. However, enhancement of a maximum sentence is not mandatory. *People v Bonilla-Machado*, 489 Mich 412; 803 NW2d 217 (2011).
7. Even for an habitual offender, the minimum cannot exceed 2/3rds of the maximum. *People v Feliciano*, 485 Mich 1122; 780 NW2d 254 (2010). However, for a life offense, the minimum can be life or any term of years, the 2/3rds rule is inapplicable. *People v Floyd*, 490 Mich 901; 804 NW2d 564 (2011). But the court cannot sentence a defendant to a term of years (for a minimum) to life sentence (as a maximum). MCL 769.9.
8. If the subsequent felony is a major controlled substance offense, the defendant can be sentenced in accordance with the Controlled Substance Act. MCL 769.10(1); MCL 769.11(1); MCL 769.12(1). A major controlled substance offense is possession with intent to deliver a schedule 1 or 2 controlled substance (MCL 761.2; MCL 333.7401(2)(a)) or possession of over 25 grams of a schedule 1 or 2 controlled substance (MCL 761.2; MCL 333.7403)(a)(i)-(iv)). However, the prosecutor may elect to enhance the defendant's sentence under the habitual offender statute even when a defendant is sentenced under the Public Health Code. *People v Wyrick*, 474 Mich 947; 707 NW2d 188 (2005); *People v Primer*, 444 Mich 269; 506 NW2d 839 (1993).
9. The court shall set a minimum and maximum. However, the maximum may not be less than the statutory maximum for the underlying offense. MCL 769.10(2); MCL 769.11(2); MCL 769.13(2). However, other than that, the maximum sentence is discretionary. Also, if the guidelines call for a non-prison sentence, the court may sentence to a determinate sentence in the county jail. See: *People v Martin*, 257 Mich App 457; 668 NW2d 397 (2003).
10. Some other enhancement statutes may prohibit the same felony from being used for enhancement purposes under two separate statutes. MCL 769.10(3); MCL 769.11(3); MCL 769.12(3). For example, a retail fraud first conviction cannot be used to elevate the degree of retail fraud and to enhance the sentence as an habitual offender. See: MCL 750.356c(6).
11. The defendant must be given notice of the prosecution's intent to enhance his or her sentence within 21 days of arraignment or if arraignment is waived within 21 days after filing the information even if defendant pleads at arraignment. MCL 769.13(1)(3). The prosecution can substitute prior convictions but the level of enhancement cannot change after the time limitations have passed. *People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002).
12. Defendant may challenge his priors at sentencing after filing a written motion. MCL 769.13(4),(5),(6). The defendant must make a prima facie case that the prior is factually

or constitutionally invalid and then the burden shifts to the prosecution by a preponderance. MCL 769.13(6).

VI. SENTENCE ENHANCEMENT-Controlled Substance Offenses

1. MCL 333.7413 also allows enhancement of both a defendant's minimum and maximum sentence under the Controlled Substances Act for certain controlled substance offenders who commit subsequent specified violations of the Controlled Substance Act. For certain subsequent major controlled substance offenders, a life without parole sentence is mandated. MCL 333.7413(1) includes conspiracy offenses but not attempts, MCL 333.7413(2) does not include either conspiracies or attempts. *People v Briseno*, 211 Mich App 11; 535 NW2d 559 (1995); *People v Anderson*, 202 Mich App 732; 508 NW2d 548 (1993).
2. A defendant's minimum and maximum can both be enhanced under MCL 333.7413(2). After the guidelines are calculated, the guidelines are doubled. *People v Lowe*, 484 Mich 718; 773 NW2d 1 (2009). This doubling of the guidelines does not count as a departure. *Id.* This enhancement is not mandatory. *People v Green*, 205 Mich App 342; 517 NW2d 782 (1994).
3. The defendant's PRVs are scored. Because MCL 333.7413 is listed as a public trust offense, OV's applicable to controlled substance offenses as well as public trust offenses are scored. *People v Peltola*, 489 Mich 174; 803 NW2d 140 (2011); MCL 777.21(4). The offense class is the same for the underlying felony.
4. The defendant must have notice and opportunity to challenge the enhancement at sentencing, but the notice provisions applicable to the habitual offender statutes are not applicable. *People v Eason*, 435 Mich 228; 458 NW2d 17 (1990).
5. All that is required for enhancement is that the previous conviction occurred before the conviction on the underlying offense. Unlike enhancement under the habitual offender act, the commission date for the underlying offense can be before the commission date of the prior conviction. *People v Roseburgh*, 215 Mich App 237; 545 NW2d 14 (1996).

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting. The document also highlights the role of internal controls in ensuring the integrity of the data.

2. The second part of the document focuses on the implementation of risk management strategies. It outlines the process of identifying potential risks, assessing their impact, and developing mitigation plans. The document stresses the importance of regular monitoring and reporting on risk levels.

3. The third part of the document addresses the issue of data security and privacy. It discusses the various threats to data integrity and the measures that can be taken to protect sensitive information. The document also touches upon the legal requirements related to data protection.

4. The fourth part of the document discusses the importance of effective communication and collaboration within the organization. It emphasizes the need for clear lines of responsibility and regular communication channels. The document also highlights the role of leadership in fostering a culture of transparency and accountability.

5. The fifth part of the document discusses the importance of continuous improvement and innovation. It outlines the process of identifying areas for improvement and implementing changes. The document also highlights the role of research and development in driving innovation.

6. The sixth part of the document discusses the importance of maintaining a strong relationship with stakeholders. It outlines the process of identifying key stakeholders and developing strategies to engage them. The document also highlights the role of communication in building trust and rapport.

7. The seventh part of the document discusses the importance of maintaining a strong financial position. It outlines the process of monitoring financial performance and developing strategies to improve it. The document also highlights the role of budgeting and financial planning in ensuring long-term sustainability.

8. The eighth part of the document discusses the importance of maintaining a strong reputation. It outlines the process of identifying potential reputational risks and developing strategies to mitigate them. The document also highlights the role of public relations in managing the organization's image.

9. The ninth part of the document discusses the importance of maintaining a strong ethical framework. It outlines the process of identifying potential ethical issues and developing strategies to address them. The document also highlights the role of ethics training in promoting a culture of integrity.

10. The tenth part of the document discusses the importance of maintaining a strong environmental and social governance (ESG) framework. It outlines the process of identifying potential ESG risks and developing strategies to address them. The document also highlights the role of ESG reporting in promoting transparency and accountability.

Anne Yantus

From: Johnson, Daphne (MDOC) [JohnsonD33@michigan.gov]
Sent: Friday, May 04, 2012 8:45 AM
To: Anne Yantus
Cc: Heinritz, Laura S. (MDOC); Wittmann, Linda C. (MDOC); Wallace, Melody A.P. (MDOC)
Subject: SAI Eligibility Question

Dear Ms. Yantus,

On April 30, 2012, you sent an e-mail to the MDOC inquiring about an offender's eligibility to participate in the SAI program. This offender [REDACTED] was sentenced on November 18, 2011 to a 51 month term of incarceration for MCL 333.7401C2F, CS – OP/Maintain Lab Involv. For two other offenses, she was sentenced to 136 days jail, credit 136 days. This e-mail was referred to the Office of Legal Affairs for a response. In your e-mail, you indicated that you attached a copy of the transcript, which I did not receive, and asserted that:

"The defense attorney argued for boot camp eligibility for a woman who was ultimately sentenced to 51 months to 20 years on a meth conviction. The judge said he agreed and would approve boot camp placement at that time. I am attaching a copy of the sentence transcript. The defendant's prison number is 818000."

As we discussed on the phone, the MDOC does not rely on the transcript with regard to the sentence of the Court. As I am sure you are aware, the Court speaks through its orders. And, in this case, in reviewing the Judgment of Sentence ordered by the Court, there is no condition ordered regarding SAI. Moreover, in the BIR section of the Presentence Investigation Report (PSI), it indicates that the offender is not SAI eligible. Had there been any question prior to sentencing regarding the SAI eligibility of the offender, the parties could have called the Probation Office and had the PSI writer and/or supervisor to explain the SAI eligibility criteria.

You also indicated to me that the defense attorney was told by some offender that if someone was sentenced to more than 36 months, once the offender had 36 months or less remaining to be served on his or sentence, that the offender would then become SAI eligible. This hearsay is not accurate and is nothing more than an urban myth.

To clarify, the MDOC relies on the SAI Act, 1988 PA 287, MCL 798.11 – MCL 798.18, and its policy with regard to SAI eligibility.

The attached SAI policy, PD 05.01.142. Paragraph "H" addresses prisoners' eligibility for SAI. Ms. Thomas is not eligible for SAI placement pursuant to paragraph H (6) because she is serving an indeterminate sentence or sentences with a minimum sentence of 36 months or more. Please also note that pursuant to paragraph L, SAI staff use the Special Alternative Incarceration Program Eligibility Screen (CAJ-253) and the criteria set forth in paragraph H to identify prisoners in CFA institutions who are eligible to be considered for placement in SAI, unless the Judgment of Sentence indicates that participation is prohibited. Thereafter, an eligible prisoner who agrees to placement in SAI will be placed in SAI only if the sentencing judge or successor permits such placement. If the sentencing judge indicated in the Judgment of Sentence that SAI placement is permitted or if the Judgment of Sentence is silent as to placement, the sentencing judge or successor shall be contacted in writing to determine if the court objects to the placement; appropriate follow-up shall be conducted to ensure a written response is received. After receipt of written notification from the sentencing judge or successor that there is no objection to SAI placement, SAI staff shall arrange for the prisoner's transfer to SAI after eligibility is verified. See Paragraph N of the SAI policy.

I hope this information is helpful.

Sincerely,

Daphne M. Johnson
Administrator
Office of Legal Affairs
Michigan Department of Corrections
206 East Michigan Avenue
Lansing, MI 48933
Tel: (517) 373-0450
Fax: (517) 373-2558

[REDACTED]

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1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

2. The second part outlines the various methods used to collect and analyze data. This includes both qualitative and quantitative approaches, ensuring a comprehensive understanding of the subject matter.

3. The third part presents the findings of the study, highlighting key trends and patterns observed in the data. It also discusses the implications of these findings for future research and practice.

4. The fourth part provides a detailed analysis of the results, comparing them with existing literature and theoretical frameworks. This helps to contextualize the findings and identify areas for further exploration.

5. The fifth part discusses the limitations of the study and suggests potential areas for future research. It acknowledges the constraints of the data and methodology used, while also highlighting the strengths of the findings.

6. The sixth part concludes the document by summarizing the main points and reiterating the significance of the research. It emphasizes the need for continued research and collaboration in this field.

7. The seventh part includes a list of references, citing the various sources used in the study. This provides a clear path for readers to explore the literature further.

8. The eighth part contains a list of appendices, providing additional information and data that support the main findings of the study.

9. The ninth part includes a list of figures and tables, which are used to present the data in a clear and concise manner. These visual aids help to illustrate the key findings and trends.

10. The tenth part includes a list of footnotes, providing additional information and clarifications for the main text. This ensures that the reader has a complete understanding of the document.

