CDAM SPRING CONFERENCE
SENTENCE LAW UPDATES, MARCH 2012
By: Anne Yantus

I. ADVICE FROM TRIAL COUNSEL BEFORE PLEA

Deportation/Immigration Advice Before Plea:

Defense counsel must provide advice to defendant on immigration consequences before the plea in order to ensure a voluntary plea. *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

> *Note:* the Michigan Court of Appeals has concluded *Padilla* is a new rule of criminal procedure and therefore has prospective application only. *People v Gomez*, ___ Mich App ___ (Docket No. 302485, 2/14/12).

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 Fonville*, 291 Mich App 363; 804 NW2d 878 (2011).

SORA Recapture Advice Before Plea:

An individual previously convicted of a listed offense for which he or she was not required to register, but who is convicted of <u>any other felony</u> 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).

Lifetime Monitoring Advice Before Plea:

The Michigan Supreme Court has granted leave to appeal to decide whether a) the trial judge must give advice on lifetime monitoring before the plea, and b) whether the failure to include lifetime monitoring as part of a *Cobbs* evaluation requires plea withdrawal? *People v Cole*, 490 Mich 869; 802 NW2d 613 (2011).

The Tennessee Supreme Court has found ineffective assistance of counsel and an involuntary plea where trial counsel failed to advise a defendant pleading guilty to a sex offense of the lifetime supervision requirement and the trial court did not cure the error during the plea hearing. *Calvert v State*, 342 SW3d 477, 487 n 12 (Tenn, 2011).

Note: Lifetime monitoring applies only to **FIRST**- and **SECOND-DEGREE CSC** involving a ***VICTIM UNDER 13*** (Defendant 17 or older), and only following a Prison Sentence. *See* MCL 750.520b(2)(d); MCL 750.520c(2)(b); MCL 750.520n; MCL 791.285; *People v Kern*, 288 Mich App 513; 794 NW2d 362 (2010).

II. ***NEW FROM THE UNITED STATES SUPRME COURT***

***Cert Granted*:**

Whether the rule of *Apprendi v New Jersey*, 530 US 466 (2011), applies to the imposition of criminal fines? *Southern Union Co. v United States*, (No. 11-94, 11/29/11).

Cert Granted:

Whether the Eighth and Fourteenth Amendments preclude a mandatory life sentence without possibility of parole for homicide committed by a juvenile offender (i.e., one under the age of 18)? *Miller v Alabama*, 132 S Ct 548 (2011) (capital murder by 14 year old); *Jackson v Hobbs*, 132 S Ct 548 (2011) (capital murder and aggravated robbery by 14 year old).

Note: The Eighth and Fourteenth Amendments prohibit the imposition of a mandatory life sentence for juvenile offenders convicted of a non-homicide offense. *Graham v Florida*, 560 US ___; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

Rehabilitation as Reason for Sentence:

Promoting rehabilitation is not a valid reason for imposing a prison sentence or imposing a longer prison sentence in light of the provision of the 1987 Sentencing Reform Act that sets out factors for federal judges to consider when imposing a sentence of imprisonment and prohibits them from considering the defendant's need for rehabilitation in deciding whether and for how long to incarcerate the defendant. *Tapia v United States*, 564 US ___; 113 S Ct 2382; 180 L Ed 2d 357 (2011).

Defendant's post-sentence efforts at rehabilitation *may* be considered as the basis for a downward departure from the now advisory federal sentencing guidelines. *Pepper v United States*, 131 S Ct 1229; 179 L Ed 2d 196 (2011).

Note: In Michigan, rehabilitation is one of the four recognized sentencing goals. *People v Coles*, 417 Mich 523 (1983).

Military History as Mitigating Sentence Factor:

The United States Supreme Court found defense counsel ineffective for failing to investigate and present the defendant's military service as a mitigating circumstance during the death penalty stage:

> Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front line as Porter did. Moreover, the relevance of Porter's extensive

combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. [*Porter v McCollum*, 558 US ___; 130 S Ct 447, 455; 175 LEd2d 398 (2009).]

III. ***NEW DECISIONS FROM THE SIXTH CIRCUIT***

The Sixth Circuit reverses a deep downward variance from the sentencing guidelines range finding it substantively unreasonable in a possession of child porn case. The Court disagrees with other circuits that concluded the child porn guidelines are flawed and this reason would encourage a departure. The Sixth Circuit believes Congress's direct involvement in the calibration of the child porn guidelines makes them more deserving of deference, not less. *United States v Bistline*, 665 F3d 758 (CA 6, 2012).

The district court's blanket policy of denying a one-level reduction for acceptance of responsibility for any defendant who waits until the time set for the final pretrial conference to plead guilty, even if the government is prepared to move for the reduction, usurped the government's discretion to move for a reduction, rendering defendant's sentence procedurally unreasonable. The policy affected the calculation of the guidelines range and the error was not harmless. *United States v Mackety*, 650 F3d 621 (CA 6, 2011).

A longer sentence imposed by a different judge following the defendant's successful appeal of his original sentence did not give rise to a presumption of vindictiveness, and even if the presumption applied it was rebutted by the second judge's careful explanation of legitimate reasons for the increased sentence. *Goodell v Williams*, 643 F3d 490 (CA 6, 2011)

The Court also stated, "a presumption of vindictiveness does not apply when an increased sentence is imposed by a different sentencer absent other circumstances demonstrating a need to guard against vindictiveness." And the court stated the general proposition that the presumption applies only where circumstances give rise to a "reasonable likelihood" the increased sentence was the product of judicial vindictiveness. *Id.*

The Sixth Circuit reverses a death sentence imposed against a man convicted of murdering a woman and her child in the Manistee National Forest, concluding it was error for the district judge to refuse to permit the attorneys to argue against the death penalty on the theory that if the crime had been committed 227 feet away, there would have been no death penalty (as the crime would not have been committed on federal land and Michigan has abolished the death penalty). *United States v Gabrion*, 648 F3d 307 (CA 6, 2011).

Habeas relief granted where the sentencing judge drew negative inferences from defendant's refusal to admit guilt and imposed discretionary consecutive sentences for this reason. *Miller v LaFler*, 2011 WL 4062410 (ED Mich, 9/13/11).

IV. ***PENDING IN THE MICHIGAN SUPREME COURT***

Does the defendant have the right to affirm the plea when the court indicates its intention not to follow the **sentence agreement** or must the court reject the plea in its entirety? *People v Franklin*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2010 (Docket No. 292469), *lv gtd* 489 Mich 856; 795 NW2d 8 (2011).

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, was it error to score 100 points under **OV 3** for the death of a "victim"? The Court of Appeals concluded the co-felon was not a "victim" because he was not harmed by the defendant's criminal activity or by the crime committed (and his death resulted from the actions of the homeowner, not the commission of a crime). *People v Laidler*, 291 Mich App 199; 804 NW2d 866 (2010). The Michigan Supreme Court has ordered oral argument on this question. *People v Laidler*, 489 Mich 903 (2011).

Whether MCR 7.101(O) allows taxation of costs in criminal cases appealed to the circuit court. *People v Rapp*, 293 Mich App 159; ___ NW2d ___ (2011), *lv gtd* 490 Mich 927; 805 NW2d 502 (2011).

V. ***NEW FROM THE MICHIGAN LEGISLATURE***

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 $49,000 (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 . . . .)

Crime Victim Fee and State Costs Apply Now to Ordinance Violations:

Effective April 1, 2012, the crime victim rights fee and state costs will apply to all misdemeanor offenses and ordinance violations (not simply 'serious" and "specified" misdemeanors, and now adding ordinance violations). 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.

Expungement:

Effective June 23, 2011, the expunction statute was amended to allow expunction for 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 it 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.

Drunk Driving Amendments:

Effective October 31, 2010, for all drunk driving offenses except first offense drunk driving with a blood alcohol level of less than .17, the court must order a one-year treatment program. 2008 PA 462.

VI. ***NEW MICHIGAN CASE LAW (NON-GUIDELINES)***

SORA – Generally:

The trial court cannot amend the sentence (here, the order of probation) to include sex offender registration 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 rehabilitated 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).

According to the Ohio Supreme Court, the duties and obligations imposed by Ohio Senate Bill 10, enacted in 2007 and based on the federal Adam Walsh Act, constitute punishment and may not be applied retroactively. *State v Williams*, 129 Oh St 3d 344; 952 NE2d 1108 (Ohio, 2011)

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*, ___ Mich App ___ (CA# 296721, 9/22/11). 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. According to the Court:

> Defendant also argues that the mandatory 25-year minimum sentence is unduly harsh compared to penalties for other offenses under

> Michigan law, including many violent offenses. We are not persuaded that these comparisons render the 25-year minimum sentence disproportionate to the offense. The perpetration of sexual activity by an adult with a pre-teen victim is an offense that violates deeply-ingrained social values of protecting children from sexual exploitation. *Even when there is no palpable physical injury or overtly coercive act, sexual abuse of children causes substantial long-term psychological effects, with implications of far-reaching social consequences*. The unique ramifications that ensue from sexual offenses against a child preclude a purely qualitative comparison of sentences for other offenses to assess whether the mandatory 25-year minimum sentence is unduly harsh in contrast to other offenses. [Sip op at ___; emphasis added.].

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).

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).

Jail Credit:

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 any 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*, ___ Mich ___ ; 792 NW2d 748 (2011).

But 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*, ___ Mich App ___ n. 2 (Docket No. 299809, 10/25/11).

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*.

Consecutive Sentencing:

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." *People v Williams*, ___ Mich App ___ (Docket No. 299809, 10/25/11). 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 incarceration, neither new sentence preceded the other and thus consecutive sentencing between these two offenses is not permitted under MCL 768.7a(1) (although the two sentences would be consecutive to the previous jail term). *Id.*

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*, ___ Mich App ___ (Docket No. 301787, 2/14/12).

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*, ___ Mich App ___ (Docket No. 301787, 2/14/12).

***Financial Penalties*:**

The circuit court may not assess costs against the prosecution in a defendant's criminal appeal from the district court. Court rule and statutory authority for the taxation of costs in civil matters does not apply in criminal cases. *People v Rapp*, 293 Mich App 159; ___ NW2d ___ (2011), *lv gtd* 490 Mich 927; 805 NW2d 502 (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*, ___ Mich App ___ (Docket No. 299267, rel'd for publication 1/24/12).

VII. ***NEW MICHIGAN CASE LAW – SENTENCING GUIDELINES***

General Application:

Where the defendant properly requested a remand for sentencing based on error in scoring OV 11, and where the Court of Appeals subsequently found error in the scoring of OV 11, resentencing is appropriate. *People v Moore*, 490 Mich 965; 806 NW2d 306 (2011).

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).

> Where trial counsel (and appellate counsel) failed to recognize a ten-year gap in the prior criminal history that would preclude the scoring of prior record variables 1, 2 and 5, and where the mistake resulted in a sentence above the appropriate range, counsel provided in effective assistance of counsel and the defendant is entitled to resentencing. *People* v *Anderson*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2011 (Docket No. 296732) (error raise via Standard 4 brief filed by the defendant).

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; ___ NW2d ___ (2011).

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

Unpublished Decision of Note:

> *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2012 (Docket No. 299484, 1/19/12) (Texas case dismissed following deferred adjudication of guilt constitutes conviction under Michigan guidelines).

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; ___ NW 2d ___ (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).

Fifteen points properly scored under OV 1 where testimony at trial and information in the 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*, 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*.

Unpublished Decision of Note:

People v Ashley, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2011 (Docket No. 299251) (Five points improperly scored under OV 2 where the weapon was an airsoft pistol that expelled small plastic pellets).

OV 3:

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, error to score 100 points for death of a "victim" as the co-felon was not a "victim" because he was not harmed by the defendant's criminal activity or by the crime committed (and his death resulted from the actions of the homeowner, not the commission of a crime). *People v Laidler*, 291 Mich App 199; 804 NW2d 866 (2010) (but mini oral argument has been ordered in the Mich Supreme Court, 489 Mich 903 (2011).

Ten points properly scored where the victim suffered an infection as a result of being raped. *People v McDonald*, ___ Mich App ___ (Docket No. 297889, 7/12/11).

Unpublished Decisions of Note:

People v Hamilton, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2011 (Docket No. 298944) (error to score 10 points under OV 3 where victim taken to hospital and examined by sexual assault nurse, but no evidence victim sustained bodily injury and no evidence she received treatment for bodily injury).

People v Morgan, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2012 (Docket No. 302900) (five points proper rather than 10 points where nurse testified she examined victim after sexual encounter with defendant and victim sustained injuries to her "genital area" that would heal without medical intervention; error harmless, however, where it did not change the range).

In lieu of granting leave to appeal, the defendant's sentence is vacated and the trial court at resentencing is to reconsider the scoring of OV3 in light of *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009) (holding that the offense variables are properly scored by reference only to the sentencing offense except where the language of a particular variable specifically provides otherwise). *People v Lenderman*, 485 Mich 921; 773 NW2d 664 (2009).

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*, ___ Mich App ___ (Docket No. 296747, 1/10/12).

OV 5:

Unpublished Decision of Note:

People v Sunich, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2011 (Docket No. 299565) (no error in scoring zero points under OV 5 where decedent's son's counseling addressed other issues and there was no showing the son's reaction to the father's death exceeded level of grief one would typically experience, and reports did not show son needed counseling to address issues related to his father's death; moreover, the decedent's mother's statement that burying her son was the most difficult thing she had ever done was not, by itself, enough to score OV 5).

OV 7:

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; ___ NW2d ___ (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*, ___ Mich App ___ (Docket No. 297889, 7/12/11).

Notable Unpublished Opinions:

In an unpublished opinion, the Court of Appeals concluded OV 7 is "intended to apply only to conduct that is very serious, beyond the egregiousness minimally necessary to technically accomplish the charged offense," and upholds the assessment of 50 points where defendant was convicted of unarmed robbery but actually held a knife within ten inches of the victim's throat and repeatedly threatened to kill her if she did not give up her purse. *People v Kelsey*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2011 (Docket No. 298456).

In another unpublished opinion of note, the Court of Appeals recently reversed the assessment of 50 points under OV 7 on the theory that assault with intent to commit murder generally requires a brutal act and slitting the victim's throat with a broken glass bottle was not excessive brutality. *People v Sturdevant*, unpublished opinion per curiam, issued July 28, 2011 (Docket No. 295982).

OV 8:

Movement of the victim from a common area to the bedroom to effectuate the CSC crimes was merely incidental movement and did not amount to asportation under OV 8 for purposes of scoring 15 points. *People* v *Thompson*, 488 Mich 888; 788 NW2d 677 (2010).

Notable Unpublished Opinions:

Error to score 15 points where movement of victims from bedroom to hallway did not place them in great danger and where movement of one victim from living room to area of back door and back to living room was merely incidental movement. *People v Allen*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2011 (Docket No. 296080).

OV 9:

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 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 is 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.*

Unpublished Decision of Note:

People v Wilson, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2011 (Docket No. 299834) (run of the mill planning is not predatory conduct).

Ten points may not be scored under OV 10 for exploitation of a "domestic relationship" where the parties had neither a familial nor cohabitating relationship. The fact that the victim had previously left clothes at the defendant's apartment did not establish a cohabitating relationship. *People v Jamison*, 292 Mich App 440; 807 NW2d 427 (2011).

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*, ___ Mich App ___ (Docket No. 296747, 1/10/12)

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).

Unpublished Decision of Note:

People v Taylor, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2011 (Docket No. 298957) (error to score five points for one additional crime against the person where defendant was convicted of assault with intent to do great bodily harm and there was no functional difference between the act of raising the tire iron and the delivering

the blow to the victim's head with the tire icon; accordingly there was not a separate contemporaneous "act" under OV 12).

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).

OV 13:

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 7771.18 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). (*Note: this decision was never appealed to the Mich Sup Ct).*

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).

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.]

QUERY: If the probable cause standard to support an arrest is lower than the probable cause standard to support bindover, as found in the recent case of *People v Cohen*, ___ Mich App ___

(Docket 298076, 8/30/11), is this not further proof that the fact of an arrest, alone, should not be considered sufficient evidence under OV 13?

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*, ___ Mich App __ (Docket No. 296747, 1/10/12).

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. Moreover, *People v McGraw*, 484 Mich 120 (2009) does not apply to the scoring of OV 19. *People v Ericksen*, 288 Mich App 192; 793 NW2d 120 (2010).

New Unpublished Opinion of Note:

People v Williams, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2013 (Docket No. 299484) (ten points properly scored where defendant left scene of crime before police arrived and did not contact police for 15 days).

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" as required by *People v Smith*, 482 Mich 292 (2008). *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; ___ NW2d ___ (2011).

Notable Unpublished Decision:

Reversed upward departure where the trial court relied on "the amount of property stolen and not returned is $93,415.00," but the defendant received ten points under OV 16 for stealing property valued over $20,000, and the court did not explain how or why this was a substantial and compelling reason that was not accounted for within the sentencing guidelines range. The Court also reversed where both the sentencing court and the judge who heard the motion for resentencing were unaware that the sentence was a departure from the guidelines range of 0 to 11 months, not 0 to 13 months. *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2011 (Docket No. 295602).

Reversed upward departure in a felony non-support case where the trial judge relied on the fact that a civil judgment was involved (in response to a discussion about prior non-payment and available employment), but the Court of Appeals concluded that this factor, while objective and verifiable, "does not irresistibly grab our attention." *People v Canup*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket No. 299247).

Defendant's post-sentence efforts at rehabilitation *may* be considered as the basis for a downward departure from the now advisory federal sentencing guidelines. *Pepper v United States*, 131 S Ct 1229; 179 L Ed 2d 196 (2011).

VIII. BEST PRACTICE: CLIENT COUNSELING

a) Advice Before Plea: Immigration, SORA, Recapture, Lifetime Monitoring

b) General Advice: Any Professional License or Educational Studies?

c) General Advice: Probation and Parole Conditions for Sex Offenders (see attachments)

d) General Advice: Probation Violations:

No plain error in revocation of probation for failure to pay child support payments and failure to report without an inquiry into defendant's ability to pay where trial court made rough calculation defendant could have made child support payments with money he was spending on cigarettes. *People v Sliter*, unpublished 300293, 12/15/11 (Berrien).