SENTENCING LAW UPDATES - FALL 2013

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New Legislation

Domestic Violence Third Offense: Effective April, 2013, the penalty for domestic violence third offense will increase to "five years or a fine of not more than $5,000.00, or both." MCL 750.81(4) (previous penalty was two years or $2,500 or both). 2012 PA 336.

Likewise, a person who commits domestic violence causing serious or aggravated injury, and who has one or more prior domestic violence convictions, will face a penalty of "five years or a fine of not more than $5,000.00, or both." MCL 750.81a(3) (previous penalty was two years or $2,500 or both). 2012 PA 336.

Domestic Violence Diversion: A discharge and dismissal under the domestic violence diversion statute, MCL 769.4a, may count as a prior "conviction" for purposes of the domestic violence recidivist statutes (effective April 1, 2013). MCL 769.4a(5). 2012 PA 364, 550.

Three Strikes Law: Effective October 1, 2012, the habitual offender laws were amended to provide a mandatory minimum term of twenty-five years for a fourth habitual offender when the instant conviction is a serious listed crime, and one of the three prior felony convictions is a listed felony. 2012 PA 319, amending MCL 769.12.

> The three prior convictions must be based on offenses that did not occur during the same transaction. MCL 769.12(1)(a)
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> Application of the twenty-five year mandatory minimum term to an offense Committed before the effective date of the law would constitute an ex post facto violation. *See Lindsey v Washington*, 301 US 397 (1937); *United States v Moon*, 926 F 2d 204, 210 (CA 2, 1991).

Sentence Bargaining

MCR 6.302 and 6.310 are amended effective January 1, 2014 to provide that a judge's decision not to follow a sentence recommendation does not entitle the defendant to withdraw his or her plea. If the bargain is for a "specified term" or "within a specified range", the defendant must be allowed to withdraw from the plea agreement if the court determines not to follow that agreement. ADM File No. 2011-19; 9/18/2013.

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 that 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. *People v Franklin*, 491 Mich 916 (2012).

Habitual Offenders

The trial court has discretion in setting the maximum sentence under the habitual offender laws, and resentencing as to the maximum sentence is required where the trial court fails to recognize its discretion. *People v Gioglio*, 493 Mich 864 (2012).

The prosecutor cannot intentionally reduce the habitual offender fourth notice to habitual offender third in order "to help" a plea, and then increase it back to the fourth notice after trial and now outside the 21-day period; but the Court finds no plain error because the error was not plain due to the lack of Michigan caselaw addressing this precise situation and the Court declines to reverse under the fourth prong of the plain error standard where defendant had notice of the fourth offender notice, he acknowledged it in his trial court pleadings, and he did not object below. *People v Siterlet*, 299 Mich App 180 (2012*), oral argument granted, ___ Mich ___; 836* NW2d 497 (2013).

The habitual offender notice was not untimely where it was filed with the felony information, even though the defendant was never arraigned on the information. *People v Marshall*, 298 Mich App 607 (2012), *vacated in part on other grds* 493 Mich 1020 (2013).

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*, 297 Mich App 80 (2012).

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 (2012). See also Amendment to MCR 6.302(B)(2)(2) (effective June 20, 2012).

Consecutive Sentencing

The trial court erred in ordering consecutive sentencing for multiple contempt sentences where there was no showing defendant was incarcerated in a penal or reformatory institution or an escapee at the time the contempts were committed, and thus MCL 768.7a(1) would not apply. *People v Veilleux*, 493 Mich 914 (2012).

The trial court had the authority to amend a judgment of sentence to provide that the sentences were to be served consecutive to a sentence for which the defendant was on parole, as this was a clerical mistake, and no hearing was required. *People v Howell*, 300 Mich App 638 (2013).

Two consecutive sentences of 25 to 50 years imprisonment, effectively resulting in a 50-year minimum term, 2343 not disproportionate 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 (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*.

Mandatory Minimum Term – Drunk Driving Third Offense

Where the defendant is placed in an at-home electronic monitoring program through the sheriff's department and under the control of the sheriff's department, this nevertheless does not satisfy the requirement of 30 days in jail for an OWI second offense (OWI with minor in the car, second offense). *People v Pennebaker,* 298 Mich App 1 (2012).

Jail Credit

The Michigan Supreme Court reaffirmed 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 (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."

Restitution

Where the restitution statute, here MCL 780.766(5), allows the trial judge to triple the restitution award where there is death or serious impairment of a bodily function, the trial court did not err in ordering triple restitution. *People v Lloyd,* 301 Mich App 95 (2013).

The trial court erred in refusing to order restitution for the insurance company's losses due to the investigation of defendant's arson offense. "[A] corporate victim is entitled to costs associated with investigating a defendant's illegal activity." But there was no error in refusing legal and court reporter fees in connection with defendant's deposition by the insurance company as the prosecutor failed to show these fees were investigatory as opposed to the costs associated with the insurance company's defense of a civil lawsuit. *People v Fawaz,* 299 Mich App 55 (2012).

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 (2012).

The trial court has no authority to order payment of one-third of the restitution prior to the defendant's release on parole. *People v Gosslein,* 493 Mich 900 (2012).

Costs

A split panel of the Court of Appeals affirmed the order of $1,000 court costs in an Allegan County case, noting the same amount was upheld in a published case from Berrien County [People v Sanders, 296 Mich App 710 (2012)]. The majority in the Allegan case approved costs for the overhead operating expenses of the court system and affirmed the Sanders rule that costs need not be particularized to the case before the court. *People v Cunningham*, 301 Mich App 218 (2013). In dissent, Judge Shapiro would not approve costs that encompass expenses necessary to maintain "the constitutionally required operations of government" and would instead allow costs "if a particular case requires a court to incur specific costs . . . ."

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*, 493 Mich 67 (2012), *affirming* 293 Mich App 159 (2011).

SENTENCING GUIDELINES

The trial court's scoring of the sentencing guidelines is reviewed on two levels. The trial court's factual determinations are reviewed for clear error, and whether the facts are adequate to satisfy the scoring is reviewed de novo. The "any evidence" test is expressly rejected. *People v Hardy*, 494 Mich 430, 438-439 (2013).

The defendant's challenge to the scoring of several offense variables was not waived by the prosecutor's agreement to recommend a sentence within a guidelines range of 42 to 70 months where defendant did not agree to a specific minimum sentence range of 42 to 70 months. *People v Osborne*, 494 Mich 861 (2013).

Where the trial court continued probation following a probation violation and did not revoke probation, the court was not required to follow the sentencing guidelines range or provide reasons for what amounted to a downward departure (note, the original sentence was also a downward departure imposed pursuant to a plea bargain). *People v Malinowski*, 301 Mich App 182 (2013).

The trial court did not err in scoring OV 5 at a resentencing which had been ordered due to an error in scoring OV 13; as the case had resumed a presentence posture. *People v Davis*, 300 Mich App 502 (2013).

PRV 1:

In determining whether an out-of-state conviction constitutes a high or low severity felony conviction, the court must consider whether the conviction "corresponds" to a Michigan felony offense. The term "corresponds" refers to something that is "similar or analogous." Ohio's second-degree burglary statute corresponds to Michigan's second-degree and third degree home invasion statutes as the Ohio crime requires a trespass of a dwelling by force, stealth or deception, with intent to commit a criminal offense. While the Ohio statute does not specify

whether the intended offense must be a felony or misdemeanor, and the Ohio statute punishes the crime with a maximum penalty of 8 years, the Court of Appeals concluded Ohio second-degree burglary most closely corresponds to Michigan's second-degree home invasion statute, thus making it a high-severity felony conviction. People v Crews, 299 Mich App 381 (2013).

25 points were properly assessed in PRV 1 for the defendant's prior assignment to HYTA status for a first-degree home invasion. *People v Williams*, 298 Mich App 121 (2012).

PRV 5:

The defendant's disorderly conduct convictions were not scorable misdemeanor offenses, but there was no error in scoring an Ohio conviction for "attempt to commit an offense" where the original charge involved a controlled substance and the Ohio statute treats attempted drug offenses in the same manner as the completed offense. The Court declined to rule on whether possession or illegal use of drug paraphernalia is a scorable misdemeanor offense. *People v Crews*, 299 Mich App 381 (2013).

Where the order of disposition for a juvenile illegal entry offense was not entered before the sentencing offense was committed, it was error to score this adjudication under PRV 5. *People v Gibbs*, 299 Mich App 473 (2013).

PRV 6:

Five points could be scored under PRV 6 even though the defendant was technically not on probation, delayed sentence, or bond for a juvenile adjudication but he had been adjudicated and was awaiting disposition on the date of the sentencing offense. *People v Gibbs*, 299 Mich App 473 (2013).

PRV 6 was correctly scored on the basis that the defendant was on probation for a juvenile adjudication on the date of the sentencing offense. *People v Anderson*, 298 Mich App 178 (2012).

PRV 7:

The Michigan Supreme Court has granted leave to appeal to decide whether three concurrent convictions vacated by the trial judge on double jeopardy grounds may be scored under PRV 7. *People v Lafountain*, 494 Mich 851 (2013).

OV 1:

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 (2012).

Although heroin is a harmful chemical substance because it is capable of causing death, but because the defendant did not force the victim to ingest the heroin, it was not used as a weapon

and so the trial court erred in scoring OV 1 at 20 points. *People v Ball*, 297 Mich App 121 (2012).

In *People v Crabtree*, 493 Mich 878 (2012), the defendant was convicted of the manufacture of methamphetamine, conspiracy to manufacture methamphetamine, possession of methamphetamine, and operating a laboratory involving methamphetamine. The trial court scored both Offense Variables 1 and 2 on the theory that methamphetamine was a harmful chemical substance and that members of narcotic enforcement team were exposed to that harmful chemical substance. The Supreme Court reversed on the basis of *People v Ball*, *supra*.

See also People v Lutz, ___ Mich ___ (Docket No. 146699, 9/18/13) (reversing where meth not used as a weapon).

OV 3:

The trial court erred in scoring 0 points under OV 3 where the newborn child died and the sentencing offense was second-degree murder. In this situation, and in accordance with the case of *People v Houston,* 473 Mich 399 (2005), 25 points is the proper assessment where the defendant caused the death of her newborn baby. A defendant's conduct need not be the sole cause of death to score points under OV 3. *People v Portellos,* 298 Mich App 431 (2012).

This variable includes the firefighters who were injured as a result of defendant's arson offense. "[F]irst responders can be 'victims' for purposes of OV 3." *People v Fawaz,* 299 Mich App 55 (2012).

The trial court properly scored ten points for OV 3 where one victim lost part of his ear, resulting in four stitches, and had blood dripping down his face and neck following an assault to the side of his face/head, and another victim suffered whiplash and completed seven weeks of physical therapy. *People v Gibbs,* 299 Mich App 473 (2013).

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, 100 points may be scored in OV 3 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 (2012), reversing decision below at 291 Mich App 199 (2010).

OV 4:

The trial court did not err in scoring 10 points for OV 4 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*, 297 Mich App 104 (2012).

There was no error in scoring 10 points for OV 4 where the victim impact statement reflected that the victim felt angry, hurt, violated and frightened after the home invasion offense. *People v Williams*, 298 Mich App 121 (2012).

There was no error in assessing 10 points for OV 4 where one victim testified the experience was traumatic and he had bad dreams, the other victim stated he no longer felt safe, and the third victim referred to the psychological impact of the crime at sentencing. *People v Gibbs*, 299 Mich App 473 (2013).

In a case where the defendant and a co-defendant were convicted of criminal sexual conduct with minor sisters who voluntarily engaged in the behavior, the trial court assessed 10 points for OV 4, reasoning that the entire circumstances "would cause any normal person of that age serious psychological injury". The Court of Appeals reversed, holding that a court may not simply assume that someone in the victims' position would suffer psychological harm, and that there was no evidence in the record to indicate that the victims actually suffered a psychological injury. *People v Lockett*, 295 Mich App 165 (2012).

OV 5:

15 points were properly scored under OV 5 for serious psychological injury to the victim's biological mother. The biological mother qualifies as "family" even though the victim was adopted as a child. And the evidence was sufficient where the biological mother suffered depression and a nervous breakdown after her son's death and she was taking more medication than before. *People v Davis*, 300 Mich App 502 (2013).
The trial court did not err in scoring zero points under OV 5 where the grandmother of the deceased newborn child submitted a sentencing letter that spoke about her disbelief, grief, anger and heartbreak over the loss of the baby, but there was no evidence either she or her husband necessarily required professional treatment. *People v Portellos*, 298 Mich App 431 (2012).

OV 6:

50 points were properly scored where the defendant was convicted of second-degree murder and first-degree home invasion, because the killing was committed in the course of first-degree home invasion and also because the killing involved the murder of a peace officer. *People v Bowling*, 299 Mich App 552 (2013).

OV 7:

Conduct designed to substantially increase the victim's fear and anxiety during the offense refers to 1) conduct "designed" for that purpose, meaning it was intended for that purpose, and 2) conduct "intended to make a victim's fear or anxiety greater by a considerable amount." The question is "whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount." The sentencing judge may consider conduct that is inherent in the crime (i.e., constitutes an element) for purposes of scoring OV 7 (although the Court notes there is language precluding this under OV 1, 3, 8, 11 and 13). The Court affirmed the assessment of 50 points in a case where the defendant pointed a shotgun, racked it and demanded the victim's possessions (Hardy), and where the defendant

struck two employees in the head with a gun, knocked one down, and forced both behind the store counter during an armed robbery (Glenn). *People v Hardy*, 494 Mich 430 (2013).

OV 9:

OV 9 includes the firefighters who were injured or placed in danger of injury as a result of defendant's arson offense. *People v Fawaz*, 299 Mich App 55 (2012).

There was no error in scoring 10 points for two or more victims where one officer was killed and there was a neighborhood resident nearby when the defendant's brother fled out of the garage just moments before shooting the officer. *People v Bowling*, 299 Mich App 552 (2013).

"A person may be a 'victim' under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a 'victim.'" *People v Gratsch*, 299 Mich App 615 (2013). In *Gratsch*, the Court of Appeals affirmed the trial court's finding of two victims where defendant possessed a makeshift "needle" in the jail, he threatened another inmate with injury if he told, and defendant stated he should stab a female corrections officer in the neck.

The trial court improperly scored 25 points for more than twenty victims of property loss where defendant pled guilty to vandalizing two school buildings because the community at large was not a direct victim of the crimes. *People v Carrigan*, 297 Mich App 513 (2012).

OV 10:

A defendant convicted of possession of child pornography may be scored 10 points for exploitation of the victim's youth despite lack of contact with the child because the defendant nevertheless engages in systematic exploitation of a vulnerable victim. *People v Needham*, 299 Mich App 251 (2013).

The trial court erred in scoring 10 points for abuse of a domestic relationship when the defendant and victim had a past dating relationship only. *People v Brantley*, 296 Mich App 546 (2012).

The scoring of 15 points for predatory conduct was proper 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 (2012).

The trial court did not err in scoring 15 points for predatory conduct where the defendant gave a cellphone, rides and gifts to the 13-year old victim and some of the gifts and the ride were given before the sexual incident(s). *People v Johnson*, 298 Mich App 128 (2012).

OV 11:

50 points were properly scored under OV 11 for two additional penetrations arising out of the sentencing offense where the defendant was convicted of three counts of first-degree criminal

sexual conduct for acts against a teenager over a period of three years and victim stated nearly every encounter involved penile- vaginal penetration and also cunnilingus and fellatio. *People v Johnson,* 298 Mich App 128 (2012).

OV 12:

Where the defendant had continuing possession of four disks containing over 100 images of child pornography, and only one offense constituted the sentencing offense, the trial court properly scored 25 points under OV 12 for three or more felonious acts – whether it was possession of each image or each disk - against the person within a period of 24 hours. *People v Loper,* 299 Mich App 451 (2013).

OV 13:

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 (2012).
Nothing precludes scoring OV 13 for multiple convictions arising out of the same incident. *People v Gibbs,* 299 Mich App 473 (2013).

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

There was no error in using a dismissed 2008 bank robbery charge for purposes of OV 13 where the presentence report indicated the defendant was identified by a parole agent for this offense and the prosecutor presented a surveillance photo as further evidence. *People v Earl,* 297 Mich App 104 (2012).

OV 13 is not a *McGraw* variable as it expressly allows consideration of conduct going beyond the sentencing offense. The trial court did not err in considering an earlier dismissed charge of felonious assault (defendant pled guilty to felon in possession in return for dismissal of the felonious assault charge) where defendant admitted he aimed a rifle at his cousin following an argument. *People v Nix,* 301 Mich App 195 (2013).

OV 14:

The trial court properly scored 10 points for a leadership role despite defendant's contention he was the only one charged with a crime as the Court of Appeals defines "multiple offender situation" as a situation consisting of more than one person violating the law while part of a group, and in this case there was another individual with the defendant who was also violating the law. *People v Jones,* 299 Mich App 284(2013).

There was no clear error in scoring 10 points for OV 14 where the defendant was 35 and 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 the defendant was presumably was the one who purchased the liquor used during the offense. *People v Lockett,* 295 Mich App 165 (2012).

OV 15:

OV 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 the 64 grams of cocaine found in a nearby motel room, it was error to score 50 points for the cocaine found in the motel room even if the two offenses occurred simultaneously. *People v Gray*, 297 Mich App 22 (2012).

OV 19:

10 points properly scored under OV 19 where defendant fled on foot after police ordered him to "freeze." *People v Ratcliff,* 299 Mich App 625 (2013).

The trial court did not err in scoring 0 points under OV 19 for two reasons. First, the statute is not written to allow an assessment of 10 points for interference or attempted interference with emergency medical services. Second, the trial court did not abuse its discretion in not scoring points for a false statement to the police where defendant was in post-op recovery suffering the effects of anesthesia when she gave the statement. *People v Portellos*, 298 Mich App 431(2012).

Guidelines Departures

The trial court properly relied on defendant's strong family and community support, her age (30), lack of prior record, steady and exemplary work history, cooperation with the police and the fact that she was learned disabled and did not make good decisions under pressure. *People v Portellos*, 298 Mich App 431 (2012).

The trial court improperly departed where it imposed a jail sentence of 363 days (with probation) to avoid deportation consequences for a lawful resident alien of Turkish heritage who faced ethnic persecution in his home country, but the trial court was mistaken as to federal immigration law. *People v Akhemdov*, 297 Mich App 745 (2012).

Error to depart based on belief defendant terrorized his parents through arson of dwelling where trial court could have scored 50 points under OV 7 and did not do so and did not explain why a score under this variable would have been inadequate. Moreover, the trial court erred in departing based on the subjective conclusion defendant could have done more to assist his parents after the fire started. But departure was upheld where the trial court properly relied on the planning defendant engaged in, the extreme nature of the victims' injuries, the unusual level of psychological trauma caused by the familial nature of the relationship between victims and the defendant, and the defendant's pattern of escalating violence and his inability to benefit from counseling. *People v Anderson,* 298 Mich App 178 (2012).

Michigan Supreme Court

Pending Cases:

IAC and 25-Year Mandatory Minimum: The Court grants leave to determine whether defendant was prejudiced by his attorney's failure to warn him of the mandatory minimum term of 25 years where defendant rejected previous plea offers and claimed innocence. The Court also questions whether appropriate remedy is to re-offer previous bargain where defendant testified at trial he was innocent. *People v Douglas*, *leave granted* 493 Mich 876; 821 NW2d 574 (2012).

Guidelines PRV 7: Leave granted to decide whether three concurrent convictions vacated by the trial judge on double jeopardy grounds may be scored under PRV 7. *People v Lafountain*, 494 Mich 851 (5/22/13).

Retroactive Application of Crime Victim Rights Fee: The Court granted leave to appeal in a case where the Court of Appeals affirmed retroactive application of an increased crime victim rights fee, finding no ex post facto violation. *People v Earl*, 297 Mich App 104 (2012), *lv gtd* 828 NW2d 359 (2013).

Delay of Sentence Beyond One Year: The Court granted leave to consider whether the trial court loses jurisdiction to sentence by failing to sentence within one year after granting a delay of sentence pursuant to MCL 771.1 *People v Smith*, 836 NW2d 497 (9/18/13).

Restitution for Victim's Travel Expenses: The Court has granted mini oral argument on "whether the victims' travel expenses were properly included in the amount of restitution that the defendant was ordered to pay. See MCL 780.766 and MCL 769.1a." *People v Garrison*, 493 Mich 1015 (5/3/13).

Timely Amendment of Habitual Offender Notice: The Court granted leave to determine whether the prosecutor erred in filing a timely habitual offender notice, then seeking to amend the arrest dates and prior offenses – but not the level of enhancement – after the 21-day period, and filing an amended notice with the corrections without an order from the trial court granting its request to file the amended notice. Two of the questions posed on appeal are what remedy, if any, is appropriate and whether the trial court had authority to sentence the offender as a fourth habitual offender. *People v Johnson*, 493 Mich 972 (5/1/13).

United States Supreme Court

APPRENDI:

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

The *Apprendi* rule also applies to fact-finding that leads to an increased a mandatory minimum term. *Alleyne v United States*, 133 S Ct 2151 (2013), overruling *Harris v United States*, 536 US 545 (2002). Any fact that increases the mandatory minimum term is an element of the crime that must be submitted to the jury. "Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." 133 S Ct at 2161.

> There is no violation of the *Alleyne-Apprendi* rule where the defendant admitted the facts necessary to support a brandishing enhancement during the plea hearing. The government's failure to charge brandishing in the indictment was not reversible error where defendant did not object to enhancement at sentencing, was advised of the increased mandatory minimum during the plea hearing, and could not establish prejudice under a plain-error standard of review. *United States v Yancy*, 725 F3d 596 (CA 6, 2013).

JUVENILE LIFERS:

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; 183 L Ed 2d 407 (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 remedy for a juvenile offender sentenced in Michigan to life without parole is a resentencing with a determination of whether the juvenile should serve parolable or non-parolable life (remedy is not a term of years sentence). *People v Eliason*, 300 Mich App 293 (2013).

The Iowa Supreme Court reversed an aggregate minimum term of 52 ½ years imposed against a defendant who was 16 years old at the time of the crimes – here second-degree murder and first-degree robbery - finding a lengthy term of years to be the functional equivalent of life without parole when considered in conjunction with the defendant's life expectancy. The Court concluded the sentence was imposed without an individualized sentencing hearing as required under *Miller v Alabama*, and the sentence violated the state constitutional prohibition against cruel and unusual punishment. *State v Null*, 836 NW2d 41 (Iowa, 2013).

For a non-homicide offender, the California Supreme Court held cumulative sentences of 110 years to life for a juvenile offender convicted of a non-homicide offense violates *Graham v Florida*, 130 S Ct 2011 (2010). *People v Callabero*, 282 P3d 291 (Cal, 2012).

But the Sixth Circuit concluded consecutive, fixed-term sentences that amount to the functional equivalent of life without parole for a non-homicide offender (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.* 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,* 685 F3d 546 (CA 6, 2012).

See also *State v Brown*, 118 So 3d 332, 336-337 (La, 2013) (collecting cases both ways).