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In this issue

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Prosecutorial disclosure of mitigating information at sentencing

There is little case law on the prosecutor's duty to disclose mitigating information at sentencing. No well-known Michigan case comes to mind and looking outside of Michigan there are few cases discussing disclosure of mitigating information at sentencing or even the right to discovery at sentencing.[1] That said, a May 2024 Michigan Bar Journal article focused on the prosecutor's duty of disclosure as a matter of ethics under MRPC 3.8, both at trial and at sentencing.[2]

The ethics rule as it relates to sentencing provides that the prosecutor has a duty to disclose all unprivileged mitigating information known to it, except where there is a protective order:

> The prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense, and, *in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal*[.] [MRPC 3.8(d) (emphasis added).]

The authors of the Bar Journal article suggest the ethics rule is slightly broader than the due process obligation to provide evidence to the accused that is favorable and material either to guilt or punishment under *Brady v Maryland*, 373 US 83

(1963).[3] There is no materiality standard in the ethics rule, and the authors reference an American Bar Association opinion that concluded the ethics rule is broader than *Brady*.[4] The Sixth Circuit has said the same.[5] Several state courts have nevertheless concluded that the ethics rule is merely consistent with the constitutional standard.[6]

Whether the ethics rule is broader than *Brady* may be a moot point in at least two sentencing scenarios: where the information would change the sentencing guidelines range or would change the judge's mind on a key point (whether suitability to a local sentence, the amount of restitution, consecutive sentencing, etc.). In these settings, the materiality test would appear to be satisfied.

One other scenario comes to mind where materiality would appear to be a given: consideration of the victim's views on the crime and the offender. The court rules require this consideration under MCR 6.425 (at least where the victim wishes to participate), and there may be cases where the victim knows the defendant and surprisingly does not seek vengeance. Yet this can be difficult to establish when the victim does not appear at sentencing. In the right case (domestic violence warranting its own caution), it may be worth inquiry of the prosecutor either at sentencing or in advance because some judges will be interested in forgiveness or at least the lesser need for retribution on the victim's behalf.

Often, we may think of *Brady* and the ethics rule as obligations that focus on guilt or innocence, but in fact both have a broader component. The criminal prosecution continues through sentencing, and the prosecutor's duty of disclosure continues as well. Whether the information relates to cooperation with the police, lack of serious harm to the victim or even victim forgiveness, the prosecutor is not free to withhold information that might lead to a lesser sentence.

Endnotes

[1] Court rules addressing discovery often do not expressly reference sentencing, see e.g., MCR 6.201 and Fed R Crim P 16, and there does not appear to be a general right of discovery with reference to the prosecutor's estimated sentencing guidelines range or expected arguments at sentencing. See *United States v Barrett*, 890 F 2d 855 (CA 6, 1989), *superseded on other grounds as stated in United States v Williams,* 940 F 2d 176, 181 n 3 (CA 6, 1991); United *States v Wagner*, 149 FRD 217 (D Utah, 1993); *United States v Knell*, 771 F Supp 230 (ND Ill, 1991).

[2] Ohanesian and Eagleson, *The Brady Conflict?,* 103 Mich B J 34 (May 2024).

[3] *Id*.

[4] American Bar Association Formal Ethics Opinion 09-454 (2009).

[5] *Brooks v Tennessee*, 626 F3d 878, 892-893 (CA 6, 2010).

[6] *In re Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163*, 582 SW2d 200 (Tenn 2019) (collecting cases).

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Anne Yantus is a sentence consultant working with attorneys to promote more favorable sentencing outcomes. Anne credits her knowledge of Michigan sentencing law to the many years she spent handling plea and sentencing appeals with the State Appellate Defender Office. Following her time with SADO, Anne taught a criminal sentencing course at the University of Detroit Mercy School of Law and subsequently continued to write and speak on felony sentencing law while serving as pro bono counsel with Bodman PLC. Anne welcomes your Michigan felony sentencing questions and is happy to arrange a consultation where appropriate.

Due to the volume of inquiries, Anne is not able to respond to pro bono requests for assistance or analysis of individual fact situations.

Ending life and long sentences: Using clemency often—A return to mercy and justice (Part 3 of 3)

Introduction

Michigan's criminal legal system faces a crisis born from decades of excessively punitive sentencing policies. As explored in Parts 1 and 2 of this series, life and excessively long sentences have resulted in an aging prison population, significant racial and gender disparities, and an overburdened Department of Corrections. While legislative reforms such as Second Look policies could offer a pathway to address some of these issues, another critical, underutilized solution lies within the power of the Executive Branch: clemency.

Historically, Michigan has been a leader in progressive justice reforms. It was the first state in the nation to abolish the death penalty in 1846. For much of the 20th century, Michigan utilized clemency powers robustly, with the Parole Board and Governor's office collaborating to offer release to rehabilitated individuals. These practices served as a model for balancing public safety with the principles of mercy and justice. However, as the state embraced "tough on crime" policies in the latter half of the century, clemency fell into disuse, leaving thousands to languish in prison with little hope of relief.

Nationally, clemency has played a crucial role in addressing systemic issues. Recent actions from both President Biden and President Trump demonstrate the capacity of executive power to correct injustices, such as addressing excessive punishments or recognizing rehabilitation among incarcerated individuals. By leveraging lessons from federal clemency practices, Michigan's leaders have an opportunity to embrace reforms that align with a broader movement toward justice and equity.

As Michigan's criminal justice system faces a growing crisis, the lessons from our progressive past and national examples provide a clear path forward. This article explores how a return to robust clemency practices could address the growing humanitarian and fiscal crises in Michigan's prisons, correct systemic inequities, and offer redemption to those who have demonstrated profound change. Drawing on Michigan's historical clemency practices, contemporary research, and national examples, we make the case for Governor Whitmer to embrace clemency as a moral and constitutional imperative.

The power and promise of clemency

A governor's power to relieve someone from their sentence has been a fundamental feature of Michigan's legal framework since the state's first constitution was adopted in 1835.[1] At that time, the term "pardon" was the legal action used to erase a conviction, and the power to forgive a conviction has remained ensconced at every opening of the constitution since. In the 1963 constitutional convention, commutation was explicitly added to the list of clemency powers to provide relief for long sentences.[2]

Clemency is not merely an act of grace; it is a constitutional mechanism designed to correct injustices and offer mercy.

Nationally, executive clemency demonstrates the power of leadership to address systemic inequities and recognize individual transformation. Recent presidential actions highlight the potential of clemency to balance justice and mercy, offering a pathway to address over-sentencing and systemic injustice. By incorporating such lessons, Michigan can leverage clemency to address its unique challenges while aligning with broader reform movements.

In unique and independent research undertaken by the American Friends Service Committee's Michigan Criminal Justice Program and the University of Michigan's Gerald R. Ford School of Public Policy, the following facts were discovered about Michigan's current prison population:

When it comes to extremely long prison sentences and actual time served in prison, Michigan leads the way. Nationally, 17% of individuals serving prison sentences have served 10 years or more. In Michigan, one-third (32%) of the prison population has served 10 years or more. Further, 41% of the Michigan prison population will have to serve at least 10 years before becoming eligible for parole. Most of those individuals will have to serve much more than ten years before becoming eligible for parole. Finally, nearly 4,500 people (approximately 14% of the full Michigan prison population) will spend the rest of their lives in prison, however many years that may be for each of them.[3]

And according to the MDOC's Offender Tracking Information System, as of January 6, 2025, we know the following to be true:

- **1 in 7** people serving a prison sentence in Michigan is serving a life sentence.
- **1 in 6** Black individuals in Michigan prisons is serving a life sentence.
- **1 in 4** women in Michigan is serving 20 years or more in prison.
- **1 in 9** Black women in Michigan is serving 20 years or more.
- Nearly 4,500 individuals (approximately 14% of the prison population) will spend the rest of their lives in prison, however many years that may be for each of them.[4]

These alarming statistics underscore Michigan's overreliance on extreme sentencing. Clemency provides an opportunity to address this crisis while upholding principles of justice and equity.

A historical precedent for success

Michigan's historical use of clemency powers demonstrates its potential to balance justice, public safety, and mercy. From the 1930s through the mid-20th century, clemency was a cornerstone of Michigan's corrections system. A 1964 memorandum from the Department of Corrections to Governor George Romney described the rigorous review process for the first-degree murder commutation program, emphasizing its success rate. Between 1938 and 1964, only six individuals out of 286 who had their life sentences commuted violated parole, most for technical reasons.[5] This unparalleled success reflects the careful screening by the Parole Board and the rehabilitative potential of those serving long sentences.

"The program has been extremely successful. Lifers not only make the best inmates, but also the best prospects for rehabilitation and successful adjustment in the community," noted Director Gus Harrison in his communication with Governor Romney.[6] Harrison also observed that delays or denials of clemency recommendations negatively impacted inmate morale and undermined the broader corrections system's rehabilitative goals.[7] These historical insights underline the humanity and practicality of clemency as a tool for systemic change.

The moral imperative for clemency

Women, particularly survivors of domestic and sexual violence, also face unique injustices. Research demonstrates **90%** of women in prisons experienced sexual and/or physical violence before coming to prison.[8] Robust clemency practices can provide much-needed relief to these survivors, allowing them to rebuild their lives and reducing the burden on our overextended prison system.

As legal historian Rachel Barkow argues in *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, clemency serves as an essential safeguard against the inherent fallibility of the judicial system.[9] Criminologists and legal scholars, including Jonathan Simon and Christopher Seeds, critique the excessive nature of sentencing in the United States. Simon, in *Governing Through Crime*, identifies the overuse of punitive measures as a response to societal fears, despite a lack of evidence supporting their efficacy.[10] Seeds, in *Death by Prison: The Emergence of Life Without Parole and Perpetual Confinement*, highlights how life sentences and lengthy incarceration fail to deter crime and instead compound social harm.[11]

Organizations like the Equal Justice Initiative (EJI) have specifically documented how juries perpetuate these injustices. Research consistently shows that juries are less likely to empathize with defendants who are Black, Brown, or poor, leading to disproportionately harsher sentences for these groups.[12] Moreover, implicit biases and structural inequalities in jury selection processes frequently exclude people of color, making juries less representative and often less equitable in their judgments.

Clemency offers a critical tool for addressing these inequities, particularly for communities disproportionately impacted by the criminal justice system.

Recommendations for reform

To rebuild Michigan's clemency process and address systemic challenges, we propose the following reforms:[13]

Immediate reforms

1. **Instruct MDOC to prioritize lifer reviews:** Conduct parole guideline assessments for all individuals who have served 20 years or more. High-probability candidates should have their status reviewed and encouraged for commutation applications.

2. **Rescind prohibitive policies:** Reverse the MDOC's prohibition on staff writing support letters for commutation. Staff insights are invaluable for evaluating a candidate's rehabilitation and readiness for reintegration.

Structural changes

3. **Issue an executive order on clemency**: Establish a clemency review board with ten members—five within the Parole Board and five independent reviewers—to evaluate applications, interview candidates, and expedite the process.

Cultural and procedural reforms

4. **Address cultural issues in MDOC:** Implement external reviews to analyze the prison environment and identify barriers to rehabilitation. Strategies should counteract systemic dehumanization and promote community-oriented success.

5. **Public hearings and transparency:** Conduct clemency hearings that focus on rehabilitation and future support plans, rather than retrying past offenses. Reduce the Attorney General's role in these hearings to ensure fairness

Clemency and human transformation

Clemency rests on the foundational belief that human beings are capable of change. Decades of research support this principle. Studies consistently demonstrate that people who have served long sentences are among the least likely to reoffend upon release.[14] Age is one of the most reliable predictors of recidivism, with rates dropping significantly as people grow older. By the time many individuals with life sentences have served 15-20 years, they have demonstrated extensive rehabilitation and pose no threat to public safety.

Clemency also addresses the inherent limitations of the legal system. As Michelle Alexander argues in *The New Jim Crow*, the criminal justice system in the United States is deeply rooted in historical practices of racial control.[15] Clemency provides an opportunity to confront these legacies and offer redemptive justice to those who have been most harmed by systemic inequities.

Conclusion

If Governor Whitmer were to embrace clemency more fully, it would not only address the growing humanitarian crisis of an aging prison population but also take a stand against the racial, gender, and class inequities perpetuated by the current system. Clemency provides a way to restore hope and dignity while realigning Michigan's justice system with values many of us hold close: Values of mercy, redemption, and second chances.

Through clemency, Governor Whitmer can set a national example, demonstrating that justice rooted in mercy is not only possible

but transformative. It is time for Michigan's leaders to honor the constitutional principles of mercy and justice by prioritizing clemency as a tool for systemic change.

Endnotes

[1] Const 1835, art 5, § 11.
[2] *Id.,* art 5, § 14.
[3] University of Michigan Ford School of Public Policy & American Friends Service Committee, *Second Look Legislation: A Ford School Policy Briefing* (2024), p 1 <https://afsc.org/sites/default/files/2024-03/second-look-legislation-a-ford-school-policy-briefing_2.pdf> (accessed January 21, 2025).
[4] As of January 6, 2025, the MDOC's OTIS website data included 4,349 people who were serving life sentences in Michigan—the vast

majority of whom are serving life without parole. An additional 6,483 people are serving 20-year minimums or more.

[5] *Second Look Legislation*, supra note 3 at 16 (memorandum from Parole Board Chair Leonard R. McConnell to Director Gus Harrison).

[6] *Id.* at 19 (letter from Director Gus Harrison to Governor Romney).

[7] *Id.*

[8] Council on Women's Justice, *Women's Justice, A Preliminary Assessment of Women in the Criminal Justice System* (July 2024) <https://councilonj.org/womens-justice-a-preliminary-assessment-of-women-in-the-criminal-justice-system/#8> (accessed January 22, 2025).

[9] Barkow, R., *Prisoners of Politics: Breaking the cycle of mass incarceration* (Cambridge: Belknap Press of Harvard University Press, 2019).

[10] Simon, J., *Governing through crime: How the war on crime transformed American democracy and created a culture of fear* (Oxford: Oxford University Press, 2007).

[11] Seeds, C., *Death by prison: The emergence of life without parole and perpetual confinement* (Oakland: University of California Press, 2022).

[12] Equal Justice Initiative, *Race and the Jury* <https://eji.org/report/race-and-the-jury/> (accessed January 22, 2025).

[13] Our full report on clemency recommendations for Governor Whitmer is available at The American Friends Service Committee, *Recommendations for Clemency Process: A Community Centered Approach* < https://afsc.org/sites/default/files/2024-08/recommendations-for-clemency-process-updated-1.pdf> (accessed January 22, 2025).

[14] The Sentencing Project, *Incarceration and Crime: A weak relationship* (2024) <https://www.sentencingproject.org/reports/incarceration-and-crime-a-weak-relationship> (accessed January 22, 2025).

[15] Alexander, M., *The New Jim Crow: Mass incarceration in the age of colorblindness* (New York: The New Press, 2010).

Natalie Holbrook-Combs
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Natalie Holbrook-Combs has worked against the punishment system and for collective accountability and healing for 20 years. Natalie's work is centered around ending life and long sentences in Michigan. Organizing with people in prison and people who have been to prison, through her paid work with the American Friends Service Committee's Michigan Criminal Justice Program, has been the most meaningful calling and privilege imaginable. She also organizes with Liberate Don't Incarcerate (LDI), a Washtenaw County abolitionist organization, committed to dreaming and working into existence a county rooted in healing and transformation, not punishment, vengeance, and cages. Two of the greatest gifts she has experienced in her organizing have been through building with Siwatu-Salama Ra's Freedom Team and Tashiena Lanay Combs' Freedom Team.

Pete Martel is the Associate Program Director at AFSC's Michigan Criminal Justice Program in Ypsilanti, Michigan. In this role he works with volunteers and interns to carry out direct service advocacy work with people incarcerated in Michigan's prison system. He is leading up individual liberation work for long and life serving people in Michigan's prisons. He has worked in various capacities in Michigan's criminal legal system. His research interests include the legal system, criminal procedure, and punishment. Pete loves music.

The impact of the Michigan Medical Marihuana Act and the Michigan Regulation and Taxation of Marihuana Act on probation conditions prohibiting marijuana use

MCL 772.3(1)(a) mandates that all orders of probation include the requirement that "[d]uring the term of his or her probation, the probationer shall not violate any criminal law of this state, the United States, or another state or any ordinance of any municipality in this state or another state." The language of this provision has not changed in the 21st century, but Michigan law pertaining to the possession and use of marijuana has undergone significant changes since 2008.

Through referendum, voters have not only decriminalized the possession and use of marijuana by adults in most circumstances but have also affirmatively granted immunity from "arrest, prosecution, or penalty in any manner," and prohibited the "den[ial] [of] any other right or privilege" based on marijuana possession or use in compliance with Michigan law.[1] Like MCL 772.3(1)(a), United States (federal) law criminalizing the possession of marijuana has remained the same for decades. Marijuana is still a Schedule 1 controlled substance, and its possession continues to violate federal law.

This article discusses the Court of Appeals' decisions that have sought to reconcile the mandatory language of MCL 771.3(1)(a) with federal law and more recent amendments to Michigan law decriminalizing marijuana and affording certain protections to those who use it.

Efforts to reconcile the Probation Act with the MMMA and MRTMA

The Michigan Medical Marihuana Act (MMMA) was approved by voter referendum in November 2008 and became effective December 4, 2008. Section 4(a) of the MMMA provides that a qualifying patient "is not subject to arrest, prosecution, or penalty in any manner or denied any right or privilege … for the medical use of marihuana in accordance with this act."[2] Section 7 further provides that except for statutes pertaining to specialized drug and mental health treatment courts: "All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act."[3] Prior to 2008, few Court of Appeals or Supreme Court decisions even mention probation conditions prohibiting marijuana use or possession. There seems to have been little or no question that a defendant's probation could be revoked if their drug screening returned a positive result for marijuana.[4]

The Court of Appeals first agreed to consider how the MMMA might restrict a court's ability to prohibit or punish marijuana use by qualifying patients placed on probation in 2014. In *People v Howard*, Mr. Howard argued that because he was a qualifying patient under the MMMA, the trial court abused its discretion and violated the law by extending the duration he was required to be on an alcohol tether because he tested positive for marijuana in a drug screening.[5] By the time the case was submitted, however, the issue had been rendered moot because he was no longer on the tether.

In 2017, the Court of Appeals addressed the issue directly, albeit in an unpublished opinion.[6] Mr. Magyari pled no contest to operating while intoxicated, third offense (OWI III), and operating without a valid

license in 2015 and was sentenced to three years' probation. His probation order prohibited him from possessing or using any controlled substances without a prescription or violating any criminal laws of any governmental unit. He was also ordered to submit to drug testing as directed by his probation officer. Thereafter, Mr. Magyari moved for an order from the trial court allowing him to use medical marijuana while on probation. After the trial court denied his motion, Mr. Magyari appealed the decision by leave granted.

In an unpublished opinion that does not appear to have been cited in any subsequent Michigan Court of Appeals or Supreme Court opinions or orders, the Court of Appeals dismissed the premise of Mr. Magyari's argument that the trial court prohibited him from using marijuana as a probation condition based on MCL 772.3(1)(a) and the Federal Controlled Substances Act. Instead, it found that the condition had been imposed under MCL 771.3(3), which grants courts the authority to "impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper."[7] The Court of Appeals panel found that the circumstances of the sentencing offense warranted the complete prohibition of Mr. Magyari's medicinal marijuana use because of his "long history of abusing both alcohol and marijuana" and "prior federal conviction for conspiring to deliver marijuana." The Court of Appeals did not address whether MCL 333.26424(a) restricted the court's authority under MCL 771.3(3).

The MMMA had been in place for over a decade before the Court of Appeals issued a published opinion that appeared to resolve whether MMMA-compliant use and possession of marijuana could be prohibited as a condition of probation.

In 2019, Mr. Thue was sentenced to one-year probation for a misdemeanor assault, which included a condition prohibiting him from using marijuana.[8] Mr. Thue, who had a valid medical marijuana registration card, moved to modify the condition to allow him to use medical marijuana. The district court denied his motion, and the circuit court affirmed. He appealed to the Court of Appeals by leave granted, which agreed to resolve the issue directly, even though Mr. Thue's term of probation had expired before the case was decided.

The Court of Appeals held that while "Michigan's probation act permits a court to impose multiple conditions of probation on a defendant under MCL 771.3," the "provisions of the probation act that are inconsistent with the MMMA do not apply to the medical use of marijuana."[9] It explained that "[b]ecause probation is a privilege," under Michigan law, "the revocation of probation because of MMMA-compliant use of marijuana constitutes a "penalty" under MCL 333.26424(a) of the MMMA."[10] As such, "a court cannot revoke probation because of a person's use of medical marijuana that otherwise complies with the terms of the MMMA."[11]

Near the end of its opinion in *Thue*, the Court of Appeals wrote that "the MMMA is inapplicable to the recreational use of marijuana, and thus, a trial court may still impose probation conditions related to the recreational use of marijuana and revoke probation for such recreational use as well as for marijuana use in violation of the MMMA."[12] Though dicta, this was a significant assertion because the Michigan Regulation and Taxation of Marihuana Act

(MRTMA) had been approved by voter referendum just fifteen months earlier, and granted all adults who possessed and used small amounts of marijuana the same protection from "arrest, prosecution, or penalty in any manner," that had previously been afforded only to "qualifying patients" under the MMMA.

People v Lopez-Hernandez (2024) (No. 367731)

In *People v Lopez-Hernandez,*[13] Mr. Lopez-Hernandez pled guilty to operating a motor vehicle while visibly impaired (OWI) and under the influence of marijuana. He was sentenced to probation. Like Mr. Thue, his probation conditions prohibited him from using or possessing marijuana. After he tested positive for marijuana, Mr. Lopez-Hernandez was charged with violating his probation. He moved to dismiss the violation based on the immunity afforded by MRTMA, but the district court denied his motion, and the circuit court affirmed. The Court of Appeals granted him leave to appeal and also affirmed.[14]

The Court of Appeals found that MRTMA "essentially placed marijuana in the same category of intoxicants as alcohol, which is legal for recreational use by adults over the age of 21," but can be prohibited as a condition of probation. The Court held that Mr. Lopez-Hernandez was "not entitled to any of the protections for recreational marijuana use set forth in the MRTMA" because he pled guilty to violating MRTMA by operating a vehicle while under the influence of marijuana.[15] According to the Court, "the probation condition prohibiting him from using marijuana was a penalty imposed for violating MCL 257.625(3)," and "[n]othing in the MRTMA suggests that it was intended to supersede the Michigan Vehicle Code…, particularly not those portions of the MVC designed to protect the health and safety of the public."

This was not the first time that the Court of Appeals held that the Motor Vehicle Act permitted the punishment of marijuana use that a more recently enacted ballot measure appeared to preclude. In *People v Koon*,[16] the Court of Appeals held that a licensed medical marijuana user could be prosecuted under MCL 257.625(8), which makes it a crime to operate a motor vehicle with any amount of schedule 1 controlled substance in one's body, because the MMMA "explicitly prohibits the operation of a motor vehicle while under the influence of marijuana" and the Motor Vehicle Act "provide[s] a definition of what constitutes being under the influence of marijuana: the presence of any amount of marijuana in the person's body."[17] In a unanimous decision, the Supreme Court found that MCL 257.625(8) and the MMMA conflict irreconcilably and that the MMMA granted immunity to registered patients who drive with indications of marijuana in their system who are not otherwise under the influence of marijuana.[18]

People v Hess (2024) (No. 366148)

In *People v Hess*,[19] Ms. Hess pled guilty to third degree retail fraud for shoplifting clothes and received a 12-month probation under HYTA. A condition of Ms. Hess's probation prohibited her from possessing or using marijuana. After she was charged with violating her probation by testing positive for marijuana, Ms. Hess moved to dismiss the violation and amend her probation to allow her to lawfully possess and use marijuana in compliance with MRTMA. The district court denied her motion and revoked her HYTA probation, and the circuit court denied her leave application. The Court of Appeals

granted leave to appeal and affirmed the district court's decision.

The Court of Appeals held that even though Ms. Hess's conviction had not violated MRTMA and did not involve a violation of the Motor Vehicle Act, the trial court correctly prohibited her from possessing or using marijuana as a condition of probation. The Court explained that because MCL 771.3(1)(a) requires courts to prohibit the violation of United States law as a probation condition, the condition was lawful and mandatory.

According to the Court, while "[u]sing recreational marijuana may be permissible in Michigan, but it is still prohibited by federal law," because 21 USC 844(a) "states, in relevant part, '[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice ....' "[20]

The tension between the Michigan precedent considering MRTMA and the MMMA

Mr. Lopez-Hernandez and Ms. Hess have sought leave to appeal from the Court of Appeals' opinions in their respective cases, and their applications remain pending as of the date of this publication.[21] Because the opinions in both cases were published, they constitute binding precedent. They will continue to dictate the law in Michigan unless they are superseded by statute or overruled by the Michigan Supreme Court. Although far from certain, both decisions' public interest and potential impact increase the likelihood that the Supreme Court will review one or both.

The decision in *Hess* is broader in scope than Lopez-Hernandez because it held that courts must prohibit recreational marijuana use as a condition of probation, regardless of the sentencing offense. In contrast, Lopez-Hernandez only held that such restrictions were permissible when the sentencing offense involved a violation of MRTMA.

The Court of Appeals' analysis in *Hess* does not appear to be reconcilable with its analysis in *Thue*. In *Thue*, the Court held that the MMMA supersedes MCL 773(1)(a) to the extent that it permits courts to prohibit MMMA-compliant possession and use of marijuana as a probation condition. Conversely, *Hess* held that MCL 773(1)(a) supersedes MRTMA and requires courts to prohibit MRTMA-compliant possession and use of marijuana whenever a defendant is sentenced to probation. *Hess* appeared to distinguish *Thue* by suggesting that the possession of lawfully prescribed marijuana does not violate federal law. But both the United States Supreme Court and Michigan Supreme Court have held that federal law makes no such distinction.

"[B]y characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses" and "designates marijuana as contraband for any purpose."[22] While MCL 333.26424(a) grants immunity for the MMMA-compliant possession and use of medical marijuana by qualifying patients, the federal Controlled Substances Act provides "no such immunity. Rather, it makes it 'unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.'"[23] "The only exception to this prohibition is for

research projects approved by the federal government."[24]

Because federal law does not distinguish between recreational and medicinal marijuana possession or use, and because the statutory language granting immunity for MRTMA- and MMMA-compliant marijuana possession and use is essentially indistinguishable, it is difficult to reconcile the analyses in *Hess* and *Thue*. Conflicts like this would garner the Court's attention even without significant public interest.

Although the Court of Appeals' analysis in *Lopez-Hernandez* was rendered largely superfluous by its broader holding in *Hess*, it is far from inconsequential. *Lopez-Hernandez*'s more limited holding—that crimes that involve violations of MRTMA may be punished through the forfeiture of MRTMA-based privileges—raises several significant questions. For instance, if the loss of privileges under MRTMA is predicated on a conviction that entails a violation of MRTMA, how can a defendant enter an intelligent plea to such offenses without being informed of this consequence? How can such forfeitures be based on judicial findings of fact, rather than a unanimous jury verdict? And do licensed medical marijuana users who violate the MMMA also forfeit the protections granted to them by the MMMA?

Endnotes

[1] MCL 333.26424(a); MCL 333.27955(1).
[2] MCL 333.26424(a).
[3] PMCL 333.26427(1)(e).
[4] See, e.g., *People v Boright*, unpublished per curiam opinion of the Court of Appeals, issued February 16, 2006 (Docket No. 256225); *In re Smith*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2006 (Docket No. 2661147); *In re Monroe*, unpublished per curiam opinion of the Court of Appeals, issued December 19, 2006 (Docket No 269996).
[5] *People v Howard*, unpublished per curiam opinion of the Court of Appeals, issued August 5, 2014 (Docket No 312267).
[6] *People v Magyari*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2017 (Docket No 327798).
[7] *Id.* at 2, quoting MCL 771.3(3).
[8] *People v Thue*, 336 Mich App 35, 47 (2021).
[9] *Id.*
[10] *Id.*
[11] *Id.* at 48.
[12] *Id.* at 48.
[13] *People v Lopez-Hernandez*, Mich App_ (2024) (Docket No 367731).
[14] *Id.*
[15] *Id.*, citing MCL 257.625(3) and MCL 333.27954(1)(a).
[16] *People v Koon*, 296 Mich App 223 (2012).
[17] *Id.* at 230, citing MCL 333.26427(b)(4) and MCL 257.625(8).
[18] *People v Koon*, 494 Mich 1, 7 (2013).
[19] *People v Hess*, _Mich App_ (2024) (Docket No 366148).
[20] *Id.*, quoting 21 USC 844(a) (alterations in original).
[21] *People v Lopez-Hernandez* (Docket No. 167529); *People v Hess* (Docket No. 167895).
[22] *Id.*
[23] *Ter Beek v City of Wyoming*, 495 Mich 1, 9 (2014), quoting 21 USC 841(a)(1) (alterations in original).
[24] *Id.* at 9 n 4, citing 21 USC 823(f) and *United States v. Oakland Cannabis Buyers' Coop*, 532 US 483, 490 (2001).

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Safe & Just Michigan

Legislative wrap-up and preview from our Executive Director

The final day of the 2023-24 legislative session was Thursday, December. 19. That day marked the end of a chaotic three-week Lame Duck session where Democratic leadership finally allowed major criminal justice priorities to move through committee. Unfortunately, most such bills ultimately fell short on the House Floor with Democrats unable to unify behind them.

It was clear going into Lame Duck that House Republican leadership would not allow its caucus members to support Democratic priorities. That left Democrats to try to pass bills on a party-line vote with the narrowest possible majority — 56 to 54. This meant that a single dissenting member could block any bill, and that is what happened. Both Second Look and the bills to abolish juvenile life without parole died on the House Floor for lack of support.

The main culprit for the failure of both packages appears to have been Rep. **Nate Shannon** (D-Sterling Heights), who was an early no on ending juvenile life without parole as well as on Second Look. We are told that there were other holdouts on Second Look as well. Leadership did not even schedule bail reform for a Floor vote.

There were some positive developments during lame duck. For example, the Legislature passed bills to create a sentencing commission that would provide oversight and guidance to the legislation on sentencing issues.

However, for us, the story of this session is House Democratic leadership's view of criminal justice reform as a political liability. This was behind their refusal to allow members to work on most criminal justice issues prior to the lame duck period, and it was ultimately behind their failure to pass any of the important, popular, commonsense criminal justice reforms proposed during their first "trifecta" period of full control of state government in nearly 40 years.

Having lost control of the state House in the November election, the inactivity of the past two years appears to have been a real missed opportunity. The lesson for leadership is that when you have power, use it courageously to make a difference, because you may not have it for long.

Looking ahead to the 2025-26 session, incoming House Speaker **Matt Hall** (R-Richland Township) has been a vocal opponent of criminal justice reform. He is not expected to move most criminal justice reform legislation. The missed opportunities of this session will continue to haunt the next.

Justice reform's legislative wins in Michigan in 2024

When Democrats gained control of the Michigan House, Senate and Governor's office in the 2022 elections, many people thought criminal justice reform advocates stood in a stronger position. Democratic politicians have been more likely than their Republican counterparts to voice support for our priorities in recent years.

However, that's not how it played out. We did find many supporters in people like House Criminal Justice Committee Chair **Kara Hope** (D-Holt), Rep. **Amos O'Neal** (D-Saginaw) and Sen. **Stephanie Chang** (D-Detroit), and supporters across the aisle, too, in people like Sen. **Ed McBroom** (R-Waucedah). But leadership in both the Senate and House as well as the Governor's office were hesitant to let items they considered controversial move forward.

At the same time, some Republicans didn't hesitate to turn the fear of crime into a political weapon. For instance, after a committee hearing on our bills to end juvenile life without parole, some House Republicans gathered reporters together to suggest the lawmakers who favored our legislation were soft on school shooters.

Against this often frustrating backdrop, we still managed to take wins where we could find them in 2024, both inside the Capitol and around the state. They include:

Improving Medically Frail Parole: Michigan passed Medically Frail Parole in 2019, but up to this year, just one person had secured release under its provisions. Previously, the Parole Board had too few options placing a prospective parolee under this provision. The new law fixed Medically Frail Parole by empowering the Parole Board to parole someone to a nursing home, hospice care facility, or family home.

Sentencing commission: The Legislature completed its work on bills to create a sentencing commission and they now await the Governor's signature. This new law will establish a sentencing commission tasked with eliminating sentencing discrepancies across Michigan. It will build on the work of the former Criminal Justice Policy Commission, which was disbanded in 2019. We hope it will also lean on our 2021 publication, *Do Michigan's Sentencing Guidelines Meet the Legislature's Goals? A Historical and Empirical Analysis of Prison Terms for Life-Maximum Offenses*. In the coming year, the Legislature will need to turn its attention toward implementing the creation of and funding this commission. Safe & Just Michigan intends to be active in this process as well.

Budget concessions: Effective advocates have to be flexible, and that means taking solutions where you find them. One of our goals is reducing the fees paid by families of incarcerated people, such as fees to deposit money into their commissary accounts. Usually, we reach our legislative goals through bills dedicated to solving one problem, like the ones that fixed Medically Frail Parole. But this year, we saw an opportunity to address these fees in the budget process. Working with Rep. Amos O'Neal, language was added into the budget bill directing the Michigan Department of Corrections to reduce the fees paid by justice-impacted families.

Life beyond life goes on the road: For the past two years, we have been sharing the remarkable stories of some of Michigan's former juvenile lifers. These storytellers — who are now social workers, entrepreneurs, ministers, advocates and more — have one thing in common: they were all sent to prison to die while they were still children. This year, we took their show on the road, with events in Grand Rapids and Detroit. The events were enthusiastically received, and we're looking for more avenues to get their stories out to the public.

Thousands of lives reached: 2024 marked the third year of Clean Slate and the first full year of Automatic Expungement in

Michigan. More than 5 million convictions have now been expunged, and Safe & Just Michigan is grateful to be an active part of that. We weren't content to just help pass these bills into law; we're continuing to help people get their records expunged.

A look back at a strange Lame Duck

Lame Duck began with a lot of ambition and not a lot of time. After putting off work for most of the past two years, we had hoped that the three-week Lame Duck session presented an opportunity for us to make up for lost time.

Some lawmakers had different ideas

On Friday, Dec. 13, incoming House Speaker **Matt Hall** (R-Richland Township) announced his caucus was going home because its priority bills weren't advancing the way it had hoped. That meant House Democrats, who hold just a one-seat majority, needed every one of their members to vote in favor of a bill on order for it to pass. It also meant that any one legislator could bring things to a halt by sitting out as well. That's what happened when state Rep. **Karen Whitsett** (D-Southfield) announced she wouldn't be coming to Lansing either, making any Floor votes impossible. When all was said and done, here are our legislative priorities that didn't make it across the finish line this session:

Bail reform: The House Criminal Justice Committee held a hearing on these bills on Nov. 12. We entered Lame Duck with measured hope for the bail reform package — we were encouraged by the hearing, but we knew it was an ambitious goal and that time was limited. Ultimately, it never progressed beyond that hearing. We have been working on this goal with partners like The Bail Project and ACLU of Michigan for several years and will continue.

Clean Slate clean-up: These bills would remove language in the Clean Slate expungement laws that holds up expungements when there has been an additional conviction between the record being expunged and the current date (an "intervening conviction.") These bills cleared the House but didn't make it through the Senate's legislative process. We will continue our work to streamline the Clean Slate laws next session.

Ending juvenile life without parole: After working so hard to end juvenile life without parole in Michigan with so many people who were directly affected by this harsh sentence, it was particularly disappointing to see these bills fail to cross the finish line. Identical sets of bills were introduced to both chambers in hopes that would speed up their legislative work, but it didn't help. In the end, the House bills were voted out of committee and to the Floor but didn't come up for a final vote. In the Senate, they didn't even get a committee hearing. We will continue this important work.

Police accountability: Ambitious bills were introduced in both the House and Senate intended to bring greater accountability to law enforcement in Michigan and address some of the concerns citizens have voiced about policing. By the final week of Lame Duck, just three of these bills had any chance left of passage: SB 1091, requiring use of force policies; SB 1092, setting training requirements; and SB 1094, limiting the use of no-knock warrants. We will work on this again next session.

Productivity credits: These bills would create a system that allows incarcerated people to participate in educational, job training and other prison programing in exchange for reducing their sentences. The Senate sent their bills to the House, but the House bills didn't even get a hearing. We have supported this plan in the past several sessions and will continue to support plans that address the challenge of life and long sentences in Michigan.

Second Look: Second Look would give people incarcerated 20 years the opportunity to have their sentence reviewed by a judge. The set of House bills was voted out of committee to the Floor but didn't make it to a final vote. The Senate bills never got a committee hearing. Second Look policies exist in several other states and we will work to bring one here.

Vital documents: This ensures people leave prison with personally identifying documents like a Social Security card in-hand. These documents are needed for the basic tasks of reestablishing a life, such as opening a bank account, securing a place to live or getting a job. While the legislation to provide these documents to people upon their release from prison completed the legislative process, Gov. Gretchen Whitmer chose to veto these bills, saying that they conflicted with an existing policy that supports voter registration. In a letter explaining the veto, she wrote that her veto was," a necessary consequence of the Legislature's failure to reconcile the text of these bills with existing law," and said she hoped to work with the Legislature to pass this "important criminal justice reform issue."

Help amplify Inside Voices

Inside Voices is a written by justice-involved people currently incarcerated in Michigan prisons that is published in our hardcopy newsletter. While space in the printed newsletter is limited, we are able to post most of them online for everyone to read.

We've recently published letters from writers on several topics, including life and long sentences, mental health services in prison, vendor monopolies and the problem of false hope in the criminal justice reform movement. Read the August and September letters here: bit.ly/InsideVoicesAug24 and bit.ly/InsideVoicesSept24.

If you would like to encourage someone who is incarcerated to submit a letter, please tell them they can send a letter of 300 words or less on criminal justice reform, pending legislation, re-entry or related topics to: Inside Voices, c/o Safe & Just Michigan, 119 Pere Marquette Drive, Suite 2A, Lansing, MI 48912. To learn more, visit us at: www.safeandjustmi.org. If you would like to join our efforts, email us at info@safeandjustmi.org or sign up for our newsletter at bit.ly/sjmsignup.

Trial court successes

If you would like to have your trial court successes featured in the Criminal Defense Newsletter, email us at wins@sado.org.

This month, we feature three cases, one each from the Oakland and Ontonagon Circuit Courts, and the 54B District Court in East Lansing.

In Oakland County, **Mitch Foster**'s client had been facing a first-degree home invasion charge but was given a delayed sentence with a reduction after the delay period to misdemeanor malicious destruction of property. At the final delayed sentence hearing, the complainant – an ex-girlfriend – accused the client of having online contact with her. The client passed a polygraph test on the contact issue, and Judge Matthews abided by the terms of delayed sentence, resulting in a misdemeanor conviction.

In Ontonagon County, **Mitch Foster**'s client was released in time for Christmas after she was sentenced by Judge Pope to 333 days in jail with 333 days credit for time served. The client had been previously convicted by a jury and sentenced to 52 months to 10 years for bringing controlled substance into the Ontonagon County jail and to 8 to 30 years for delivering methamphetamine to another inmate while she was in the jail. But after Mr. Foster raised the fact that the client had been impeached at trial with a misdemeanor theft offense, in violation of MRE 609(a)(2)(A), the prosecutor agreed to dismiss the client's conviction and add a lesser count with no habitual offender enhancement and to an agreement for a guilty plea with credit for time served.

Finally, in the 54B District Court in East Lansing, Public Defender **Jonathan Forman** successfully moved to dismiss a charge of biased crime reporting against his client, arguing that the relevant East Lansing ordinance violated the First Amendment. Judge Molly Hennessey Greenwalt agreed, finding that the ordinance created content-based restrictions on speech because it criminalized some false police reports (those based on the criteria listed in the ordinance, such as race) but not others (those based on criteria not listed in the ordinance, such as "gender, gender identity, sexual orientation, religion, political affiliation, or union membership, to name a few examples"). Judge Greenwalt also concluded: "[t]here is no dispute . . . that biased crime reporting is reprehensible [but] East Lansing has sufficient means at its disposal to prevent such behavior without violating the First Amendment."

Congratulations to all!

Kathy Swedlow
Manager, CDRC

New and interesting in the brief bank

Subscribers to the Criminal Defense Resource Center, www.sado.org, have access to more than 1,800 appellate pleadings filed by SADO attorneys in the last five years. The brief bank is updated regularly, searchable by keyword, results can be organized by relevance/date, and the pleadings can be filtered by court of filing. Below are some of the issues presented in briefs over the last few weeks. For confidentiality purposes, the names of clients and witnesses have been removed.

COA No. 368430

Michigan's restrictive CCW statute violates the Second and Fourteenth Amendments. As applied to Defendant, MCL 750.227 is not consistent with historical tradition. Defendant's handgun was not a dangerous or unusual weapon. Defendant did not pose a threat that rises to disarmament.

COA No. 371239

Admitting other acts evidence pursuant to MCL 768.27b violates separation of powers and rendered Defendant's trial fundamentally unfair. Watkins and Mack are wrongly decided.

COA No. 365997

The prosecutor suppressed material, exculpatory evidence in violation of Brady when she failed to disclose that the video surveillance system was turned over to the police by the complainant's mother, rather than obtained by the police from a search of the defendant's home.

COA No. 366477

The trial court reversibly erred in holding that a key witness was unavailable where the prosecutor kept him off the witness stand by threatening to charge him with perjury and lying to a police officer in a capital case. The prosecutor's misconduct

and the trial court's ruling violated the defendant's state and federal constitutional rights to due process and to present a defense, entitling him to a new trial.

COA No. 362854

Trial counsel's mistake of law regarding her authority to make strategic decisions about the case over her client's objection violated the defendant's right to the effective assistance of counsel. Trial counsel performed deficiently in permitting her client to override her on matters of basic trial strategy. Defendant was prejudiced by his counsel's failure to retain full authority over strategic and tactical decisions, which rendered the trial fundamentally unfair, and its result inherently unreliable.

COA No. 365981

Where trial counsel advised the defendant to go to trial on a legally and logically flawed defense strategy, the defendant received ineffective assistance of counsel at the plea-bargaining stage. Defendant would have taken the plea offer but for the deficient advice. The trial court abused its discretion in denying relief without holding an evidentiary hearing.

COA No. 373640

The $1000 court costs assessment is a "fine" and it violates the Excessive Fines clauses of the Michigan and United States Constitutions.

COA No. 367433

Beck's protection against acquitted-conduct sentencing is retroactive. Defendant is entitled to resentencing.

Jacqueline McCann
Research & Mentoring Attorney, CDRC

Michigan Supreme Court: Selected order summaries

Dual convictions of both assault with intent to murder and felonious assault arising from same act violates double jeopardy's prohibition against multiple punishments for the same offense

At the conclusion of a bench trial, Mr. Gardner was found guilty of assault with intent to commit murder (AWIM) and assault with a dangerous weapon (felonious assault), per MCL 750.82.

On appeal, Mr. Gardner argued that his convictions of both AWIM and felonious assault were error because the two offenses have mutually exclusive mens rea requirements. AWIM requires that the defendant assault another "with intent to commit the crime of murder," MCL 750.83, whereas felonious assault requires that the assault be committed "without intending to commit murder..." MCL 750.82(1). The Court of Appeals agreed and vacated Mr. Gardner's felonious assault conviction based on its finding that the dual convictions represented an inconsistent verdict.

After granting leave to appeal, the Supreme Court held that by requiring mutually exclusive mens rea elements for AWIM and felonious assault, the Legislature clearly demonstrated its intent that a defendant not be convicted of both offenses for the same act. As such, Mr. Gardner's convictions of both offenses violated the Double Jeopardy Clauses of the Michigan and United States Constitutions.

Because the double jeopardy issue was unpreserved, however, the Supreme Court held that to avoid forfeiture, the double jeopardy violation needed to satisfy plain error. The Court held that the legislative intent was evident, and that, as a result, the trial court's error in convicting Mr. Gardner of both offenses was plain. It also determined "the error affected defendant's substantial right to be protected from being twice placed in jeopardy for the same offense." Finally, the Court chose to exercise its discretion to vacate Mr. Gardner's conviction of felonious assault in violation of "seriously affected the fairness of the judicial proceedings."

As a result, the Supreme Court affirmed the result reached by the Court of Appeals but held that the Court of Appeals erred in basing its result on the rationale of mutually exclusive verdicts, rather than double jeopardy. Unlike the Court of Appeals, the Supreme Court also remanded the case for resentencing on Mr. Gardner's remaining convictions.

In a concurrence joined by Justice Welch, Justice Cavanagh wrote that she agreed with the result but questioned the applicability of plain error analysis to errors implicating double jeopardy. *People v Gardner*, No. 163124, 12-26-24; Jacqueline J McCann (SADO).

Justice Bolden dissents from Supreme Court's denial of leave to appeal Court of Appeals' decision reversing trial court's exclusion of defendant's alleged sexual assault in the 1980's, which the purported victim recanted shortly after she originally alleged she had been abused

After the prosecution charged Mr. Branch with engaging in criminal sexual conduct against his adopted daughter in 2014 and 2015, it moved to admit evidence that he sexually assaulted his stepdaughter, CC, between 1985 to 1992, when she was a minor. Shortly after CC came forward with allegations of abuse in the 1990s, she

recanted those allegations. She apparently testified in support of the prosecution's motion in the present case and attributed her recantation to pressure from her family. The CPS records involving those allegations had been lost and several of the family members with information about and/or responsibility for her decision to recant, including her mother, had passed away.

The trial court found that while CC's testimony was "compelling," it would be unfairly prejudicial to admit at trial due to the amount of time that had passed between CC's allegations and the charged offenses, which reduced the evidence's probative value and also prevented Mr. Branch from effectively challenging her allegations, given the loss of evidence that resulted.

The prosecution then filed an interlocutory application for leave to appeal, and the Court of Appeals reversed in an unpublished decision. It held that questions regarding CC's credibility were for the jury, not the trial court judge, and that under *People v Brown*, 294 Mich App 377, 387 (2011), the remoteness in time of CC's allegations affected only the weight of the evidence rather than its admissibility.

Mr. Branch then sought leave to appeal, which was denied. Justice Bolden, joined by Justice Welch, dissented from the denial of leave, noting that *Brown*'s discussion regarding the temporal proximity of the other acts evidence had been superseded by *People v Watkins*, 491 Mich 450 (2012), which "expressly rejected the argument that courts could not consider how long ago the other acts occurred when considering admissibility under MRE 403." Justice Bolden also wrote that the Supreme Court should consider "whether and to what extent a trial court may weigh credibility when deciding whether other-acts evidence is reliable under *Watkins*."

Finally, the dissent explained that the denial of leave to appeal was not a ruling on the merits. "Therefore, if this case proceeds to trial and defendant is convicted, he retains the ability to follow the appellate process and, if necessary, challenge the admission of other-acts evidence again in this Court." *People v Branch*, No. 167344, 12-6-24; Rachel A Vinales (Kalamazoo County Defender).

Reconsideration of assessment of 50 points for Offense Variable 7 required where Court of Appeals failed to consider whether defendant's conduct was similarly egregious to sadism, torture, and excessive brutality, as amended statute requires

Mr. Brownsfield was convicted of first degree criminal sexual conduct (CSC I), under the theory that he engaged in sexual penetration through force or coercion causing penetration, resulting in injury. In scoring his guideline, the trial court assessed 50 points under Offense Variable 7 because it found "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a).

Mr. Brownsfield challenged the scoring, but the Court of Appeals affirmed, holding that evidence he "grab[bed] the victim's head, shove[d] it into a pillow, and t[old] the victim

to 'shut up' "sufficiently supported the trial court's finding "that defendant's conduct was beyond the minimum necessary to commit the offense of CSC-I, and the conduct was intended to substantially increase the victim's fear or anxiety."

Mr. Brownsfield sought leave to appeal to the Supreme Court. In lieu of granting leave,

the Supreme Court vacated the portion of the Court of Appeals' decision addressing OV 7.

The Court explained that the Court of Appeals had erroneously used the analysis set forth in *People v Hardy*, 494 Mich 430, 442-444 (2013) when addressing the scoring. When *Hardy* was issued, MCL 777.37(1)(a) provided for 50 points where "A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." However, the statute was amended in 2015 to provide for 50 points only where "A victim was treated with sadism, torture, excessive brutality, or **similarly egregious** conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The Court therefore reversed and remanded to provide the Court of Appeals an opportunity to consider whether Mr. Brownfields' actions were "similarly egregious" to sadism, torture, or excessive brutality. *People v Brownfield*, No. 167115, 12-27-24; Michael A Faraone (MAACS).

Steven Helton
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Michigan Supreme Court: Selected opinion summaries

Dual convictions of both reckless driving causing death and involuntary manslaughter arising from a single death violates double jeopardy's prohibition against multiple punishments for the same offense

In 2015, Mr. Fredell was driving with alcohol and controlled substances in his system when he caused an accident that resulted in the death of two individuals and serious injuries to three others. At the conclusion of a jury trial, among other offenses, he was convicted of two counts of involuntary manslaughter, in violation of MCL 750.321, and two counts of reckless driving causing death, in violation of MCL 257.626(4).

On appeal, Mr. Fredell argued that his convictions and sentences for both reckless driving causing death and involuntary manslaughter for each death he caused violated double jeopardy. In a published opinion, the Court of Appeals held that the Legislature had not intended to prohibit a person from being convicted of both offenses arising from a single act and then found that under the abstract legal elements test, reckless driving causing death includes an element not present in involuntary manslaughter (specifically, the act of driving), while involuntary manslaughter requires a higher degree of mental culpability than reckless driving, as the gross negligence element of involuntary manslaughter "involves a greater degree of culpability than recklessness." *People v Fredell*, 340 Mich App 221, 241 (2022). Consequently, the Court of Appeals affirmed Mr. Fredell's convictions did not violate double jeopardy.

The Supreme Court subsequently granted leave to appeal and reversed. The Court explained that because MCL 257.626(2) states the mens rea for all forms of reckless driving under MCL 257.626 is "willful or wanton disregard for the safety of people or property," the Court of Appeals erred by focusing on whether gross negligence and recklessness are generally identical offenses when it considered the abstract elements of the offenses. Instead, the relevant inquiry is whether "gross negligence" and "willful or wanton disregard for the safety of persons or property" are the same. The Supreme Court's precedent "makes it clear that these legal elements are the same." "Therefore, when an

involuntary-manslaughter charge is based on a theory of gross negligence, the offense does not have an element that reckless driving causing death does not have," and the Double Jeopardy Clauses of both the Michigan and United States Constitutions "prohibit convicting a defendant of both offenses."

However, because Mr. Fredell had not raised the error in the trial court, the Supreme Court held that the error had been forfeited, and so to demonstrate entitlement to relief, he was required to establish the double jeopardy violation constituted plain error under *People v Carines*, 460 Mich 750, 763 (1999). The Court held that the error was plain because "MCL 257.626 specifies that the mens rea for reckless driving causing death is "willful or wanton disregard," not recklessness. The Court held that a defendant's substantial rights are always affected "where, as here, a defendant is convicted of two crimes when he could only be convicted of one." The Court also held that few errors are more likely to affect the fairness, integrity, and public reputation of judicial proceedings than to permit a conviction obtained in violation of double jeopardy to stand, and so it exercised its discretion to reverse.

The remedy for this violation is to affirm the greater conviction and sentence and vacate the lesser. However, because reckless driving causing death and involuntary manslaughter both provide for fifteen year maximum sentences, the Court remanded to the trial court to determine which of the two convictions to set aside.

In a concurring opinion, which was joined by Justice Welch, Justice Cavanagh noted that the Court had never previously held that plain error review is applicable to errors involving double jeopardy violations. She noted that the majority's plain error analysis demonstrated that its application was likely redundant in this context. *People v Fredell*, No. 164098, 12-26-24; Michael A Faraone (MAACS).

Automatic waiver of juveniles into believed to have committed assault with intent to commit great bodily harm while in possession of a dangerous weapon does not apply based on the allegation the juvenile aided and abetted another person who possessed a dangerous weapon

Mr. Oslund, a 16-year-old student, was charged with assault with intent to commit great bodily harm (AWIGBH) under the theory that he aided and abetted an assault committed by two other students. During the assault that Mr. Oslund recorded, the other two students punched the fourth student and struck him with their shoes.

By default, proceedings against a juvenile charged with AWIGBH are to be conducted in juvenile court. However, the prosecution filed a complaint and warrant against Mr. Oslund under MCL 764.1f, seeking to waive jurisdiction of the juvenile court and prosecute him as an adult. MCL 764.1f(2)(b) provides that the prosecution may waive juvenile jurisdiction and file charges against a juvenile in adult court where the juvenile is to be charged with AWIGBH "if the juvenile [wa]s armed with a dangerous weapon" at the time of the assault. While Mr. Oslund was not alleged to have personally possessed a dangerous weapon, the prosecution asserted that automatic waiver was authorized because the two students he allegedly aided and abetted had committed the assault while armed with dangerous weapons–their shoes.

Following a preliminary examination and bindover, Mr. Oslund moved to dismiss for lack of jurisdiction over the case, asserting

that the automatic waiver provision was inapplicable because shoes are not a dangerous weapon. The circuit court denied his motion, finding that a shoe could constitute a dangerous weapon within the meaning of MCL 764.1f(2)(b). Mr. Oslund filed an interlocutory application for leave to appeal, and the Court of Appeals affirmed this decision, finding that the circuit court had not abused its discretion in denying his motion to quash because shoes could constitute a dangerous weapon within the meaning of MCL 764.1f(2)(b). In dissent, Judge Hood wrote that "a flip flop or tennis shoe does not satisfy the statutory definition for a dangerous weapon under the automatic waiver statute," but even if they did, the statute was inapplicable because there was no evidence that Mr. Oslund had been in possession of either piece of footwear at the time of the assault. The majority did not address whether a dangerous weapon possessed by another could be properly attributed to a juvenile within the meaning of MCL 764.1f(2)(b).

The Michigan Supreme Court majority held that whether sneakers and flip flops constituted a dangerous weapon within the meaning of the statute was not relevant because a weapon possessed by a third party does satisfy the statutory requirement of MCL 764.1f(2)(b). The Court explained that "to properly obtain jurisdiction over a juvenile defendant charged with AWIGBH through the automatic waiver process, the juvenile defendant themselves must be armed with a dangerous weapon," as "[t]he

statute's use of the term "the juvenile" unambiguously refers to the charged juvenile in question." Because Mr. Oslund did not possess a dangerous weapon during the assault, the statutory requirements for an automatic waiver to adult court were not met.

The Court remanded the case to the family division of the circuit court for further proceedings, holding that jurisdiction properly remained with the juvenile court.

In a concurrence joined by Justice Welch, Justice Cavanagh wrote separately that the absence of any allegation or evidence that Mr. Oslund was armed with a dangerous weapon precluded the criminal division of the circuit court from possessing or exercising subject matter jurisdiction over the case because "the complaint only alleged a violation of law that, by itself, was not a specified juvenile violation."

As the sole dissenter, Justice Viviano wrote that the Court of Appeals had correctly addressed the issue Mr. Oslund raised on appeal—whether shoes could constitute a dangerous weapon—and criticized the majority for reversing on grounds not adequately preserved or briefed. He also disagreed with Justice Cavanagh's conclusion that MCL 764.1f must be satisfied to vest a court with subject matter jurisdiction over proceedings against a juvenile, as opposed to personal jurisdiction over the juvenile charged with the violation. *People v Oslund*, No. 165544, 12-27-24; Kristina Larson Dunne (appointed).

Steven Helton
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Michigan Court of Appeals: Selected published opinion summaries

Sheriff's deputy could not be charged with willful neglect of a duty for failing to help stop an inmate from escaping, in violation of a sheriff's department policy manual, but same charge may be appropriate under theory that statute obligated deputy to seek to prevent the inmate's escape

Mr. Harper was a Deputy with the Wayne County Sheriff's Department (WCSD), who was working at the Wayne County Jail in 2022. According to the prosecution, he violated a WCSD policy by failing to attempt to stop an escaping inmate who ran past him while he was taking a smoke break outside the jail, and by then failing to join the other officers who attempted to chase after the inmate. Based on this, the prosecution charged him with willful neglect of duty, alleging he "did willfully neglect to perform maintaining security of the facility, a duty enjoined upon him or her by Wayne County Sheriff Policy and Procedure: Standards of Conduct Section 5.75; contrary to MCL 750.478." MCL 750.478 provides in relevant part: "When any duty is or shall be enjoined by law upon any public officer, … every willful neglect to perform such duty… constitutes a misdemeanor."
After the complaint was filed in district court, Mr. Harper moved to quash, arguing that a WCSD Policy is not a "duty … enjoined by law upon any public officer," but the district court denied his motion. He appealed to the circuit court, which affirmed the district court's decision. He then filed an interlocutory application for leave to appeal to the Court of Appeals which was granted.

The Court of Appeals agreed that a policy of the Wayne County Sheriff's Department was not a "duty enjoined by law" under MCL 750.478, and therefore, the violation of such a policy could not provide the basis for a conviction under the statute. The Court equated a sheriff's policy manual to a contract, and therefore relied on *People v Parlovecchio,* 319 Mich App 237 (2017)'s analysis, which stated that a public officer should not be held criminally liable under MCL 750.478 for failing to perform a contractual obligation" because "[a] contract is not 'law' "persuasive.

The Court found the prosecution's alternative theory that MCL 51.75 – which states, "The sheriff shall have the charge and custody of the jails of his county, and of the prisoners in the same; and shall keep them himself, or by his deputy or jailer" – imposed essentially the same legal obligation on

deputies as required by the WCSD policy manual. The Court "conclude[d] that MCL 51.75 imposes a duty on sheriffs and sheriff's deputies to hold prisoners in their charge in custody," and "that part and parcel of this duty is not allowing such a prisoner to escape." However, because the complaint charging Mr. Harper with willful neglect of duty had not identified MCL 51.75 as a basis for the charge, the Court of Appeals remanded to allow the prosecution to amend the complaint and the district court to reconsider in Mr. Harper's motion to quash under the amended charge. *People v Harper*, No. 371144, 12-18-24; Douglas M Gutscher (retained).

Defendants indicted by one-man grand jury procedure, which the Supreme Court deemed invalid in *People v Peeler*, waive any challenge to the exercise of personal jurisdiction over them based on the indictment if they do not object prior to trial

In 2003, Mr. Kennedy was indicted for murder by a 'one man grand jury', and was subsequently convicted of first-degree murder. He appealed as of right in 2007, but his conviction was affirmed in an unpublished opinion.

After the Supreme Court held *People v Peeler*, 509 Mich 381 (2022), that an indictment issued by a one-man grand jury does not grant a circuit court jurisdiction to try the offense in the absence of a preliminary examination, Mr. Kennedy filed a motion for relief from judgment, which the trial court denied. The Court of Appeals then granted him leave to appeal, and issuing a published opinion, "agree[ing] that defendant was indicted using a faulty procedure, and that no preliminary examination was held," that "*Peeler* must be given retroactive effect," but holding that the improper procedure did not deprive the circuit court of exercising jurisdiction over him, and thus, did not render his conviction of sentence invalid. *People v Kennedy*, _ Mich App_ (2023) (Docket No 363575) (*Kennedy I*). The Supreme Court subsequently reversed and remanded the case back to the Court of Appeals for reconsideration because: "" [t]he record reflects … and the defendant indicates that he did in fact receive a preliminary examination." In a supplemental brief submitted after the remand order, Mr. Kennedy apprised the Court of Appeals that no preliminary examination had been conducted in his case, seemingly eliminating the basis for the remand order. However, after the Supreme Court vacated *Kennedy I*, but before the new opinion issued, a different Court of Appeals panel issued a published opinion in in *People v Robinson*, __ Mich App __ (2024) (Docket No. 365226), acknowledging that *Kennedy I* had held *Peeler* was to be given retroactive effect, but noting that it was no longer binding precedent because it had been vacated, and holding that *Peeler* was not retroactive.

On remand in *Kennedy II*, the Court of Appeals explained that it was required to adhere to *Robinson*'s holding that *Peeler* did not constitute a retroactive change in law. Therefore, Mr. Kennedy was required to challenge the use of a one-man grand jury prior to trial or on direct appeal, representing another barrier to relief from judgment that did not exist when *Kennedy I* issued. The Court of Appeals also held a defendant who proceeded to trial without objecting to the circuit court's exercise of personal jurisdiction over him or her based on the erroneous charging procedure would be deemed to have consented to the exercise of personal jurisdiction, thereby waiving any challenge to the exercise of personal jurisdiction. *People v Kennedy*, No. 363575, 12-26-24; Mark J Kriger and N C Deday Larene (retained).

Steven Helton
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Michigan Court of Appeals: Selected unpublished opinion summaries

Remand to Wayne Circuit for a second resentencing required where trial court erroneously assessed 15 points under Offense Variable 5 at resentencing after the Supreme Court vacated the defendant's sentence and remanded for resentencing based on the trial court's erroneous assessment of 15 points under OV 5

Mr. Jaber was convicted of second-degree murder in 2019. The court calculated his guidelines at 167- to 270 months, based in part on the assessment of 15 points for Offense Variable 5, which as appropriate where "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). The court then departed from the guidelines substantially, and sentenced Mr. Jaber to serve 35- to 50-years in prison, a 150-month departure.

The Court affirmed the conviction and the scoring of OV 5, and found that the sentence was not disproportionate or unreasonable. In lieu of granting Mr. Jaber's application for leave to appeal, the Supreme Court reversed the Court of Appeals' holding regarding OV 5, vacated his sentence, and remanded to the trial court for resentencing based on Mr. Jaber's corrected guideline range. In doing so, the Court found that "although the victim's father and brother 'clearly experienced grief' from the victim's death, "there was no evidence presented to show that [the victim's family] experienced the type of serious psychological trauma contemplated in MCL 777.35," It then explained that the "trial court's conclusion that a 'serious psychological injury' would normally occur as a result of a given crime" did not establish psychological injury by a preponderance of the evidence, and that such an injury could not "be inferred from the fact that the victim's mother did not speak at sentencing, as the record is silent as to why she did not speak."

At Mr. Jaber's resentencing, the prosecutor again asked that he be assessed 15 points under OV 5, which led to the court questioning the decedent's father, who told that court that "the incident had been 'very traumatic' on his family," that the decedent's mother could no longer celebrate Mother's Day, and his brother could no longer celebrate his own birthday, as both days reminded them of their deceased loved one. His father said that his mother was not attending the resentencing because she did not wish to see Mr. Jaber again. The trial court held that this explanation, and the fact that the decedent's family was "still grappling with the death of the victim at the hands of defendant" five years later demonstrated more than "just mere grief," and so it again assessed 15 points for OV 5 over the defense objection, resulting in the same 162- to 270-month guideline score it used at Mr. Jaber's original sentencing. The court then resentenced him to 25- to 40-years in prison, a 30-month departure.

The Appeals held that the trial court again erred when in its scoring of OV 5 "because the evidence adduced during the resentencing did not establish by a preponderance of evidence that a serious psychological injury requiring professional treatment occurred as opposed to a continuing, long-term grieving process on the dates identified." It therefore vacated his sentencing and remanded for a second resentencing. *People v Jaber*, No. 368387, 12-18-24; Alona Sharon (retained).

Remand to Jackson Circuit to vacate invalid no-contact order, prohibiting the defendant from having any contact with individuals outside of prison other than her attorney

Ms. McClure was charged with aggravated child sexually abusive materials (A-CSAM), second degree criminal sexual conduct (CSC-II), third degree criminal sexual conduct (CSC-III), second degree child abuse, and surveilling an unclothed person. The charges were based on evidence that Ms. McClure sexually assaulted or aided and abetted her then-husband's sexual assaults of her daughter and granddaughter and also recorded her daughter in the nude and sent the recordings to her husband. She agreed to plead guilty to the charges pursuant to a *Killebrew* agreement.

In addition to sentencing Ms. McClure to prison, the trial court said that because Ms. McClure was "clearly a predatory and a danger" it was also ordering that she have "no access to J-Pay, … no mail, no phone, no social media, no computer access, [and] no visitors whatsoever while she's in prison" except for her attorney.

After the trial court denied Ms. McClure's motion to strike the no contact order, she appealed by leave granted.

The Court of Appeals found that *People v Lafey*, __ Mich App __ (2024) (Docket No. 361936), which addressed a similar no contact order entered by the Barry Circuit Court at sentencing dictated the result. Like in *Lafey*, "[n]one of the statutes under which defendant was sentenced contain a reference to the trial court's authority to prohibit contact with virtually all individuals outside of prison," and "there is no statute expressly authorizing the trial court to impose a blanket no-contact condition of sentence as was imposed in this case." As such, "the trial court lacked statutory or inherent authority to impose the no-contact condition, rendering it unauthorized by law." The Court therefore declined to address Ms. McClure's argument that the provision constituted cruel and/or unusual punishment, and instead "reverse[d] the no-contact condition placed on defendant's sentence and remand to the trial court to amend defendant's amended judgment of sentence." *People v McClure*, No. 367882, 12-20-24; Belinda A Barbier (MAACS).

Remand to Shiawasee Circuit required for imposition of a term-of-years sentence for a 72-year-old juvenile lifer where the trial court clearly erred by finding that his impeccable 50-year prison record did not indicate he had been rehabilitated and abused its discretion by imposing life without parole sentence

In 1971, Mr. Wheeler was convicted of first-degree premeditated murder based on evidence that he killed his ex-girlfriend when he was 17 years old. He was sentenced to a mandatory life without parole sentence.

In 2020, after *Montgomery v Louisiana*, 577 US 190 (2016) gave retroactive effect to *Miller v Alabama*, 567 US 460 2012), the trial court resentenced Mr. Wheeler to life without parole, and the Court of Appeals affirmed. However, in December 2022, the Supreme Court vacated his sentence and remanded for resentencing to a term of years sentence unless the prosecutor could rebut the presumption that a LWOP sentence was disproportionate.

In February 2024, the trial court again resentenced Mr. Wheeler to life without parole. He appealed by right, and the Court of Appeals found that the trial court had clearly erred in analyzing most of the *Miller*

factors and abused its discretion in against sentencing Mr. Wheeler to LWOP.

First, the trial court erred in finding the mitigating circumstances of youth were irrelevant because his offense involved premeditation. The Court explained that the "evidence showed that Wheeler's conduct was based on a wholly immature and reckless reaction," and the fact that he "engaged in forethought and attempted to hide the crime after he committed it did not negate that Wheeler acted with reckless immaturity."

Second, the trial court clearly erred when it determined that the circumstances of the offense were not mitigating because the offense not impacted by external pressure. This finding was not supported by the record and the contemporaneous evidence demonstrated that he "was recklessly immature, emotionally reactive, overdramatic, and impulsive," and that he rehabilitation, as demonstrated by his over 50-year prison record, was not mitigating. Despite Mr. Wheeler's prison record, which showed "a sharp decrease in misconduct and problematic behavior after his 20s as well as a long list of achievements and wide-ranging praise," the trial court held that his record did not support the conclusion that he was capable of being rehabilitated. The court's finding was based on a minor misconduct ticket Mr. Wheeler received in 2018 for having in "a handmade miniature table saw for cutting popsicle sticks for crafts" in his cell, which to the court indicated Mr. Wheeler's "personality traits that may have led to his criminality were not transitory." Again, the Court of Appeals was "definitely and firmly convinced that the trial court made a mistake" in analyzing this factor because Mr. Wheeler's "record over decades is utterly inconsistent with irreparable corruption."

committed the offense to avoid responsibility and the consequences of his sexual relationship.

Third, the trial court clearly erred when it found that Mr. Wheeler's youthful incompetence in navigating the justice system was not a mitigating factor. Although the court credited evidence that Mr. Wheeler rejected his attorney's advice that he accept the prosecutor's offer for him to plead guilty to second degree murder because the evidence of his guilty was overwhelming, the court concluded that this was not mitigating considering Mr. Wheeler's decision to maintain innocence throughout the proceedings. This finding was erroneous because the record clearly showed that his decision to do so was the result of his "transient immaturity and rashness."

Fourth, the trial court erred when determined that Mr. Wheeler's prospects for

Ultimately, the Court held that "the trial court abused its discretion by again sentencing Wheeler to life imprisonment with the possibility of parole," because the record "shows a youthful offender who committed a heinous crime before the age of 18, but who was not irredeemably depraved, but one who could, and did, grow into a responsible, contributing adult." Judge Kelly wrote in dissent that "although the trial court's analysis was not perfect," he was "not definitely and firmly convinced that it had clearly erred by finding that the *Miller* factors were neutral," and so its decision to resentence Mr. Wheeler to LWOP should be affirmed.

While the majority denied Mr. Wheeler's request for resentencing before a different judge based on his allegations of judicial bias and the substantial delays in resentencing him pursuant to the Supreme Court's 2022 remand order, the did order that Mr.

Wheeler be resentenced to a term-of-years sentence within 56 days. The maximum possible term-of-years sentence is 60-years. Because Mr. Wheeler has already served over 50 years in prison and is entitled to over 10 years in good time credit, this remedy will result in Mr. Wheeler's release from prison within 56 days, absent intervention by the Michigan Supreme Court. *People v Wheeler*, No. 366696, 12-26-24; Rachel N. Helton (MAACS).

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Michigan Court of Appeals: Youth defense opinion summary

Remand to Macomb Circuit required for *Ginther* hearing regarding counsel's advice to youth client

The Court of Appeals remanded for an evidentiary hearing as to whether CFB was denied the effective assistance of counsel in his delinquency case. Specifically, the proceedings are to explore: "(1) trial counsel's alleged failure to advise *CFB* or his parent of *CFB* 's right to a jury trial; (2) trial counsel's decision to request a bench trial before a referee; (3) trial counsel's purported failure to advise *CFB* of his right to be physically present in the courtroom during his trial; (4) the decision to request or consent to proceedings on Zoom, including the trial; (5) trial counsel's advice regarding respondent's confrontation rights; and (6) trial counsel's decision regarding the potential evidentiary objections, including the admission of hearsay identified in *CFB's* appellate brief."

In Re CFB, unpublished order of the Court of Appeals, entered December 16, 2024 (Docket No. 366835).

Joshua Pease
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Upcoming events (Additional information and registration available here).

January 30-31, 2025	Virtual tech expo	NAPD | Online
February 6, 2025	Defending arson cases	SADO | Zoom
February 18, 2025	District Court to District Court appeals 101	SADO | Zoom
March 6, 2025	Investigator meetup	SADO | Zoom
March 10, 2025	Memory phenomena and false narrative creation	NAPD | Webinar
March 13, 2025	A is for attorney	CDAM | Pontiac, MI
March 14-15, 2025	Annual spring conference	CDAM | Pontiac, MI
March 18, 2025	Effective cross-examination techniques	SADO | Zoom
March 20-21, 2025	Rise. Resist. Represent. Virtual conference	NAPD | Online
April 3, 2025	*Brady*/*Youngblood*	SADO | Zoom
April 15, 2025	Reverse 404(b)	SADO | Zoom
May 1, 2025	Investigator meetup	SADO | Zoom
May 20, 2025	Raising race in search & seizure litigation (Part I)	SADO | Zoom

Changes at the CDRC!

In this issue of the *Criminal Defense Newsletter*, we write with some bittersweet news: After an incredible 46 years, CDRC's Production Manager, Bill Moy, has officially retired. We celebrate this exciting new chapter for Bill, and wish him good luck.

We also congratulate Heather Waara, CDRC's new Publications Coordinator, and Angie Clayton, CDRC's new Services Coordinator. We look forward to seeing what the next chapter will bring for each of you.

Congrats!

Kathy Swedlow
Manager, CDRC

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