Crime Victim Rights Benchbook—Third Edition

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Michigan Supreme Court

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- The Honorable Elizabeth T. Clement, *MJI Supervising Justice*
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This third edition was initially published in 2016, and the text has been revised, reordered, and updated through September 23, 2020. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Note on Precedential Value

"A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this court rule." MCR 7.215(J)(1).

Several cases in this book have been reversed, vacated, or overruled in part and/or to the extent that they contained a specific holding on one issue or another. Generally, trial courts are bound by decisions of the Court of Appeals "until another panel of the Court of Appeals or [the Supreme] Court rules otherwise[.]" *In re Hague*, 412 Mich 532, 552 (1982). While a case that has been fully reversed, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated, or overruled in its entirety. Some cases state that "an overruled proposition in a case is no reason to ignore all other holdings in the case." *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, "that portion of the Court of Appeals' opinion [had] no precedential effect and the trial court [was] not bound by its reasoning"). But see *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing MCR 7.215(J)(1) and stating that "a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision." See also *People v James*, 326 Mich App 98 (2018) (citing *Dunn* and MCR 7.215(J)(1) and stating that the decision, "*People v Crear*, 242 Mich App 158, 165-166 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008), . . . [was] not binding"). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part.

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. Because it is unclear how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

COVID-19: Special Procedures

In response to the public health emergency, the Michigan Supreme Court and the Governor have issued (and continue to issue) administrative and executive orders affecting trial court procedures. MJI has endeavored to summarize and synthesize these orders to assist courts in adapting to the new requirements and limitations. Please visit our COVID-19: Procedures Affected webpage for more information.

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The **Michigan Judicial Institute (MJI)** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373-7171.**

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Glossary

Chapter 1: Overview of Crime Victim's Rights

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1.1 Constitutional and Statutory Rights of Crime Victims in Michigan[1]

This section discusses the constitutional and statutory rights of crime victims in Michigan. This section is limited to the protections afforded under the Michigan Constitution and the William Van Regenmorter Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. However, other statutes, court rules, and administrative rules exist to help enforce crime victims' rights in Michigan. These legal rules are discussed where relevant throughout this benchbook.

A. The Crime Victim's Constitutional Rights

The Michigan Constitution provides crime victims with certain constitutional protections:

> "(1) Crime victims, as defined by law, shall have the following rights, as provided by law:
>
> > The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
> >
> > The right to timely disposition of the case following arrest of the accused.
> >
> > The right to be reasonably protected from the accused throughout the criminal justice process.
> >
> > The right to notification of court proceedings.
> >
> > The right to attend trial and all other court proceedings the accused has the right to attend.
> >
> > The right to confer with the prosecution.
> >
> > The right to make a statement to the court at sentencing.
> >
> > The right to restitution.
> >
> > The right to information about the conviction, sentence, imprisonment, and release of the accused.
>
> (2) The legislature may provide by law for the enforcement of this section.

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

> (3) The legislature may provide for an assessment against convicted defendants to pay for crime victims' rights." Const 1963, art 1, § 24.

B. The Crime Victim's Statutory Rights

The William Van Regenmorter Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, implements many of the same rights afforded to crime victims under the Michigan Constitution.[2] The purpose of the CVRA is to provide crime victims with certain statutory rights in all stages of the criminal and juvenile proceedings.

The CVRA is divided into three articles, each dealing with different offenses, offenders, and courts:

- Article 1, the Felony Article, applies to felonies committed by persons age 17 or older, and to juveniles at least 14 but less than 17 years old who are charged with certain serious felonies and being prosecuted in the Criminal Division of Circuit Court. See MCL 780.752(1)(b); MCL 780.752(1)(g). See also MCL 600.606.

- Article 2, the Juvenile Article, applies to felonies and certain misdemeanors committed by juveniles. See MCL 780.781(1)(e); MCL 780.781(1)(g).

- Article 3, the Misdemeanor Article, applies to serious misdemeanors committed by persons age 17 or older. See MCL 780.811(1)(a).

See the Michigan Judicial Institute's table outlining the major differences among the CVRA articles.

1.2 Overview of Rights Afforded Victims Under the CVRA[3]

See the Michigan Judicial Institute's *Crime Victim Rights Quick Reference Materials*, for a general overview of the rights afforded a victim under the CVRA.

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[2] For a list of constitutional protections set out under the Michigan Constitution, see Section 1.1(A).

[3] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

1.3 A *Victim* Under the CVRA

A. *Victim* Under the CVRA, Article 1 (Felony Article)

1. General Definition

Except as otherwise defined in the CVRA, Article 1 (Felony Article), for purposes of the CVRA, Article 1 (Felony Article), MCL 780.752(1)(m) defines *victim* as:

> "(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).
>
> (*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):
>
> > (A) The spouse of the deceased victim.
> >
> > (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.
> >
> > (C) A parent of the deceased victim if sub-subparagraphs (A) and (B) do not apply.
> >
> > (D) The guardian or custodian of a child of the deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.
> >
> > (E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.
> >
> > (F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.
>
> (*iii*) A parent, guardian, or custodian of the victim if the victim is less than 18 years of age, who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.
>
> (*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the defendant nor incarcerated.

> (*v*) For the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:
>
> > (A) The spouse of the victim.
> >
> > (B) A child of the victim if the child is 18 years of age or older.
> >
> > (C) A parent of the victim.
> >
> > (D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.
> >
> > (E) A sibling of the victim.
> >
> > (F) A grandparent of the victim.
> >
> > (G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated."

Limitations on the applicability of the CVRA exist, such as when the defendant or an incarcerated individual claims to be a victim. See Section 1.4 for information.

2. *Victim* Defined for Restitution Purposes

For purposes of restitution, MCL 780.766(1) limits the definition of a victim to only persons or entities specifically harmed:

> "As used in this section only, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.[4] As used in [MCL 780.766(2), MCL 780.766(3), MCL 780.766(6), MCL 780.766(8), MCL 780.766(9), and MCL 780.766(13)] only, victim includes a sole proprietorship,

[4] Note that "Michigan's general restitution statute, MCL 769.1a, defines 'victim' in essentially the same fashion [as MCL 780.766(1)], clarifying that the term reaches individuals harmed 'as a result of the commission of a felony, misdemeanor, or ordinance violation.' MCL 769.1a(1)(b)." *People v Corbin*, 312 Mich App 352, 359-360 (2015).

> partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime." MCL 780.766(1).

For a detailed discussion of restitution, see Chapter 8.

3. Designation of Person to Act in Victim's Place

If the victim is "[a]n individual who suffers direct or threatened physical, financial or emotional harm as a result of the commission of a crime," MCL 780.752(1)(m)(*i*), and he or she "is physically or emotionally unable to exercise the privileges and rights" provided under the felony article of the CVRA, he or she may designate any of the following persons to "act in his or her place while the physical or emotional disability continues[:]"

> (1) the victim's spouse;
>
> (2) the victim's child if 18 years of age or older;
>
> (3) the victim's parent, sibling, or grandparent; or
>
> (4) any other person who is at least 18 years of age and who is neither the defendant nor incarcerated. MCL 780.752(2).

Despite the designation, notices required under the CVRA must still be sent to only the victim.[5] MCL 780.752(2).

The victim must notify the prosecuting attorney of the person who is designated to act in his or her place. MCL 780.752(2).

B. *Victim* Under the CVRA, Article 2 (Juvenile Article)

1. General Definition

For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781(1)(j) defines *victim* as:

> "(*i*) A person who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

[5] See Chapter 5 for a detailed discussion of victim notification requirements under the CVRA.

(*ii*) The following individuals other than the juvenile if the victim is deceased, except as provided in subparagraph (*v*):

(A) The spouse of the deceased victim.

(B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

(C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

(D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

(E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

(F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

(*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the juvenile nor incarcerated, if the parent, guardian, or custodian so chooses.

(*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the juvenile nor incarcerated.

(*v*) For the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the juvenile:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

> (E) A sibling of the victim.
>
> (F) A grandparent of the victim.
>
> (G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated."

Limitations on the applicability of the CVRA exist, such as when the juvenile or an incarcerated individual claims to be a victim. See Section 1.4 for information.

2. *Victim* Defined for Restitution Purposes

For purposes of restitution, MCL 780.794(1)(b) limits the definition of a *victim* to only persons or entities specifically harmed:

> "'Victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense. As used in [MCL 780.794(2), MCL 780.794(3), MCL 780.794(6), MCL 780.794(8), MCL 780.794(9), and MCL 780.794(13)] only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of an offense." MCL 780.794(1)(b).
>
> > **Note:** For purposes of restitution, MCL 780.794(1)(a) limits the definition of an *offense* to "a violation of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine."

For a detailed discussion of restitution, see Chapter 8.

3. Designation of Person to Act in Victim's Place

If the victim is "[a] person who suffers direct or threatened physical, financial or emotional harm as a result of the commission of an offense," MCL 780.781(1)(j)(*i*), and he or she "is physically or emotionally unable to exercise the privileges and rights" provided under the juvenile article of the CVRA, he or she may designate any of the following persons to "act in

his or her place while the physical or emotional disability continues[:]"

(1) the victim's spouse;

(2) the victim's child if 18 years of age or older;

(3) the victim's parent, sibling, or grandparent; or

(4) any other person who is at least 18 years of age and who is neither the defendant nor incarcerated. MCL 780.781(2).

Despite the designation, notices required under the CVRA must still be sent only to the victim.[6] MCL 780.781(2).

The victim must notify the prosecuting attorney of the person who is designated to act in his or her place. MCL 780.781(2).

C. *Victim* Under the CVRA, Article 3 (Misdemeanor Article)

1. General Definition

For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811(1)(h) defines *victim* as:

"(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a serious misdemeanor, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

(*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):

(A) The spouse of the deceased victim.

(B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

(C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

(D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

[6] See Chapter 5 for a detailed discussion of victim notification requirements under the CVRA.

(E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

(F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

(*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.

(*iv*) A parent, guardian, or custodian of a victim who is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process if he or she is not the defendant and is not incarcerated.

(*v*) for the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated."

Limitations on the applicability of the CVRA exist, such as when the defendant or an incarcerated individual claims to be a victim. See Section 1.4 for information.

2. *Victim* Defined for Restitution Purposes

For purposes of restitution, MCL 780.826(1)(b) limits the definition of a *victim* to only persons or entities specifically harmed:

> "As used in this section only[,] '[v]ictim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a misdemeanor.[7] As used in [MCL 780.826(2), MCL 780.826(3), MCL 780.826(6), MCL 780.826(8), MCL 780.826(9), and MCL 780.826(13)] only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a misdemeanor." MCL 780.826(1)(b).
>
> **Note:** For purposes of restitution, MCL 780.826(1)(a) limits the definition of *misdemeanor* to "a violation of a law of this state or a local ordinance that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, but that is not a felony."

For a detailed discussion of restitution, see Chapter 8.

3. Designation of Person to Act in Victim's Place

If the victim is "[a]n individual who suffers direct or threatened physical, financial or emotional harm as a result of the commission of a serious misdemeanor," MCL 780.811(1)(h)(*i*), and he or she "is physically or emotionally unable to exercise the privileges and rights" provided under the misdemeanor article of the CVRA, he or she may designate any of the following persons to "act in his or her place while the physical or emotional disability continues[:]"

(1) the victim's spouse;

(2) the victim's child if 18 years of age or older;

(3) the victim's parent, sibling, or grandparent; or

[7] Note that "Michigan's general restitution statute, MCL 769.1a, defines 'victim' in essentially the same fashion [as MCL 780.826(1)(b)], clarifying that the term reaches individuals harmed 'as a result of the commission of a felony, misdemeanor, or ordinance violation.' MCL 769.1a(1)(b)." *People v Corbin*, 312 Mich App 352, 359-360 (2015). Although the *Corbin* Court did not address MCL 780.826(1)(b) specifically, its finding would presumably extend to that statute as well.

> (4) any other person who is at least 18 years of age and who is neither the defendant nor incarcerated. MCL 780.811(2).

Despite the designation, notices required under the CVRA must still be sent to only the victim.[8] MCL 780.811(2).

The victim must notify the prosecuting attorney of the person who is designated to act in his or her place. MCL 780.811(2).

1.4 Limitations of the CVRA

A. Limitations on Applicability of the CVRA

1. Individuals Charged with Crime/Offense Arising Out of Same Transaction as Defendant's Charge

For purposes of the CVRA, Article 1 (Felony Article), "[a]n individual who is charged with a crime arising out of the same transaction from which the charge against the defendant arose is not eligible to exercise the privileges and rights established for victims under this article." MCL 780.752(3).

For purposes of the CVRA, Article 2 (Juvenile Article), "[a]n individual who is charged with an offense arising out of the same transaction from which the charge against the defendant arose is not eligible to exercise the privileges and rights established for victims under this article." MCL 780.781(3).

For purposes of the CVRA, Article 3 (Misdemeanor Article), "[a]n individual who is charged with a serious misdemeanor, a crime as defined in [MCL 780.752(1)(b)], or an offense as defined in [MCL 780.781(1)(g)] arising out of the same transaction from which the charge against the defendant arose is not eligible to exercise the privileges and rights established for victims under this article." MCL 780.811(3).

2. Incarcerated Individuals

For purposes of the CVRA, Article 1 (Felony Article), and the CVRA, Article 3 (Misdemeanor Article), incarcerated individuals are not eligible to exercise the privileges and rights established for crime victims. MCL 780.752(4); MCL 780.811(4). Incarcerated victims may, however, submit a written statement

[8] See Chapter 5 for a detailed discussion of victim notification requirements under the CVRA.

for the court's consideration at sentencing. MCL 780.752(4); MCL 780.811(4).

3. Defendants and Juvenile Offenders Prohibited From Exercising Victim's Rights Under the CVRA

A criminal defendant may not seek to have his or her conviction or sentence set aside on grounds that the victim was not provided a right, privilege, or notice under the CVRA. MCL 780.774; MCL 780.833. See *People v Smith (Danny)*, 180 Mich App 622, 623-624 (1989) (holding that the prosecuting attorney's failure to give the victim notice of her right to make an oral impact statement at sentencing did not entitle the defendant to resentencing).

Similarly, a juvenile offender may not seek to have a delinquency proceeding set aside on grounds that the victim was not provided a right, privilege, or notice under the CVRA. MCL 780.801.

B. Limitations on Civil Actions for Violations of the CVRA

Crime victims cannot bring civil actions for money damages against certain entities or individuals for a violation of his or her rights under the CVRA. See MCL 780.773, MCL 780.800, and MCL 780.832, which provide for no cause of action under the CVRA against state or local governments.

However, crime victims may have other remedies available to them when a prosecuting attorney, corrections official, or judge violates their rights under the CVRA. See Section 1.5 for additional information.

1.5 Remedies Available for Violations of the CVRA[9]

Where a crime victim's rights under the CVRA are violated, he or she may file a writ of mandamus against nonjudicial officers, an action for superintending control of a lower court, and/or a judicial grievance action.

[9]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

A. Writ of Mandamus Action Against Nonjudicial Officer

A brief discussion of mandamus actions is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 8.

A writ of mandamus directs a public official to perform his or her legal duty. *Jones v Dep't of Corrections*, 468 Mich 646, 658 (2003). "Mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Teasel v Dep't of Mental Health*, 419 Mich 390, 410 (1984).

"[A] writ of mandamus is an extraordinary remedy and will only be issued where: (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 284 (2008). See *Smith v Crime Victims Comp Bd*, 130 Mich App 625, 628 (1983) (finding writ of mandamus was improper where the victim could apply for leave to appeal the denial of her application for crime victim's compensation from the Crime Victim's Compensation Board); *Hayes v Parole Bd*, 312 Mich App 774, 781 (2015) (holding that a prisoner whose "net minimum date [had] passed[]" was entitled to a writ of mandamus compelling the Board to consider his parole request).

The party seeking mandamus has the burden of proving all four requirements. See *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518-519 (2014); *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367 (2012).

"An action for mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims. . . . All other actions for mandamus must be brought in the circuit court unless a statute or court rule requires or allows the action to be brought in another court." MCR 3.305(A)(1)-(2).

B. Actions for Superintending Control of Lower Court

A brief discussion of actions for superintending control is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 8.

An order of superintending control enforces the supervisory power of a court over lower courts or tribunals. MCR 3.302(A).

Superintending control is an extraordinary remedy. *In re Gosnell*, 234 Mich App 326, 341 (1999). Availability of an appeal or another

remedy will defeat a writ of superintending control. MCR 3.302(B), (D)(2); *Choe v Flint Charter Twp*, 240 Mich App 662, 667 (2000). But see *In re Hague*, 412 Mich 532, 546 (1982) (if an appeal is available, but not adequate, then superintending control is not precluded).

The action for superintending control is proper to determine if the lower court failed to perform a clear duty. *Gosnell*, 234 Mich App at 341. "[S]uperintending control is not to be used to review an alleged abuse of discretion." *In re Wayne Co Prosecutor*, 192 Mich App 677, 679-680 (1991).

If a party does not have standing to appeal, superintending control may be a proper remedy. *Michigan State Police v 33rd Dist Court*, 138 Mich App 390, 394 (1984).

C. Judicial Grievance Actions

A judge may be subject to disciplinary proceedings for misconduct in office. See MCR 9.202(B). Misconduct in office may include:

- persistent incompetence or neglect in timeliness; persistent failure to treat persons fairly, with courtesy and respect; unfair or discourteous treatment of a person because of a protected characteristic; misuse of judicial office for advantage or gain; failure to cooperate with a reasonable request from the JTC in its investigation, MCR 9.202(B)(1);

- violation of the Code of Judicial Conduct or the Michigan Rules of Professional Conduct either before or after becoming a judge or being related to judicial office, MCR 9.202(B)(2); and

- disregarding statutes and court rules, *In re Del Rio*, 400 Mich 665, 695 (1977).

1.6 Immigrant Crime Victim

"Immigration and Customs Enforcement at the U.S. Department of Homeland Security issued a policy on January 10, 2018 limiting civil immigration enforcement at courthouses. For advocates, attorneys, law enforcement, prosecutors, judges and court staff, it is important to note that the new policy's limits and rules regarding immigration enforcement at courthouses are protections that apply to all immigrant[s] and are in addition to the protections provided immigrant crime victims by [the federal act, Violence Against Women Act (VAWA), 18 USC 2261 *et seq.*,] Confidentiality.

This ICE Courthouse Enforcement Memo confirms (in footnote 2) that immigrant crime victims and witnesses continue to receive VAWA confidentiality protections against courthouse enforcement that are in addition to the limitations on civil courthouse enforcement set out in the January 10, 2018 memo. (See further discussion below)

Read together with VAWA Confidentiality protections for immigrant victims, the policy will result in the following:

- Under both the ICE Courthouse policy and VAWA Confidentiality, supervisory approval at the high levels of the local ICE offices is needed to approve any civil immigration enforcement action that is to take place at a courthouse in a family court or civil court case (including protection orders, custody, divorce, child support, small claims, landlord tenant, etc.)
    - For victims of domestic violence, sexual assault, human trafficking, stalking, and other U visa listed criminal activities once the victim has filed their immigration case the case will appear in a DHS data base of VAWA confidentiality protected cases that the supervisors and enforcement officers can access and will have to check as part of the process of approving civil enforcement at a courthouse in a non-criminal case. (Note VAWA confidentiality protected victims also receive some protection from immigration enforcement in criminal cases). The VAWA confidentiality protected immigration case types that will be flagged for addition protection are:
        - VAWA self-petitions, VAWA cancellation of removal and VAWA suspension of deportation
        - U visas for crime victims
        - T visas for human trafficking victims
        - Battered spouse waivers
        - Work authorization applications filed by abused spouses of A, E(iii), G and H visas.
- Since it is clear from research that when victims begin filing for immigration protections and seek help from lawyers, law enforcement and courts, perpetrators are actively involved in trying to get immigrant victim deported by providing 'tips' about the victim to immigration enforcement officials. The protections these

policies offer victims are strongest once the victim has filed one of the immigration cases listed above.

- Advocates, attorneys, law enforcement and prosecutors need to screen immigrant victims early and file their VAWA confidentiality protected immigration case as soon as possible so that victims can get the best protections from the policies described in more detail below." National Immigrant Women's Advocacy Project (NIWAP), *Immigration and Customs Enforcement January 2018 Courthouse Enforcement Policy and VAWA Confidentiality Protections for Immigrant Crime Victims (January 31, 2018)*.

For additional discussion of the ICE January 2018 Courthouse Enforcement Policy and what additional protections VAWA confidentiality provides to immigrant crime victims, see the NIWAP, *Immigration and Customs Enforcement January 2018 Courthouse Enforcement Policy and VAWA Confidentiality Protections for Immigrant Crime Victims (January 31, 2018)*, *supra*.

1.7 Committee Tips for Mitigating the Psychological Effects of Victimization and Maximizing Victim Participation in Court Proceedings

While crime victims are contending with the primary financial, physical, and psychological effects of their victimization, it is important to prevent insensitive treatment of these victims at the hands of the criminal justice system.[10] To mitigate the psychological effects of victimization and maximize victim participation in court proceedings, the editorial advisory committee offers the following:

- **Prevent secondary victimization.**

To avoid insensitive treatment of crime victims, the court should prevent insensitive questioning towards the victim, deter suggestive assertions that the victim contributed towards his or her own victimization, prevent purposeful delays or withholding of pertinent information designed to frustrate the victim, and deter purposeful delays in returning the victim's property taken during the investigation of the offense.[11]

[10] A discussion of the psychological effects of criminal victimization is beyond the scope of this benchbook. For a detailed discussion of the trauma of victimization, which could impact a victim's participation with the court proceedings, see http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization.

[11] See Section 4.10 for a detailed discussion of returning a crime victim's property taken during the investigation of an offense.

- **Emphasize that the proceedings are between the defendant and the People, not the defendant and crime victim.**

A defendant who realizes that the victim does not control court proceedings may be discouraged from making efforts to obstruct justice.

- **Keep the crime victim informed of court proceedings and offender's status within correctional or juvenile agencies.**

Crime victims in Michigan have a constitutional right to notification of court proceedings and the offender's status within correctional or juvenile agencies,[12] Const 1963, art 1, § 24, and in some instances it may be the court's responsibility to provide this notification, see e.g., MCL 780.752a; MCL 780.785; and MCL 780.811b. While it may not be the court's responsibility to provide notification in all situations, simply asking if notice has been provided may help ensure the victim's rights are protected. The crime victim also has a constitutional right to attend criminal trials, juvenile adjudications, and "all other court proceedings the accused has the right to attend."[13] *Id.* The crime victim should also be told in advance about potentially traumatic procedures, such as continuances and depositions.

- **Allow the crime victim an opportunity to participate in the court proceedings.**

The CVRA and Const 1963, art 1, § 24, provide crime victims with the right to participate in criminal and juvenile proceedings; consult with the prosecuting attorney before the prosecuting attorney finalizes a plea agreement with the defendant or juvenile, agrees to placement of the defendant or juvenile in a pretrial diversion program, or agrees to an informal disposition of a juvenile; and provide a written crime victim impact statement for inclusion in a presentence report (PSIR) or dispositional report, and provide an oral crime victim impact statement to the court at sentencing or disposition.[14] To ensure the crime victim's rights are protected, the court should ask throughout the court proceedings whether the crime victim has had an opportunity to be involved in the process and whether the crime victim has had an opportunity to attend court proceedings (and where sequestration of the victim was required, that the victim was sequestered up until he or she first testified).

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[12] See Chapter 5 for a detailed discussion of victim notification.

[13] See Section 6.1 for a detailed discussion of the victim's constitutional right to attend trial and other proceedings.

[14] See Chapter 6 for additional information on a crime victim's right to participate in criminal and juvenile proceedings, Chapter 4 for additional information on a crime victim's right to consultation with the prosecuting attorney, and Chapter 7 for additional information on victim impact statements.

- **Minimize contact between the defendant and the crime victim**

The CVRA requires the court to provide a separate waiting area for crime victims when a defendant is charged with a felony, juvenile offense, or a serious misdemeanor. See Section 2.4 for additional information on separate waiting areas for crime victims.

- **Recognize effects of criminal victimization**

Crime victims may suffer severe economic consequences due to damage to property, medical expenses, and lost wages. The CVRA and the Michigan Constitution require the court to order the defendant or juvenile to pay restitution to compensate the crime victim for losses caused by the offense. Because restitution is a crime victim's constitutional right and is mandatory under the CVRA, the prosecutor and the defendant or juvenile cannot exclude restitution from a plea or sentence agreement. See Chapter 8 for a detailed discussion of restitution.

1.8 Community-Based Efforts to Improve the Administration of Justice

A. Restorative Justice

"Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior. It is best accomplished through cooperative processes that allow all willing stakeholders to meet, although other approaches are available when that is impossible. This can lead to transformation of people, relationships[,] and communities." Centre for Justice & Reconciliation, *Restorative Justice* (accessed December 9, 2015). The three basic principles to restorative justice are:

> "1. Crime causes harm and justice should focus on repairing that harm.
>
> 2. The people most affected by the crime should be able to participate in its resolution.
>
> 3. The responsibility of the government is to maintain order and of the community is to build peace." *Id.*

For additional information on the restorative justice principles and practices, see http://www.restorativejustice.org/.

B. Ethical Concerns With Judicial Participation in Coordinated Community Efforts to Improve the Administration of Justice

A judge may participate in the activities of a community organization whose purpose is to improve the administration of justice as long as the "activity as a member of an organization [does not] cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions."[15] MCJC 2(F). For a list of quasi-judicial activities a judge may engage in, see MCJC 4.

However, "[a] judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice." MCJC 4(I).

Additionally, "[a] judge must avoid all impropriety and appearance of impropriety." MCJC 2(A).

See State Bar of Michigan Ethics Opinion, JI-66 (March 23, 1993), regarding a judge's participation on the board of a civic organization dedicated to helping certain victims, presumably including those of domestic violence. Many other ethics opinions, judicial tenure commission opinions, and opinions from other jurisdictions exist that address ethical concerns related to judicial participation on various committees or organizations. A full discussion of those are beyond the scope of this resource benchbook.

[15] "A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic." MCJC 2(F).

Chapter 2: Protection From Revictimization

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2.1 Constitutional Right to Reasonable Protection From Accused

The Michigan Constitution provides crime victims with "[t]he right to be reasonably protected from the accused throughout the criminal justice process." Const 1963, art 1, § 24.

2.2 Heightened Protections to Prevent Revictimization

Several legal provisions include heightened protections for crime victims to prevent a crime victim from being revictimized by the accused or convicted offender, including:

- limiting the law enforcement officer's authority to release persons charged with assault and battery offenses. See e.g., MCL 764.9c(3)(a).
- limiting pretrial release for individuals arrested for certain violent offenses. See e.g., MCL 780.582a; MCR 6.106(B)(1).
- authorizing the court to issue custody orders with protective conditions. See MCR 6.106(B)(5).
- authorizing the court to release defendants subject to protective conditions. See e.g., MCL 765.6b(1); MCL 765.6b(6); MCR 6.106(D).
- authorizing the court to release juveniles subject to protective conditions. See e.g., MCR 3.935(E); MCR 6.909(A).
- limiting the court's authority to postconviction bail for defendants convicted of assaultive crimes. See e.g., MCL 770.9a(1); MCL 770.9a(2).
- authorizing the court to issue probation orders subject to protective conditions. See e.g., MCL 771.3(2)(o); MCL 712A.18;
- authorizing the court to issue parole orders subject to protective conditions. See e.g., MCL 791.236(16); MCL 791.236(18).

A. Limitation on Issuance of Appearance Tickets After Warrantless Arrest

Generally, MCL 764.9c(1) permits "a police officer [who] has arrested a person without a warrant for a misdemeanor or ordinance violation for which the maximum penalty does not

exceed 93 days in jail or a fine, or both, . . . [to] issue [] and serve upon the person an appearance ticket . . . and release the person from custody." However, MCL 764.9c(3)(a) prohibits the issuance of an appearance ticket to "[a] person arrested for a violation of . . . MCL 750.81 [(assault and battery) or MCL] 750.81a [(assault with infliction of serious or aggravated injury)], or a local ordinance substantially corresponding to . . . MCL 750.81, if the victim of the assault is the offender's spouse, former spouse, an individual who has had a child in common with the offender, an individual who has or has had a dating relationship with the offender, or an individual residing or having resided in the same household as the offender."[1]

B. Protections Provided When Determining Pretrial Release in Criminal Proceedings[2]

Several types of pretrial release exist: conditional release, interim bail/interim bond, money bail, and personal recognizance. See Const 1963, art 1, § 15; MCL 765.6; MCR 6.106(B)(1)(a)(*i*). Alternatively, in some instances, pretrial release may (or must) be denied. See Const 1963, art 1, § 15; MCL 765.6; MCR 6.106(B)(1)(a)(*i*).

1. Availability of Pretrial Release

Every person charged with a noncapital offense has the right to bail. *Stack v Boyle*, 342 US 1, 4 (1951). "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v Salerno*, 481 US 739, 755 (1987). "The right to release before trial is conditioned upon the accused's giving adequate assurance that he [or she] will stand trial and submit to sentence if found guilty." *Stack*, 342 US at 4. "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." *Id.* at 5.

However, the following individuals are not entitled to pretrial release:

- A defendant charged with murder or treason, "if the court finds that proof of the defendant's guilt is evident or the presumption is great[.]" MCR 6.106(B)(1)(a)(*i*); Const 1963, art 1, § 15.

[1] MCL 764.9c(3)(b)-(c) also prohibit the issuance of appearance tickets for persons "subject to detainment for violating a personal protection order" and persons "subject to a mandatory period of confinement, condition of bond, or other condition of release until he or she has served that period of confinement or meets that requirement of bond or other condition of release."

[2] Please see our COVID-19: Procedures Affected webpage for information on pretrial release.

- A defendant charged with committing a violent felony "if the court finds that proof of the defendant's guilt is evident or the presumption is great[,]" *and* (1) at the time the violent felony was committed, he or she was on probation, parole, or released pending trial for another violent felony, *or* (2) during the 15 years preceding the commission of the violent felon, the defendant was convicted of two or more violent felonies. MCR 6.106(B)(1)(a)(*ii*); Const 1963, art 1, § 15.

- A defendant charged with first-degree criminal sexual conduct, armed robbery, or kidnapping with the intent to extort money or something valuable "if the court finds that proof of the defendant's guilt is evident or the presumption is great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person." MCR 6.106(B)(1)(b); Const 1963, art 1, § 15.

2. Protective Measures Available Where Court Denies Pretrial Release

"If the court determines as provided in [MCR 6.106(B)(1)[3]] that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail."[4] MCR 6.106(B)(3).

"The court may, in its custody order, place conditions on the defendant, including but not limited to restricting or prohibiting [the] defendant's contact with any other named person or persons, if the court determines the conditions are reasonably necessary to maintain the integrity of the judicial proceedings or are reasonably necessary for the protection of one or more named persons. If an order under this paragraph is in conflict with another court order, the most restrictive provisions of the orders shall take precedence until the conflict is resolved." MCR 6.106(B)(5).

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[3] For reasons why the court may deny the defendant's pretrial release under MCR 6.106(B)(1), see Section 2.2(B)(1).

[4] "The court must state the reasons for an order of custody on the record and on a form approved by the State Court Administrator's Office entitled 'Custody Order.' The completed form must be placed in the court file." MCR 6.106(B)(4). See SCAO form MC 240, *Order for Pretrial Release/Custody*.

"Nothing in [MCR 6.106] limits the ability of a jail to impose restrictions on detainee contact as an appropriate means of furthering penological goals." MCR 6.106(B)(6).

3. Denial of Interim Bond or Personal Recognizance for Domestic Violence Charges

For certain domestic violence charges, MCL 780.582a(1) prevents a person from being released by law enforcement on an interim bond under MCL 780.581 or on a personal recognizance under MCL 780.583a and requires the person to be "held until he or she can be arraigned or have interim bond set by a judge or district court magistrate[.]" Specifically,

> "A person shall not be released on an interim bond as provided in [MCL 780.581] or on his or her own recognizance as provided in [MCL 780.583a], but shall be held until he or she can be arraigned or have interim bond set by a judge or district court magistrate if either of the following applies:
>
> > (a) The person is arrested without a warrant under . . . MCL 764.15a,[5] or a local ordinance substantially corresponding to that section.
> >
> > (b) The person is arrested with a warrant for a violation of . . . MCL 750.81 [(assault and battery) or MCL] 750.81a [(assault with infliction of serious or aggravated injury)], or a local ordinance substantially corresponding to [MCL 750.81] and the person is a spouse or former spouse of the victim of the violation, has or has had a dating relationship with the victim of the violation, has had a child in common with the victim of the violation, or is a person who resides or has resided in the same household as the victim of the violation." MCL 780.582a(1)(a)-(b).

[5] MCL 764.15a provides for the warrantless arrest of an individual believed to have violated MCL 750.81 (assault and battery) or MCL 750.81a (assault with infliction of serious or aggravated injury) against a person with whom "[t]he individual has had a child in common with the victim, resides or has resided in the same household as the victim, has or has had a dating relationship with the victim, or is a spouse or former spouse of the victim. . . ."

4. Protective Measures Available Where Defendant Released on Personal Recognizance or Interim Bail/ Bond

MCL 780.582a. "If a judge or district court magistrate sets interim bond under [MCL 780.582a], the judge or magistrate shall consider and may impose the condition that the person released shall not have or attempt to have contact of any kind with the victim." MCL 780.582a(2). If the judge or district court magistrate orders a person released subject to protective conditions under MCL 780.582a, MCL 780.582a(3)-(6) set out certain procedures that must be followed.

"[MCL 780.582a] does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules." MCL 780.582a(7). See for example MCL 764.15b(2)(b), which requires a bond be set within 24 hours after an arrest for an alleged PPO violation.

MCL 780.755; MCL 780.813a. If a defendant is released on bond or personal recognizance, the bond or personal recognizance may be revoked if the defendant directly or indirectly threatens or intimidates the victim or the victim's family. MCL 780.755(2); MCL 780.813a. See Section 2.6(B) for additional information on revocation of the bond or personal recognizance based on acts or threats of physical violence or intimidation against the victim.

Violating Bond Conditions. Violation of a bond condition is punishable by criminal contempt because "a court's decision in setting bond is a court order[,]" and "a bail decision is an interlocutory order." *People v Mysliwiec*, 315 Mich App 414, 417, 418 (2016) (finding a "defendant's bond condition prohibiting the use of alcohol was a court order punishable by contempt[]" under MCL 600.1701(g) where "[t]he trial court . . . issued written mittimuses, which required [the] defendant have no alcohol[]" following the defendant's arraignment on a charge of operating a motor vehicle while under the influence of alcohol). For information on contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

5. Release of Defendant Subject to Protective Conditions

MCL 765.6b(1) permits "[a] judge or district court magistrate [to] release a defendant under [MCL 765.6b] subject to

conditions reasonably necessary for the protection of 1 or more named persons."[6,7] See also MCR 6.106(D), which authorizes the court to release the defendant subject to conditions it determines are appropriate to reasonably ensure the defendant's appearance or the public's safety.[8]

If the judge or district court magistrate orders a person released subject to protective conditions under MCL 765.6b, MCL 765.6b sets out certain procedures that must be followed.

Among other conditions set out under MCR 6.106(D)(2), the judge or district court magistrate may, for purposes of protecting the named person(s), impose conditions on the defendant's pretrial release that require the defendant to "not possess a firearm or dangerous weapon[,[9]]" "not enter specified premises or areas[,] [] not assault, beat, molest, or wound a named person or persons[,]" "comply with any condition limiting or prohibiting contact with any other named person or persons[,[10]]" "satisfy any injunctive order made a condition of release[, and]" "comply with any other condition . . . reasonably necessary to ensure . . . the safety of the public." MCR 6.106(D)(2).

The judge or district court magistrate may also "order the defendant to wear an electronic monitoring device as a condition of release" where "[the] defendant [] is charged with a crime involving domestic violence, or any other assaultive crime, [and] is released under [MCL 765.6b(1) and MCL 765.6b(6).]"[11] MCL 765.6b(6). "In determining whether to order a defendant to wear an electronic monitoring device, the court shall consider the likelihood that the defendant's participation in electronic monitoring will deter the defendant

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[6] "[MCL 765.6b] does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules, including ordering a defendant to wear an electronic monitoring device." MCL 765.6b(10). See also *People v Mysliwiec*, 315 Mich App 414, 420 (2016) (finding that, contrary to the defendant's argument, "MCL 765.6b does not provide that a defendant may only be held in contempt of court for violating conditions necessary to protect named persons and not for violating other conditions[]"). For information on contempt of court in general, see the Michigan Judicial Institute's *Contempt of Court Benchbook*, and *Contempt Quick Reference Materials*.

[7] Unless it is modified, rescinded, or expired, the district court's conditional release order in a felony case continues in effect after the defendant has been bound over to circuit court. MCL 780.66(3).

[8] See MCR 6.106(F) for more information on factors the court is to consider when deciding whether to order pretrial release.

[9] "[I]f the court orders the defendant to carry or wear an electronic monitoring device as a condition of release as described in [MCL 765.6b(6)], the court shall [] impose a condition that the defendant not purchase or possess a firearm." MCL 765.6b(3). Note that MCL 765.6b(3) still contemplates an order to *carry* an electronic monitoring device, but see MCL 765.6b(6), which was amended effective June 11, 2013, to no longer authorize a court to order a defendant to *carry* an electronic monitoring device. See 2013 PA 54.

from seeking to kill, physically injure, stalk, or otherwise threaten the victim prior to trial." *Id*.

> **Note:** "An electronic monitoring device ordered to be worn under [MCL 765.6b(6)] shall provide reliable notification of removal or tampering." MCL 765.6b(6). Moreover, "[t]he court shall instruct the entity monitoring the defendant's position to notify the proper authorities if the defendant violates the order." MCL 765.6b(6).

"With the informed consent of the victim, the court may also order the defendant to provide the victim of the charged crime with an electronic receptor device capable of receiving the global positioning system information from the electronic monitoring device worn by the defendant that notifies the victim if the defendant is located within a proximity to the victim as determined by the judge or district court magistrate in consultation with the victim." MCL 765.6b(6). "The victim shall also be furnished with a telephone contact with the local law enforcement agency to request immediate assistance if the defendant is located within that proximity to the victim." MCL 765.6b(6). "In addition, the victim may provide the court with a list of areas from which he or she would like the defendant excluded[, and] [t]he court shall consider the victim's request and shall determine which areas the defendant shall be prohibited from accessing." *Id*.

> **Note:** The victim may make a request for termination of his or her participation in the defendant's monitoring at any time, and the court cannot impose sanctions against the victim for refusing to participate in the monitoring. MCL 765.6b(6).

MCL 765.6b(7) also permits the judge or district court magistrate to release "a defendant subject to conditions reasonably necessary for the protection of the public if the defendant has submitted to a preliminary roadside analysis that detects the presence of alcoholic liquor, a controlled

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[10] "If an order under [MCR 6.106(D)(2)(m)] limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of the orders shall take precedence until the conflict is resolved. The court may make this condition effective immediately on entry of a pretrial release order and while [the] defendant remains in custody if the court determines it is reasonably necessary to maintain the integrity of the judicial proceedings or it is reasonably necessary for the protection of one or more named persons." MCR 6.106(D)(2)(m).

[11] If the judge or district court magistrate orders the defendant's participation in electronic monitoring, the defendant "shall only be released if he or she agrees to pay the cost of the device and any monitoring as a condition of release or to perform community service work in lieu of paying that cost." MCL 765.6b(6).

substance, or other intoxicating substance, or any combination of them[.]"

6. Release of Juvenile Subject to Protective Conditions

In juvenile delinquency proceedings, MCR 3.935(E) authorizes the court to release the juvenile subject to conditions it determines are appropriate to reasonably ensure the juvenile's appearance or the public's safety.[12] If the court releases a juvenile under MCR 3.935(E), certain procedures must be followed.[13]

In automatic waiver cases, MCR 6.909(A) authorizes the court to release the juvenile to a parent or guardian subject to "any lawful condition" on the juvenile's release. For release of a juvenile in felony cases, see MCR 6.909.

If the juvenile is afforded conditional release, the conditional release may be revoked if the defendant directly or indirectly threatens or intimidates the victim or the victim's family. MCL 780.785(2). See Section 2.6(C) for additional information on revocation of the conditional release based on acts or threats of physical violence or intimidation against the victim.

C. Limitation on Post-Conviction Bail

Before conviction, a defendant has a right, with certain exceptions, to reasonable bail. See Const 1963, art 1, § 15; Const 1963, art 1, § 16; MCL 765.5; MCL 765.6; MCR 6.106(1)(b). However, after conviction, a defendant is "no longer entitled to the presumption of innocence and release on bail or bond becomes a matter of discretion not of right." *People v Tate (Daniel)*, 134 Mich App 682, 693 (1984). See also MCL 770.8.

1. Before Sentencing

MCL 770.9a(1) requires the court to deny bail to a defendant convicted of and awaiting sentence for an assaultive crime, "unless the trial court finds by clear and convincing evidence that the defendant is not likely to pose a danger to other persons and that [MCL 770.9b] does not apply." MCL 770.9b prohibits postconviction bail for defendants convicted of sexually assaulting a minor.[14]

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[12] See MCR 3.935(C)(1) for more information on factors the court is to consider when deciding whether to release or detain the juvenile.

[13] For discussion of the requirements for releasing a juvenile pending resumption of a preliminary hearing, further order, or trial, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 6.

2. After Sentencing[15]

MCL 770.9a(2)(a)-(b) require a court to deny bail to a defendant convicted of an assaultive crime where the defendant has been sentenced to a term of imprisonment and has filed an appeal (or an application for leave to appeal), "unless the trial court or the court to which the appeal is taken finds by clear and convincing evidence" that all of the following exist:[16]

- MCL 770.9b, which prohibits postconviction bail for defendants convicted of sexually assaulting a minor, does not apply.[17]
- The defendant is unlikely to be a danger to other persons.
- The defendant's appeal or application presents a substantial question of law or fact.

> **Note:** Pending a prosecution appeal of a conviction *reversed* by the Court of Appeals, a defendant's request for bail must be analyzed under the statutes governing postconviction appeals—MCL 770.8, MCL 770.9, and MCL 770.9a(2)—and not the statute governing prosecution appeals from a court of record, MCL 765.7,[18] which would permit a defendant to be released on personal recognizance under certain conditions. *People v Sligh*, 431 Mich 673, 681-682 (1988) (the defendant's motion for release on personal recognizance was denied).[19]

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[14] If a defendant was convicted of sexually assaulting a minor and is awaiting sentence, the court must detain the defendant and deny him or her bail. MCL 770.9b(1). For information on sexual assault offenses, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 2.

[15] Please see our COVID-19: Procedures Affected webpage for information on release pending appeal.

[16] See *People v Nevers*, 462 Mich 913 (2000).

[17] If a defendant was convicted and sentenced for committing a sexual assault against a minor and files an appeal or application for leave to appeal, the appellate court must deny him or her bail. MCL 770.9b(2). See also MCL 770.9a. For information on sexual assault offenses, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 2.

[18] Under MCL 765.7, "[i]f an appeal is taken by or on behalf of the people of the state of Michigan from a court of record, the defendant shall be permitted to post bail on his or her own recognizance, pending the prosecution and determination of the appeal, unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required."

[19] All statutes cited were enacted before the Court of Appeals was created, so no original version of the statutes specifically embraces the circumstances involved in the *Sligh* case. *Sligh*, 431 Mich at 677. "[A]mendments of the statutes relied on by [the] plaintiff contain slight but sufficient indications of legislative intent to apply to [the defendant's] situation." *Id.* at 677.

D. Probation Orders Subject to Protective Conditions

If a defendant is placed on probation following conviction, the court may order probation conditions "reasonably necessary for the protection of 1 or more named persons."[20] MCL 771.3(2)(o). For juvenile delinquency cases, see MCL 712A.18, which provides the court with authority to place a juvenile on probation subject to terms or conditions "the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile[,]" among other dispositional options.[21]

Certain statutes pertaining to specific offenses also specifically authorize the court to include no contact conditions in probation orders. See e.g., MCL 750.411h(3)(b) (stalking) and MCL 750.411i(4)(b) (aggravated stalking).

For domestic violence cases, the court must revoke probation for violation of a no contact order. MCL 769.4a(4)(c).

If the court orders the early termination of an offender's probation and the order of probation included a condition for the victim's protection, the court must, at the victim's request, notify the victim by mail of the early termination. MCL 780.768b; MCL 780.795a; MCL 780.827b.

E. Parole Orders Subject to Protective Conditions

Parole orders may contain conditions intended to protect one or more named persons. See MCL 791.236(16).

If a prisoner serving a sentence for aggravated stalking under MCL 750.411i is paroled and the victim has registered to receive notification under the CVRA about that prisoner, the prisoner's parole order must require that the prisoner's location be monitored by a global positioning monitoring system (GPS) during the entire parole period. MCL 791.236(18). If, at the time the prisoner was paroled, no victim of that crime had registered to receive notification, but a victim registers to receive notification after the prisoner's parole, the parole order must *immediately* be modified to include the requirement that the prisoner's location be monitored by a GPS. *Id.* For a detailed discussion of victim notification requirements, see Chapter 5.

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[20] For a detailed discussion of probation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

[21] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 10, for additional information on the dispositional options available to the court.

2.3 Status of the Offender

To prevent a victim from being revictimized, the Michigan Constitution and several provisions of the CVRA provide the crime victim with the right to receive notification of court proceedings and the defendant's or juvenile offender's status within the correctional or juvenile agencies. This right to receive notification also includes cases against the defendant or juvenile offender resolved "by assignment of the defendant to trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal." MCL 780.752a; MCL 780.781a; MCL 780.811b. For a detailed discussion of victim notification requirements, see Chapter 5.

2.4 Separate Waiting Areas for Crime Victims[22]

The CVRA requires "[t]he court [to] provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with [the] defendant, defendant's relatives, and defense witnesses during court proceedings." MCL 780.757; MCL 780.817. See also MCL 780.787, which contains a substantially similar provision for proceedings involving juvenile offenders.

Committee tip:

When a separate waiting area is not available or practical, safeguards that may be employed include party/witness check in procedures and flagging the file of a case involving a victim so that the court is aware and can check whether the victim is present. It may be beneficial for the court to coordinate the responsibility of maintaining the space/safeguards and of monitoring whether a crime victim is present and in need of the separate waiting area/ safeguards with another staff member or the prosecuting attorney.

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[22]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

2.5 Limiting Exposure of Victim's Location or Personal Information

A. Denying Freedom of Information Act (FOIA) Requests

The CVRA, Article 1 (Felony Article), the CVRA, Article 2 (Juvenile Article), and the CVRA, Article 3 (Misdemeanor Article), exempt from disclosure under the Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, the following information and visual representations of a crime victim:[23]

> (a) the victim's home address, work address, home telephone number, and work telephone number.
>
> > **Note:** The CVRA, Article 1 (Felony Article), provides for an exception if the "address is used to identify the place of the crime." MCL 780.758(3)(a).
>
> "(b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent to commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed:
>
> > (*i*) The victim's name and address.
> >
> > (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
> >
> > (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused." MCL 780.758(3)(a)-(c); MCL 780.788(2)(a)-(c); MCL 780.818(2)(a)-(c).

A victim's address and telephone number maintained by the court, sheriff, or Department of Corrections for notification purposes are exempt from disclosure under the FOIA, and must not be released. MCL 780.769(2); MCL 780.798(5); MCL 780.830. MCL 780.769a(3)

[23] MCL 780.758(3), MCL 780.788(2), and MCL 780.818(2) "do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.758(4); MCL 780.788(3); MCL 780.818(3).

also excludes from disclosure under the FOIA "[a] victim's address and telephone number maintained by a hospital or facility" for purposes of notification regarding a defendant's hospitalization or admittance by court order subsequent to the defendant being found not guilty by reason of insanity.

Any record of a crime victim's oral or written statement to a parole board or other panel having authority over the defendant's release on parole is exempt from disclosure under the FOIA, and must not be released.[24] MCL 780.771(4).

B. Exempting Disclosure of Information in Presentence Investigation Report

MCL 771.14(2) prohibits "[a] presentence investigation report prepared under [MCL 771.14(1)] [from] includ[ing] any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual."

On request, MCL 771.14(2) also exempts from disclosure "any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness . . . unless an address is used to identity the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual."

C. Limiting Testimony During Pretrial Proceedings and at Trial

Although MCR 6.201(A)(1) generally requires disclosure of the names and addresses of all lay witnesses the opposing party may call at trial, see also, MCR 3.922(A)(1)(c) (permitting discovery of the names of all prospective witnesses in juvenile delinquency cases); MCR 6.610(E)(2) (permitting discovery in misdemeanor cases where defendant requests discovery), in certain circumstances, the CVRA permits the prosecuting attorney to request that a victim's identifying information be protected from disclosure during pretrial proceedings and also at trial:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by

[24] For additional information on a crime victim's right to address or submit a written statement to the parole board, see Section 7.4.

> the defendant or at [the] defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera." MCL 780.758(1); MCL 780.818(1). See also MCL 780.788(1), which contains a substantially similar provision for proceedings involving juvenile offenders except that it also permits the victim to move to limit testimony in the prosecuting attorney's absence.

D. Limiting Content of Court File and Court Documents

Under the CVRA, Article 1 (Felony Article), the victim's work and home address must "not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime." MCL 780.758(2). In addition, the victim's work and home telephone number must "not be in the court file or ordinary court documents except as contained in a transcript of the trial." *Id.*

2.6 Acts or Threats of Physical Violence or Intimidation Against Victim

A. Notice of Procedures For Victim to Follow If Threatened or Intimidated

The prosecuting attorney must provide written notification to the crime victim of suggested procedures to follow in the event that he or she is threatened or intimidated by or at the direction of the defendant or juvenile, within the following time limits:[25]

- in felony cases, "[n]ot later than seven days after the defendant's arraignment for a crime, but not less than 24 hours before a preliminary examination," MCL 780.756(1)(e);

[25] See Chapter 5 for a complete list of notifications the prosecuting attorney must provide to the victim.

- in juvenile cases,[26] "[w]ithin 72 hours after the prosecuting attorney files or submits a petition seeking to invoke the court's jurisdiction for an offense," MCL 780.786(2)(e); and

- in cases involving serious misdemeanors, "[w]ithin 48 hours after receiving [] notice [from the court as set out in MCL 780.816(1) that a plea has been accepted and the date when sentencing will occur]," MCL 780.816(1)(e).

B. Revocation of Bond or Personal Recognizance

If a defendant is released on bond or personal recognizance, the prosecuting attorney may move for revocation of the bond or personal recognizance where there is "credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family[.]" MCL 780.755(2); MCL 780.813a.

C. Revocation of Juvenile Release

If the juvenile is released on a conditional release, the prosecuting attorney may move for the juvenile to be detained in a juvenile facility where there is "credible evidence of acts or threats of physical violence or intimidation by the juvenile or at the juvenile's direction against the victim or the victim's immediate family[.]" MCL 780.785(2).

D. Contempt of Court for Interfering With Victim[27]

MCL 600.1701(h) states, in pertinent part:

> "The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> (h) All persons . . . for unlawfully detaining any witness or party to an action while he is going to, remaining at, or returning from the court where the action is pending for trial, or for any other

[26] Note that in juvenile cases, the court may be responsible for providing this notification pursuant to a written agreement with the prosecutor and if it provided this notification before May 1, 1994. See MCL 780.798a.

[27] For more information on contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

> unlawful interference with or resistance to the process or proceedings in any action."

Threatening a complaining witness in a criminal case may be punished as contempt of court. See generally *In re Contempt of Nathan (People v Traylor)*, 99 Mich App 492, 493 (1980). A person may also be found in contempt of court for attempting to prevent the attendance of a person not yet subpoenaed as a witness. *Montgomery v Palmer*, 100 Mich 436, 441 (1894).

2.7 Victim's Retention of Existing Wireless Telephone Number

Where a domestic relationship personal protection order (PPO) under MCL 600.2950(1), a nondomestic stalking PPO under MCL 600.2950a(1),[28] or a no contact order has been issued and the petitioner-victim is not the named wireless service phone customer, the court may order a wireless telephone service provider to transfer billing responsibility for and rights to the petitioner-victim's wireless telephone number (or the wireless telephone number of a minor to whom the victim has legal custody) to the petitioner-victim.[29] MCL 600.2950n(1).

"An order issued under [MCL 600.2950n(1)] must list the name and billing telephone number of the named customer, the name and telephone number of the petitioner[-victim], and each telephone number to be transferred to the petitioner[-victim]. The court shall ensure that the contact information of the petitioner[-victim] is not provided to the customer or [the] respondent." MCL 600.2950n(2).

If the wireless telephone service provider notifies the petitioner-victim within 72 hours of receiving the court's order that it cannot "operationally or technically effectuate" the order for one of the reasons set out under MCL 600.2950o(2)(a)-(d), the court's order is automatically suspended. MCL 600.2950o(2)-(3).

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[28] For a detailed discussion on domestic relationship PPOs issued under MCL 600.2950(1) and nondomestic stalking PPOs issued under MCL 600.2950a(1), see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5.

[29] "[MCL 600.2950n] and [MCL 600.2950o] do not affect the ability of the court to determine the temporary use, possession, and control of personal property or to apportion the assets and debts of the parties as otherwise provided by law." MCL 600.2950n(3).

2.8 Additional Protections for Certain Victims of Criminal Sexual Conduct[30]

"As part of its adjudication order, order of disposition, judgment of sentence, or order of probation a court shall order that an individual who is convicted of or, a juvenile who is adjudicated for, a violation of [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] and who is a student at a school in this state is prohibited from . . . [a]ttending the same school building that is attended by the victim of the violation," and "[u]tilizing a school bus for transportation to and from any school if the individual or juvenile will have contact with the victim during use of the school bus." MCL 750.520o(1).

For a detailed discussion of postconviction and sentencing matters specific to sex offenders, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 9.

[30]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

Chapter 3: Victim Privacy

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3.1 Constitutional Right of Victim to Have Privacy and Dignity Respected

The Michigan Constitution provides crime victims with "[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24.

3.2 Overview of Procedures Available to Protect Victim Privacy[1]

Caselaw, non-CVRA statutes, and court rules employ various procedures and requirements to protect victim privacy. Several of these procedures and requirements are discussed in this chapter, including discovery, privileges, access to victim information, and confidentiality.

3.3 Ordering Psychiatric Evaluations of Certain Crime Victims

"While [a psychiatric examination of the victim] apparently may be ordered in Michigan in certain cases, it requires, at least, a compelling reason to do so." *People v Payne (Larry)*, 90 Mich App 713, 723-724 (1979) (upholding trial court's refusal to require the victim to undergo a psychiatric examination in a criminal sexual conduct case where the defendant failed to show a compelling reason to subject the witness to such examination). See also *People v Graham*, 173 Mich App 473, 478-479 (1988) (trial court abused its discretion when it ordered the four-year-old victim's mother to undergo a psychiatric examination where the defendant failed to show a compelling reason to subject the victim's mother to such examination); *People v Freeman*, 406 Mich 514, 516 (1979) (trial court abused its discretion when it ordered the victim to submit to a psychiatric examination based on the defendant's unsubstantiated claims that the victim was a "'highly nervous person'; the alleged crimes had occurred more than two years before the date of the hearing; the [victim] [was] mentally retarded; the accusation [was] 'uncorroborated'; and the information was necessary to attack the [victim's] credibility[]").[2]

If the court orders a victim to undergo a psychiatrist evaluation, "[the] defendant should [not] be allowed to select the psychiatrist;" rather, the court "should designate the psychiatrist." *Freeman*, 406 Mich at 516.

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[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]To date, there is no published caselaw that sets out what evidence is indicative of a compelling reason for court-ordered psychiatric evaluation of the victim.

3.4 Discovery Provisions That Pertain to Crime Victims

A. Applicable Discovery Rules[3]

MCR 6.201 (criminal discovery rule) applies to felony proceedings in both district and circuit court. *People v Greenfield (On Reconsideration)*, 271 Mich App, 442, 450 n 6 (2006). "The provisions of MCR 6.201, except for MCR 6.201(A), apply in all misdemeanor proceedings." MCR 6.610(E)(1). However, in limited circumstances, MCR 6.201(A) may apply in misdemeanor proceedings. See MCR 6.610(E)(2). "MCR 6.201(A) only applies in misdemeanor proceedings . . . if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, the defendant must also comply with MCR 6.201(A)." MCR 6.610(E)(2).

"A trial court may grant a motion for discovery on two different grounds. First, MCR 6.201 makes certain discovery mandatory[in felony cases]. Second, in a criminal case, [the] trial court has the discretion to grant additional discovery." *People v Valeck*, 223 Mich App 48, 50 (1997), citing to *People v Laws*, 218 Mich App 447, 454-455 (1996) and *People v Johnson (Richard)*, 168 Mich App 581, 584 (1988). Discovery in juvenile delinquency proceedings is governed by MCR 3.922(A). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 7 for more information.

MCR 6.001(D) prohibits taking depositions and other discovery proceedings as provided in subchapter 2.300 of the Michigan Court Rules in criminal cases for discovery purposes. However, "[t]his exception merely precludes parties in criminal proceedings from utilizing the discovery methods of subchapter 2.300; it is not broad enough to exclude the remaining provisions of subchapter 2.300 from criminal discovery." *People v Holtzman*, 234 Mich App 166, 177 (1999).

B. Privacy Protections During Discovery

All parties are required to disclose some information to the opposing side (i.e., mandatory disclosure). See MCR 6.201(A) (all parties' obligations); MCR 6.201(B) (prosecutor's obligations); MCL 767.94a (defendant's obligations); and MCR 6.610 (obligations in misdemeanor proceedings).[4] However, some limitations or protections are in place to protect victim privacy and are discussed below.

[3] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1,* Chapter 9, for more information on discovery in criminal cases.

1. Name and Address of Witness

"In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties . . . the names an addresses of all lay . . . witnesses whom the party may call at trial[.]" MCR 6.201(A)(1).

As an alternative to the mandatory disclosure of a witness's name and address, MCR 6.201(A)(1) permits a party to "provide the name of the witness and make the witness available to the other party for interview[.]"

2. Discovery of Privileged Records[5]

"Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in [MCR 6.201(C)(2)]." MCR 6.201(C)(1).

MCR 6.201(C)(2) sets out the procedure in which a defendant may discover certain privileged records, including a requirement for the court to conduct an in camera inspection of the records if "[the] defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense." See *People v Davis-Christian*, 316 Mich App 204, 209, 212-213 (2016) (finding the trial court abused its discretion in granting the defendant's motion for an in camera review of the complainant's counseling records when it "failed to apply the law as articulated in [*People v*] *Stanaway*[, 446 Mich 643 (1994),[6]] and MCR 6.201(C)(2)[, and instead] . . . articulated [its own] standard [that] would allow an in camera review of most—if not all—of the counseling records of alleged sexual assault victims[;]" specifically, the defendant did not demonstrate that the records "would be 'necessary to the defense[]'" as required under MCR 6.201(C)(2) where his "assertion of need merely voice[d] a hope of corroborating evidence, untethered to any

[4] For a complete discussion of what must be disclosed in a felony case, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9. This subsection will set out mandatory disclosures that are relevant to a correlating limitation or protection as it relates to victim privacy.

[5] This discussion focuses on discovery of privileged records; see Section 3.5 for a discussion on relevant statutory privileges and protections.

[6] "The Michigan Supreme Court amended MCR 6.201(C) in 1996 to reflect the rule announced in *Stanaway*." *Davis-Christian*, 316 Mich App at 208.

articulable facts[,]" and his "access to the police report and [the victim's] forensic interview" when coupled with witness statements gave him "the information necessary to properly prepare a defense[]").

"Records disclosed under [MCR 6.201] shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide." MCR 6.201(C)(2)(e).

3. Excision

MCR 6.201(D) provides for the exclusion of some portions of material or information that is otherwise discoverable:

> "When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal."

4. Protective Orders

In some cases, a court may issue a protective order to guard against improper use of discovery material:

> "On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters. On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the courts grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal." MCR 6.201(E).

C. Discovery Violations and Remedies

MCR 6.201(J)[7] addresses a party's failure to comply with the requirements of MCR 6.201:

> "If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wil[l]ful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion."

Although MCR 6.201(J) affords a court discretion in fashioning a remedy for noncompliance with a discovery order, *People v Jackson (Andre)*, 292 Mich App 583, 591 (2011), exclusion of otherwise admissible evidence is a remedy which should be used only in the most egregious cases, *People v Taylor (Robert)*, 159 Mich App 468, 487 (1987). The preferred remedy for discovery violations is to grant an adjournment to allow the other party to react to the new information. *People v Burwick*, 450 Mich 281, 298 (1995).

3.5 Privileged Communications, Privileged Material, and Confidential Records

In Michigan, written or oral communications made in certain relationships are protected and are generally not discoverable.[8] A brief discussion on privileged communications, privileged material, and confidential records is contained in this section. For additional information on asserting or waiving a privilege, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1.

A. Privileges Arising From a Marital Relationship

The two privileges that arise from a marital relationship under MCL 600.2162 are:

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[7] MCR 6.201(J) applies to all felony proceeding, and starting May 1, 2020, to all misdemeanor proceedings. See MCR 6.001(A); MCR 6.610(E)(1), amended by ADM File No. 2018-23.

[8] See Section 3.4(B)(2) for a discussion on when a defendant may be entitled to discover privileged information.

- the spousal privilege; and
- the confidential communications privilege.

1. Spousal Privilege

MCL 600.2162(2) establishes spousal privileges that limit the circumstances under which one spouse may "be examined as a witness for or against" the other spouse in criminal proceedings:

> "In a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent, except as provided in [MCL 600.2162(3)]."

2. Confidential Communication Privilege

MCL 600.2162(7) establishes confidential communication privileges limiting the circumstances under which an individual may "be examined" in criminal proceedings[9] regarding communications that occurred between the individual and his or her spouse during their marriage:

> "Except as otherwise provided in [MCL 600.2162(3)], a married person or a person who has been married previously shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage without the consent of the person to be examined."

3. Exceptions to Privileges Arising From Marital Relationship

"The spousal privileges established in [MCL 600.2162(1)] and [MCL 600.2162(2)] and the confidential communications established in [MCL 600.2162(7)] do not apply in any of the following:

> (a) In a suit for divorce, separate maintenance, or annulment.
>
> (b) In a prosecution for bigamy.

[9] MCL 600.2162(4)-(6) establish other confidential communication privileges in the context of civil and administrative proceedings. They are not discussed in this publication.

> (c) In a prosecution for a crime committed against a child of either or both or a crime committed against an individual who is younger than 18 years of age.
>
> (d) In a cause of action that grows out of a personal wrong or injury done by one to the other or that grows out of the refusal or neglect to furnish the spouse or children with suitable support.
>
> (e) In a case of desertion or abandonment.
>
> (f) In a case in which the husband or wife is a party to the record in a suit, action, or proceeding if the title to the separate property of the husband or wife called or offered as a witness, or if the title to property derived from, through, or under the husband or wife called or offered as a witness, is the subject matter in controversy or litigation in the suit, action, or proceeding, in opposition to the claim or interest of the other spouse, who is a party to the record in the suit, action, or proceeding. In all such cases, the husband or wife who makes the claim of title, or under or from whom the title is derived, shall be as competent to testify in relation to the separate property and the title to the separate property without the consent of the husband or wife, who is a party to the record in the suit, action, or proceeding, as though the marriage relation did not exist." MCL 600.2162(3).

"[T]he legal right not to testify [established] in [MCL 600.2162(2)] . . . is specifically limited by [MCL 600.2162(3)], which states that the spousal privilege established in [MCL 600.2162(2)] 'do[es] not apply' in certain cases[.]" *People v Szabo*, 303 Mich App 737, 747 (2014). "When such an 'exception' exists the effect, then, is not that the ownership of the spousal privilege transfers from the one spouse to the other . . . ; rather, the effect is that no spousal privilege exists at all." *Id.* at 748. Accordingly, a victim-spouse may be compelled to testify against his or her defendant-spouse. *Id.* at 749. In *Szabo*, the victim-wife "was not vested with a spousal privilege [under MCL 600.2162(2)]" and could be compelled to testify where "[the] defendant[-husband] was charged with felonious assault and felony-firearm arising from criminal actions he allegedly committed against [her]" because those actions gave rise to a "cause of action [that grew] out of a personal wrong or injury done by the defendant-spouse against the victim-

spouse.'" *Szabo*, 303 Mich App at 748, 749, quoting MCL 600.2162(3)(d).

B. Privileged Communications with Care Providers

The Michigan Legislature has enacted a number of statutes that limit the use of communications with various care providers as evidence in civil or criminal trials.

1. Sexual Assault and Domestic Violence Counselors

Communications between a victim and a sexual assault or domestic violence counselor are protected under MCL 600.2157a(2):

> "Except as provided by . . . [MCL] 722.631,[10] . . . a confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim."

If a sexual assault or domestic violence counselor is also licensed, certified, or identified as a social worker, psychologist, or other professional, additional privileges may apply:

- Social workers (MCL 333.18513);[11]
- Psychiatrists (MCL 330.1750);[12]
- Psychologists (MCL 330.1750; MCL 333.18237);[13]
- Physicians (MCL 600.2157);[14] and
- Clergy (MCL 767.5a(2)).[15]

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[10] For purposes of child protective proceedings, MCL 722.631 abrogates all recognized privileges except the attorney-client and cleric-congregant privileges. See Section 3.5(B)(9) for more information.

[11] For a discussion of the social worker-client privilege, see Section 3.5(B)(3).

[12] For a discussion of the psychiatrist-patient privilege, see Section 3.5(B)(4).

[13] For a discussion of the psychologist-patient privilege, see Section 3.5(B)(4).

[14] For a discussion of the physician-patient privilege, see Section 3.5(B)(5).

[15] For a discussion of the cleric-congregant privilege, see Section 3.5(B)(6).

2. Licensed Professional Counselors

Confidential relationships and communications between a victim-client and a licensed professional counselor are protected under MCL 333.18117:

> "For the purposes of this part, the confidential relations and communications between a licensed professional counselor or a limited licensed counselor and a client of the licensed professional counselor or a limited licensed counselor are privileged communications, and this part does not require a privileged communication to be disclosed, except as otherwise provided by law. . . ."

There are three additional ways in which a privileged communication with a licensed professional counselor or limited licensed counselor may be disclosed:

- consent by the client,
- if the counselor "reasonably believes it is necessary to disclose the information to comply with [MCL 333.16222]," [16] or
- if the counselor receives a request for medical records or information from the Department of Health and Human Services for purposes of initiating a child abuse or neglect investigation under MCL 333.16281. MCL 333.18117.

3. Social Workers

Communications between a victim-client and a social worker are protected under MCL 333.18513(1)-(2):

> "(1) An individual registered or licensed under this part or an employee or officer of an organization that employs the registrant or licensee is not required to disclose a communication or a portion of a communication made by a client to the individual or advice given in the course of professional employment.

[16] MCL 333.16222(1) requires "[a licensed professional counselor] who has knowledge that another licensee or registrant has committed a violation under [MCL 333.16221], [MCL 333.7101 *et seq.*] or [MCL 333.8101 *et seq.*], . . . [to] report the conduct and the name of the subject of the report to the department."

> (2) Except as otherwise provided in this section, a communication between a registrant or licensee or an organization with which the registrant or licensee has an agency relationship and a client is a confidential communication. . . ."

See *People v Carrier*, 309 Mich App 92, 112-113 (2015) (extending the privilege under MCL 333.18513 to a client whose communications were with an employee who had a limited license, bachelor's of social work).

"A confidential communication [between a victim and his or her social worker] shall not be disclosed, except under either or both of the following circumstances:

> (a) The disclosure is part of a required supervisory process within the organization that employs or otherwise has an agency relationship with the registrant or licensee.
>
> (b) The privilege is waived by the client or a person authorized to act in the client's behalf." MCL 333.18513(2).

A child's parent who has at least joint custody "is a person authorized to act in the child's behalf and, hence, [can] waive the [social worker-client] privilege." *Thames v Thames*, 191 Mich App 299, 303 (1991).[17] However, a parent-defendant may not *assert* the social worker-client privilege on the child's behalf, especially where the assertion is an attempt "to suppress evidence of activity by the parent that could be harmful to the child[.]" *People v Wood*, 447 Mich 80, 90-91 (1994) ("As a general rule, criminal defendants do not have standing to assert the rights of third parties.").

In addition, MCL 333.18513(4) permits the disclosure of a privileged communication, or a portion thereof, where a mental health professional's[18] duty to warn or protect under MCL 330.1946. MCL 330.1946(1) provides:

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[17] The *Thames* Court based its holding on a former statute that is now repealed and was replaced by MCL 333.18513. The relevant statutory language is substantively similar.

[18] "MCL 330.1946 indicates that it is only a 'mental health professional' who is saddled with the duty to warn or protect under the circumstances outlined in the statute." *Carrier,* 309 Mich App at 115. While a limited licensed, bachelor's social worker is not a *mental health professional*, see *id.* at 115-116, if he or she "necessarily work[s] in tandem with and under the statutorily mandated supervision of [a mental health professional (e.g., a licensed master's social worker), who is] obligated to review [the limited licensed, bachelor's social worker's] work, . . . there [is] a duty to warn and protect under MCL 330.1946." *Carrier,* 309 Mich App at 116.

> "If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in subsection (2). Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person."

In *Carrier*, although the defendant's communications with an emergency services specialist through a mental health crisis hotline were generally privileged communication under MCL 333.18513, the defendant "effectively and permanently waived or lost" the privilege once the defendant communicated to the specialist specific physical threats of shooting his ex-girlfriend, any police officers who showed up at his home, and the specialist's family, and the defendant "had the apparent intent and ability to carry out the[se] threats in the foreseeable future" by "list[ing to the specialist] the types of guns that he had in his possession and expressed that he had ammunition." *Carrier*, 309 Mich App at 97-98, 119-120. "[T]he Legislature, in enacting MCL 330.1946, intended and envisioned the use of an otherwise privileged communication in a court case or proceeding when the duty to warn or protect was indeed implicated in a given matter." *Carrier*, 309 Mich App at 117.

4. Psychiatrists and Psychologists

Communications between a victim-patient and a psychiatrist or psychologist are protected under the Mental Health Code, MCL 330.1750(1):

> "Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section."

"[T]he fact that the patient has been examined or treated or undergone a diagnosis" is also privileged from disclosure with certain exceptions for requests by health care insurance companies and other health care and dental care-related organizations. MCL 330.1750(3).

Communications between a patient and a psychologist are also protected under the Public Health Code, MCL 333.18237. MCL 333.18237 provides that, without client consent, "[a] psychologist . . . or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services."

Communications between a patient and a psychiatrist may also fall under the physician-patient privilege. See MCL 600.2157. For a discussion of the physician-patient privilege, see Section 3.5(B)(5).

a. Waiver of Privilege

Under the Mental Health Code, a patient may waive the patient-psychiatrist or patient-psychologist privilege, in which case communications with that professional could be disclosed. MCL 330.1750(1).

b. Court-Ordered Examination: Mandatory Disclosure of Privileged Communication

A privileged communication must be disclosed upon request if it was made during a court-ordered examination, and the victim-patient was informed before the examination that the communication would not be privileged. MCL 330.1750(2)(e).[19] The communication may "only [be used] with respect to the particular purpose for which the examination was ordered." *Id.* For example, although the defendant would have been informed that communications between him and his social worker regarding a risk assessment evaluation "could be used in the sentencing memorandum, or discussed during sentencing, there was no evidence that he was aware that the contents of the risk assessment evaluation would be subject to disclosure if he were permitted to withdraw his plea and proceed to trial." *People v Cowhy*, ___ Mich App ___, ___ (2019) (finding that the social worker's testimony was inadmissible at trial because the communications "could only be disclosed to the trial court for sentencing purposes in accordance with MCL 330.1750(2)(e), and must otherwise remain protected by the psychologist-patient privilege").

[19] For a complete list of situations where disclosure is mandatory, see MCL 330.1750(2)(a)-(f).

c. Discretionary Disclosure of Privileged Communication

Under the Mental Health Code, MCL 330.1750(4) permits the disclosure of a privileged communication where a psychiatrist's or psychologist's duty to warn or protect under MCL 330.1946 is implicated.MCL 330.1946(1) provides:

> "If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in subsection (2). Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person."

Under the Public Health Code, MCL 333.18237 permits disclosure of a privileged communication otherwise protected by the psychologist-patient privilege in the following situations:

- by consent of the patient,
- if the psychologist or psychiatrist "reasonably believes it is necessary to disclose the information to comply with [MCL 333.16222]," [20] or
- if the counselor receives a request for medical records or information from the Department of Health and Human Services for purposes of initiating a child abuse or neglect investigation under MCL 333.16281.

5. Physicians

Information that a physician acquires from a victim-patient is protected under MCL 600.2157:[21]

[20] MCL 333.16222(1) requires "[a licensed professional counselor] who has knowledge that another licensee or registrant has committed a violation under [MCL 333.16221], [MCL 333.7101 *et seq.*] or [MCL 333.8101 *et seq.*], . . . [to] report the conduct and the name of the subject of the report to the department."

> "Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. . . ."

See also MCL 767.5a(2), which also protects communications between a victim-patient and physician when the communications are necessary for the physician to serve as such to the patient.

The physician-patient privilege "protects 'any information' that is 'acquired' by a physician in the course of treating a patient, as long as that information is necessary to treat the patient." *People v Childs*, 243 Mich App 360, 368 (2000) (extending the physician-patient privilege to unconscious patients).

a. Physician-Patient Privilege is Automatic

The physician-patient privilege under MCL 600.2157 automatically "arises by operation of MCL 600.2157 upon the development of a physician-patient relationship" and not by a patient's "[e]xpress or implied invocation of the privilege[.]" *Meier v Awaad*, 299 Mich App 655, 668 (2013). Once the physician-patient privilege exists, the privilege remains in existence until waived by the patient. *Id.*

b. Waiver of Privilege

The physician-patient privilege may only be waived by the patient or, if the patient is deceased, the personal representative of the deceased's estate.[22] *Scott v Henry Ford Hosp*, 199 Mich App 241, 243 (1993).

c. Exception to Privileged Communication

MCL 750.411(6) provides for an exception to the physician-patient privilege where a physician's or surgeon's duty to report to local law enforcement under

[21] See also MCL 333.17078(1), which extends the physician-patient privilege to communications between the patient and the physician's physician's assistant.

[22] MCL 600.2157 sets out additional ways with which the physician-patient privilege may be waived, none of which are relevant to this publication.

MCL 750.411(2) is implicated when he or she is caring for a patient "suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence[.]" MCL 750.411(1)-(2) (requiring the physician and surgeon to report "the name and residence of the [wounded] person, if known, his or her whereabouts, and the cause, character, and extent of the injuries and may state the identification of the perpetrator, if known[]").

6. Clergy

Communications between a victim-church member and a cleric are protected under MCL 767.5a(2):

> "Any communications . . . between members of the clergy and the members of their respective churches . . . are hereby declared to be privileged and confidential when those communications were necessary to enable the . . . members of the clergy . . . to serve as such . . . member of the clergy . . . ."

See also MCL 600.2156, which also protects "confessions made to [the cleric] in his [or her] professional character, in the course of discipline enjoined by the rules or practice of such denomination."

> **Note:** Although MCL 600.2156 and MCL 767.5a both appear to contain a cleric-congregant privilege, the Court of Appeals concluded that only MCL 767.5a contains an evidentiary privilege. *People v Bragg*, 296 Mich App 433, 453 (2012). "The evidentiary privilege [under MCL 767.5a(2)] . . . is broader than MCL 600.2156 in one important sense. MCL 600.2156 only precludes the disclosure of 'confessions,' while the evidentiary privilege of MCL 767.5a(2) addresses the use of 'any communication.'" *Bragg*, 296 Mich App at 453. Specifically,
>
> > "Read together and harmonized, the more specific MCL 767.5a(2) creates an evidentiary privilege, precluding the incriminatory use of 'any communication' made by a congregant to his or her cleric when that communication was 'necessary to enable the' cleric 'to serve as such' cleric. That statute governs the specific use of a defendant's statements against him or her in court. MCL 600.2156 more broadly

> precludes a cleric from disclosing certain covered communications in other situations, not limited to the courtroom. It does not qualify as an evidentiary privilege." *Bragg*, 296 Mich App at 453.

MCL 767.5a(2) prohibits a cleric from revealing in court a congregant's statements that were made to the cleric in confidence. *Bragg*, 296 Mich App at 453. Specifically, MCL 767.5a(2) precludes "the incriminatory use of 'any communication' made by a congregant to his or her cleric when that communication was 'necessary to enable the' cleric 'to serve as such' cleric." *Bragg*, 296 Mich App at 453. For a communication to be "necessary to enable a cleric to serve as a cleric[,] . . . the communication [must] serve[] a religious function such as providing guidance, counseling, forgiveness, or discipline." *Id.* at 455. "The congregant cannot speak to the cleric in his or her role as a relative, friend, or employer and receive the benefit of the evidentiary privilege." *Id.* at 458-459.

In *Bragg*, 296 Mich App at 462, "[the] [d]efendant's statements to [the cleric] [fell] within the statutory scope of privileged and confidential communications under MCL 767.5a(2). The communication was necessary to enable [the cleric] to serve as a pastor, because [the] defendant communicated with [the cleric] in his professional character in the course of discipline enjoyed by the Baptist Church." Specifically, the Court of Appeals found the following facts relevant:

> "The communication between [the] defendant and [the cleric] served a religious function—it enabled [the cleric] to provide guidance, counseling, forgiveness, and discipline to [the] defendant. [The cleric] testified that he wanted 'to get [the] [defendant] some help,' and the first step necessitated that [the] defendant admit his actions. [The cleric] averred that he 'consoled' [the] defendant and counseled him as 'a loving broken hearted minister.'
>
> [The cleric] also spoke with [the] defendant in his 'professional character' as a pastor. [The cleric] explicitly stated that he 'interrogate[d]' [the] defendant '[i]n [his] role as a pastor.' Once [the cleric] convinced [the] defendant to speak about the sexual assault, the pastor prayed with [the] defendant. This was not a secular conversation. If [the cleric] had not been a pastor, the communication would not have occurred. Because

> of [the cleric's] authority as the church pastor, he was able to summon [the] defendant and his mother to the church office and expect their attendance. Inside the pastor's office, the trio did not discuss secular topics such as [the mother's] employment at the church. They spoke only of the victim's accusation that [the] defendant had committed a sin and a criminal act against her.
>
> The communication was also made in the course of discipline enjoined by the Baptist Church. . . .[23] [The cleric] testified that under Baptist doctrine, his communication with [the] defendant would be considered confidential, and yet [the cleric] claimed that his sharing [the] defendant's communication with the police and the victim's family did not violate that confidence. . . . [The cleric] also testified that providing counseling and guidance services are a part of his role as a Baptist minister.
>
> The record clearly establishes that [the] defendant's communication to [the cleric] falls within MCL 767.5a(2)'s scope. The communication was therefore privileged and confidential. [The cleric] was not permitted to divulge the content of the communication at the preliminary examination, and the circuit court correctly precluded any further use of that evidence." *Bragg*, 296 Mich App at 462-463.

a. Initiation of Conversation Irrelevant for Privilege Purposes

The term *communication* as used in MCL 767.5a(2) "in no way suggests that the congregant must initiate the conversation in order for the privilege to apply." *Bragg*, 296 Mich App at 464. Rather, "it is irrelevant to the statutory-privilege analysis [who] . . . initiate[s] the conversation." *Id.* at 465.

[23] "[W]hen considering whether a communication would be considered confidential under the discipline or practices of a specific religion, we are bound to accept the guidance provided by the clerical witness without embarking on a fact-finding mission." *Bragg*, 296 Mich App at 459.

b. Waiver of Privilege

> "[A] congregant may waive the cleric-congregant privilege by 'giving evidence of what took place at the confessional,' or sharing the content of the otherwise privileged communication with a third party[.]" *Bragg*, 296 Mich App at 466, quoting *People v Lipsczinska*, 212 Mich 484, 493 (1920).

7. School Teachers and School Staff Members

Communications between a victim-student and a school teacher or school staff member are protected under MCL 600.2165:

> "No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has records in his [or her] custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him [or her] from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian."

8. Sign Language Interpreters

Communications between a deaf or deaf-blind victim and a sign language interpreter are protected under MCL 393.506(2):

> "The information that the qualified interpreter, intermediary interpreter, or deaf interpreter gathers from the deaf or deaf-blind person pertaining to any action or other pending proceeding shall at all times remain confidential and privileged, unless the deaf or deaf-blind person executes a written waiver allowing the information to be communicated to other persons

> and the deaf or deaf-blind person is present at the time the information is communicated."

9. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Child Neglect

If a person listed as a mandatory reporter under MCL 722.623(1) suspects that a child is being abused or neglected, the person must report the suspected child abuse or child neglect.[24] MCL 722.623(1).

"MCL 722.631 governs privileges in child protective proceedings." MCR 3.901(A)(3). MCL 722.631 provides:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]."

"[A] communication [between a member of the clergy and a church member] [was] within the meaning of 'similarly confidential communication' when the church member d[id] not make an admission, but ha[d] a similar expectation that the information [would] be kept private and secret." *People v Prominski*, 302 Mich App 327, 328, 336-337 (2013) (where the parishioner "went to [her pastor] 'for guidance[and] advice'" to discuss "her concerns that her husband was abusing her daughters" and "'expected that the conversation be kept private[,]'" the parishioner's communication with the pastor was a confidential communication as contemplated by MCL 722.631, and the pastor was not required to report the

[24] For a detailed discussion of reporting suspected child abuse or child neglect, including a list of individuals who are required to report suspected child abuse or child neglect under MCL 722.623(1), see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 2.

suspected child abuse under the mandatory reporting statute, MCL 722.623(1)(a)).

Abrogation of privileges under MCL 722.631 does not depend on whether the person initiating the child protective proceeding was required to report the suspected abuse, or whether the proffered testimony directly addresses the abuse or neglect that gave rise to the protective proceeding. *In re Brock*, 442 Mich 101, 116-120 (1993) (physician and psychologist were permitted to testify concerning a parent's past history of mental illness despite the fact that a neighbor reported the suspected neglect that gave rise to the proceeding). See also MCR 3.973(E)(1), which states in relevant part that, "as provided by MCL 722.631, no assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment."

C. Privileged Material and Confidential Records

1. Work-Product Privilege

An attorney's work product, including notes of interviews with witnesses whom the attorney intends to call at trial, is not discoverable. *People v Holtzman*, 234 Mich App 166, 168-169 (1999); *People v Gilmore*, 222 Mich App 442, 453 (1997).

Note, however, that "written witness statements that have been signed or otherwise adopted or approved by the persons who made them, MCR 2.302(B)(3)(c)(*i*), and verbatim recorded statements as described in MCR 2.302(B)(3)(c)(*ii*) qualify as 'statements' under MCR 6.201(A)(2)[and may be subject to disclosure]."[25] *Holtzman*, 234 Mich App at 178-179. However, in *Holtzman*, the "trial court . . . erred in ruling that the [attorney] notes constituted a discoverable statement" where "the witness merely checked the notes for inaccuracies and for information about what questions the prosecutor would ask." *Id.* at 180.

Additionally, "a prosecutor's entire work product is privileged from disclosure under the [Freedom of Information Act (FOIA), MCL 15.231 *et seq.*]." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641 (1998). See also MCL 15.243(1)(g).

[25] "MCR 2.302(B)(3)(c) is part of the work-product privilege rule for civil discovery[, and . . . the civil work-product rule governs criminal discovery as well." *Holtzman*, 234 Mich App at 177.

2. Mental Health Records

MCL 330.1748(1) provides for the confidentiality of mental health records:

> "Information in the record of a recipient, and other information acquired in the course of providing mental health services to a recipient, shall be kept confidential and is not open to public inspection. The information may be disclosed outside the department, community mental health services program, licensed facility, or contract provider, whichever is the holder of the record, only in the circumstances and under the conditions set forth in this section or [MCL 330.1748a[26]]."

a. Confidentiality is Waived

Mental health records may be disclosed with the consent of the holder of the record and the recipient of treatment. *Kearney v Dep't of Mental Health*, 168 Mich App 406, 409 (1988).

b. Exceptions to Confidentiality

Relevant to criminal proceedings,[27] confidential information may be disclosed under court order or subpoena, unless protected by privilege; or when necessary to comply with another provision of law. MCL 330.1748(5)(a); MCL 330.1748(5)(d).

3. Prescription Records

"A prescription or equivalent record on file in a pharmacy is not a public record." MCL 333.17752(2).

a. Confidentiality is Waived

"A person having custody of or access to prescriptions shall not disclose their contents or provide copies without the patient's authorization[.]" MCL 333.17752(2).

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[26] MCL 330.1748a pertains to child abuse or child neglect investigations. For additional information on MCL 330.1748a, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 2.

[27] For a complete list of exceptions, see MCL 330.1748(5).

b. Exception to Confidentiality

"A prescription or equivalent record on file in a pharmacy" may be disclosed without the patient's authorization to "[a] person authorized by a court order." MCL 333.17752(2)(d).[28]

4. Records of Federal Drug or Alcohol Abuse Treatment Programs

"Records of the identity, diagnosis, prognosis, or treatment of any patient" in any federal drug or alcohol abuse prevention program are confidential. 42 USC 290dd-2(a).

a. Confidentiality is Waived

Disclosure of drug or alcohol abuse treatment program records is permissible with the patient's written consent, "but only to such extent, under such circumstances, and for such purposes as may be allowed under [42 CFR 2.]" 42 USC 290dd-2(b)(1).

b. Exception to Confidentiality

Regardless of patient consent, disclosure is permissible where a court orders disclosure of any or all portions of the record it deems necessary on a showing of good cause. 42 USC 290dd-2(b)(2)(C); 42 CFR 2.64(d). To make a good cause determination, "the court must find that:

> (1) Other ways of obtaining the information are not available or would not be effective; and
>
> (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services."[29, 30] 42 CFR 2.64(d).

"Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose

[28] For a complete list of exceptions, see MCL 333.17752(2).

[29] See also 42 USC 290dd-2(b)(2)(C), which also requires the court to "weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services" when assessing good cause.

appropriate safeguards against unauthorized disclosure." 42 USC 290dd-2(b)(2)(C). Safeguards against unauthorized disclosure include "requir[ing] the deletion of patient identifying information from any documents made available to the public" (when the disclosure is being ordered in the context of a criminal or administrative investigation of a record holder); "limit[ing] disclosure to those parts of the patient's records which are essential to fulfill the objective of the order; [l]imiting disclosure to those persons whose need for information is the basis for the order; and [i]nclude such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services[(]for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered)]." 42 CFR 2.64(e); 42 CFR 2.66(d)(1).[31]

Disclosure is also permissible where the disclosure is necessary to protect against an existing threat to life, or a threat of serious bodily injury, including circumstances that constitute suspected child abuse or neglect and verbal threats against third parties, or if disclosure is necessary to investigate or prosecute child abuse or neglect. 42 CFR 2.63(a)(1)-(2).

"[A] closed judicial hearing is required before a court may order the release of a substance abuse patient's confidential medical records." *In re Petition of Attorney General for Subpoenas (Attorney General v Mortiere)*, 327 Mich App 136, 156 (2019) ("the court erred when it determined that no hearing was required and when it failed to hold a hearing" before issuing a subpoena that

[30] Where "the court [does not] properly consider[] the issue of good cause" under 42 USC 290dd-2(b)(2)(C) and 42 CFR 2.64(d) before releasing patient records, the "error is not harmless." *In re Petition of Attorney General for Subpoenas (Attorney General v Mortiere)*, 327 Mich App 136, 153 n 6 (2019) (where "the court's order did not comply with 42 CFR 2.64(d)(1) because the court did not determine whether there were other ways of obtaining the necessary information," and "addressed only one side of the equation—the public interest and need for disclosure—without addressing the other side—the injury to the patient, physician-patient relationship, and treatment services, . . . the court never properly considered the issue of good cause").

[31] See *Mortiere*, 327 Mich App at 154 ("the trial court failed to follow the mandatory procedural safeguards [under 42 CFR 2.64(e) and 42 CFR 2.66(d)(1)] before ordering the disclosure of records" when it "limited the disclosure of the patients' treatment records by providing that 'all unique identifiers of patients shall be deleted or blocked out from all documents' before any disclosure to the public, and that disclosure was to be limited 'to those persons whose need for the information is related to the investigation of the licensee or any following administrative licensing action,' . . . [but then failed to] protect the patient, physician-patient relationship, and treatment services by 'other measures as are necessary to limit disclosure" by "not order[ing] that the administrative proceedings were to be closed and sealed to protect the patient's records").

authorized the release of substance abuse patient's confidential medical records).

5. Records of Child Abuse or Child Neglect Investigations

The Department of Health and Human Services (DHHS)[32] is required to maintain a registry of reports filed under the Child Protection Law, MCL 722.621 *et seq.*, in which relevant and accurate evidence of child abuse or child neglect is found. MCL 722.622(c); MCL 722.627(1). MCL 722.627(2) allows only limited access to such records:

> "(2) Unless made public as specified information released under [MCL 722.627d], a written report, document, or photograph filed with the [MDHHS] as provided in this act is a confidential record available only to 1 or more of the following:
>
> * * *
>
> (f) A person named in the report or record as a perpetrator or alleged perpetrator of the child abuse or child neglect or a victim who is an adult at the time of the request, if the identity of the person who made the report is protected as provided in [MCL 722.625].
>
> (g) A court for the purpose of determining the suitability of a person as a guardian of a minor or that otherwise determines that the information is necessary to decide an issue before the court, or in the event of a child's death, a court that had jurisdiction over that child under [MCL 712A.2(b).]"

For additional information on the DHHS central registry of reports filed under the Child Protection Law, see the Michigan Judicial Institute's, *Child Protective Proceedings Benchbook*, Chapter 2.

3.6 Access to Victim Impact Information

"The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a

[32] SeeMCL 722.622(q), which defines the term *department* to mean the Department of Health and Human Services (DHHS).

presentence investigation report [(PSIR).]" MCL 780.764 (applicable to felony cases). See also MCL 780.792 (providing a victim of a juvenile involved in juvenile proceedings, including designated proceedings, the same right if a presentence report is prepared in anticipation of disposition or sentencing); MCL 780.824 (providing a victim of a misdemeanor the same right if a PSIR is prepared). In all cases, a victim may request that his or her written impact statement be included in the presentence investigation report (PSIR).[33] MCL 771.14(2)(b); MCL 780.764; MCL 780.792(3); MCL 780.824. See also MCL 780.763(1)(c) and MCL 780.823(1)(c) (requiring the prosecuting attorney, upon request, to provide notice to the victim of his or her right "to make a written or oral impact statement for use in the preparation of a presentence investigation report concerning the defendant[]"), and MCL 780.791(2)(a) (requiring the person preparing the report to provide notice in juvenile proceedings).

PSIRs are privileged and cannot be a subject of discovery. See MCL 791.229; *Peters v Bay Fresh Start, Inc.*, 161 Mich App 491, 497-498 (1987) (reversing the trial court "insofar as it held that any of the probation officer's records or reports were discoverable[]"); *Havens v Roberts*, 139 Mich App 64, 68 (1984) ("[p]robation officers' reports are absolutely privileged [under MCL 791.229] and cannot be a subject of discovery[]"). However, where preservation of the confidentiality of PSIRs directly conflicts with the equally protected rights of confrontation and impeachment through prior inconsistent statements, a defendant's right of cross-examination for impeachment purposes outweighs the state's interest in the confidentiality of the reports. *People v Rohn*, 98 Mich App 593, 599-600 (1980), overruled on other grounds by *People v Perry*, 460 Mich 55 (1999).[34] Specifically, the *Rohn* Court provided:

> "[W]e must conclude that the need for impeachment of criminal accusations outweighs any need for confidentiality of presentence reports. This does not mean that defendants should receive wholesale access to the confidential records of others. We hold only that when records of prior inconsistent statements of witnesses are necessary for effective cross-examination, they should be made available to the defendant. An *in camera* inspection procedure should be utilized by the court to limit disclosure to those statements materially inconsistent with the witness's testimony." *Rohn*, 98 Mich at 600.

"The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not

[33] For a detailed discussion of victim impact statements, See Chapter 7.

[34] For more information on the precedential value of an opinion with negative subsequent history, see our note.

represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report."[35] MCR 6.425(B). See also MCL 771.14(7), which provides substantially similar requirements except that it includes a waiver provision for the defendant to waive the two-business day requirement; MCR 6.610(G)(1)(b), which provides substantially similar requirements for presentence reports prepared in district court.[36] For additional information on the inclusion of a victim impact statement in a presentence report and the exclusion of certain content contained in the victim impact statement, see Section 7.2.

> **Note:** The victim must be notified that the PSIR (or presentence report in juvenile designated cases) and his or her impact statement in the report will be made available to the defendant or juvenile and defense counsel unless the court exempts it from disclosure. MCL 780.763(1)(e); MCL 780.791(2)(c); MCL 780.823(1)(e).

3.7 Access to Court Records and Proceedings

Court records and confidential files are not subject to disclosure under Michigan's Freedom of Information Act (FOIA), as the judicial branch of government is specifically exempted from that act. MCL 15.232(h)(*iv*); MCL 15.233(1). However, court records are public except as otherwise indicated by law, court rule, or court order. See MCR 6.007; MCR 8.119(H)(1).

Specifically, MCR 8.119(H)(1) provides that "[u]nless access to a case record or information contained in a record as defined in [MCR 8.119(D)] is restricted by statute, court rule, or an order entered pursuant to [MCR 8.119(I)[37]], any person may inspect that record and may obtain copies as

[35] "If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court." MCR 6.425(B). See also MCR 6.610(G)(1)(b).

[36] For additional information on the Michigan Department of Corrections' (MDOC) handling of PSIRs, including its confidentiality requirements, see the MDOC's Policy Directive, PD 06.01.140, *Pre-Sentence Investigation and Report*, available at http://www.michigan.gov/documents/corrections/06_01_140_396739_7.pdf?20151207093447.

[37] MCR 8.119(I) pertains to sealed records. For additional information on sealing court records under MCR 8.119(I), see Section 3.7(D).

provided in [MCR 8.119(J)]."[38] Note that "[MCR 8.119] applies to all records in every trial court." MCR 8.119(A).

"MCR 8.119 governs a court's maintenance of court records, the public's access to those records, and the circumstances under which a court may seal, or perpetually prohibit the public's access, to those records." *Jenson v Puste*, 290 Mich App 338, 342 (2010).

This section examines specific restrictions designed to preserve the confidentiality of crime victims' identities and court records accessibility.

A. Preserving Confidentiality of Victim's Identifying Information

1. Felony Cases

"Records are public except as otherwise indicated in court rule or statute." MCR 6.007.

In Michigan, crime victims have a constitutional "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24. To protect this right, the Crime Victim's Rights Act (CVRA) exempts from disclosure under Michigan's Freedom of Information Act (FOIA), MCL 15.231 to MCL 15.246, the following information and visual representations of a crime victim:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim unless the address is used to identify the place of the crime.
>
> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed:
>
> (*i*) The victim's name and address.

[38] See MCR 8.119(H) for information on accessing public records, and MCR 8.119(J) for information on access and reproduction fees.

> (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
>
> (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused."[39] MCL 780.758(3).

A victim's address and telephone number maintained by the sheriff or Department of Corrections for notification purposes are exempt from disclosure under the FOIA, and must not be released. MCL 780.769(2). MCL 780.769a(3) also excludes from disclosure under the FOIA "[a] victim's address and telephone number maintained by a hospital or facility" for purposes of notification regarding a defendant's hospitalization or admittance by court order subsequent to the defendant being found not guilty by reason of insanity.

The CVRA also limits access to a victim's address and phone number from court files:

> "The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial." MCL 780.758(2).

A prosecutor may motion the court and ask that witnesses not be compelled to testify about a victim's identifying information:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at [the] defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of

[39] The provisions in MCL 780.758(3) "do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.758(4).

> employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera." MCL 780.758(1).

2. Serious Misdemeanor Cases

In Michigan, crime victims have a constitutional "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24. To protect this right, the CVRA exempts from disclosure under Michigan's FOIA, MCL 15.231 to MCL 15.246, the following information and visual representations of a crime victim:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim.
>
> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed:
>
> > (*i*) The victim's name and address.
> >
> > (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
> >
> > (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused."[40] MCL 780.818(2).

A victim's address and telephone number maintained by a court or sheriff are exempt from disclosure under Michigan's FOIA. MCL 780.830.

[40] The provisions in MCL 780.818(2) "do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.818(3).

A prosecutor may motion the court and ask that witnesses not be compelled to testify about a victim's identifying information:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at [the] defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera." MCL 780.818(1).

Although a victim's name, address, and telephone number must appear on certain documents related to the case, these documents "shall not be a matter of public record." MCL 780.812 (requiring "[a] law enforcement officer investigating a serious misdemeanor involving a victim [to] include with the complaint, appearance ticket, or traffic citation filed with the court a separate written statement including the name, address, and phone number of each victim[, and that] [t]his separate statement shall not be a matter of public record[]"); MCL 780.816(1) (requiring the court to send notice to the prosecuting attorney when a guilty or nolo contendere plea was accepted at arraignment "on a separate form and [to] include [on the notice] the name, address, and telephone number of the victim[, and that] [t]he notice shall not be a matter of public record[]").

3. Juvenile Delinquency Cases

In Michigan, crime victims have a constitutional "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24. To protect this right, the CVRA exempts from disclosure under Michigan's FOIA, MCL 15.231 to MCL 15.246, the following information and visual representations of a crime victim:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim.

> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed:
>
> > (*i*) The victim's name and address.
> >
> > (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
> >
> > (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused."[41] MCL 780.788(2).

A victim's address and telephone number maintained by a sheriff or the Department of Corrections for notification purposes are exempt from disclosure under Michigan's FOIA, and must not be released. MCL 780.798(5).

A prosecutor may motion the court and ask that witnesses not be compelled to testify about a victim's identifying information:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the juvenile or at [the] juvenile's direction against the victim or the victim's immediate family, the prosecuting attorney may move, or in the absence of the prosecuting attorney, the victim may request that the victim or any other witness not be compelled to testify at any court hearing for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera." MCL 780.788(1).

[41] The provisions in MCL 780.788(2) "do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.788(3).

> Although a victim's name, address, and telephone number must appear on certain documents related to the case, these documents "shall not be a matter of public record." MCL 780.784 (requiring "the investigating agency that files a complaint or submits a petition seeking to invoke the court's jurisdiction for a juvenile offense [to] file with the complaint, or petition a separate written statement listing any known victims of the juvenile offense and their addresses and phone numbers[, and that] [t]his separate statement shall not be a matter of public record[]").

B. Confidentiality of Records in Juvenile Delinquency Cases[42]

Except as otherwise required by MCR 3.903(A)(21),[43] all *case file records* under the Juvenile Code, MCL 712A.1 *et seq.*, are open to the general public, while *confidential files* are only open to individuals "who are found by the court to have a legitimate interest [in the file]." MCR 3.925(D)(1)-(2). "In determining whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law." MCR 3.925(D)(2). See also MCL 712A.28(2).

"Confidential files are defined in MCR 3.903(A)(3) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order." MCR 3.925(D)(2). Under MCR 3.903(A)(3)(b), the contents of a juvenile's social file, including victim statements, are part of the confidential file. MCR 3.903(A)(3)(b)(*vi*).

C. Name Changes

A crime victim may wish to change his or her name; MCL 711.3(1) addresses the confidentiality of name change proceedings:

> "In a [name change proceeding under MCL 711.1], the court may order for good cause that no publication of the proceeding take place and that the record of the proceeding be confidential. Good cause under [MCL 711.3] includes, but is not limited to, evidence that publication or availability of a record of the proceeding

[42] The provisions discussed in this subsection also apply to child protective proceeding cases. See MCR 3.901(B).

[43] MCR 3.903(A)(21) provides that until a petition is authorized, it is a nonpublic record accessible only by the court and the parties. After a petition is authorized, it and any associated records may be made nonpublic only if permitted by rule or statute. *Id*.

> could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking or an assaultive crime."

"Evidence under [MCL 711.3(1)] of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available." MCL 711.3(2). However, "[i]f evidence is offered of stalking or an assaultive crime, the court shall not require proof of arrest or prosecution for that crime to reach a finding of good cause under [MCL 711.3(1)]." *Id.*

MCL 711.3(3) imposes misdemeanor penalties on a "court officer, employee, or agent who divulges, uses, or publishes, beyond the scope of his or her duties with the court, information from a record made confidential under [MCL 711.3.]" However, no penalties apply to disclosures made under a court order. MCL 711.3(3).

"In cases where the court orders that records are to be confidential and that no publication is to take place, records are to be maintained in a sealed envelope marked confidential and placed in a private file." MCR 3.613(E). Unless the court orders otherwise, "only the original petitioner may gain access to confidential files[.]" *Id.* In addition, information about a confidential record, including whether it even exists, must not be publicly accessible. *Id.* See also MCL 711.3(4), which provides that confidential records created under this statute are exempt from disclosure under Michigan's FOIA.

D. Sealing Records

A victim may wish to seal the court record; MCR 8.119(I) governs the procedure for sealing court records:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts records, in whole or in part, in any action or proceeding, unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected,
> >
> > (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and

(c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.

(2) In determining whether good cause has been shown, the court must consider,

(a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and

(b) the interest of the public.

(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.

(4) Materials that are subject to a motion to seal a record in whole or in part must be made nonpublic temporarily pending the court's disposition of the motion.

(5) For purposes of this rule, 'court records' includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action.

(6) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office.

(8) Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C) without a motion to seal or require that a protective order issued under MCR 2.302(C) be filed with the Clerk of the Supreme Court and the State Court Administrative Office. A protective order issued under MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under this rule.

(9) Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection.

> If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D)."

"When considering a motion to seal court records in a civil or criminal matter[and] the motion involves an allegation of domestic violence, the court shall consider the safety of any alleged victim or potential victim of the domestic violence." MCL 600.2972(1).

1. Filing Documents Under Seal

"Public documents may not be filed under seal except when the court has previously entered an order in the case under MCR 2.302(C). However, a document may be made nonpublic temporarily before an order is entered as follows:

> (a) A filer may request that a public document be made nonpublic temporarily when filing a motion to seal a document under MCR 8.119(I). As part of the filing, the filer shall provide a proposed order granting the motion to seal and shall identify each document that is to be sealed under the order. The filer shall bear the burden of establishing good cause for sealing the document.
>
> (b) Pending the court's order, the filer shall serve on all the parties:
>
> > (*i*) copies of the motion to seal and the request to make each document nonpublic temporarily,
> >
> > (*ii*) each document to be sealed, and
> >
> > (*iii*) the proposed order.
>
> (c) The clerk of the court shall ensure that the documents identified in the motion are made nonpublic pending entry of the order.
>
> (d) Before entering an order sealing a document under this rule, the court shall comply with MCR 8.119(I). On entry of the order on the motion, the clerk shall seal only those documents stated in the court's order and shall remove the nonpublic status of any of the documents that were not stated in the order." MCR 1.109(D)(8).

2. Request to Seal a Personal Protection Order (PPO)

The court does not have the authority to seal personal protection orders (PPOs) under MCR 8.119(I)(1). See *Jenson v Puste*, 290 Mich App 338, 345 (2010), where the trial court properly denied the defendant's request for entry of a consent order to seal a PPO under MCR 8.119(I)(1) because "[MCR 8.119(I)(6)[44]] specifically prohibits a court from sealing court orders and opinions."

For a detailed discussion on PPOs, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5.

3. Access to Sealed Trial Court File During Appeal to Court of Appeals

If a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed filed will be referred to the trial court. *Id.*

E. Public Access to Search Warrant Affidavits

MCL 780.651(8) provides that, "[e]xcept as provided in [MCL 780.651(9)], an affidavit for a search warrant contained in any court file or court record retention system is nonpublic information." MCL 780.651(9) provides:

> "On the fifty-sixth day following the issuance of a search warrant, the search warrant affidavit contained in any court file or court record retention system is public information unless, before the fifty-sixth day after the search warrant is issued, a peace officer or prosecuting attorney obtains a suppression order from a judge or district court magistrate upon a showing under oath that suppression of the affidavit is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness. The suppression order may be obtained ex parte in the same manner that the search warrant was issued. An initial suppression order issued under this subsection expires on the fifty-sixth day after the order is issued. A second of subsequent suppression order may be obtained in the same manner as the initial suppression order and shall expire on a date specified in the order. This subsection and [MCL 780.651(8)] do not

[44] Formerly MCR 8.119(I)(5).

> affect a person's right to obtain a copy of a search warrant affidavit from the prosecuting attorney or law enforcement agency under the [FOIA], . . . MCL 15.231 to [MCL] 15.246."

F. Limitations on Access to Court Proceedings

MCR 8.116(D) sets out the procedures for limiting public access to court proceedings:

> "(1) Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
> >
> > (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
> >
> > (c) the court states on the record the specific reasons for the decision to limit access to the proceeding.
>
> (2) Any person may file a motion to set aside an order that limits access to a court proceeding under this rule, or objection to entry of such an order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies the motion or objection, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action.
>
> (3) Whenever the court enters an order limiting access to a proceeding that otherwise would be public, the court must forward a copy of the order to the State Court Administrative Office."

1. Closing Preliminary Examination to Members of the Public

Upon the motion of any party and satisfaction of certain conditions, the examining magistrate has the discretion to close to members of the general public the preliminary

examination of a person charged with any of the following offenses:

- Criminal sexual conduct in any degree;
- Assault with intent to commit criminal sexual conduct;
- Sodomy;
- Gross indecency;
- Any other offense involving sexual misconduct. MCL 766.9(1).

To close a preliminary examination to the public, the following conditions must be met:

> "(a) The magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination.
>
> (b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.
>
> (c) The magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public." MCL 766.9(1)(a)-(c).

When deciding whether it is necessary to close the preliminary examination for the protection a victim or witness, the magistrate must consider all of the following:

> "(a) The psychological condition of the victim or witness.
>
> (b) The nature of the offense charged against the defendant.
>
> (c) The desire of the victim or witness to have the examination closed to the public." MCL 766.9(2).

In addition, "[t]he magistrate may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

> (a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.

> (b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial." MCL 766.9(3).

In narrowly tailoring closure to accommodate the interests of a victim testifying about sensitive matters, the court should only close those portions of the examination in which such matters are discussed. *In re Closure of Preliminary Examination (People v Jones)*, 200 Mich App 566, 569-570 (1993).

2. Closing Criminal Trials to Members of the Public

All trials must be open to the public. See MCL 600.1420. See also US Const, Am VI and Const 1963, art 1, § 20 (providing a defendant with the right to a public trial). In addition, "a member of the public can invoke the right to a public trial under the First Amendment." *People v Vaughn (Joseph)*, 491 Mich 642, 652 (2012) (distinguishing between the public's right to a public trial under the First Amendment and a criminal defendant's right to a public trial under the Sixth Amendment), citing *Presley v Georgia*, 558 US 209, 212 (2010).

However, "for good cause shown, [the court may] exclude from the courtroom other witnesses in the case when they are not testifying and may, in actions involving scandal or immorality, exclude all minors from the courtroom unless the minor is a party or witness. This section shall not apply to cases involving national security." MCL 600.1420.

The requirements for *total* closure are: "(1) [t]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced[;] (2) the closure must be no broader than necessary to protect that interest[;] (3) the trial court must consider reasonable alternatives to closing the proceeding[;] and (4) it must make findings adequate to support the closure." *People v Kline*, 197 Mich App 165, 169 (1992), citing *Waller v Georgia*, 467 US 39, 48 (1984).

"A *partial* closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain, or when the closure order is narrowly tailored to specific needs." *Kline*, 197 Mich App at 170 n 2 (with emphasis and without internal citations). Because the effect of a partial closure does not rise to the level of a total closure, only a substantial (rather than a compelling) reason for the closure is necessary. *People v Russell (Fred)*, 297 Mich App 707, 720 (2012) (holding that limited courtroom capacity constituted a substantial reason for the partial closure of voir dire proceedings and did not deny the defendant his right to a

public trial); see also *People v Gibbs (Phillip)*, 299 Mich App 473, 481-482 (2013) (no error occurred where, before jury selection began, the trial court stated that spectators were welcome to enter, "but [the courtroom was] then closed once jury selection began[]" because the trial court found it "'too confusing' to allow individuals to come and go during jury selection[;]" furthermore, even if error occurred, the defendant was "not entitled to a new trial or evidentiary hearing[] . . . [where] both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, . . . each side expressed satisfaction with the jury[, and] . . . the venire itself was present[]"); *Kline*, 197 Mich App at 170.

"The parties may not, by their mere agreement, empower a judge to exclude the public and press." *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 549 (1979).

The right to a public trial extends to pretrial hearings, *Waller*, 467 US at 43-47, and the jury selection process, *Presley*, 558 US at 212-216; *Vaughn (Joseph)*, 491 Mich at 650-652.

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials[,]" e.g., "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Presley*, 558 US at 215-216 (trial court improperly excluded public from courtroom during jury selection process without considering alternatives to closure).

3. Closing Juvenile Delinquency Proceedings to Members of the Public

Generally, all juvenile court proceedings on the formal calendar and all preliminary hearings must be open to the public. MCR 3.925(A)(1). However, on motion of a party or a victim, the court may close proceedings to the general public during the testimony of a child-witness or a victim to protect the child-witness's or victim's welfare. MCL 712A.17(7); MCR 3.925(A)(2). In deciding whether to close juvenile proceedings, the court must consider:

- the age and maturity of the witness or victim;
- the nature of the proceeding; and
- the witness's or victim's preference, and if the witness or victim is a child, the preference of his or her parent,

guardian, or legal custodian. MCL 712A.17(7); MCR 3.925(A)(2).

For purposes of MCL 712A.17(7), a child-witness does not include the juvenile against whom the proceeding is brought. MCL 712A.17(8); MCR 3.925(A)(2).

Except where the victim requests a copy of the adjudication order under MCL 780.799, the records from a hearing that is closed under MCL 712A.17(7) must only be opened by court order to persons having a legitimate interest. MCL 712A.28(2).

G. Media Access to Court Proceedings

The press has no greater right of access to court proceedings than does the public. *In re Midland Publishing Co, Inc*, 420 Mich 148, 162 (1984).

See Administrative Order No. 1989-1, 432 Mich cxii (1989), regarding film or electronic media coverage of court proceedings.

H. Gag Orders

The term *gag order* refers to a court order directed to attorneys, witnesses, and parties prohibiting them from discussing a case with reporters, or to a court order prohibiting reporters from publishing information related to a case. A court order prohibiting reporters from publishing information related to a case is unconstitutional. *Nebraska Press Ass'n v Stuart*, 427 US 539, 556 (1976) ("[t]he [United States Supreme] Court has interpreted [First Amendment] guarantees to afford special protection against orders that [impose a prior restraint on speech by] prohibit[ing] the publication or broadcast of particular information or commentary[]"). "A prior restraint on a First Amendment right will be upheld only if there is a clear showing that the exercise of the First Amendment right will interfere with the right to a fair trial." *People v Sledge*, 312 Mich App 516, 531 (2015). "In order to determine whether the right to a fair trial justified the prior restraint, a court 'must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important.'" *Id.*, quoting *Nebraska Press Ass'n*, 427 US at 562.

MCR 8.116(D)(1) should be followed in assessing whether to grant a gag order prohibiting discussion of the case with reporters. A gag order that is reasonable and serves a legitimate purpose that

overrides any limited incidental effects on First Amendment rights is permissible. *In re Detroit Free Press*, 463 Mich 936 (2000).

"[A] gag order precluding all potential trial participants from making any extrajudicial statement regarding the case to the media or to any person for the purpose of dissemination to the public[] . . . [was] overbroad and vague . . . [and] constituted a prior restraint on the freedom of speech, freedom of expression, and the freedom of the press[.]" *Sledge*, 312 Mich App at 537 (noting that "the vague and overbroad scope of people covered by the gag order indicate[d] that it [was] an impermissible prior restraint on . . . freedom of expression[,]" and that "[a]lthough the gag order [did] not directly prohibit the media from discussing the case, it prohibit[ed] the most meaningful sources of information from discussing the case with the media[,]" thereby impairing "the right of the [intervening newspaper] to obtain information from all potential trial participants"). Additionally, the trial court erred by "fail[ing] to make findings of fact or conclusions of law to justify the gag order[,]" which was issued sua sponte for the ostensible purpose of protecting the defendants' right to a fair trial; the court did not "consider the nature and extent of the pretrial news coverage, whether the gag order would prevent the danger to [the] defendants' right to a fair trial, whether there were any willing speakers[,] . . . and whether there were any alternatives to the gag order." *Id*. at 531.

If "there were willing speakers that [a] court intend[s] to preclude from speaking[]" by issuing a gag order, a news agency "[has] standing to challenge the gag order [both] as a recipient of speech and as a news gatherer." *Sledge*, 312 Mich App at 526, 527 (holding that where a newspaper "identified at least one willing speaker who felt restrained because of [a] gag order[,]" and "the gag order cut the [newspaper] off from access to important sources of information since it prohibited any potential trial participant from speaking with the news media regarding the case[,]" the newspaper had standing to challenge the order).

3.8 Limitations on Duplication of Evidence in Sexually Abusive Crimes Involving Children

"In any criminal proceeding regarding an alleged violation or attempted violation of [MCL 750.145c], the court shall deny any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any photographic or other pictorial evidence of a child engaging in a listed sexual act if the prosecuting attorney makes that evidence reasonably available to the defendant. Evidence is considered to be reasonably available to the defendant under this subsection if the prosecuting attorney provides an opportunity to the defendant and his or her

attorney, and any person the defendant may seek to qualify as an expert witness at trial, to inspect, view, and examine that evidence at a facility approved by the prosecuting attorney." MCL 750.145c(11).

3.9 Confidentiality in Crime Victim Compensation Proceedings[45]

The Crime Victim Services Commission (CVSC) may reimburse crime victims eligible for awards of compensation under the Crime Victims Compensation Act, MCL 18.351 *et seq.*, for certain crime-related expenses. See MCL 18.353(1)(c); MCL 18.353(1)(j). This section contains a brief discussion on the confidentiality and non-disclosure of information the CVSC collects for purposes of the crime victim compensation proceedings. For a detailed discussion of crime victim compensation awards from the CVSC, see Chapter 9.

A. Victim of Sexual Assault

"Except with the victim's consent or as otherwise provided in this subsection, information collected by the [CVSC] under this section that identifies a victim of sexual assault is exempt from disclosure under the [FOIA], . . . MCL 15.231 to [MCL] 15.246, shall not be obtained by subpoena or in discovery, and is inadmissible as evidence in any civil, criminal, or administrative proceeding. Information collected by the [CVSC] under this section that identifies a victim of sexual assault is confidential and shall only be used for the purposes expressly provided in this act, including, but not limited to, investigating and prosecuting a civil or criminal action for fraud related to reimbursement provided by the [CVSC] under this section." MCL 18.355a(9).

B. Record of Proceeding Before CVSC

"The record of a proceeding before the [CVSC] is a public record, except that a claimant's file and his or her testimony before the [CVSC] is exempt from disclosure under the [, MCL 15.231 *et seq.*]. . . . A record or report obtained by the [CVSC], the confidentiality of which is protected by any other law or rule, shall remain confidential." MCL 18.363.

[45]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

C. Information Regarding Claims or Proceedings Before CVSC is Inadmissible in Criminal Proceedings

"For purposes of this act, information relating to the filing of a claim by a claimant before the [CVSC] or proceedings before the [CVSC], an emergency award made by the [CVSC] pursuant to [MCL 18.359], or final awards made by the [CVSC] pursuant to [MCL 18.361(2)] are inadmissible in a criminal proceeding." MCL 18.365.

3.10 Confiscation and Disposal of Items in Prisoner's Possession That Pertain to Victim

"Upon the request of a victim or a victim's representative, the department shall confiscate and dispose of any of the following that are in the possession of a prisoner:

(a) Any item belonging to that victim or that formerly belonged to that victim.

(b) A photograph, drawing, or other visual image or representation of the victim." MCL 791.269(1).

Chapter 4: Crime Victim's Rights During Prosecution of Case

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4.1 Constitutional Right of Crime Victim to be Treated Fairly[1]

The Michigan Constitution provides crime victims with "[t]he right to be treated with fairness and respect for their dignity . . . throughout the criminal justice process." Const 1963, art 1, § 24(1).

4.2 Constitutional Right of Crime Victim to Confer With Prosecuting Attorney[2]

The Michigan Constitution provides crime victims with "[t]he right to confer with the prosecution." Const 1963, art 1, § 24(1).

4.3 Statutory Right of Crime Victim to Consult With Prosecuting Attorney[3]

In all cases falling under the CVRA, crime victims have the right to consult with the prosecuting attorney before the prosecuting attorney finalizes a plea agreement with the defendant or the juvenile, agrees to placement of the defendant or the juvenile in a pretrial diversion program, or agrees to an informal disposition of the juvenile. See MCL 780.756(3); MCL 780.816(3); MCL 780.786(4); MCL 780.786b(2). Because the procedures in criminal and juvenile cases differ, a victim's rights to consult with the prosecutor differ depending on the type of case involved.

A. Felony Cases

"Before finalizing any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the prosecution for the crime, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs." MCL 780.756(3).

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[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[3]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

B. Serious Misdemeanor Cases[4]

"If the defendant has not already entered a plea of guilty or nolo contendere at the arraignment, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about the disposition of the serious misdemeanor, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs before finalizing any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion." MCL 780.816(3).

C. Juvenile Cases

MCL 780.786(4) provides a victim of a juvenile offense with the right to consult with the prosecuting attorney before reducing the original charge, as follows:

> "If the juvenile has not already entered a plea of admission or no contest to the original charge at the preliminary hearing, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the offense, including the victim's views about dismissal, waiver, and pretrial diversion programs, before finalizing any agreement to reduce the original charge."

MCL 780.786b(2) also provides a victim of a juvenile offense with the right to consult with the prosecuting attorney before disposition of the case through an informal procedure:

> "Before finalizing any informal disposition, preadjudication, or expedited procedure, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about that manner of disposing of the case."

4.4 Crime Victim's Role in Sentence Bargaining and Plea Agreements[5]

Plea agreement and sentence bargaining refer generally to an agreement reached by the prosecutor, the defendant's attorney, and the defendant

[4] See the glossary for a definition of serious misdemeanor.

[5] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

about the crime(s) to which the defendant has agreed to plead guilty or nolo contendere in exchange for an agreed-on sentence or sentence recommendation. This section contains a brief discussion of the role the victim has in sentence bargaining and plea agreements. For additional information on sentence bargains and plea agreements in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7.

"If there is a plea agreement [reached between the prosecutor and the defendant] and its terms provide for the defendant's plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may

> (a) reject the agreement; or
>
> (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to a specified term or within a specified range as agree to; or
>
> (c) accept the agreement without having considered the presentence report; or
>
> (d) take the plea agreement under advisement.
>
> If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow [a prosecutorial] sentence recommendation does not entitle the defendant to withdraw the defendant's plea."[6] MCR 6.302(C)(3).

Note: In all felony cases, the victim of the original offense may request that his or her written impact statement be included in the presentence investigation report (PSIR). MCL 771.14(2)(b); see also MCL 780.763(1)(c) (requiring the prosecuting attorney, upon request, to provide notice to the victim of his or her right "to make a written or oral impact statement for use in the preparation of a presentence investigation report

[6] See MCR 6.310 for the procedures required for a defendant to withdrawal his or her plea.

concerning the defendant[]"). For a detailed discussion of victim impact statements, see Chapter 7.

4.5 Crime Victim's Impact in Juvenile Delinquency Cases[7]

Under the Juvenile Code and related court rules, the Family Division Circuit Court has several procedural options when a petition or complaint is filed in a delinquency proceeding. This section addresses the crime victim's impact on these procedures. For a complete discussion of the court's options in juvenile delinquency cases, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

"When a petition [filed in a juvenile delinquency case] is not accompanied by a request for detention of the juvenile, the court may conduct a preliminary inquiry." MCR 3.932(A). If the juvenile is in custody or the petitioner requests that the juvenile be taken into custody, the court must conduct a preliminary hearing. See MCL 712A.14(2); MCR 3.932(A).

During a preliminary inquiry and subject to procedural requirements imposed under the CVRA,[8] MCR 3.932(A)(1)-(5) allow the court to choose one of the following procedural avenues that will serve the interest of the juvenile and the public:

> "(1) deny authorization of the petition;
>
> (2) refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.*;
>
> (3) direct that the juvenile and the parent, guardian, or legal custodian be notified to appear for further informal inquiry on the petition;
>
> (4) proceed on the consent calendar as provided in [MCR 3.932(C)]; or
>
> (5) [authorize the filing of the petition and proceed] on the formal calendar as provided in [MCR 3.932(D)]."

[7]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[8] For the procedural requirements imposed under the CVRA, see Section 4.5(B) (the CVRA requiring the court to accept certain petitions) and Section 4.5(C) (the CVRA setting out certain requirements that must be met before removing a case from the adjudicative process).

During a preliminary hearing and subject to procedural requirements imposed under the CVRA,[9] MCR 3.935(B)(3) authorizes the court to choose one of the following procedural avenues:

(1) dismiss the petition;

(2) refer the matter to alternative services under the Juvenile Diversion Act;

(3) proceed on the consent calendar under MCR 3.932(C); or

(4) continue with the preliminary hearing.

A. Preliminary Inquiry Must Be on Record

MCR 3.932(A) requires a preliminary inquiry to be conducted on the record if the juvenile delinquency case involves an offense enumerated under the CVRA, MCL 780.781(1)(g).

The enumerated offenses set out under MCL 780.781(1)(g) are:

> "(*i*) A violation of a penal law of this state for which a juvenile offender, if convicted as an adult, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony.
>
> (*ii*) A violation of [MCL 750.81] (assault and battery, including domestic violence), [MCL 750.81a] (assault; infliction of serious injury, including aggravated domestic violence), [MCL 750.115] (breaking and entering or illegal entry), [MCL 750.136b(7)] (child abuse in the fourth degree), [MCL 750.145] (contributing to the neglect or delinquency of a minor), [MCL 750.145d] (using the internet or a computer to make a prohibited communication), [MCL 750.233] (intentionally aiming a firearm without malice), [MCL 750.234] (discharge of a firearm intentionally aimed at a person), [MCL 750.235] (discharge of an intentionally aimed firearm resulting in injury), [MCL 750.335a] (indecent exposure), or [MCL 750.411h] (stalking) . . . .
>
> (*iii*) A violation of [MCL 257.601b(2)] (injuring a worker in a work zone) or [MCL 257.617a] (leaving the scene of a personal injury accident) . . ., or a violation of [MCL 257.625] (operating a vehicle while under the influence

[9] For the procedural requirements imposed under the CVRA, see Section 4.5(B) (the CVRA requiring the court to accept certain petitions) and Section 4.5(C) (the CVRA setting out certain requirements that must be met before removing a case from the adjudicative process).

of or impaired by intoxicating liquor or a controlled substance,[10] or with unlawful blood alcohol content) . . ., if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

(*iv*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of . . . MCL 436.1701, if the violation results in physical injury or death to any individual.

(*v*) A violation of [MCL 324.80176(1)] or [MCL 324.80176(3)] (operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with unlawful blood alcohol content) . . ., if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.[11]

(*vi*) A violation of a local ordinance substantially corresponding to a law enumerated in subparagraphs (*i*) to (*v*).

(*vii*) A violation described in subparagraphs (*i*) to (*vi*) that is subsequently reduced to a violation not included in subparagraphs (*i*) to (*vi*)." MCL 780.781(1)(g)(*i*)-(*vii*).

B. The Court Must Accept Certain Petitions

"The court shall accept a petition submitted by a prosecuting attorney that seeks to invoke the court's jurisdiction for a juvenile offense, unless the court finds on the record that the petitioner's allegations are insufficient to support a claim of jurisdiction under [MCL 712A.2(a)(1)]." MCL 780.786.

C. Removing Case From Adjudicative Process

If the juvenile delinquency case involves an offense enumerated under the CVRA, MCL 780.781(1)(g),[12] the court must comply with

[10] Effective March 31, 2013, MCL 257.625 was amended to include "other intoxicating substance[s]" in its various provisions dealing with the unlawful operation of a motor vehicle. MCL 780.781(1)(g) has not yet been amended to reflect this change.

[11] Effective March 31, 2015, MCL 324.80176(1) and MCL 324.80176(3) were amended to replace the term *vessel* with the term *motorboat*, to replace the term *intoxicating* with the term *alcoholic*, and to include "any amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in [MCL 333.7214(a)(*iv*)]" in its provisions dealing with the unlawful operation of a motorboat. MCL 780.781(1)(g) has not yet been amended to reflect this change.

the requirements set out under the CVRA in order to remove the case from the adjudicative process. MCR 3.932(B). See also MCL 712A.2f(3), which permits the court, in cases involving an offense enumerated under the CVRA, MCL 780.781, to "transfer a case from the formal calendar to the consent calendar at any time before disposition[]" only upon compliance with the procedures set out in MCL 780.786b.[13]

MCL 780.786b governs the process for removing a juvenile case from the adjudicative process. "The plain language of MCL 780.786b(1) contains several procedural steps that the family court must fulfill before deciding to remove from the adjudicative process a juvenile case in which it is alleged that the minor committed a CVRA offense." *In re Lee*, 282 Mich App 90, 95 (2009). MCL 780.786b specifically requires:

> "(1) Except for a dismissal based upon a judicial finding on the record that the petition and the facts supporting it are insufficient to support a claim of jurisdiction under [MCL 712A.2(a)(1)] . . ., a case involving the alleged commission of an offense, as defined in [MCL 780.781], by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process. Before any formal or informal action is taken, the prosecutor shall give the victim notice of the time and place of the hearing on the proposed removal of the case from the adjudicative process.[14] The victim has the right to attend the hearing and to address the court at the hearing. As part of any other order removing any case from the adjudicative process, the court shall order the juvenile or the juvenile's parents to provide full restitution as provided in [MCL 780.794].[15]

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[12] For a list of enumerated offenses set out under MCL 780.781(1)(g), see Section 4.5(A)

[13] "A case shall not be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian and the prosecutor agree to have the case placed on the consent calendar." MCL 712A.2f(2).

[14] See also MCR 3.932(C)(4), which, after a case is placed on the consent calendar, requires the prosecutor to "provide the victim notice as required by article 2 of the [CVRA], MCL 780.781 to [MCL] 780.802." MCR 3.932(C)(1). For additional information on notification requirements under the CVRA, see Chapter 5.

[15] For a detailed discussion of restitution, see Chapter 8.

> (2) Before finalizing any informal disposition, preadjudication, or expedited procedure, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about that manner of disposing of the case."[16]

"[T]he plain language of MCL 780.786b(1) requires notice to the prosecutor and the victim of the alleged offense of the time and place of a hearing 'before the case is removed from the adjudicative process.'" *In re Lee*, 282 Mich App at 104 (disagreeing with the trial court's "conclusion that it can comply with MCL 780.786b(1) by scheduling a hearing after it has rendered its ruling to transfer a CVRA case to the consent calendar[]" but ultimately concluding that the court did actually comply with the notice requirements).

"It is true that MCL 780.786b(1) requires the trial court to give notice to the prosecution before conducting a 'prepetition or preadjudication procedure that removes the case from the adjudicative process.' However, MCL 780.786b recognizes a trial court's authority to remove a case from the adjudicative process *preadjudication*, so long as the trial court complies with certain procedural requirements." *In re D*, 329 Mich App 671, 693 (2019) ("on the basis of the plain language of MCL 780.786b(1), the trial court was permitted to remove the second and third petitions from the adjudicative process because those petitions had not yet been adjudicated").

1. Trial Court's Compliance With CVRA Requirements

a. Trial Court Complied With CVRA Requirements

The trial court complied with the requirements of MCL 780.786b(1) where although written notice was not provided to the victim, the court gave oral notice to counsel at the first dispositional hearing of its belief that the consent calendar was appropriate for the case, the victim was present at this hearing and expressed her views to the court, the prosecutor spoke with the victim and stated its and the victim's objections to reassigning the case, and the court followed up with a letter to the prosecuting attorney and defense counsel informing them "that the court believed the case was an appropriate one for the consent calendar, and that 'it is appropriate for us to appear in court, on the record, so that all concerns and

[16] For additional information on the victim's right to consult with the prosecuting attorney in a juvenile proceeding, see Section 4.3(C).

objections can be codified.'" *In re Lee*, 282 Mich App at 104-105. "Although the court's notice of the time and place scheduled for the hearing did not specifically state that the purpose was to consider removing the case from the adjudicative process," the letter informing the parties that it believed the case was appropriate for the consent calendar "constituted substantial compliance with MCL 780.786b(1) and MCR 3.932(B)." *In re Lee*, 282 Mich App at 105.

b. Trial Court Failed to Comply with CVRA Requirements

The trial court "failed to comply with the requirements of MCL 780.786b(1) by not providing the prosecutor with written notice of the court's intent to remove the case from the adjudicative process and notice of the time and place of a hearing on the proposed removal[where a]lthough the court furnished the prosecutor notice of an adjudicative-dispositional hearing, nothing in that written notice apprised the prosecutor that the court might remove the case from the adjudicative process by transferring the case to the court's consent calendar." *In re Lee*, 282 Mich App at 98-99.

2. Placement on Consent Calendar

"After a case is placed on the consent calendar, the prosecutor shall provide the victim with notice as required by [the CVRA, Article 2 (Juvenile Article)]."[17] MCL 712A.2f(4).

The victim and prosecutor may, but are not required, to be present for the consent calendar hearing that the court must conduct with "the juvenile, the juvenile's attorney, if any, and the juvenile's parent, guardian, or legal custodian to discuss the allegations." MCL 712A.2f(6). If the court determines that the juvenile engaged in conduct that subjects the juvenile to the court's jurisdiction, it must issue a written consent calendar plan. MCL 712A.2f(7)(a). The written plan must include, among other provisions, "a requirement that the juvenile pay restitution under the [CVRA]."[18] MCL 712A.2f(7)(a).

For additional information on the procedural steps of consent calendars, see MCL 712A.2f and MCR 3.972(C).

[17] For additional information on notification requirements under the CVRA, Article 2, see Section 5.7(B).

[18] For a detailed discussion on restitution, see Chapter 8.

4.6 Crime Victim's Role in Prosecution of Identity Theft[19]

"To facilitate compliance with 15 USC 1681g,[20] a bona fide victim of identity theft is entitled to file a police report with a law enforcement agency in a jurisdiction where the alleged violation of identity theft may be prosecuted as provided under . . . MCL 762.10c, and to obtain a copy of that report from that law enforcement agency."[21] MCL 780.754a(1); MCL 780.783b(1); MCL 780.814a(1). Unless MCL 762.10c(3) applies,[22] MCL 762.10c(1) permits the prosecution of identity theft crimes in the jurisdiction where the offense occurred, in the jurisdiction where the "information used to commit the violation was illegally used[,]" or in the jurisdiction where the victim lives.

4.7 Crime Victim's Role in Offender's Admission to Problem-Solving Court[23]

A. Right to Submit Written Statement to Drug Treatment Court Regarding Admission

An individual charged with a criminal offense or a juvenile "alleged to have engaged in activity that would constitute a criminal act if committed by an adult" may be eligible for admission to drug treatment court if he or she meets certain eligibility requirements as set out in MCL 600.1060 *et seq*. MCL 600.1068.[24]

In addition to the rights accorded a crime victim under the CVRA, MCL 600.1068(4) requires a drug treatment court to "permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted,

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[19]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[20] "For the purpose of documenting fraudulent transactions resulting from identity theft," 15 USC 1681g(e)(1) and 15 USC 1681g(e)(1)(2)(B) require a victim of identity theft to provide a copy of a police report as proof of the victim's claim of being a victim of identity theft.

[21] For the procedures required to prosecute identity theft crimes, see the Identity Theft Protection Act, MCL 445.61 *et seq.*

[22] MCL 762.10c(3) states that an individual charged with more than one violation of the Identity Theft Protection Act or MCL 750.539k may be prosecuted for *all* charged crimes in any jurisdiction where *any* of the charged crimes may be prosecuted.

[23] For a thorough discussion of problem-solving courts, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9. For a discussion of relevant problem-solving courts as they relate to juveniles, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1. For additional information on problem-solving court programs, including standards and best practice manuals, see http://courts.mi.gov/administration/admin/op/problem-solving-courts/pages/default.aspx.

[24] For a detailed discussion of drug treatment courts, see the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 9.

and members of the community in which either the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the drug treatment court."

B. Right to Submit Written Statement to Veterans Treatment Court Regarding Admission

A veteran charged with a criminal offense may be eligible for admission to a veterans treatment court if he or she meets certain eligibility requirements as set out in MCL 600.1200 *et seq*. MCL 600.1205(1).

In addition to the rights accorded a victim under the CVRA, MCL 600.1205(4) requires the veterans treatment court to "permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the veterans treatment court."

C. Right to Submit Written Statement to Mental Health Court Regarding Admission

An individual charged with a criminal offense may be eligible for admission to a mental health court if he or she meets certain eligibility requirements as set out in MCL 600.1090 *et seq*. MCL 600.1094(1).

"In addition to rights accorded a victim under the [CVRA]," MCL 600.1094(4) requires the mental health court to "permit any victim of the offense or offenses of which the individual is charged as well as any victim of a prior offense of which that individual was convicted to submit a written statement to the court regarding the advisability of admitting the individual into the mental health court."

D. Right to Submit Written Statement to Juvenile Mental Health Court Regarding Admission

A juvenile "alleged to have engaged in activity that would constitute a criminal act if committed by an adult" may be eligible for admission to a juvenile mental health court if he or she meets certain eligibility requirements as set out in MCL 600.1099b *et seq*. MCL 600.1099f(1).

"In addition to rights accorded a victim under the [CVRA]," MCL 600.1099g requires the juvenile mental health court to "permit any victim of the offense or offenses for which the juvenile has been petitioned to submit a written statement to the court regarding the advisability of admitting the juvenile into the juvenile mental health court."

4.8 Limitations on Crime Victim's Role in Prosecution of Case[25]

"[I]n criminal cases, the prosecutor alone possesses the authority to determine whether to prosecute the accused." *People v Williams (Anterio)*, 244 Mich App 249, 254 (2001). "[C]rime victims do [] have rights with respect to the prosecution of their offender . . . [through] both [the Michigan C]onstitution and the [CVRA,] . . . [but t]hese provisions 'were intended to enable victims to be compensated fairly for their suffering at the hands of convicted offenders[,]'. . . [and t]he [CVRA] ensures the victim's participation in the criminal proceedings against the offender, if desired. . . . However, nowhere in the laws of this state have crime victims been given authority to determine whether the [Penal C]ode has been violated or whether the prosecution of a crime should go forward or be dismissed." *Id.* at 251, 253-254 (the trial court erred in dismissing the assault charges against the defendant after the victim-girlfriend failed to appear at trial to testify against the defendant and in "concluding that the victim[-girlfriend] did not want [the] defendant prosecuted and that the present offense was a private crime rather than a public crime[]").

4.9 Crime Victim's Right to Confer With the Prosecuting Attorney Before Jury Selection and Trial[26]

In felony cases, the crime victim has the right to confer with the prosecuting attorney before jury selection and trial:

[25]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[26]Previously, "all jury trials [were] delayed . . . until June 22, 2020[], or as otherwise provided for by local order, whichever date [was] later." See Administrative Order No. 2020-10. However, effective June 26, 2020, "[c]ourts that have progressed to Phase 3 under the Return to Full Capacity guidance document under Administrative Order No. 2020-14 shall begin holding jury trials using trial standards approved by the State Court Administrative Office." Administrative Order No. 2020-19(1). "[C]ourts that are not yet at Phase 3 may proceed with jury trials upon approval from the State Court Administrative Office." *Id*. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

> "Upon request of the victim, the prosecuting attorney shall confer with the victim prior to the selection of the jury and prior to the trial of the defendant." MCL 780.760.

In misdemeanor cases, the crime victim has the right to confer with the prosecuting attorney before trial:

> "Upon request of the victim, the prosecuting attorney shall confer with the victim prior to the trial of the defendant." MCL 780.820.

Note that the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, does not contain any provisions providing the crime victim with the right to confer with the prosecuting attorney before jury selection or trial in juvenile proceedings.[27]

4.10 Return of Crime Victim's Property[28]

Under MCL 780.754(1), "[t]he law enforcement agency having responsibility for investigating a reported crime shall promptly return to the victim property belonging to that victim which is taken in the course of the investigation" unless:

- the property is contraband, which must not be returned. MCL 780.754(2).
- "the ownership of the property is disputed[,]" which must not be returned "until the dispute is resolved." MCL 780.754(3).
- the property is a weapon "used in the commission of the crime[,]" which must be retained as evidence, or "any other evidence if the prosecuting attorney certifies that there is a need to retain that evidence in lieu of a photograph or other means of memorializing its possession by the agency." MCL 780.754(4).

See also MCL 780.783(1)-(4), which contains substantially similar language for the investigation of a reported offense in juvenile proceedings; MCL 780.814(1)-(4), which contains substantially similar language for the investigation of a reported serious misdemeanor.

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[27] The victim in a juvenile proceeding does, however, have the right to consult with the prosecuting attorney and provide his or her views about the disposition of the case "[b]efore finalizing any informal disposition, preadjudication, or expedited procedure[.]"

[28] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

4.11 Employer Cannot Penalize Crime Victim or Crime Victim Representative

An employer who penalizes a crime victim for attending court to testify may be guilty of a misdemeanor and in contempt of court:

> "An employer or the employer's agent, who threatens to discharge or discipline or who discharges, disciplines, or causes to be discharged from employment or to be disciplined a victim because that victim is subpoenaed or requested by the prosecuting attorney to attend court for the purpose of giving testimony, is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both, and may be punished for contempt of court." MCL 780.762(1); MCL 780.790(1); MCL 780.822(1).

An employer who penalizes a crime victim representative for attending court during the victim's testimony may be guilty of a misdemeanor and in contempt of court:

> "An employer or an employer's agent who disciplines or discharges a victim representative from employment, causes a victim representative to be disciplined or discharged from employment, or threatens to discipline or discharge a victim representative from employment because that victim representative attends or desires to attend court to be present during the testimony of the victim, is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both, and may be punished for contempt of court." MCL 780.762(2); MCL 780.790(2); MCL 780.822(2).

Chapter 5: Victim Notification

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5.1 Constitutional Right of Crime Victim to Notification

The Michigan Constitution provides crime victims with "[t]he right to notification of court proceedings[, and] . . . [t]he right to information about the conviction, sentence, imprisonment, and release of the accused." Const 1963, art 1, § 24(1).

5.2 Overview of Notification Requirements[1]

Throughout the legal process, certain persons are required to provide certain agencies and crime victims with notification of an offender's status. See the Michigan Judicial Institute's tables providing an overview of notification requirements under the CVRA Article I, Article II, Article III, and under other acts.

Committee Tip:

Because the court is not the only entity required to provide victim notification, the court should be aware of other notification requirements when scheduling and rescheduling hearings.

5.3 Notification of Available Crime Victim Services[2]

A. Notification Requirements Under the CVRA

"Within 24 hours after the initial contact between the victim of a reported crime and the law enforcement agency having the responsibility for investigating that crime, that agency shall give to the victim the following information in writing:

> (a) The availability of emergency and medical services, if applicable.
>
> (b) The availability of victim's compensation benefits and the address of the crime victims compensation board.

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

(c) The address and telephone number of the prosecuting attorney whom the victim should contact to obtain information about victim's rights.

(d) The following statements:

> 'If you would like to be notified of an arrest in your case or the release of the person arrested, or both, you should call [identify law enforcement agency and telephone number] and inform them.'
>
> 'If you are not notified of an arrest in your case, you may call this law enforcement agency at [the law enforcement agency's telephone number] for the status of the case.'" MCL 780.753.

See also MCL 780.782, which contains substantially similar language for the investigation of a reported offense in juvenile proceedings, and MCL 780.813(1), which contains substantially similar language for the investigation of a reported serious misdemeanor).

If the defendant is charged with a violation of a local ordinance corresponding to a serious misdemeanor, "the law enforcement agency having responsibility for investigating the serious misdemeanor shall give to the victim the name and business address of the local prosecuting attorney for the political subdivision responsible for prosecuting the case along with the following statement:

> 'The defendant in your case will be prosecuted under a local ordinance, rather than a state statute. Nonetheless, you have all the rights and privileges afforded to victims under the state constitution and the state crime victim's rights act.'" MCL 780.813(2).

B. Notification Requirements Under the Sexual Assault Victim's Access to Justice Act

The Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, requires the investigating law enforcement agency to provide certain information to a sexual assault victim. This section contains a brief discussion on the notification requirements under the Act. For more information on the Sexual Assault Victim's Access to Justice Act, see the Michigan Department of Health and Human Services, *Sexual Assault Victims Access to Justice Act*.

"Within 24 hours after the initial contact between a sexual assault victim and the investigating law enforcement agency, that

investigating law enforcement agency shall give the sexual assault victim a written copy of, or access to, the following information:

> (a) Contact information for a local community-based sexual assault services program, if available.
>
> (b) Notice that he or she can have a sexual assault evidence kit administered and that he or she cannot be billed for this examination as provided in . . . MCL 18.355a.
>
> (c) Notice that he or she may choose to have a sexual assault evidence kit administered without being required to participate in the criminal justice system or cooperate with law enforcement as provided in . . . MCL 18.355a.
>
> (d) Notice of the right to request information under [MCL 752.955] and [MCL 752.956].[3]
>
> (e) Notice of the right to request a personal protection order as provided in . . . MCL 600.2950 [or MCL] 600.2950a."[4] MCL 752.953(1).[5]

C. Notification Requirements Under the Code of Criminal Procedure for Domestic Violence Incidents

The Code of Criminal Procedure, MCL 764.15c(1), requires a peace officer to provide a victim with written notice following the intervention or investigation of a domestic violence incident:[6]

> "After investigating or intervening in a domestic violence incident, a peace officer shall provide the victim with a copy of the notice in this section. The notice shall be written and shall include all of the following:
>
> > (a) The name and telephone number of the responding police agency.

---

[3] MCL 752.955 and MCL 752.956 require the investigating law enforcement agency to provide to the sexual assault victim, at the victim's request, certain information regarding the status of the case and DNA testing results, "if available and if the disclosure does not impede or compromise an ongoing investigation[.]"

[4] For additional information on personal protection orders under MCL 600.2950 and MCL 600.2950a, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5.

[5] "Beginning not later than September 30, 2015, law enforcement agencies shall provide sexual assault victims with the information required in [MCL 752.953(1)]." MCL 752.953(4).

[6] For a detailed discussion of domestic violence in general, see the Michigan Judicial Institute's *Domestic Violence Benchbook*.

(b) The name and badge number of the responding peace officer.

(c) Substantially the following statement:

> 'You may obtain a copy of the police incident report for your case by contacting this law enforcement agency at the telephone number provided.
>
> The domestic violence shelter program and other resources in your area are (include local information).
>
> Information about emergency shelter, counseling services, and the legal rights of domestic violence victims is available from these resources.
>
> Your legal rights include the right to go to court and file a petition requesting a personal protection order to protect you or other members of your household from domestic abuse which could include restraining or enjoining the abuser from doing the following:
>
>> (a) Entering onto premises.
>>
>> (b) Assaulting, attacking, beating, molesting, or wounding you.
>>
>> (c) Threatening to kill or physically injure you or another person.
>>
>> (d) Removing minor children from you, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.
>>
>> (e) Engaging in stalking behavior.
>>
>> (f) Purchasing or possessing a firearm.
>>
>> (g) Interfering with your efforts to remove your children or personal property from premises that are solely owned or leased by the abuser.
>>
>> (h) Interfering with you at your place of employment or education or engaging in conduct that impairs your employment

> relationship or your employment or educational environment.
>
> (i) Engaging in any other specific act or conduct that imposes upon or interferes with your personal liberty or that causes a reasonable apprehension of violence.
>
> (j) Having access to information in records concerning any minor child you have with the abuser that would inform the abuser about your address or telephone number, the child's address or telephone number, or your employment address.
>
> Your legal rights also include the right to go to court and file a motion for an order to show cause and a hearing if the abuser is violating or has violated a personal protection order and has not been arrested.'"

MCL 764.15c(2) also requires the officer who investigates or intervenes in a domestic violence incident to prepare a standard domestic violence incident report form describing the incident.[7]

5.4 Notification Regarding Arrest and Pretrial Release[8]

A. Felony Cases

"Not later than 24 hours after the arraignment of the defendant for a crime, the law enforcement agency having responsibility for investigating the crime shall give to the victim notice of the availability of pretrial release for the defendant, the telephone number of the sheriff or juvenile facility, and notice that the victim may contact the sheriff or juvenile facility to determine whether the defendant has been released from custody. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the defendant, or both, if the victim requests or has requested that information. If the defendant is released from custody by the sheriff

[7] See MCL 764.15c(2) for a list of information that must be included in the domestic violence report. MCL 764.15c(3) also requires "[t]he law enforcement agency [to] retain the completed domestic violence report in its files[, and] . . . file a copy of the completed domestic violence report with the prosecuting attorney within 48 hours after the domestic violence incident is reported to the law enforcement agency."

[8] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters, including information about pretrial release.

or juvenile facility, the sheriff or juvenile facility shall notify the law enforcement agency having responsibility for investigating the crime." MCL 780.755(1).

B. Juvenile Cases

"If the juvenile has been placed in a juvenile facility, not later than 48 hours after the preliminary hearing of that juvenile for a juvenile offense, the prosecuting attorney or, pursuant to an agreement under [MCL 780.798a[9]], *the court shall give to the victim the telephone number of the juvenile facility and notice that the victim may contact the juvenile facility to determine whether the juvenile has been released from custody*. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the juvenile, or both, if the victim requests or has requested that information. If the juvenile is released from custody by the sheriff or juvenile facility, the sheriff or juvenile facility shall notify the law enforcement agency having responsibility for investigating the crime." MCL 780.785(1) (emphasis added).

C. Serious Misdemeanor Cases

"Not later than 72 hours after the arrest of the defendant for a serious misdemeanor, the law enforcement agency having responsibility for investigating the serious misdemeanor shall give to the victim notice of the availability of pretrial release for the defendant, the phone number of the sheriff, and notice that the victim may contact the sheriff to determine whether the defendant has been released from custody. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the defendant, or both, if the victim requests or has requested that information. If the defendant is released from custody by the sheriff, the sheriff shall notify the law enforcement agency having responsibility for investigating the crime." MCL 780.815.

[9] In juvenile cases, MCL 780.798a authorizes "[t]he court [to] perform the notification functions delegated to the prosecuting attorney under [the CVRA] if both of the following circumstances exist: (a) The prosecuting attorney allows the court to perform those functions pursuant to a written agreement. (b) The court performed those functions before the effective date of [1993 PA 341, effective May 1, 1994]."

5.5 Statements That Must Be Included With or On Charging Documents

A. Juvenile Proceedings

"The investigating agency that files a complaint or submits a petition seeking to invoke the court's jurisdiction for a juvenile offense shall file with the complaint or petition a separate statement listing any known victims of the juvenile offense and their addresses and phone numbers. This separate statement shall not be a matter of public record." MCL 780.784.

Additionally, the investigating agency or prosecuting attorney must place a statement on the complaint or petition if the offense resulted in "damage to another individual's property or physical injury or death to another individual[:]"

> "The investigating agency or prosecuting attorney that files a complaint or submits a petition seeking to invoke the court's jurisdiction for a juvenile offense described in MCL 780.781(1)(g)(*iii*)], [MCL 780.781(1)(g)(*iv*)], or [MCL 780.781(1)(g)(*v*)], or a local ordinance substantially corresponding to a juvenile offense described in [MCL 780.781(1)(g)(*iii*)], [MCL 780.781(1)(g)(*iv*)], or [MCL 780.781(1)(g)(*v*)], shall place a statement on the complaint or petition that the offense resulted in damage to another individual's property or physical injury or death to another individual."[10] MCL 780.783a.

The offenses set out under MCL 780.781(1)(g)(*iii*)-(*v*) are:

> (*iii*) A violation of [MCL 257.601b(2)] (injuring a worker in a work zone) or [MCL 257.617a] (leaving the scene of a personal injury accident) . . ., or a violation of [MCL 257.625] (operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance,[11] or with unlawful blood alcohol content) . . ., if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

[10] For purposes of MCL 780.783a, the term *offense* was formerly defined under MCL 780.781(1)(d). The term is now defined under MCL 780.781(1)(g), but the statutory reference under MCL 780.783a has not yet been amended to reflect this change.

[11] Effective March 31, 2013, MCL 257.625 was amended to include "other intoxicating substance[s]" in its various provisions dealing with the unlawful operation of a motor vehicle. MCL 780.781(1)(g) has not yet been amended to reflect this change.

> (*iv*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of . . . MCL 436.1701, if the violation results in physical injury or death to any individual.
>
> (*v*) A violation of [MCL 324.80176(1)] or [MCL 324.80176(3)] (operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with unlawful blood alcohol content) . . ., if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual."[12] MCL 780.781(1)(g)(*iii*)-(*v*).

B. Serious Misdemeanor Cases

"A law enforcement officer investigating a serious misdemeanor involving a victim shall include with the complaint, appearance ticket, or traffic citation filed with the court a separate written statement including the name, address, and phone number of each victim. This separate statement shall not be a matter of public record." MCL 780.812.

Additionally, the law enforcement officer or prosecuting attorney must place a statement on the "complaint, appearance ticket, traffic citation, or other charging instrument" if the serious misdemeanor offense resulted in "damage to another individual's property or physical injury or death to another individual[:]"

> "A law enforcement officer or prosecuting attorney who files with the court a complaint, appearance ticket, traffic citation, or other charging instrument regarding a serious misdemeanor described in [MCL 780.811(1)(a)(*xv*), MCL 780.811(1)(a)(*xvi*), or MCL 780.811(1)(a)(*xvii*)[13]], or a local ordinance substantially corresponding to a serious misdemeanor described in section [MCL 780.811(1)(a)(*xv*), [MCL 780.811(1)(a)(*xvi*), or MCL 780.811(1)(a)(*xvii*)], shall place a statement on the complaint, appearance ticket, traffic citation, or

[12] Effective March 31, 2015, MCL 324.80176(1) and MCL 324.80176(3) were amended to replace the term *vessel* with the term *motorboat*, to replace the term *intoxicating* with the term *alcoholic*, and to include "any amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in [MCL 333.7214(a)(*iv*)]" in its provisions dealing with the unlawful operation of a motorboat. MCL 780.781(1)(g) has not yet been amended to reflect this change.

[13] Note that effective January 1, 2007, 2006 PA 461 renumbered MCL 780.811. However, MCL 780.811a has not been amended to reflect these changes and still references to provisions of MCL 780.811 as they existed before the renumbering.

> other charging instrument that the offense resulted in damage to another individual's property or physical injury or death to another individual." MCL 780.811a.

5.6 Notification of Removal of Juvenile Delinquency Case From Adjudicative Process

A. Notification Before Removal of Case

MCL 780.786b governs the process for removing a juvenile case from the adjudicative process. "[T]he plain language of MCL 780.786b(1) requires notice to the prosecutor and the victim of the alleged offense of the time and place of a hearing 'before the case is removed from the adjudicative process.'" *In re Lee*, 282 Mich App 90, 104 (2009) (disagreeing with the trial court's "conclusion that it can comply with MCL 780.786b(1) by scheduling a hearing after it has rendered its ruling to transfer a CVRA case to the consent calendar[]" but ultimately concluding that the court did actually comply with the notice requirements).

Specifically, MCL 780.786b(1) provides in relevant part:

> "Except for a dismissal based upon a judicial finding on the record that the petition and the facts supporting it are insufficient to support a claim of jurisdiction under . . . MCL 712A.2, a case involving the alleged commission of an offense, as defined in [MCL 780.781(1)(g)], by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process. Before any formal or informal action is taken, the prosecutor shall give the victim notice of the time and place of the hearing on the proposed removal of the case from the adjudicative process.[14] The victim has the right to attend the hearing and to address the court at the hearing. . . ."[15]

[14] See also MCR 3.932(C)(4), which, after a case is placed on the consent calendar, requires the prosecutor to "provide the victim notice as required by article 2 of the [CVRA], MCL 780.781 to [MCL] 780.802." MCR 3.932(C)(1). For additional information on notification requirements under the CVRA, see Chapter 5.

For additional information on the procedural steps the court must fulfill before it can remove a juvenile delinquency case from the adjudicative process, see Section 4.3(C).

B. Notification After Removal of Case

"After a case is placed on the consent calendar, the prosecutor shall provide the victim with notice as required by [the CVRA, Article 2 (Juvenile Article)]."[16] MCL 712A.2f(4). For additional information on placing a case on the consent calendar as it relates to crime victims, see Section 4.5(C).

5.7 Notification of Court Procedures, Crime Victim's Rights, and Court Schedule

In all cases under the CVRA, the prosecuting attorney must provide the crime victim with certain information regarding court procedures, the crime victim's rights, and the court schedule.

A. Felony Cases

"Not later than 7 days after the defendant's arraignment for a crime, but not less than 24 hours before a preliminary examination, the prosecuting attorney shall give to each victim a written notice in plain English of each of the following:

> (a) A brief statement of the procedural steps in the processing of a criminal case.
>
> (b) A specific list of the rights and procedures under this article.
>
> (c) A convenient means for the victim to notify the prosecuting attorney that the victim chooses to exercise his or her rights under this article.
>
> (d) Details and eligibility requirements for compensation from the crime victim services commission [(CVSC)] under . . . MCL 18.351 to [MCL] 18.368.[17]

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[15] For additional information on the victim's right to consult with the prosecuting attorney in a juvenile proceeding, see Section 4.3(C).

[16] For additional information on notification requirements under the CVRA, Article 2, see Section 5.7(B).

[17] For additional information on the crime victim compensation awards from the CVSC, see Chapter 9.

> (e) Suggested procedures if the victim is subjected to threats or intimidation.
>
> (f) The person to contact for further information." MCL 780.756(1).
>
> > **Note:** A victim who receives a notice under MCL 780.756(1) and who chooses to exercise his or her rights under the CVRA must keep certain persons, including the prosecuting attorney, informed of his or her current address and telephone number. MCL 780.756(4)(a). For a detailed discussion of the crime victim's obligations to keep certain persons informed of the victim's contact information, see Section 5.14(A).

At the crime victim's request, the prosecuting attorney must provide the victim with "notice of any scheduled court proceedings and any changes in that schedule." MCL 780.756(2).

"[T]he prosecuting attorney [must also] offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the prosecution for the crime, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs[,]" "[b]efore finalizing any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion[.]" MCL 780.756(3). For a detailed discussion of the crime victim's rights to consult with the prosecuting attorney, see Chapter 4.

B. Juvenile Proceedings

"Within 72 hours after the prosecuting attorney files or submits a petition seeking to invoke the court's jurisdiction for an offense, the prosecuting attorney, or the court pursuant to an agreement under [MCL 780.798a[18]], shall give to each victim a written notice in plain English of each of the following:

> (a) A brief statement of the procedural steps in processing a juvenile case, including the fact that a juvenile may be tried in the same manner as an adult in a designated case or waived to the court of general criminal jurisdiction.

[18] In juvenile cases, MCL 780.798a authorizes "[t]he court [to] perform the notification functions delegated to the prosecuting attorney under [the CVRA] if both of the following circumstances exist: (a) The prosecuting attorney allows the court to perform those functions pursuant to a written agreement. (b) The court performed those functions before the effective date of [1993 PA 341, effective May 1, 1994]."

(b) A specific list of the rights and procedures under this article.

(c) A convenient means for the victim to notify the prosecuting attorney that the victim chooses to exercise his or her rights under this article.

(d) Details and eligibility requirements for compensation from the crime victim services commission [(CVSC)] under . . . MCL 18.351 to [MCL] 18.368.[19]

(e) Suggested procedures if the victim is subjected to threats or intimidation.

(f) The person to contact for further information." MCL 780.786(2).

Note: A victim who receives a notice under MCL 780.786(2)[20] and who chooses to exercise his or her rights under the CVRA must keep certain persons, including the prosecuting attorney (or the court if an agreement under MCL 780.798a exists), informed of his or her current address and telephone number. MCL 780.786(5)(a). For a detailed discussion of the crime victim's obligations to keep certain persons informed of the victim's contact information, see Section 5.14(B).

"If the victim requests, the prosecuting attorney, or the court pursuant to an agreement under [MCL 780.798a], shall give the victim notice of any scheduled court proceedings and any changes in that schedule." MCL 780.786(3).

"If the juvenile has not already entered a plea of admission or no contest to the original charge at the preliminary hearing, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the offense, including the victim's views about dismissal, waiver, and pretrial diversion programs, before finalizing any agreement to reduce the original charge." MCL 780.786(4). For a detailed discussion of the crime victim's rights to consult with the prosecuting attorney, see Chapter 4.

[19] For additional information on the crime victim compensation awards from the CVSC, see Chapter 9.

[20] Formerly MCL 780.786(1).

C. Serious Misdemeanor Cases

Within 48 hours after a defendant's arraignment, *the court must notify the prosecuting attorney if it accepts a defendant's guilty or nolo contendere plea*, or if no plea is accepted but further proceedings will be scheduled. MCL 780.816(1) (emphasis added). If the court accepts a defendant's guilty or nolo contendere plea at arraignment, within 48 hours after the arraignment, *the court must also notify the prosecuting attorney of the sentencing date*. *Id.* (emphasis added). "A notice to the prosecuting attorney under [MCL 780.816(1)] shall be on a separate form and shall include the name, address, and telephone number of the victim. The notice shall not be a matter of public record." *Id.*

"Within 48 hours after receiving [notification from the court], the prosecuting attorney shall give to each victim a written notice in plain English of each of the following:

> (a) A brief statement of the procedural steps in the processing of a misdemeanor case, including pretrial conferences.
>
> (b) A specific list of the rights and procedures under this article.
>
> (c) A convenient means for the victim to notify the prosecuting attorney that the victim chooses to exercise his or her rights under this article.
>
> (d) Details and eligibility requirements for compensation from the [CVSC], MCL 18.351 to [MCL] 18.368.[21]
>
> (e) Suggested procedures if the victim is subjected to threats or intimidation.
>
> (f) The person to contact for further information." MCL 780.816(1).

At the crime victim's request, the prosecuting attorney must provide the victim with "notice of any scheduled court proceedings and notice of any changes in that schedule." MCL 780.816(2).

> **Note:** A victim who receives a notice under MCL 780.816(1) or MCL 780.816(2) and who chooses to exercise his or her rights under the CVRA must keep certain individuals, including the prosecuting

[21] For additional information on the crime victim compensation awards from the CVSC, see Chapter 9.

attorney, informed of his or her current address and telephone number. MCL 780.816(5)(a). For a detailed discussion of the crime victim's obligations to keep certain persons informed of the victim's contact information, see Section 5.14(C).

"If the defendant has not already entered a plea of guilty or nolo contendere at the arraignment, the prosecuting attorney [must also] offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about the disposition of the serious misdemeanor, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs before finalizing any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion." MCL 780.816(3). For a detailed discussion of the crime victim's rights to consult with the prosecuting attorney, see Chapter 4.

5.8 Notification of Case Outcome and of Crime Victim's Rights to Participate in Process

In all cases under the CVRA, the prosecuting attorney must provide information to the victim that informs the victim of the case outcome and of the crime victim's rights to participate in the process.

A. Duty to Notify Extends to Resolution of Case By Assignment to Trainee Status, Delayed Sentenced, or Deferred Judgment of Guilt

In all cases under the CVRA, the court's, the Department of Corrections's (DOC), the Department of Health and Human Services's (DHHS), a county sheriff's, or a prosecuting attorney's duty to provide notice to a victim applies even when the case against the offender is "resolved by assignment of the [offender] to trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal." MCL 780.752a; MCL 780.781a; MCL 780.811b.

In providing notice to the victim, "the court, [the DOC], [the DHHS], [the] county sheriff, or [the] prosecuting attorney may furnish information or records to the victim that would otherwise be closed to public inspection, including information or records [related to an offender's youthful trainee assignment]." MCL 780.752a; MCL 780.781a; MCL 780.811b.

B. Notification of Conviction or Adjudication and of Victim's Right to Participate in Sentencing or Disposition

1. Notification of Conviction in Felony Cases and Victim's Right to Participate in Sentencing

At the victim's request and "by any means reasonably calculated to give prompt actual notice[,]" the prosecuting attorney must provide the crime victim with notice of:

> "(a) The defendant's conviction.
>
> (b) The crimes for which the defendant was convicted.
>
> (c) The victim's right to make a written or oral impact statement for use in the preparation of a presentence investigation report concerning the defendant.[22]
>
> (d) The address and telephone number of the probation office which is to prepare the presentence investigation report.
>
> (e) That a presentence investigation report and any statement of the victim included in the report will be made available to the defendant unless exempted from disclosure by the court.
>
> (f) The victim's right to make an impact statement at sentencing.
>
> (g) The time and place of the sentencing proceeding."[23] MCL 780.763(1)-(2).

"A notice given under [MCL 780.763(1)] shall inform the victim that his or her impact statement may include but shall not be limited to the following:

> (a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.

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[22] A court must use a presentence investigation report (PSIR) when sentencing a defendant for a felony offense. MCL 771.14(1); *People v Hemphill*, 439 Mich 576, 579 (1992). For additional information on PSIRs, see the Michigan Judicial Institute, *Criminal Proceedings Benchbook, Vol. 2*, Chapter 6.

[23] See, however, *People v Pfeiffer*, 207 Mich App 151, 155, 160 (1994) (prosecutor's failure to notify the victim's family of the sentencing date did not justify resentencing the defendant even though the victim was unable to address the court at sentencing because "the court had a victim impact statement in the PSIR, and where the sentencing went forward without objection by the prosecutor[]").

> (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
>
> (c) An opinion of the need for and extent of restitution[24] and whether the victim has applied for or received compensation for loss or damage.[25]
>
> (d) The victim's recommendation for an appropriate sentence."[26] MCL 780.763(3).

If a juvenile sentencing hearing is required in automatic waiver proceedings,[27] the court must determine whether to sentence the juvenile as an adult or place the juvenile on juvenile probation and commit him or her to the state under MCL 769.1b. MCR 6.931(A). "On request, *the court shall notify the victim of the juvenile sentencing hearing*." *Id.* (Emphasis added.)

2. Notification of Adjudication or Conviction in Juvenile Proceedings and Victim's Right to Participate in Disposition Hearing or Sentencing

At the victim's request, the prosecuting attorney (or the court if an agreement under MCL 780.798a[28] exists) must provide the crime victim with notice of:

> "(a) The offenses for which the juvenile was adjudicated or convicted.
>
> (b) The victim's right to make an impact statement at the disposition hearing or sentencing.
>
> (c) The time and place of the disposition or sentencing proceeding." MCL 780.791(1).

"If a report is to be prepared for the juvenile's disposition or for a sentencing in a proceeding that is a designated case, the

[24] For a detailed discussion of restitution, see Chapter 8.

[25] For a detailed discussion of crime victim compensation awards, see Chapter 9.

[26] For additional information on victim impact statements, see Chapter 7.

[27] A juvenile sentencing hearing is required unless the juvenile is convicted of an offense listed in MCL 769.1(1)(a)-(*l*), in which case the juvenile must "be sentenced in the same manner as an adult." MCR 6.931(A).

[28] In juvenile cases, MCL 780.798a authorizes "[t]he court [to] perform the notification functions delegated to the prosecuting attorney under [the CVRA] if both of the following circumstances exist: (a) The prosecuting attorney allows the court to perform those functions pursuant to a written agreement. (b) The court performed those functions before the effective date of [1993 PA 341, effective May 1, 1994]."

person preparing the report shall give notice to the victim of all of the following:

> (a) The victim's right to make an impact statement for use in preparing the report.
>
> (b) The address and telephone number of the person who is to prepare the report.
>
> (c) The fact that the report and any statement of the victim included in the report will be made available to the juvenile unless exempted from disclosure by the court." MCL 780.791(2). See also MCL 780.792(1).

The victim may request that his or her statement be included in the report. MCRL 780.792(3).

"If no presentence report is prepared, *the court shall notify the prosecuting attorney of the date and time of sentencing at least 10 days prior to the disposition or sentencing*." MCL 780.792(2) (emphasis added).

"A notice under [MCL 780.791(1)] or [MCL 780.791(2)] shall inform the victim that his or her impact statement may be oral or written and may include, but shall not be limited to, any of the following:

> (a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
>
> (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
>
> (c) An opinion of the need for and extent of restitution[29] and whether the victim has applied for or received compensation for loss or damage.[30]
>
> (d) The victim's recommendation for an appropriate sentence."[31] MCL 780.791(3).

"The victim has the right to appear and make an oral impact statement at the juvenile's disposition or sentencing."[32] MCL 780.793(1).

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[29] For a detailed discussion of restitution, see Chapter 8.

[30] For a detailed discussion of crime victim compensation awards, see Chapter 9.

[31] For additional information on victim impact statements, see Chapter 7.

3. Notification of Conviction in Serious Misdemeanor Cases and Participation in Sentencing

At the victim's request, the prosecuting attorney must provide the crime victim with notice of:[33]

> "(a) The defendant's conviction.
>
> (b) The offenses for which the defendant was convicted.
>
> (c) If a presentence investigation report is to be prepared, the victim's right to make a written or oral impact statement for use in the preparation of the presentence investigation report concerning the defendant.
>
> (d) The address and telephone number of the probation office which is to prepare the presentence investigation report.
>
> (e) That a presentence investigation report and any statement of the victim included in the report will be made available to the defendant unless exempted from disclosure by the court.
>
> (f) The victim's right to make an impact statement at sentencing.
>
> (g) The time and place of the sentencing proceeding." MCL 780.823(1).

Note: Use of a presentence investigation report (PSIR) in misdemeanor cases is at the court's discretion.[34] MCL 771.14(1). "If a [PSIR] concerning the defendant is prepared, the victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing the report pursuant to . . . MCL 771.14."[35] MCL 780.824. "If no presentence report is prepared, *the court shall notify the*

[32] "If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney." MCL 780.793(1).

[33] "The notice given by the prosecuting attorney to the victim must be given by any means reasonably calculated to give prompt actual notice." MCL 780.823(2).

[34] For additional information on PSIRs, see the Michigan Judicial Institute, *Criminal Proceedings Benchbook, Vol. 2*, Chapter 6.

> *prosecuting attorney of the date and time of sentencing at least 10 days prior to the sentencing*." MCL 780.825(1) (emphasis added).

"A notice given under [MCL 780.823(1)] shall inform the victim that his or her impact statement may include but shall not be limited to the following:

> (a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
>
> (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
>
> (c) An opinion of the need for and extent of restitution[36] and whether the victim has applied for or received compensation for loss or damage.[37]
>
> (d) The victim's recommendation for an appropriate sentence."[38] MCL 780.823(3).

"The victim has the right to submit a written impact statement and has the right to appear and make an oral impact statement at the sentencing of the defendant[, and] . . . [t]he court shall consider the victim's statement in imposing sentence on the defendant."[39] MCL 780.825(1).

"Unless the court has determined, in its discretion, that the defendant is behaving in a disruptive manner or presents a threat to the safety of any individuals present in the courtroom, the defendant must be physically present in the courtroom at the time a victim makes an oral impact statement[.]" MCL 780.825(2). "In making its determination, . . . the court may consider any relevant statement provided by the victim regarding the defendant

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[35] The victim may request that his or her written impact statement be included in the PSIR. MCL 771.14(2)(b). If the victim so requests, the victim's written impact statement must be included in the report. MCL 780.824.

[36] For a detailed discussion of restitution, see Chapter 8.

[37] For a detailed discussion of crime victim compensation awards, see Chapter 9.

[38] For additional information on victim impact statements, see Chapter 7.

[39] "If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney." MCL 780.825(1).

being physically present during that victim's oral impact statement." *Id*.

C. Notification of Disposition

1. Notification of Final Disposition in Felony Cases

"Upon the request of a victim, the prosecuting attorney shall, within 30 days of the final disposition of the case, notify the victim in writing of the final disposition of the case." MCL 780.772.

2. Notification of Disposition in Juvenile Delinquency Proceedings

"Upon request, the victim shall be notified by the prosecuting attorney, or, pursuant to an agreement under [MCL 780.798a[40]], the court of the disposition of the juvenile's offense not more than 30 days after the disposition is made." MCL 780.793(2).

3. Notification of Final Disposition in Serious Misdemeanor Cases

"Upon the request of a victim, the prosecuting attorney shall, within 30 days of the final disposition of the case, notify the victim in writing of the final disposition of the case." MCL 780.827.

However, if the case is dismissed, "the prosecuting attorney shall notify the victim of the dismissal within 48 hours." MCL 780.816(4).

5.9 Notification of Appeal

A. Felony Cases

"Upon the request of the victim, the prosecuting attorney shall notify the victim of the following:

[40] In juvenile delinquency cases, MCL 780.798a authorizes the prosecuting attorney to enter a written agreement that the court will perform many of the prosecutor's notification duties if the court performed those functions before May 1, 1994.

(a) That the defendant filed an appeal of his or her conviction or sentence or that the prosecuting attorney filed an appeal.

(b) Whether the defendant has been ordered released on bail or other recognizance pending the disposition of the appeal. If the prosecuting attorney is notified that the defendant has been ordered released on bail or other recognizance pending disposition of the appeal, the prosecuting attorney shall use any means reasonably calculated to give the victim notice of that order within 24 hours after the prosecuting attorney is notified of the order.

(c) The time and place of any appellate court oral arguments and any changes in the time or place of those arguments.

(d) The result of the appeal. If the conviction is ordered reversed, the sentence is vacated, the case is remanded for a new trial, or the prosecuting attorney's appeal is denied, and if the prosecuting attorney has filed the appropriate notice with the appellate court, the appellate court shall expedite delivery of the relevant document to the prosecuting attorney's office by any means reasonably calculated to give the prosecuting attorney prompt notice. The prosecuting attorney shall use any means reasonably calculated to give the victim notice of that order within 24 hours after the prosecuting attorney is notified of the order." MCL 780.768a(1).

Note: "If the prosecuting attorney is not successful in notifying the victim of an event described in [MCL 780.768a(1)] within the period set forth in that subsection, the prosecuting attorney shall notify the victim of that event as soon as possible by any means reasonably calculated to give the victim prompt actual notice." MCL 780.768a(2).

In addition to providing notice, the prosecuting attorney must also "provide the victim with a brief explanation in plain English of the appeal process, including the possible dispositions." MCL 780.768a(3).

"If the case is returned to the trial court for further proceedings or a new trial, the victim has the same rights as previously requested during the proceedings that led to the appeal." MCL 780.768a(4).

For criminal cases where "the prosecuting attorney file[d] a notice of a victim's request for information and proof that copies of the notice were served on the other parties to an appeal," MCR 7.215(H) requires, "coincident with [the Court of Appeals] issuing an order or opinion that reverses a conviction, vacates a sentence, remands a case to the trial court for a new trial, or denies the prosecuting attorney's appeal, . . . the clerk of the court [to] electronically transmit a copy of the order or opinion to the prosecuting attorney at a facsimile number or electronic mail address provided by the prosecuting attorney in the notice"."

B. Juvenile Proceedings

"Upon the request of the victim, the prosecuting attorney shall notify the victim of the following:

> (a) That the juvenile filed an appeal of his or her adjudication, conviction, disposition, or sentence or the prosecuting attorney filed an appeal.
>
> (b) Whether the juvenile has been ordered released on bail or other recognizance pending the disposition of the appeal. If the prosecuting attorney is notified that the juvenile has been ordered released on bail or other recognizance pending disposition of the appeal, the prosecuting attorney shall use any means reasonably calculated to give the victim notice of that order within 24 hours after the prosecuting attorney is notified of the order.
>
> (c) The time and place of any appellate court oral arguments and any changes in the time or place of those arguments.
>
> (d) The result of the appeal. If the disposition or conviction is ordered reversed, the sentence is vacated, the case is remanded for a new trial, or the prosecuting attorney's appeal is denied, and if the prosecuting attorney has filed the appropriate notice with the appellate court, the appellate court shall expedite delivery of the relevant document to the prosecuting attorney's office by any means reasonably calculated to give the prosecuting attorney prompt notice. The prosecuting attorney shall use any means reasonably calculated to give the victim notice of that order within 24 hours after the prosecuting attorney is notified of the order." MCL 780.796(1).

> **Note:** "If the prosecuting attorney is not successful in notifying the victim of an event described in [MCL 780.796(1)] within the period set forth in that subsection, the prosecuting attorney shall notify the victim of that event as soon as possible by any means reasonably calculated to give the victim prompt actual notice." MCL 780.796(2).

In addition to providing notice, the prosecuting attorney must also "provide the victim with a brief explanation in plain English of the appeal process, including the possible dispositions." MCL 780.796(3).

"If the case is returned to the court for further proceedings or a new trial, the victim has the same rights as previously requested during the proceedings that led to the appeal." MCL 780.796(4).

C. Serious Misdemeanor Cases

"Upon the request of the victim, the prosecuting attorney shall notify the victim of the following:

> (a) That the defendant filed an appeal of his or her conviction or sentence or the prosecuting attorney filed an appeal.
>
> (b) Whether the defendant has been ordered released on bail or other recognizance pending the disposition of the appeal. If the prosecuting attorney is notified that the defendant has been ordered released on bail or other recognizance pending disposition of the appeal, the prosecuting attorney shall use any means reasonably calculated to give the victim notice of that order within 24 hours after the prosecuting attorney is notified of the order.
>
> (c) The time and place of any appellate court oral arguments and any changes in the time or place of those arguments.
>
> (d) The result of the appeal. If the conviction is ordered reversed, the sentence is vacated, the case is remanded for a new trial, or the prosecuting attorney's appeal is denied, and if the prosecuting attorney has filed the appropriate notice with the appellate court, the appellate court shall expedite delivery of the relevant document to the prosecuting attorney's office by any means reasonably calculated to give the prosecuting attorney prompt notice. The prosecuting attorney shall

use any means reasonably calculated to give the victim notice of that order within 24 hours after the prosecuting attorney is notified of the order." MCL 780.828(1).

> **Note:** "If the prosecuting attorney is not successful in notifying the victim of an event described in [MCL 780.828(1)] within the period set forth in that subsection, the prosecuting attorney shall notify the victim of that event as soon as possible by any means reasonably calculated to give the victim prompt actual notice." MCL 780.828(2).

In addition to providing notice, the prosecuting attorney must also "provide the victim with a brief explanation in plain English of the appeal process, including the possible dispositions." MCL 780.828(3).

"If the case is returned to the trial court for further proceedings or a new trial, the victim has the same rights as previously requested during the proceedings that led to the appeal." MCL 780.828(4).

5.10 Notification of Offender's Status

At the crime victim's request, the CVRA requires certain agencies to provide the crime victim with notification of the prisoner's or juvenile's status. See MCL 780.769(1); MCL 780.798(1); MCL 780.828a(1). Note that the transfer of an inmate to a jurisdiction outside of Michigan does not "impair or abrogate the rights of [the] crime victims" as set out under the CVRA. See MCL 791.256(3). See also MCL 3.981, which provides for the transfer of certain inmates under the Interstate Corrections Compact, MCL 3.981 *et seq*.

A. Felony Cases

"When a defendant is sentenced to probation, sentenced to a term of imprisonment, ordered to be placed in a juvenile facility, or hospitalized in or admitted to a hospital or a facility, the prosecuting attorney shall provide the victim with a form the victim may submit to receive [notification of the offender's status as provided for under] [MCL 780.768b], [MCL 780.769], [MCL 780.769a], [MCL 780.770], or [MCL 780.770a]. The form shall include the address of the court, the department of corrections [(DOC)], the sheriff, the department of [health and] human services [(DHHS)], the county juvenile agency, or the hospital or facility, as applicable, to which the form may be sent." MCL 780.763a(1).

A victim's address and telephone number maintained by a sheriff, the DOC, a hospital, or mental facility under MCL 780.769 or MCL 780.769a is exempt from disclosure under the Michigan's FOIA, MCL 15.231 *et seq.*, and shall not be released. MCL 780.769(2); MCL 780.769a(3).

1. Revocation of Defendant's Probation

"If the defendant is sentenced to probation, the [DOC] or the sheriff, as applicable, shall notify the victim if the probation is revoked and the defendant is sentenced to the [DOC] or to jail for more than 90 days. The notice shall include a form the victim may submit to the [DOC] or the sheriff to receive notices under [MCL 780.769], [MCL 780.770], or [MCL 780.770a]." MCL 780.763a(2).

2. Proposed Placement of Prisoner in Special Alternative Incarceration (SAI) Program

"If the [DOC] determines that a defendant who was, in the defendant's judgment of sentence, not prohibited from being or permitted to be placed in the special alternative incarceration [(SAI)] unit established under . . . the special alternative incarceration act, . . . MCL 798.13, meets the eligibility requirements of [MCL 791.234a(2)] and [MCL 791.234a(3),] . . . the [DOC] shall notify the victim, if the victim has submitted a written request for notification under [MCL 780.769], of the proposed placement of the defendant in the [SAI] unit not later than 30 days before placement is intended to occur." MCL 780.763a(3). For a detailed discussion of the SAI program, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

"In making the decision on whether or not to object to the placement of the defendant in a special alternative incarceration unit as required by [MCL 791.234a(4),] . . . the sentencing judge or the judge's successor shall review an impact statement submitted by the victim under [MCL 780.764]."[41] MCL 780.763a(3).

[41] MCL 780.764 affords the victim "the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report [(PSIR)]."

3. Defendant's Status in Court-Ordered Hospitalization or Mental Facility

"On a victim's written request, the director of a hospital or facility where a defendant found not guilty by reason of insanity has been hospitalized or admitted by court order shall notify the victim of the following:

> (a) A pending transfer of the defendant to a less secure hospital or facility.
>
> (b) A pending transfer of the defendant to alternative care or treatment, community placement, or aftercare reintegration.
>
> (c) A pending leave, absence, furlough, or other release from confinement for the defendant, whether temporary or permanent." MCL 780.769a(1).

"A notice required by [MCL 780.769a(1)] shall be given by any means reasonably calculated to give the victim prompt actual notice." MCL 780.769a(2).

4. Prisoner's Earliest Release or Parole Eligibility Date

Within 30 days of a "written request of any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim . . . notice of the sheriff's calculation of the prisoner's earliest release date or the [DOC's] calculation of the prisoner's earliest parole eligibility date, with all potential good time or disciplinary credits considered, if the sentence of the imprisonment exceeds 90 days." MCL 780.769(1)(a).

5. Prisoner's Transfer to or From a Secure Facility or Release/Transfer to or From Community Status

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim[:]"

- "Notice of the prisoner's transfer or pending transfer to a minimum security facility and the facility's address." MCL 780.769(1)(b).
- "Notice of the prisoner's release or pending release in a community residential program or under furlough; any other transfer to community status; any transfer

> from 1 community residential program or electronic monitoring program to another; or any transfer from a community residential program or electronic monitoring program to a state correctional facility." MCL 780.769(1)(c).

For a juvenile convicted following an automatic waiver proceeding, the DHHS or the county juvenile agency must, at the victim's written request, "make a good faith effort to notify the victim before . . . [the] juvenile is transferred from a secure juvenile facility to a nonsecure juvenile facility." MCL 780.770a(1)(b).

"If the [DHHS] or [the] county juvenile agency is not successful in notifying the victim before [the juvenile is transferred to the nonsecure juvenile facility], it shall notify the victim as soon as possible after [the transfer] by any means reasonably calculated to give prompt actual notice." MCL 780.770a(2).

6. Offender's Escape From Custody

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction[, that victim must receive] . . . [n]otice that the person accused, convicted, or imprisoned for committing a crime against the victim has escaped from custody, as provided in [MCL 780.770]." MCL 780.769(1)(d).

MCL 780.770 specifically requires certain persons to provide the victim and the prosecuting attorney with immediate notice of a prisoner's escape:

> "(1) The person designated in subsections (2) to (4) shall give a victim who requests notice and the prosecuting attorney who is prosecuting or has prosecuted the crime for which a defendant is detained, under sentence, hospitalized, or admitted to a facility immediate notice of the escape of the defendant accused, convicted, imprisoned, hospitalized, or admitted to a facility for committing a crime against the victim. The notice shall be given by any means reasonably calculated to give prompt actual notice.
>
> (2) If notice is required under this section and the defendant escapes from custody before sentence is executed or before the defendant is delivered to the [DOC], hospitalized, or admitted to a facility, the chief law enforcement officer of the agency in

> charge of the person's detention shall give notice to the prosecuting attorney that the defendant has escaped, who shall then give notice to the victim who requested that notice. The notice shall be provided to the victim within 24 hours after the defendant is reported to have escaped.
>
> (3) If the defendant is confined under a sentence, the notice required under this section shall be given by the chief administrator of the place in which the prisoner is confined.
>
> (4) If the defendant is hospitalized under an order of hospitalization or admitted to a facility under an order of admission, the notice required under this section shall be given by the director of the hospital in which the defendant is hospitalized or by the director of the facility to which the defendant is admitted."

For a juvenile convicted following an automatic waiver proceeding, the DHHS or the county juvenile agency must provide, at the victim's written request, notice of a juvenile's escape. MCL 780.770a(3). "A victim who requests notice of an escape shall be given immediate notice of the escape by any means reasonably calculated to give prompt actual notice." *Id.*

> **Note:** "If the escape occurs before the juvenile is delivered to the [DHHS] or county juvenile agency, the agency in charge of the juvenile's detention shall give notice of the escape to the [DHHS] or county juvenile agency, which shall then give notice of the escape to the victim who requested notice." MCL 780.770a(3).

7. Review Hearings

a. Parole Review Proceedings

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim[:]"

- "Notice of both the following:

  (*i*) The victim's right to address or submit a written statement for consideration by a parole board member or a member of any

other panel having authority over the prisoner's release on parole during the time the prisoner's release on parole or commutation of sentencing is being considered, as provided in [MCL 780.771].

(*ii*) The victim's right to address the parole board and to present exhibits or other photographic or documentary information to the parole board including at a commutation hearing." MCL 780.769(1)(e).

- "Notice of the decision of the parole board, or any other panel having authority over the prisoner's release on parole, after a parole review, as provided in [MCL 780.771]." MCL 780.769(1)(f).

"Not less than 30 days before a review of the prisoner's release, a victim who has requested notice under [MCL 780.769(1)(f)] shall be given written notice by the [DOC] informing the victim of the pending review and of victims' rights under this section.[42] The victim, at his or her own expense, may be represented by counsel at the review." MCL 780.771(2).

"A victim shall receive notice of the decision of the board or panel and, if applicable, notice of the date of the prisoner's release on parole. Notice shall be mailed within a reasonable time after the board or panel reaches its decision but not later than 14 days after the board or panel has reached its decision. The notice shall include a statement of the victim's right to appeal a parole decision, as allowed under . . . MCL 791.234." MCL 780.771(3).

b. Automatic Waiver Review Hearings

For a juvenile convicted following an automatic waiver proceeding and placed on probation and committed to state wardship, the prosecuting attorney must, at the victim's request, provide the victim with "notice of a review hearing conducted pursuant to [MCL 769.1b.]" MCL 780.770b. "The victim has the right to make a

[42] MCL 780.771(1) provides the victim with the following rights: "(a) To address or submit a written statement for consideration by a parole board member or a member of any other panel having authority over the prisoner's release on parole during the time the prisoner's release on parole or commutation of sentencing is being considered. (b) To address the parole board and to present exhibits or other photographic or documentary information to the parole board including at a commutation hearing." For a detailed discussion of the crime victim's rights in parole proceedings, see Section 7.4.

statement at the [review] hearing, submit a written statement for use at the hearing, or both." *Id.*

For a detailed discussion of review hearings conducted under MCL 769.1b, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16.

8. Automatic Waiver Proceedings: Juvenile's Dismissal From Court Jurisdiction or Discharge From Commitment to DHHS or County Juvenile Agency

For a juvenile convicted following an automatic waiver proceeding, the DHHS or the county juvenile agency must, at the victim's written request, "make a good faith effort to notify the victim before . . . [the] juvenile is dismissed from court jurisdiction or discharged from commitment to the [DHHS] or county juvenile agency."[43] MCL 780.770a(1)(a).

"If the [DHHS] or [the] county juvenile agency is not successful in notifying the victim before [the juvenile is dismissed from court jurisdiction or discharged from commitment to the DHHS or the county juvenile agency], it shall notify the victim as soon as possible after [the dismissal or discharge] by any means reasonably calculated to give prompt actual notice." MCL 780.770a(2).

9. Prisoner's Discharge From Prison

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim . . . [n]otice of the release of a prisoner 90 days before the date of the prisoner's discharge from prison, unless the notice has been otherwise provided under this article." MCL 780.769(1)(g).

10. Early Termination of Defendant's Probation

"If a defendant is sentenced to probation with a condition for the protection of the victim and if requested by the victim, *the court shall notify the victim* by mail if the court orders that the probation be terminated earlier than previously ordered." MCL 780.768b (emphasis added).

[43] For the requirements of releasing from custody a juvenile who is subject to court jurisdiction and for discharging a juvenile from public wardship, see the Youth Rehabilitation Services Act, MCL 803.307. For a discussion on the requirements under MCL 803.307 to release a juvenile from custody or discharge a juvenile from public wardship, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16.

The Code of Criminal Procedure, MCL 771.2(2), permits a sentencing court, with certain restrictions, to reduce a probationary term for a defendant who has completed one-half of the original felony probation period, "[i]f, after a hearing to review the case and the defendant's conduct while on probation, the court determines that the defendant's behavior warrants a reduction in the probationary term[.]" "The victim must be notified of the date and time of the hearing and be given an opportunity to be heard." *Id*. "The court shall consider the impact on the victim and repayment of outstanding restitution caused by reducing the defendant's probationary term." *Id*.

11. Prisoner's Request for Reprieve, Commutation, or Pardon

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim[:]"

- "Notice that the prisoner has applied for a reprieve, commutation, or pardon and the parole board has decided to consider the application." MCL 780.769(1)(h).
- "Notice of a public hearing under . . . MCL 791.244, regarding a reprieve, commutation, or pardon of the prisoner's sentence by the governor." MCL 780.769(1)(i).
- "Notice that a reprieve, commutation, or pardon has been granted or denied upon conclusion of a public hearing." MCL 780.769(1)(j).

MCL 791.244(2) sets out the required procedures the parole board must follow after receiving a prisoner's application for reprieve, commutation, or pardon. MCL 791.244(2)(g) specifically requires that "[n]ot fewer than 30 days before conducting the public hearing, [the parole board must] provide written notice of the public hearing by mail to the attorney general, the sentencing trial judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice under [the CVRA]."

MCL 791.244a(2) sets out the required procedures the parole board must follow after receiving the governor's request to "expedite the review hearing process for a reprieve, commutation, or pardon based in part on a prisoner's medical condition[.]" MCL 791.244a(2)(g) specifically requires that

"[n]ot fewer than 30 days before conducting the public hearing, [the parole board must] provide written notice of the public hearing by mail to the attorney general, the sentencing judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice under [the CVRA]."

12. Prisoner's Conviction of New Crime

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim . . . [n]otice that a prisoner has been convicted of a new crime." MCL 780.769(1)(*l*).

13. Prisoner's Parole Violation

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim . . . [n]otice that a prisoner has been returned from parole status to a correctional facility due to an alleged violation of the conditions of his or her parole." MCL 780.769(1)(m).

14. Defendant's Name Change

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim . . . [n]otice that a prisoner has had his or her name legally changed while on parole or within 2 years after release from parole." MCL 780.769(1)(k).

MCL 711.1 sets out the required procedures for issuing name change orders. MCL 711.1(3) specifically requires the court to take the following actions, which help effectuate notice to the victim:

> "If the court enters an order to change the name of an individual who has a criminal record, *the court shall forward the order to the central records division of the department of state police and to 1 or more of the following*:
>
> > (a) The [DOC] if the individual named in the order is in prison or on parole or has been imprisoned or released from parole in the immediately preceding 2 years.

> (b) The sheriff of the county in which the individual named in the order was last convicted if the individual was incarcerated in a county jail or released from a county jail within the immediately preceding 2 years.
>
> (c) The court that has jurisdiction over the individual named in the order if the individual named in the order is under the jurisdiction of the family division of the circuit court or has been discharged from the jurisdiction of that court within the immediately preceding 2 years." MCL 711.1(3) (emphasis added).

15. Prisoner's or Parolee's Death

At the written request of "any individual who was a victim of the defendant's course of conduct that gave rise to the conviction, the sheriff or the [DOC] shall mail to that victim . . . [n]otice that the prisoner, including a parolee, has died." MCL 780.769(1)(n). Note, however, notification of a parolee's death is required only if the DOC is aware of the parolee's death. *Id.*

B. Juvenile Proceedings

"When a juvenile is ordered to be placed in a juvenile facility or sentenced to probation or to a term of imprisonment, the prosecuting attorney, or the court pursuant to an agreement under [MCL 780.798a[44]], shall provide the victim with a form the victim may submit to receive the notices from the court, prosecuting attorney, department of [health and] human services [(DHHS)], or county juvenile agency, as applicable, provided for under [MCL 780.795a] or [MCL 780.798]. The form shall include the address of the court, prosecuting attorney, [DHHS], county juvenile agency, department of corrections [(DOC)], or the sheriff, as applicable, to which the form may be sent." MCL 780.791a.

"A victim's address and telephone number maintained by a sheriff or the [DOC] upon a request for notice under [MCL 780.798] are exempt from disclosure under the [Michigan's FOIA] . . . MCL 15.231 to [MCL] 15.246, and shall not be released." MCL 780.798(5).

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[44] In juvenile delinquency cases, MCL 780.798a authorizes "[t]he court [to] perform the notification functions delegated to the prosecuting attorney under [the CVRA] if both of the following circumstances exist: (a) The prosecuting attorney allows the court to perform those functions pursuant to a written agreement[, and] (b) The court performed those functions before [May 1, 1994]." May 1, 1994 is the effective date of 1993 PA 341, which added MCL 780.798a.

1. Juvenile's Earliest Release or Parole Eligibility Date

Within 30 days of "[a] victim's request, the sheriff or the [DOC] shall mail to the victim . . . notice of the sheriff's calculation of the juvenile's earliest release date or the department's calculation of the juvenile's earliest parole eligibility, with all potential good time or disciplinary credits considered, if the sentence of imprisonment exceeds 90 days." MCL 780.798(4)(a).

2. Juvenile's Transfer

a. Juvenile's Transfer From One Juvenile Facility to Another

"Upon the victim's written request, the court or the [DHHS[45]] or county juvenile agency, as applicable, shall make a good faith effort to notify the victim before . . . [t]he juvenile is transferred from a juvenile facility to any other juvenile facility." MCL 780.798(1)(b).

"If the court, [the DHHS], or county juvenile agency is not successful in notifying the victim before [the juvenile is transferred], it shall notify the victim as soon as possible after [the transfer] occurs." MCL 780.798(2).

b. Juvenile's Transfer to Minimum Security Facility or Release/Transfer to or From Community Status

At the victim's written request, the sheriff or the DOC must mail to that victim:

- "Notice of the juvenile's transfer or pending transfer to a minimum security facility and the facility's address." MCL 780.798(4)(b).
- "Notice of the juvenile's release or pending release in a community residential program, under furlough, or any other transfer to community status; any transfer from 1 community residential program or electronic monitoring program to another; or any transfer from a community residential program or

[45] See the DHHS's Juvenile Justice Field Services (JJ2), *JJ Roles & Responsibilities - Victim Notification JJ2 260*, for the procedures set out within the DHHS in fulfilling their statutory obligations of notifying crime victims under the CVRA. The manual is available at http://www.mfia.state.mi.us/OLMWEB/EX/JJ/Public/JJ2/260.pdf.

> electronic monitoring program to a state correctional facility." MCL 780.798(4)(c).

3. Juvenile's Escape From Custody

At the victim's request, "the [DHHS[46]], county juvenile agency, *or [the] court shall give to the victim notice* of a juvenile's escape from a secure detention or treatment facility." MCL 780.798(3). The notice provided to the victim of the juvenile's escape must be immediate and "by any means reasonably calculated to give prompt actual notice." *Id.* (Emphasis added.)See also MCL 780.798(4)(d), which requires the sheriff or DOC to mail, at the victim's written request, "[n]otice of the escape of the juvenile accused, convicted, or imprisoned for committing an offense against the victim." MCL 780.798(4)(d).

To effectuate notice to the victim, MCL 780.798(6)-(8) sets out who must provide notice of an escape:

> "(6) As provided in [MCL 780.798(7)] or [MCL 780.798(8)], a victim who requests notice of the escape and the prosecuting attorney who filed the petition alleging the offense for which the juvenile is accused, detained, or under sentence shall be given immediate notice of the juvenile's escape. The notice shall be given by any means reasonably calculated to give prompt actual notice.
>
> (7) If the escape occurs before the sentence is executed or before the juvenile is delivered to the department of human services, county juvenile agency, sheriff, or the department of corrections, the person in charge of the agency in charge of the juvenile's detention shall give notice of the escape to the prosecuting attorney, who shall then give notice of the escape to a victim who requested notice.
>
> (8) If the juvenile is confined under sentence, the notice of escape shall be given to the victim and the prosecuting attorney by the chief administrator of the place in which the juvenile is confined."

[46] See the DHHS's Juvenile Justice Field Services (JJ2), *JJ Roles & Responsibilities - Victim Notification JJ2 260*, for the procedures set out within the DHHS in fulfilling their statutory obligations of notifying crime victims under the CVRA. The procedures manual is available at http://www.mfia.state.mi.us/OLMWEB/EX/JJ/Public/JJ2/260.pdf.

4. Review Hearings

a. Parole Review Proceedings

At the victim's written request, the sheriff or the DOC must mail to that victim:

- "Notice of both the following:

  (*i*) The victim's right to address or submit a written statement for consideration by a parole board member or a member of any other panel having authority over the juvenile's release on parole during the time the juvenile's release on parole or commutation of sentencing is being considered.

  (*ii*) To address the parole board and to present exhibits or other photographic or documentary information to the parole board including at a commutation hearing." MCL 780.798(4)(e).

- "Notice of the decision of the parole board, or any other panel having authority over the juvenile's release on parole, after a parole review." MCL 780.798(4)(f).

b. Juvenile Review Hearings

"Upon the victim's request, the prosecuting attorney shall give the victim notice of a review hearing conducted under . . . MCL 712A.18. The victim has the right to make a statement at the hearing or submit a written statement for use at the hearing, or both." MCL 780.798(9). See also MCR 3.945(A)(1), which provides the crime victim with "a right to make a statement at the [juvenile's periodic review[47]] hearing or submit a written statement for use at the hearing, or both."

For additional information on review hearings conducted under MCL 712A.18, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

[47] MCR 3.945(A)(1) requires the court to "conduct periodic hearings to review the dispositional orders in delinquency cases in which the juvenile has been placed outside the home. Such review hearings must be conducted at intervals designated by the court, or may be requested at any time by a party or by a probation officer or caseworker." For additional information on dispositional review hearings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 12.

5. Juvenile's Dismissal From Court Jurisdiction or Discharge From Commitment to DHHS or County Juvenile Agency

"Upon the victim's written request, *the court* or the [DHHS[48]] or county juvenile agency, as applicable, shall make a good faith effort to notify the victim before . . . [t]he juvenile is dismissed from court jurisdiction or discharged from commitment to the [DHHS] or county juvenile agency." MCL 780.798(1)(a) (emphasis added).

"If the court, [the DHHS], or county juvenile agency is not successful in notifying the victim before [the juvenile is dismissed from court jurisdiction or discharged from commitment to DHHS or the county juvenile agency], it shall notify the victim as soon as possible after [the dismissal or discharge] occurs." MCL 780.798(2).

6. Juvenile's Conviction of New Crime

"Upon the victim's written request, *the court* or the [DHHS] or county juvenile agency, as applicable, shall make a good faith effort to notify the victim before . . . [t]he juvenile is detained for having committed an act which, if committed by an adult, would be a criminal violation." MCL 780.798(1)(d) (emphasis added).

7. Prisoner's Discharge From Prison

At the victim's written request, the sheriff or the DOC must mail to that victim "[n]otice of the release of a juvenile 90 days before the date of the juvenile's discharge from prison, unless the notice has been otherwise provided under this article." MCL 780.798(4)(g).

8. Early Termination of Juvenile's Probation

"If a juvenile is sentenced to probation with a condition for the protection of the victim and if requested by the victim, *the court shall notify the victim by mail if the court orders that the probation be terminated earlier than previously ordered*." MCL 780.795a (emphasis added).

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[48] See the DHHS's Juvenile Justice Field Services (JJ2), *JJ Roles & Responsibilities - Victim Notification JJ2 260*, for the procedures set out within the DHHS in fulfilling their statutory obligations of notifying crime victims under the CVRA. The procedures manual is available at http://www.mfia.state.mi.us/OLMWEB/EX/JJ/Public/JJ2/260.pdf.

9. Juvenile's Request for Reprieve, Commutation, or Pardon

At the victim's written request, the sheriff or the DOC must mail to that victim:

- "Notice of a public hearing under . . . MCL 791.244, regarding a reprieve, commutation, or pardon of the juvenile's sentence by the governor." MCL 780.798(4)(h).

- "Notice that a reprieve, commutation, or pardon has been granted or denied upon conclusion of a public hearing." MCL 780.798(4)(i).

MCL 791.244(2) sets out the required procedures the parole board must follow after receiving a juvenile's application for reprieve, commutation, or pardon. MCL 791.244(2)(g) specifically requires that "[n]ot fewer than 30 days before conducting the public hearing, [the parole board must] provide written notice of the public hearing by mail to the attorney general, the sentencing trial judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice under [the CVRA]."

MCL 791.244a(2) sets out the required procedures the parole board must follow after receiving the governor's request to "expedite the review hearing process for a reprieve, commutation, or pardon based in part on a [juvenile's] medical condition[.]" MCL 791.244a(2)(g) specifically requires that "[n]ot fewer than 30 days before conducting the public hearing, [the parole board must] provide written notice of the public hearing by mail to the attorney general, the sentencing judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice under [the CVRA]."

10. Juvenile's Name Change

At the victim's written request, *the court*, the DHHS, or the county juvenile agency must "make a good faith effort to notify the victim before . . . [t]he juvenile has his or her name legally changed while under the court's jurisdiction or within 2 years after discharge from the court's jurisdiction." MCL 780.798(1)(c) (emphasis added). "If the court, [the DHHS], or county juvenile agency is not successful in notifying the victim before [the juvenile has his or her name legally changed], it shall notify the victim as soon as possible after [the name change] occurs." MCL 780.798(2).

At the victim's request and if the juvenile is "on parole or [is] within 2 years after release from parole[,]" the sheriff or the DOC must also mail to the victim "[n]otice that a juvenile has had his or her name legally changed[.]" MCL 780.798(4)(j).

MCL 711.1 sets out the required procedures for issuing name change orders. MCL 711.1(3) specifically requires the court to take the following actions, which help effectuate notice to the victim:

> "If the court enters an order to change the name of an individual who has a criminal record, *the court shall forward the order to the central records division of the department of state police and to 1 or more of the following*:
>
> > (a) The [DOC] if the individual named in the order is in prison or on parole or has been imprisoned or released from parole in the immediately preceding 2 years.
> >
> > (b) The sheriff of the county in which the individual named in the order was last convicted if the individual was incarcerated in a county jail or released from a county jail within the immediately preceding 2 years.
> >
> > (c) The court that has jurisdiction over the individual named in the order if the individual named in the order is under the jurisdiction of the family division of the circuit court or has been discharged from the jurisdiction of that court within the immediately preceding 2 years." MCL 711.1(3) (emphasis added).

11. Juvenile's or Parolee's Death

At the victim's written request, the sheriff or the DOC must mail to that victim "[n]otice that the juvenile, including a parolee, has died." MCL 780.798(4)(k). Note, however, notification of a parolee's death is required only if the DOC is aware of the parolee's death. *Id*.

C. Serious Misdemeanor Cases

"When a defendant is sentenced to probation or a term of imprisonment, the prosecuting attorney shall provide the victim with a form the victim may submit to receive the notices provided

for under [MCL 780.828a] or [MCL 780.827b] or [MCL 780.828b]. The form shall include the address of the court, prosecuting attorney, or sheriff's department, as applicable, to which the form may be sent." MCL 780.828a(2).

"A victim's address and telephone number maintained by a court or a sheriff pursuant to this article is exempt from disclosure under the [FOIA], . . . MCL 15.231 to [MCL] 15.246[.]" MCL 780.830.

1. Prisoner's Earliest Release or Parole Eligibility Date

Within 30 days of a "written request of a victim of a serious misdemeanor, the sheriff [under whose jurisdiction the defendant is imprisoned for commission of that serious misdemeanor] shall mail to the victim . . . notice of the sheriff's calculation of the earliest release date of the prisoner, with all potential good time or disciplinary credits considered if the sentence of imprisonment exceeds 90 days. The victim may request [a] 1-time only notice of the calculation described in this subdivision." MCL 780.828a(1)(a). But see, MCL 780.829(1)-(2), which requires at the victim's written request, "the sheriff [to] notify the victim of the earliest possible release date of the defendant if the defendant is sentenced to more than 92 days' imprisonment[, and for t]he victim's written request for notice under [MCL 780.829] to include the victim's address."

2. Prisoner's Placement on Day Parole or Work Release

"Upon the written request of a victim of a serious misdemeanor, the sheriff [under whose jurisdiction the defendant is imprisoned for commission of that serious misdemeanor] shall mail to the victim . . . [n]otice that the prisoner has been placed on day parole or work release." MCL 780.828a(1)(c).

3. Defendant's Escape From Custody

MCL 780.828b sets out the required notification procedures for notification related to a defendant's escape from custody:"

> "(1) As provided in subsection (2) or (3), a victim who requests notice of the escape and the prosecuting attorney who is prosecuting or has prosecuted the serious misdemeanor for which the person is detained or under sentence shall be given immediate notice of the escape of the person accused, convicted, or imprisoned for committing

> a serious misdemeanor against the victim. The notice shall be given by any means reasonably calculated to give prompt actual notice.
>
> (2) If the escape occurs before the sentence is executed or before the defendant is delivered to the sheriff, the chief law enforcement officer of the agency in charge of the person's detention shall give notice of the escape to the prosecuting attorney, who shall then give notice of the escape to a victim who requested notice.
>
> (3) If the defendant is confined pursuant to a sentence, the notice shall be given by the chief administrator of the place in which the prisoner is confined."

4. Early Termination of Defendant's Probation

"If a defendant is sentenced to probation with a condition for the protection of the victim and if requested by the victim, *the court shall notify the victim by mail if the court orders that the probation be terminated earlier than previously ordered*." MCL 780.827b.

5. Defendant's Name Change

"Upon the written request of a victim of a serious misdemeanor, the sheriff [under whose jurisdiction the defendant is imprisoned for commission of that serious misdemeanor] shall mail to the victim . . . [n]otice that a prisoner has had his or her name legally changed while imprisoned in the county jail or within 2 years of release from the county jail." MCL 780.828a(1)(b).

MCL 711.1 sets out the required procedures for issuing name change orders. MCL 711.1(3) specifically requires the court to take the following actions, which help effectuate notice to the victim:

> "If the court enters an order to change the name of an individual who has a criminal record, *the court shall forward the order to the central records division of the department of state police and to 1 or more of the following*:
>
> > (a) The [DOC] if the individual named in the order is in prison or on parole or has been

> imprisoned or released from parole in the immediately preceding 2 years.
>
> (b) The sheriff of the county in which the individual named in the order was last convicted if the individual was incarcerated in a county jail or released from a county jail within the immediately preceding 2 years.
>
> (c) The court that has jurisdiction over the individual named in the order if the individual named in the order is under the jurisdiction of the family division of the circuit court or has been discharged from the jurisdiction of that court within the immediately preceding 2 years." MCL 711.1(3) (emphasis added).

5.11 Notification Requirements Under Sex Offenders Registration Act (SORA)

A. Notification of Hearing on Offender's Disputed "Romeo & Juliet" Exception Claim

A brief discussion of the "Romeo & Juliet" provisions as they relate to crime victim notification is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10.

MCL 28.723a provides exceptions to the sex offender registration requirement under the Sex Offenders Registration Act (SORA) in very specific cases involving certain tier II and tier III offenses. These exceptions, commonly referred to as "Romeo & Juliet" provisions, are found in MCL 28.722(u)(*v*), MCL 28.722(u)(*vi*), and MCL 28.722(w)(*iv*).

> **Note:** The Romeo & Juliet exceptions in MCL 28.722(u)(*v*), MCL 28.722(u)(*vi*), and MCL 28.722(w)(*iv*) apply to criminal and juvenile cases pending on July 1, 2011, and to criminal and juvenile cases brought on or after July 1, 2011. MCL 28.723a(7).

Under MCL 28.723a(1), "[i]f an individual pleads guilty to or is found guilty of a listed offense or is adjudicated as a juvenile as being responsible for a listed offense but alleges that he or she is not required to register under [the SORA] because [MCL 28.722(u)(*v*)] or [MCL 28.722(u)(*vi*)] applies or [MCL 28.722(w)(*iv*)] applies, and the prosecuting attorney disputes that allegation, the court shall

conduct a hearing on the matter before sentencing or disposition to determine whether the individual is required to register under [the SORA]."

The prosecuting attorney must notify the victim of the date, time, and place of the hearing. MCL 28.723a(4). The victim may exercise the following rights at the hearing:

- The victim may submit a written statement to the court.
- The victim may attend the hearing and make a written or oral statement to the court.
- The victim may refuse to attend the hearing.
- The victim may attend the hearing and refuse to testify or make a statement. MCL 28.723a(5).

B. Notification of Offender's Petition to Discontinue Sex Offender Registration

A brief discussion on petitioning for a discontinuation of sex offender registration as it relates to crime victim notification is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Sexual Assault Benchbook,* Chapter 10.

An offender convicted of a listed offense may petition the appropriate court to discontinue registering under the Sex Offenders Registration Act (SORA). MCL 28.728c.[49] The offender must file a copy of the petition with the prosecuting attorney who prosecuted the underlying criminal case or, "for a conviction that occurred in another state or country, the prosecuting attorney for the county of his or her residence, at least 30 days before a hearing is held on the petition." MCL 28.728c(7). "The prosecuting attorney may appear and participate in all proceedings regarding the petition and may seek appellate review of any decision on the petition." *Id.*

> **Note:** If an offender previously filed a petition under MCL 28.728c, and after a hearing, the court denied the petition, the offender may not file a subsequent petition. MCL 28.728c(4).

If the prosecuting attorney knows the name of the victim involved in the offense, the prosecuting attorney must provide the victim with written notice that a petition was filed and must provide the

[49] MCL 28.728c is the only means by which an offender may obtain judicial review of his or her registration requirements under the SORA. MCL 28.728c(4).

victim with a copy of the petition. MCL 28.728c(8). The prosecuting attorney must send the notice by first-class mail to the victim's last known address. *Id.* The notice must include information about the victim's rights as described in MCL 28.728c(10). MCL 28.728c(8).

Before the court makes any decision on the petition, the victim has the right to attend any proceeding held on the petition and to present a written or oral statement to the court.[50] MCL 28.728c(10). However, a victim must not be *required* to appear at any proceeding against his or her will. *Id.*

5.12 Notification of Post-Conviction DNA Testing

A brief discussion on post-conviction DNA testing as it relates to victim notification is discussed under this section. For a detailed discussion on post-conviction DNA testing, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

"Notwithstanding the limitations of [MCL 770.16(2)],[51] a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing. Notwithstanding the limitations of [MCL 770.16(2)], a defendant convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing:

(a) That DNA testing was done in the case or under this act.

(b) That the results of the testing were inconclusive.

(c) That testing with current DNA technology is likely to result in conclusive results." MCL 770.16(1).

See *People v Poole*, 497 Mich 1022, 1022 (2015) (finding that "no provision set forth in MCL 770.16 prohibits the issuance of an order granting DNA testing of previously tested biological material[]").[52]

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[50] The court must consider this statement, along with several other factors, when determining whether to allow a tier I offender discontinue registration under MCL 28.728c(12) or a tier III offender discontinue registration under MCL 28.728c(13). See MCL 28.728c(11).

[51] MCL 770.16(2) provides that "[a] petition under [MCL 770.16] "shall be filed not later than January 1, 2016[, t]he petition shall be filed in the circuit court for the county in which the defendant was sentenced and shall be assigned to the sentencing judge or his or her successor[, and t]he petition shall be served on the prosecuting attorney of the county in which the defendant was sentenced."

"If the name of the victim of the felony conviction described in [MCL 770.16(1)] is known, the prosecuting attorney shall give written notice of a petition under this section to the victim. The notice shall be by first-class mail to the victim's last known address. Upon the victim's request, the prosecuting attorney shall give the victim notice of the time and place of any hearing on the petition and shall inform the victim of the court's grant or denial of a new trial to the defendant." MCL 770.16(11).

5.13 Notification of Application to Have Conviction or Adjudication Set Aside

A. Felony Cases

"If a defendant applies to have a conviction for an assaultive crime set aside under . . . [MCL 780.621] to [MCL 780.624], and if the name of the victim is known by the prosecuting attorney, the prosecuting attorney shall give to the victim of the assaultive crime written notice of the application and forward a copy of the application to the victim. The notice shall be by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under [MCL 780.621 *et seq.*] concerning that conviction and make a written or oral statement. . . ." MCL 780.772a.

B. Juvenile Proceedings

"If a juvenile applies to have a conviction for an assaultive crime or serious misdemeanor or an adjudication for an offense that if committed by an adult would be an assaultive crime or a serious misdemeanor set aside under . . . MCL 712A.18e, and the prosecuting attorney knows the victim's name, the prosecuting attorney shall give the victim of the offense written notice of the application and forward a copy of the application to the victim. The notice shall be by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under . . . MCL 712A.18e, concerning that adjudication and make a written or oral statement." MCL 780.796a(1).

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[52] See MCL 770.16(4)(b)(*ii*), which specifically requires the trial court to order DNA testing where, among other requirements set out under MCL 770.16(4)(a)-(b), the defendant established that "[t]he identified biological material described in [MCL 770.16(1)] was not previously subjected to DNA testing, *or if previously tested*, will be subject to DNA testing technology that was not available when the defendant was convicted." (Emphasis added.)

C. Serious Misdemeanor Cases

"If a defendant applies to have a conviction for a serious misdemeanor set aside under . . . [MCL 780.621] to [MCL 780.624], and if the name of the victim is known by the prosecuting attorney, the prosecuting attorney shall give to the victim of the serious misdemeanor written notice of the application and forward a copy of the application to the victim. The notice shall be by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under [MCL 780.621 *et seq.*] concerning that conviction and make a written or oral statement." MCL 780.827a.

5.14 Crime Victim's Obligation to Maintain Current Contact Information

Crime victims who wish to receive notices or exercise their rights under the CVRA must keep certain agencies apprised of their current address and telephone number.

A. Felony Cases

"A victim who receives a notice under [MCL 780.756(1)[53]] and who chooses to receive any notice or exercise any right under this article shall keep the following persons informed of the victim's current address and telephone number:

> (a) The prosecuting attorney, until final disposition or completion of the appellate process, whichever occurs later.
>
> (b) The [DOC] or the sheriff, as the prosecuting attorney directs, if the defendant is imprisoned.
>
> (c) The [DHHS] or county juvenile agency, as the prosecuting attorney directs, if the defendant is held in a juvenile facility.
>
> (d) The hospital or facility, as the prosecuting attorney directs, if the defendant is hospitalized in or admitted to a hospital or a facility." MCL 780.756(4).

[53] MCL 780.756(1) requires the prosecuting attorney to provide the crime victim with notice of court procedures and the crime victim's rights "not later than 7 days after the defendant's arraignment for a crime, but not less than 24 hours before a preliminary examination[.]" For additional information on the requirements under MCL 780.756(1), see Section 5.7(A).

B. Juvenile Proceedings

"A victim who receives a notice under [MCL 780.786(2)[54,55]] and chooses to receive any notice or exercise any right under this article shall keep the following persons informed of the victim's current address and telephone number:

> (a) The prosecuting attorney, or the court if an agreement under [MCL 780.798a[56]] exists.
>
> (b) If the juvenile is made a public ward, the [DHHS] or county juvenile agency, as applicable.
>
> (c) If the juvenile is imprisoned, the [DOC] or the sheriff as directed by the prosecuting attorney." MCL 780.786(5).

C. Serious Misdemeanor Cases

"A victim who receives a notice under [MCL 780.816(1)[57]] or [MCL 780.816(2)[58]] and who chooses to receive any notice or exercise any right under this article shall keep the following persons informed of the victim's current address and telephone number:

> (a) The prosecuting attorney, until final disposition or completion of the appellate process, whichever occurs later.
>
> (b) The sheriff, if the defendant is imprisoned for more than 92 days." MCL 780.816(5).

---

[54] Formerly MCL 780.786(1).

[55] MCL 780.786(2) requires the prosecuting attorney to provide the crime victim with notice of court procedures and the crime victim's rights "within 72 hours after the prosecuting attorney files or submits a petition seeking to invoke the court's jurisdiction for an offense[.]" For additional information on the requirements under MCL 780.786(2), see Section 5.7(B).

[56] In juvenile delinquency cases, MCL 780.798a authorizes the prosecuting attorney to enter a written agreement that the court will perform many of the prosecutor's notification duties if the court performed those functions before May 1, 1994.

[57] MCL 780.816(1) requires the prosecuting attorney to provide the crime victim with notice of court procedures and the crime victim's rights "within 48 hours after the arraignment" if a plea is accepted at the of the arraignment or if there is no plea, "within 48 hours after the arraignment[.]" For additional information on the requirements under MCL 780.816(1), see Section 5.7(C).

[58] MCL 780.816(2) requires the prosecuting attorney to provide the crime victim with notice of "any scheduled court proceedings and notice of any changes in that schedule." For additional information on the requirements under MCL 780.816(2), see Section 5.8(C).

D. Preserving Confidentiality of Victim's Identifying Information

In all cases under the CVRA, a crime victim's address and telephone number maintained by the court, sheriff, or DOC for notification purposes are exempt from disclosure under the Michigan's Freedom of Information Act (FOIA), and must not be released. MCL 780.769(2); MCL 780.798(5); MCL 780.830. A victim's address and telephone number provided for purposes of the notice authorized when a defendant is placed in a hospital or facility is also exempt from disclosure under the FOIA.[59] MCL 780.769a(3). For a detailed discussion of the FOIA as it relates to crime victim's identities and court records accessibility, see Section 2.5.

5.15 Notification of Communicable Disease Test or Examination Results

The Public Health Code, MCL 333.5101 *et seq.*, requires criminal defendants and juveniles charged with or convicted or adjudicated of certain offenses to submit to testing or examination for communicable diseases. This section contains a brief discussion on the Public Health Code's requirements to provide notice to the victim of the test and examination results. For additional information on the court's authority to order testing and counseling for certain communicable diseases, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6.

In cases involving sexual penetration, sexual contact, or exposure to the body fluids during the course of the crime, if the victim consents, *the court must provide the person or agency conducting the mandatory examinations or tests*[60] *under MCL 333.5129(3)-(4) with the name, address, and telephone number of the victim*, and the person or agency administering the tests must notify the victim immediately of the results (and subsequent results "if the defendant or [juvenile] receives appropriate follow up testing for the presence of HIV") and refer the victim for appropriate counseling. MCL 333.5129(5). If the victim is a minor or otherwise incapacitated, the victim's parent, guardian, or person in loco parentis may give the required consent for notification. *Id*. If the victim is found to be infected with a communicable disease, the agency providing the testing or counseling must refer the victim for appropriate medical care. MCL 333.5129(8).

[59] For a detailed discussion of a victim's request for notification of a defendant's status within a hospital or a facility, see Section 5.10.

[60] Certain defendants and juveniles are required to undergo mandatory examination or testing for certain communicable diseases.

5.16 Automated Crime Victim Notification Service-Michigan VINE Service (MI-VINE)

The Michigan Victim Information Notification Network (MI-VINE) is an "automated notification system [designed to] greatly enhance victim safety and convenience while providing added response capabilities for agencies implementing crime victims rights." The Michigan Department of Health & Human Services, *About Crime Victims Rights in Michigan*. "Notifications produced by the system include the majority of crime victim rights act requirements, including court schedule information." *Id*.

"The [MI-VINE] is a free, anonymous service that gives victims of crime information and notification about offender custody status and related court events. The MI VINE Service provides the following to crime victims and other concerned citizens over the telephone or via internet at www.VINELink.com[:]

- 24 hour access to offender custody or case information[;]
- The ability to verify an offender's custody status[;]
- Automatic notification to registered users of a change in offender custody or case status." VINE, *Michigan Statewide*.

"For victims whose offenders are sentenced to serve a prison sentence with the [MDOC] - Victims must register with the [MDOC] by completing the department's Notification Request Form. By providing a telephone number on this form, victims are automatically registered to receive automated telephone notification unless the victim opts out of the automated service by not providing a telephone number on the request for notification." *Michigan Statewide, supra*. For additional information on notifications concerning prisoner's sentenced with the MDOC, see the MDOC, *Victim Services*.

"For victims with offenders in a participating county jail in Michigan - Victims may register themselves at www.VINELink.com to receive custody status information through the telephone, email and/or via text message. Victims with court cases may register themselves to receive information on court events related to their case at www.VINELink.com. Court event information is available through telephone, email and/or text message." *Michigan Statewide, supra*.

Chapter 6: The Crime Victim's Impact on Pretrial and Trial Procedures

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6.1 Constitutional Right to Attend Trial and Other Proceedings[1]

The Michigan Constitution provides crime victims with "[t]he right to attend trial and all other court proceedings the accused has the right to attend." Const 1963, art 1, § 24(1).

6.2 Sequestration and the Right to Attend Trial[2]

In felony cases and serious misdemeanor cases, the crime victim has "the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness." MCL 780.761; MCL 780.821. For good cause shown, the victim being called as a witness may be sequestered up until he or she first testifies. MCL 780.761; MCL 780.821.

In juvenile cases, the crime victim has "the right to be present throughout the entire contested adjudicative hearing or waiver hearing of the juvenile, unless the victim is going to be called as a witness." MCL 780.789. For good cause shown, the victim being called as a witness may be sequestered up until he or she first testifies. *Id.*

6.3 Right to Speedy Trial[3]

A. Felony Cases

"As provided in [MCL 780.759(2)], a speedy trial may be scheduled for any case in which the victim is declared by the prosecuting attorney to be any of the following:

> (a) A victim of child abuse, including sexual abuse or any other assaultive crime.
>
> (b) A victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit criminal sexual conduct involving penetration

[1]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[3]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

> or to commit criminal sexual conduct in the second degree.
>
> (c) Sixty-five years of age or older.
>
> (d) An individual with a disability that inhibits the individual's ability to attend court or participate in the proceedings." MCL 780.759(1).

"The chief judge, upon motion of the prosecuting attorney for a speedy trial for a case described in [MCL 780.759(1)], shall set a hearing date within 14 days of the date of the filing of the motion. Notice shall be made pursuant to the Michigan court rules. If the motion is granted, the trial shall not be scheduled earlier than 21 days from the date of the hearing." MCL 780.759(2).

B. Juvenile Proceedings

"As provided in [MCL 780.786a(2)], a speedy trial may be scheduled for any case in which the victim is declared by the prosecuting attorney to be any of the following:

> (a) A victim of child abuse, including sexual abuse or any other assaultive crime.
>
> (b) A victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit criminal sexual conduct involving penetration or to commit criminal sexual conduct in the second degree.
>
> (c) Sixty-five years of age or older.
>
> (d) An individual with a disability that inhibits the individual's ability to attend court or participate in the proceedings." MCL 780.786a(1).

"The court, upon motion of the prosecuting attorney for a speedy trial for a case described in [MCL 780.786a(1)], shall set a hearing date within 14 days after the motion is filed. Notice shall be made pursuant to the Michigan court rules. If the motion is granted, the trial shall not be scheduled earlier than 21 days from the date of the hearing." MCL 780.786a(2).

C. Serious Misdemeanor Cases

"An expedited trial may be scheduled for any case in which the victim is averred by the prosecuting attorney to be a child." MCL 780.819.

6.4 Adjournments or Continuances[4]

A. Preliminary Examination

1. Generally

"The state and the defendant are entitled to a prompt examination and determination by the examining magistrate in all criminal causes[.]" MCL 766.1. See also MCR 6.110(A), which states, in part, that "[w]here a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination."[5]

Except as provided in MCL 712A.4,[6] the preliminary examination, unless waived or adjourned, must be scheduled at the arraignment for "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also MCR 6.104(E)(4). However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4).

"Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint." MCR 6.110(B)(1). A violation of MCR 6.110(B)(1) "is deemed to be harmless error unless the defendant demonstrates actual prejudice." *Id*.

2. Immediate Commencement of Preliminary Examination for Purpose of Taking Victim Testimony

"Upon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to

[4]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[5] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for a detailed discussion of preliminary examinations.

[6] MCL 712A.4 governs traditional waiver proceedings involving a juvenile 14 years of age or older. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 14 for more information.

establish probable cause to believe that the defendant committed the charged crime or crimes, the magistrate shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause." MCL 766.4(4). See also MCR 6.110(B)(2), which contains substantially similar language except that it requires that the defendant be present in the courtroom or have waived the right to be present.

3. Adjournment, Continuance, or Delay of Preliminary Examination

The judge may adjourn, continue, or delay the preliminary examination for a reasonable time with the consent of the defendant and prosecuting attorney without a showing of good cause. MCR 6.110(B)(1); see also MCL 766.7. Additionally, the preliminary examination may be adjourned, continued, or delayed without the consent of the defendant or the prosecuting attorney for good cause shown. MCR 6.110(B)(1); MCL 766.7. "If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment." MCR 6.110(B)(1).

To accommodate the absence of a material witness, where it appears probable that the witness will be produced and testify, is good cause to adjourn a preliminary examination. *People v Buckner*, 144 Mich App 691, 694 (1985) (victim of the shooting was hospitalized until the day before the preliminary examination).

B. Trial

MCL 768.2 provides that the trial court, in a criminal case, has discretion to adjourn or continue a criminal case for good cause shown in the manner provided for civil cases.[7] The statute states that where the prosecution and the defendant consent to an adjournment, there must be a showing to the court that the consent is "founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done." MCL 768.2.

[7] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9, for a detailed discussion of pretrial procedures.

> The trial court may grant an adjournment based on the unavailability of a witness or evidence if it "finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence."[8] MCR 2.503(C)(2). See *People v Grace*, 258 Mich App 274, 277 (2003) ("it was an abuse of discretion for the trial court not to give the prosecutor more time to find [the victim and material witnesses who failed to timely return to the court for resumption of trial following a lunch recess], not to allow the one prosecution witness present to testify, not to call a recess, or not to grant the motion to adjourn[]" where "the court denied the motion for an adjournment and dismissed the case after a mere seventeen-minute wait for the witnesses[, t]he testimony of the missing witnesses was material and the prosecutor had duly attempted to locate them, . . . [t]he trial court 'had no reason to expect that [the witnesses'] cooperation would not continue[,]' . . . [and] the witnesses arrived shortly after the dismissal was granted[claiming] . . . that [they] were delayed by a long line at the security checkpoint in the courthouse[]").

6.5 Competency of Crime Victim as Witness

Under MRE 601, every person is presumed competent to be a witness:

> "Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence]."

Competency to testify is a matter within the discretion of the trial court, and the trial court may conduct an examination to determine a witness's competency. *People v Bedford*, 78 Mich App 696, 705 (1977). A defendant's constitutional right to confront witnesses is not necessarily violated by the defendant's exclusion from a competency hearing. *Kentucky v Stincer*, 482 US 730, 739-744 (1987).

"The test of competency is . . . whether the witness has the capacity and sense of obligation to testify truthfully and understandably. Where the trial court examines a child witness and determines that the child is competent to testify, 'a later showing of the child's inability to testify truthfully reflects on credibility, not competency." *People v Watson*

[8] The motion to adjourn must be filed "as soon as possible after ascertaining the facts." MCR 2.503(C)(1). "If the testimony or evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary." MCR 2.503(C)(3).

(David), 245 Mich App 572, 583 (2001), quoting *People v Coddington*, 188 Mich App 584, 597 (1991) (internal citations omitted).

See *People v Breck*, 230 Mich App 450, 457-458 (1998) (developmentally disabled complainant competent to testify); *People v Burch*, 170 Mich App 772, 774-775 (1988) (11-year-old victim with mental retardation competent to testify).

6.6 Special Protections For Victims and Witnesses

A. Confrontation Issues Generally[9]

Except in very limited circumstances involving child victims, a defendant has an absolute right to face-to-face confrontation "for all 'testimonial' evidence unless a witness is unavailable and the defendant had a prior opportunity to cross-examine the witness."[10] *People v Jemison*, ___ Mich ___, ___ (2020) (forensic expert's testimony via two-way video technology was improperly admitted at trial).

"Use of a procedure that limits a defendant's right to confront his [or her] accusers face[-]to[-]face" is permissible where the court "determine[s] that the procedure is necessary to further an important state interest[,] . . . hear[s] evidence and determine[s] . . . use of the procedure is necessary to protect the witness[, and] . . . find[s] that the witness would be traumatized by the presence of the defendant and that the emotional distress would be more than *de minimis*." *People v Rose (Ronald)*, 289 Mich App 499, 516-517 (2010).

The exception to the absolute right of face-to-face confrontation may be made under very specific circumstances in cases involving a child victim. *Jemison*, ___ Mich at ___ n 1, ___. The *Jemison* Court confined the exception to the specific facts in *Maryland v Craig*, 497 US 836, 860 (1990), and held that "a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection." *Jemison*, ___ Mich at ___. That is, to preserve a respondent's due process rights, including the right to face-to-face confrontation, the court must hear evidence and make

[9] More detailed discussion on confrontation issues related to specific special protections for victims and witnesses appears throughout this section. For additional information on a defendant's right to confrontation, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

[10] A defendant may waive his or her constitutional right of confrontation; a defendant's right of confrontation may also be waived by defense counsel, absent any record objection by the defendant. *People v Buie*, 491 Mich 294, 306-307, 315 (2012).

particularized, case-specific findings that the alternative arrangement is necessary to protect the welfare of a child witness who seeks to testify. *Craig*, 497 at 855-856.[11] In *Craig*, 497 US at 855-856, the United States Supreme Court described the necessary findings:

> "The requisite finding of necessity must . . . be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify[.]'" (Internal citations omitted.)

MCL 600.2163a(20),[12] a statute permitting special arrangements for a child victim's testimony during certain types of proceedings, impaired persons who are victims, and vulnerable adults who are victims, has been found to satisfy the *Craig* requirements. *People v Pesquera*, 244 Mich App 305, 310-312 (2001).[13]

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[11] See also *In re Vanidestine*, 186 Mich App 205, 209-212 (1990) (applying *Craig* to juvenile delinquency case); *In re Brock*, 442 Mich 101, 110 (1993) (holding that in a child protective proceeding, the court properly allowed the jury to view a child's videotaped deposition, conducted by an independent examiner, in lieu of the child's live testimony).

[12] Formerly MCL 600.2163a(13).

[13] Although former MCL 600.2163a(13) has been amended since the *Pesquera* decision, the language analyzed in *Pesquera* does not appear to be impacted.

B. Victims and Witnesses (Regardless of Age or Disability)

1. Special Procedures to Protect Victims and Witnesses

Under MRE 611(a), a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying:

> "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) *protect witnesses from harassment or undue embarrassment*." MRE 611(a) (emphasis added). See also MCL 768.29.

MRE 611(a) permits the trial court to limit cross-examination to protect witnesses from harassment or undue embarrassment. *People v Daniels*, 311 Mich App 257, 268 (2015). Specifically, "MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault[; t]he court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting child sexual abuse victims from further trauma.'" *Daniels*, 311 Mich App at 269 (holding that the "trial court wisely and properly prevented [the] defendant from personally cross-examining [his children regarding their testimony that he sexually abused them], to stop the children from suffering 'harassment and undue embarrassment[,]'" following "a motion hearing at which [the court] heard considerable evidence that [the] defendant's personal cross-examination would cause [the children] significant trauma and emotional stress[,]" and finding that the defendant's right to self-representation was not violated because "a criminal defendant has 'no constitutional right to personally cross-examine the victim of his crimes[,]" and "[a]t all times in this case, [the] defendant maintained autonomy in presenting his defense, and was able to control the direction of the cross-examination of [the children] by writing the relevant questions for his advisory attorney[,] . . . [and the] advisory counsel conferred with [the] defendant and received assistance from him in coordinating the exhibits during [the children's cross-]examinations[]") (quoting MRE 611(a); additional citations omitted). See also *People v Adamski*, 198 Mich App 133, 138 (1993) ("[t]he right of cross-examination does not include a

right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interest of the trial process or of society[]").

MRE 611(a) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Additionally, the trial court is free to use its authority under other rules, including any rules of civil procedure that apply in criminal cases. See MCR 6.001(D).

2. Use of Support Person or Support Animal

MCL 600.2163a(4) permits certain witnesses to be accompanied by a support person or support animal.[14] However, "a fully abled adult witness may not be accompanied by a support animal or support person while testifying." *People v Shorter (Dakota)*, 324 Mich App 529, 542 (2018).[15]

C. Victims-Witnesses Under Age 16, Age 16 or Older With Developmental Disability, or Vulnerable Adults

MCL 600.2163a (criminal proceedings) and MCL 712A.17b (child protective proceedings and certain juvenile delinquency) provide specific protections or procedures to a witness in addition to those afforded to a witness by law or court rule. MCL 600.2163a(22); MCL 712A.17b(18). See also *In re Hensley*, 220 Mich App 331, 333-334 (1996) (these statutory provisions supplement rather than limit a trial court's authority to protect specified child and witnesses with developmental disabilities).

The protections set out in MCL 600.2163a apply to a *witness*, defined in MCL 600.2163a(1)(g) as "an alleged victim of an [enumerated] offense" who is one of the following:

- under 16 years of age,
- 16 years of age or older with a developmental disability, or
- a vulnerable adult.

[14] For a discussion on MCL 600.2163a(4), see Sections 6.6(C)(2)(b)-(c).

[15] Note that *Shorter* was decided before 2018 PA 282 was enacted. The Court analyzed former MCL 600.2163a(4) in the context of support persons, which has been amended to also authorize the use of support dogs for certain witnesses. In addition, the Court relied on the definition of witness in coming to its conclusion that fully abled adult witnesses are not afforded the special protections under MCL 600.2163a; that definition has not been amended since the *Shorter* decision. Accordingly, although it is ultimately up to the trial court to decide, it does not appear that the 2018 amendments to MCL 600.2163a impact the outcome of the *Shorter* decision.

See also MCL 712A.17b(1)(e), which contains a similar definition of *witness*, but does not include vulnerable adults.

A court is free to go beyond the statutory protections enumerated in MCL 600.2163a and MCL 712A.17b and to use its authority under other rules, such as MCR 3.923 and MRE 611.[16] *In re Hensley*, 220 Mich App at 335.

1. Applicable Prosecutions and Proceedings

a. Witnesses Under Age 16 or Age 16 or Older With Developmental Disability

For purposes of a witness under the age of 16 or a witness 16 years of age or older with a developmental disability, the protections that are afforded under MCL 600.2163a and MCL 712A.17b apply only to "prosecutions and proceedings" involving the following offenses, as set out in MCL 600.2163a(2)(a) and MCL 712A.17b(2):[17]

- Child abuse, MCL 750.136b.
- Sexually abusive activity or material involving children, MCL 750.145c.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

In addition, MCL 712A.17b also applies to child protective proceedings. MCL 712A.17b(2)(b).

b. Vulnerable Adult Witnesses

For purposes of a witness who is a vulnerable adult, protections may be afforded under MCL 600.2163a only in "prosecutions and proceedings" for one or more of the

[16] Generally, the rules of civil procedure also apply in criminal cases. MCR 6.001(D).

[17] The protections afforded under MCL 712A.17b only apply to an enumerated offense if, when committed by an adult, it would be a felony. MCL 712A.17b(2)(a).

following offenses, as set out in MCL 600.2163a(2)(b)(*i*)-(*ii*):

- Home invasion, MCL 750.110a.
- Vulnerable adult abuse, MCL 750.145n–MCL 750.145p.
- Embezzlement, MCL 750.174–MCL 750.174a.
- An assaultive crime, as that term is defined in MCL 770.9a.

2. Alternative Procedures

In appropriate prosecutions or proceedings, if a witness meets the age or disability requirements of MCL 600.2163a or MCL 712A.17b, the court must allow the use of certain protective measures to protect the witness.

a. Dolls or Mannequins

"If pertinent, the court must permit the witness to use dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination." MCL 600.2163a(3). See also MCL 712A.17b(3), which contains substantially similar language. See also MCR 3.923(E) (applicable to child protective proceedings and certain juvenile delinquency proceedings), which allows, among other protective measures, the use of anatomical dolls.

b. Support Persons

"The court must permit a witness who is called upon to testify to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony." MCL 600.2163a(4). See also MCL 712A.17b(4), which contains substantially similar language. See also MCR 3.923(E), which allows, among other protective measures, the use of support persons.

Cases where trial court properly permitted support person:

- *People v Rockey*, 237 Mich App 74, 78 (1999) (trial court did not err in allowing a seven-year-old sexual assault victim to sit on her father's lap while testifying or in denying the defendant's

motion for a new trial where there was no evidence of nonverbal communication between the victim and her father).

- *People v Jehnsen*, 183 Mich App 305, 308-311 (1990) (trial court did not err in allowing four-year-old victim's mother to remain in courtroom following the mother's testimony or in denying the defendant's motion for a new trial despite engaging in "nonverbal behavior which could have communicated the mother's judgment of the appropriate answers to questions on cross-examination[,]" where the trial court found no correlation between the mother's conduct and the victim's answers).

"A notice of intent to use a support person . . . is only required if the support person . . . is to be utilized during trial and is not required for the use of a support person . . . during any other courtroom proceeding. A notice of intent under this subsection must be filed with the court and must be served upon all parties to the proceeding. The notice must name the support person . . ., identify the relationship the support person has with the witness, if applicable, and give notice to all parties that the witness may request that the named support person . . . sit with the witness when the witness is called upon to testify during trial." MCL 600.2163a(5). See also MCL 712A.17b(4), which contains similar requirements.

The defendant may file a motion objecting to the use of a named support person. See MCL 600.2163a(5); MCL 712A.17b(4). If the defendant objects, the court must rule on the motion "before the date when the witness desires to use the support person[.]" MCL 600.2163a(5); MCL 712A.17b(4).

Committee Tip:

Before testimony is taken, the judge should consider advising the support person not to react verbally or non-verbally (with gestures or motions) to questions asked of the witness or to the witness's responses.

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c. Courtroom Support Dog

"The court must . . . permit a witness who is called upon to testify to have a courtroom support dog and handler sit with, or be in close proximity to, the witness during his or her testimony."[18] MCL 600.2163a(4).

"A notice of intent to use a . . . courtroom support dog is only required if the . . . courtroom support dog is to be utilized during trial and is not required for the use of a . . . courtroom support dog during any other courtroom proceeding. A notice of intent under this subsection must be filed with the court and must be served upon all parties to the proceeding. The notice must name the . . . ,courtroom support dog, . . . , and give notice to all parties that the witness may request that the . . . courtroom support dog sit with the witness when the witness is called upon to testify during trial." MCL 600.2163a(5).

The defendant may file a motion objecting to the use of a courtroom support dog. See MCL 600.2163a(5). If the defendant objects, the court must rule on the motion "before the date when the witness desires to use the . . . courtroom support dog." MCL 600.2163a(5).

3. Special Arrangements in the Courtroom

In certain proceedings, a party may make a timely motion for special arrangements in the courtroom to protect the welfare of a witness. See MCL 600.2163a(16); MCL 600.2163a(18); MCL 712A.17b(14). Types of *special arrangements* may include excluding unnecessary persons from the courtroom and rearranging the courtroom.

a. Preliminary Examinations in Criminal Proceedings

Before a preliminary examination in criminal proceedings, a party may make a motion for special arrangements in the courtroom to protect the welfare of a witness. See MCL 600.2163a(16). "In determining whether it is necessary to protect the welfare of the witness, the court must consider all of the following factors:

[18] The agency supplying the courtroom support dog conveys all responsibility for the animal to the prosecutor's office or government entity in charge of the courtroom while the dog is being utilized. See MCL 600.2163a(6)

> (a) The age of the witness.
>
> (b) The nature of the offense or offenses.
>
> (c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
>
> (d) The physical condition of the witness." MCL 600.2163a(16).

If the court "finds on the record that the special arrangements specified in [MCL 600.2163a(17)] are necessary to protect the welfare of the witness, the court must order those special arrangements." MCL 600.2163a(16).

Under MCL 600.2163a(17), "[i]f the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under [MCL 600.2163a(16)], the court must order both of the following:

> (a) That all persons not necessary to the proceeding must be excluded during the witness's testimony from the courtroom where the preliminary examination is held. Upon request by any person and the payment of the appropriate fees, a transcript of the witness's testimony must be made available.
>
> (b) That the courtroom be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant's position must be located so as to allow the defendant to hear and see the witness and be able to communicate with his or her attorney."

b. Criminal Trials

Before a criminal trial, a party may make a motion for special arrangements in the courtroom to protect the welfare of a witness. See MCL 600.2163a(18). "In determining whether it is necessary to protect the welfare of the witness, the court must consider all of the following factors:

> (a) The age of the witness.

> (b) The nature of the offense or offenses.
>
> (c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
>
> (d) The physical condition of the witness." MCL 600.2163a(18).

If the court "finds on the record that the special arrangements specified in [MCL 600.2163a(19)] are necessary to protect the welfare of the witness, the court must order those special arrangements." MCL 600.2163a(18).

Under MCL 600.2163a(19), "[i]f the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under [MCL 600.2163a(18)], the court must order 1 or more of the following:

> (a) That all persons not necessary to the proceeding be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony must be broadcast by closed-circuit television to the public in another location out of sight of the witness.
>
> (b) That the courtroom be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant's position must be the same for all witnesses and must be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.
>
> (c) That a questioner's stand or podium be used for all questioning of all witnesses by all parties and must be located in front of the witness stand."

c. Certain Juvenile Delinquency Adjudications

Before a juvenile delinquency adjudication for an enumerated offense,[19] a party may make a motion for special arrangements in the courtroom to protect the

welfare of a witness. See MCL 712A.17b(14). "In determining whether it is necessary to protect the welfare of the witness, the court shall consider both of the following:

> (a) The age of the witness.
>
> (b) The nature of the offense or offenses." MCL 712A.17b(14).

If the court "finds on the record that the special arrangements specified in [MCL 712A.17b(15)] are necessary to protect the welfare of the witness, the court shall order 1 or both of those special arrangements." MCL 712A.17b(14).

Under MCL 712A.17b(15), "[i]f the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under [MCL 712A.17b(14)], the court shall order 1 or both of the following:

> (a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.
>
> (b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand."

4. Witness Screen

Use of a witness screen "that limits a defendant's right to confront his [or her] accusers face[-]to[-]face" is permissible where the court "determine[s] that [use of the witness screen] is necessary to further an important state interest[,] . . . hear[s] evidence and determine[s] . . . use of the [witness screen] is

[19] As it pertains to juvenile delinquency proceedings, MCL 712A.17b "only applies to either . . . [a] proceeding brought under [MCL 712A.2(a)(1)] . . . in which the alleged offense, if committed by an adult, would be a felony under [MCL 750.136b, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g]." MCL 712A.17b(2)(a).

necessary to protect the witness[, and] . . . find[s] that the witness would be traumatized by the presence of the defendant and that the emotional distress would be more than *de minimis*." *People v Rose (Ronald)*, 289 Mich App 499, 516-517 (2010) (trial court's decision to permit an eight-year-old victim to testify using a one-way witness screen that prevented the victim from seeing the defendant, did not violate the defendant's right to confrontation where "the trial court clearly found that the use of the witness screen was necessary to protect [the victim,]" the victim expressed fear of the defendant, and the court determined "that, given [the victim's] age, the nature of the offenses, and [the victim's] therapist's testimony, there was 'a high likelihood' that [the victim] testifying face[-]to[-]face with [the defendant] would cause [the victim] to 'regress in her therapy, have psychological damage' and could cause her 'to possibly not testify . . . [,]' [and] . . . the use of the witness screen preserved the other elements of the confrontation right"), citing *People v Burton*, 219 Mich App 278, 288, 290 (1996).[20]

"Even if the use of a [witness] screen were inherently prejudicial, a trial court could nevertheless require a [witness] screen [without violating the defendant's due process right to a fair trial] if its use were necessary to further an essential state interest." *Rose (Ronald)*, 289 Mich App at 521-522 (because "the state has a compelling interest in protecting child witnesses from the trauma of testifying when the trauma would be the result of the defendant's presence and would impair the child's ability to testify[,]" the trial court properly found that "the use of the [witness] screen was necessary in order to ensure [the eight-year-old victim] would be able to testify[]"), citing *Maryland v Craig*, 497 US 836, 855-857 (1990).

[20] In *Rose (Ronald)*, the trial court erroneously relied on MCL 600.2163a for its authority to permit use of the witness screen because "MCL 600.2163a requires the trial court to employ very specific protections, and none of these protections includes the use of a witness screen." Nevertheless, "the trial court's erroneous reliance on MCL 600.2163a [did] not itself warrant relief[]" because "the existence of [MCL 600.2163a] does not preclude [a] trial court[] from using [a witness screen as an] alternative procedure[] [as long as use of the witness screen was] permitted by law or court rule to protect [the] witness[,] . . . [and] the trial court's decision to use [the] witness screen [did not] violate[] [the defendant's] Sixth Amendment right to confront [the witness] or violate[] [the defendant's] basic right to due process and a fair trial." *Rose (Ronald)*, 289 Mich App at 509.

5. Videotaped Depositions and One-Way Closed-Circuit Television

a. Criminal Proceedings

In criminal proceedings, "[i]f, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding[21] even with the benefit of the protections afforded the witness in [MCL 600.2163a(3) (use of dolls or mannequins)], [MCL 600.2163a(4) (use of support person or courtroom support dog)], [MCL 600.2163a(17) (special arrangements in the courtroom during preliminary examination)], and [MCL 600.2163a(19) (special arrangements in the courtroom during trial)], the court must order that the witness may testify outside the physical presence of the defendant by closed circuit television or other electronic means that allows the witness to be observed by the trier of fact and the defendant when questioned by the parties." MCL 600.2163a(20).

"For purposes of the videorecorded deposition under [MCL 600.2163a(20)], the witness's examination and cross-examination must proceed in the same manner as if the witness testified at the court proceeding for which the videorecorded deposition is to be used. The court must permit the defendant to hear the testimony of the witness and to consult with his or her attorney." MCL 600.2163a(21).

b. Child Protective Proceedings

"In a proceeding brought under [MCL 712A.2(b)], if, upon the motion of a party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify at the adjudication stage, the court shall order to be taken a videorecorded deposition of a witness that shall be admitted into evidence at the adjudication stage instead of the live testimony of the witness. The examination and cross-examination of the witness in the videorecorded deposition shall proceed in the same manner as permitted

[21] The court must find that the witness would be unable to testify truthfully and understandably in the defendant's presence, not that the witness would stand mute when questioned. *People v Pesquera*, 244 Mich App 305, 311 (2001).

at the adjudication stage." MCL 712A.17b(13). See also MCR 3.923(E), which allows the court, among other protective measures, to use "videoconferencing technology, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties[,]" and the use of videotaped depositions "to protect the child witness as authorized by MCL 712A.17b."

Use of a child's videotaped deposition did not deprive the respondent-parents of their due process rights to confrontation where an expert testified to the child's inability to communicate if attorneys questioned her and that she may suffer trauma if forced to participate in cross-examination, and during the deposition, the respondent-parents' counsel observed the child through a one-way window and submitted questions before and during the deposition. *In re Brock*, 442 Mich 101, 105-115 (1993).[22] The Court found that although parents "have an important liberty interest in the management of their children that is protected by due process[,] . . . the child's welfare is primary in child protective proceedings." *Id*. at 114-115. Thus, where "the spirit of confrontation and cross-examination [can] only be achieved by alternative, nontraditional procedures, deviation from traditional practices should be allowed." *Id*. at 115.

c. Certain Juvenile Delinquency Proceedings

In juvenile delinquency proceedings, "in which the alleged offense, if committed by an adult, would be a felony under [MCL 750.136b, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g], if, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in [MCL 712A.17b(3) (use of dolls or mannequins)], [MCL 712A.17b(4) (use of support person)], and [MCL 712A.17b(15) (rearranging of courtroom)], the court shall order that a videorecorded deposition of a witness shall be taken to be admitted at the adjudication stage instead of the witness's live testimony." MCL 712A.17b(16). See

[22] The Michigan Supreme Court also concluded that the Sixth Amendment right to confrontation was inapplicable to child protective proceedings because that right only applies to criminal proceedings. *In re Brock,* 442 Mich at 108.

also MCR 3.923(E), which allows the court, among other protective measures, to use "videoconferencing technology, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties[,]" and the use of videotaped depositions "to protect the child witness as authorized by MCL 712A.17b."

"For purposes of the videorecorded deposition under [MCL 712A.17b(16)], the witness's examination and cross-examination shall proceed in the same manner as if the witness testified at the adjudication stage, and the court shall order that the witness, during his or her testimony, shall not be confronted by the respondent but shall permit the respondent to hear the testimony of the witness and to consult with his or her attorney." MCL 712A.17b(17).

6. Videorecorded Statements

a. Criminal Proceedings

The court may use telephonic, voice, video conferencing, or two-way interactive video technology during certain criminal proceedings.[23] See MCR 6.006.[24] However, in Michigan, defendants in felony cases have a statutory right to be "personally present" at trial. MCL 768.3. In addition, criminal defendants have a constitutional right to confront the witnesses against them. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1. Thus, use of this technology may implicate a defendant's right to confrontation.

"A videorecorded statement may be considered in court proceedings only for 1 or more of the following purposes:

> (a) It may be admitted as evidence at all pretrial proceedings, except that it cannot be introduced at the preliminary examination instead of the live testimony of the witness.
>
> (b) It may be admitted for impeachment purposes.

[23] "The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).

[24] Administrative Order No. 2012-7 (which limits the circumstances under which judges may preside over remote proceedings) is suspended until further order of the Court." Administrative Order No. 2020-19.

> (c) It may be considered by the court in determining the sentence.
>
> (d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea." MCL 600.2163a(8). "

MCL 600.2163a(7) requires the videorecorded statement to do all of the following:

- "[S]tate the date and time that the statement was taken;"
- "[I]dentify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording;"
- "[S]how a time clock that is running during the taking of the videorecorded statement."

"A custodian of the videorecorded statement may take a witness's videorecorded statement before the normally scheduled date for the defendant's preliminary examination." MCL 600.2163a(7).

Questioning of the witness. "In a videorecorded statement, the questioning of the witness should be full and complete; must be in accordance with the forensic interview protocol[25] implemented as required by . . . MCL 722.628, or as otherwise provided by law; and, if appropriate for the witness's developmental level or mental acuity, must include, but is not limited to, all of the following areas:

> (a) The time and date of the alleged offense or offenses.
>
> (b) The location and area of the alleged offense or offenses.
>
> (c) The relationship, if any, between the witness and the accused.
>
> (d) The details of the offense or offenses.
>
> (e) The names of any other persons known to the witness who may have personal

[25] For detailed information and discussion about proper techniques involved in child victim cases, see the *Forensic Interviewing Protocol*.

knowledge of the alleged offense or offenses." MCL 600.2163a(10).

Release or use of videorecorded statement. "A videorecorded statement must not be copied or reproduced in any manner except as provided in this section." MCL 600.2163a(15). MCL 600.2163a(15) does not, however, "prohibit the production or release of a transcript of a videorecorded statement."

MCL 600.2163a(11)-(12) set out the applicable standards for release or use of videorecorded statements:

- "A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to[:]
  - a law enforcement agency,
  - an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or
  - an entity that is part of county protocols established under . . . MCL 722.628, or as otherwise provided by law." MCL 600.2163a(11) (bullets added).
- "The defendant and, if represented, his or her attorney has the right to view and hear a videorecorded statement before the defendant's preliminary examination." MCL 600.2163a(11).
- "Upon request, the prosecuting attorney shall provide the defendant and, if represented, his or her attorney with reasonable access and means to view and hear the videorecorded statement at a reasonable time before the defendant's pretrial or trial of the case." MCL 600.2163a(11).
- "In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement, the court may order that a copy of the videorecorded statement be given to the defense." MCL 600.2163a(11).
- "If authorized by the prosecuting attorney in the county in which the videorecorded statement was taken, and with the consent of a minor

> witness's nonoffending parent or legal guardian, a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county, or for purposes of training persons in another county who would meet the definition of custodian of the videorecorded statement had the videorecorded statement been taken in that other county, on the forensic interview protocol[26] implemented as required by . . . MCL 722.628, or as otherwise provided by law. The consent required under this subsection must be obtained through the execution of a written, fully informed, time-limited, and revocable release of information. An individual participating in training under this subsection is also required to execute a nondisclosure agreement to protect witness confidentiality." MCL 600.2163a(12).

"Except as provided in this section, an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or consent to release a videorecorded statement or a copy of a videorecorded statement." MCL 600.2163a(13). "A person who intentionally releases a videorecorded statement in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 600.2163a(23).

"A videorecorded statement is exempt from disclosure under the freedom of information act [(FOIA)], . . . MCL 15.231 to [MCL] 15.246, is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery." MCL 600.2163a(15).

Videorecorded statement subject to protective order. "A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness." MCL 600.2163a(14).

[26] For detailed information and discussion about proper techniques involved in child victim cases, see the *Forensic Interviewing Protocol*.

b. Child Protective and Certain Juvenile Delinquency Proceedings[27]

"The court may allow the use of videotaped statements . . . to protect the child witness as authorized by MCL 712A.17b." MCR 3.923(E).

MCL 712A.17b(5) requires the videorecorded statement to do all of the following:

- "[S]tate the date and time that the [videorecorded] statement was taken."
- "[I]dentify the persons present in the room and state whether they were present for the entire video recording or only a portion of the video recording."
- "[S]how a time clock that is running during the taking of the videorecorded statement."

"A custodian of the videorecorded statement may take a witness's videorecorded statement. The videorecorded statement shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(5).[28] See *In re Martin*, 316 Mich App 73, 81-82 (2016) (reversing the trial court's order of adjudication with respect to the respondent-father and the order terminating his parental rights where the trial court erroneously relied on the child's videorecorded statements contained in a DVD instead of live testimony to adjudicate the respondent-father).[29]

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[27] MCL 712A.17b "only applies to either . . . [a] proceeding brought under [MCL 712A.2(a)(1)] . . . in which the alleged offense, if committed by an adult, would be a felony under [MCL 750.136b, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g,] . . . [or] a proceeding brought under [MCL 712A.2(b)]." MCL 712A.17b(2).

[28] "MCL 712A.17b(5) requires a trial court to admit video recordings of a child's forensic interview during a non-adjudicatory stage," rather than a "forensic [interviewer's] interpretation of [the child's] statements." *In re Brown/Kindle/Muhammad, Minors*, 305 Mich App 623, 632, 633 (2014).

[29] "[A] videorecorded statement taken in compliance with MCL 712A.17b must be admitted at a [pretrial] tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement, i.e., to assess whether 'the circumstances surrounding the giving of the statement provide[d] adequate indicia of trustworthiness,' MCR 3.972(C)(2)(a)[;]" however, in the *In re Martin* case, "the forensic interviewer [whose recorded questioning of the child raised claims by the child of sexual abuse by the respondent-father] did not testify at trial with respect to the child's statements made in the interview[, and t]he trial court did not employ the [videorecorded statement] to determine whether the forensic interviewer should be allowed to testify under MCR 3.972(C)(2)(a)[, but the trial court instead erroneously] . . . used the [videorecorded statement], in and of itself, to adjudicate [the] respondent-father." *In re Martin*, 316 Mich App at 83.

Questioning of the witness. "In a videorecorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol[30] implemented as required by . . . MCL 722.628; and, if appropriate for the witness's developmental level, shall include, but need not be limited to, all of the following areas:

> (a) The time and date of the alleged offense or offenses.
>
> (b) The location and area of the alleged offense or offenses.
>
> (c) The relationship, if any, between the witness and the respondent.
>
> (d) The details of the offense or offenses.
>
> (e) The names of other persons known to the witness who may have personal knowledge of the offense or offenses." MCL 712A.17b(6).

Release or use of videorecorded statement. "A videorecorded statement shall not be copied or reproduced in any manner except as provided in [MCL 712A.17b]." MCL 712A.17b(11). MCL 712A.17b(11) does not, however, "prohibit the production or release of a transcript of a videorecorded statement."

MCL 712A.17b(7)-(8) set out the applicable standards for release or use of videorecorded statements:

- "A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to[:]
  - a law enforcement agency,
  - an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or
  - an entity that is part of county protocols established under . . . MCL 722.628." MCL 712A.17b(7) (bullets added).

[30] For detailed information and discussion about proper techniques involved in child victim cases, see the *Forensic Interviewing Protocol*.

- "Each respondent and, if represented, his or her attorney has the right to view and hear the videorecorded statement at a reasonable time before it is offered into evidence." MCL 712A.17b(7).

- "In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement, the court may order that a copy of the videorecorded statement be given to the defense." MCL 712A.17b(7).

- "If authorized by the prosecuting attorney in the county in which the videorecorded statement was taken and with the consent of a minor witness's nonoffending parent or legal guardian, a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county, or for purposes of training persons in another county that would meet the definition of custodian of the videorecorded statement had the videorecorded statement been taken in that other county, on the forensic interview protocol[31] implemented as required by . . . MCL 722.628. The consent required under this subsection must be obtained through the execution of a written, fully informed, time-limited, and revocable release of information. An individual participating in training under this subsection is also required to execute a nondisclosure agreement to protect witness confidentiality." MCL 712A.17b(8).

"Except as provided in [MCL 712A.17b], an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or consent to release a videorecorded statement or a copy of a videorecorded statement." MCL 712A.17b(9). "A person who intentionally releases a videorecorded statement in violation of [MCL 712A.17b] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 712A.17b(19).

[31] For detailed information and discussion about proper techniques involved in child victim cases, see the *Forensic Interviewing Protocol*.

"A videorecorded statement is exempt from disclosure under the [FOIA], . . . MCL 15.231 to [MCL] 15.246, is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery." MCL 712A.17b(11).

Videorecorded statement subject to protective order. "A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness." MCL 712A.17b(10).

6.7 Use of Interpreters[32]

A. Use of Sign Language Interpreter

"In any action before a court or a grand jury where a deaf or deaf-blind person is a participant in the action, either as a plaintiff, defendant, or witness, the court shall appoint a qualified interpreter to interpret the proceedings to the deaf or deaf-blind person, to interpret the deaf or deaf-blind person's testimony or statements, and to assist in preparation of the action with the deaf or deaf-blind person's counsel." MCL 393.503(1).

Committee Tip:

*It is strongly suggested that a family member of witnesses not be appointed as a sign language interpreter for a witness or party. See generally MCR 1.111(E)(1)(b) (appointing a family member as a **foreign language interpreter** may create a conflict, and the court must articulate a reason on the record for appointing that person).*

"The right of a deaf or deaf-blind person to a qualified interpreter shall not be waived except by a request for waiver in writing by the deaf or deaf-blind person. A written waiver of a plaintiff or defendant is subject to the approval of the deaf or deaf-blind person's counsel and the approval of the appointing authority." MCL 393.503(3).

[32] For general information on Language Access, see http://courts.mi.gov/Administration/admin/op/access.

For additional information on the procedures and requirements for using a sign language interpreter in court proceedings, see the Deaf Persons' Interpreters Act, MCL 393.501 *et seq*. For further discussion on the requirements under the Americans With Disabilities Act, 42 USC 12101 *et seq.*, including the Michigan Supreme Court Administrative Order, ADM File No. 2015-5 and Model LAO 35, effective September 16, 2015, see http://courts.mi.gov/Administration/admin/op/access/Pages/americans-with-disabilities-act.aspx.

B. Use of Foreign Language Interpreter

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter[33] if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1).[34]

> **Note:** The court should avoid appointing an interpreter that has potential to create a conflict of interest. See MCR 1.111(E)(1), which lists certain persons that raise potential conflict of interest issues:
>
> > "(1) The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:
> >
> > > (a) The interpreter is compensated by a business owned or controlled by a party or a witness;
> > >
> > > (b) The interpreter is a friend, a family member, or a household member of a party or witness;
> > >
> > > (c) The interpreter is a potential witness;
> > >
> > > (d) The interpreter is a law enforcement officer;

[33] "The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: 'Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?'" MCR 1.111(G).

[34] In addition, "[t]he court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

> (e) The interpreter has a pecuniary or other interest in the outcome of the case;
>
> (f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;
>
> (g) The interpreter does have, or may have, a perceived conflict of interest;
>
> (h) The appointment of the interpreter creates an appearance of impropriety." MCR 1.111(E)(1)(a)-(h).

"A person may waive the right to a foreign language interpreter established under [MCR 1.111(B)(1)] unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of [MCR 1.111(F)[35]] and the foreign language interpreter may participate remotely." MCR 1.111(C).

The State Court Administrative Office (SCAO) has provided quick reference guides for court-appointed foreign language interpreters under MCR 1.111. See SCAO's Bench Card, *Limited English Proficient Interpreter Appointment: MCR 1.111 Summary*; SCAO's Quick Reference Guide, *Judge's Quick Guide to Foreign Language Access*; SCAO's Quick Reference Guide, *Interpreters in the Judicial System*.

For more information on court-appointed foreign language interpreters under MCR 1.111, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1.

6.8 Evidentiary Issues: Character Evidence and Expert Testimony

This section contains a brief discussion on evidentiary issues that are specific to crime victims. For a detailed discussion on evidentiary issues in general, see the Michigan Judicial Institute's *Evidence Benchbook*.

[35] MCR 1.111(F) sets out the procedures for appointment of a foreign language interpreter.

A. Evidence of Victim's Character

1. Homicide Victim

In general, evidence of a person's character or a character trait is not admissible to show that the person acted in conformity with his or her character or character trait at the time in question. MRE 404(a). However, MRE 404(a)(2) permits evidence of an alleged victim's character in homicide cases when self-defense is an issue in the case:

> "When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor[.]"

Where the defendant offers character evidence of the deceased victim to show that the defendant acted in self-defense, the evidence is being offered to show the defendant's state of mind, and the defendant must have had knowledge of the victim's violent reputation before the evidence will be admitted. *People v Harris (Jerry)*, 458 Mich 310, 315-316 (1998). If, however, the character evidence of a victim is being offered to show that he or she was the probable aggressor, the defendant need not know of the victim's reputation at the time. *People v Orlewicz*, 293 Mich App 96, 104 (2011). "[T]his type of character evidence may only be admitted in the form of reputation testimony, not by testimony regarding specific instances of conduct unless the testimony regarding those instances is independently admissible for some other reason or where character is an essential element of a claim or defense."[36] *Orlewicz*, 293 Mich App at 104. "[E]vidence of [a] decedent's specific acts of violence is admissible only to prove an essential element of self-defense, such as a reasonable apprehension of harm." *People v Edwards (William)*, 328 Mich App 29, 37 (2019).

In cases where the defendant is claiming self-defense, a jury instruction on the alleged victim's past acts or reputation may

[36] In *Orlewicz*, the Court of Appeals found that social networking and personal websites may be used as character evidence because they are self-edited and thus "constitute general reputational evidence rather than evidence concerning specific instances of conduct." *Orlewicz*, 293 Mich App at 105.

be appropriate. See M Crim JI 7.23. M Crim JI 7.23(1) addresses past violent acts committed by the alleged victim. M Crim JI 7.23(2) addresses the alleged victim's reputation for cruelty and violence.

2. Sexual Assault Victim

A brief discussion on Michigan's rape-shield provisions is contained in this sub-subsection. For a detailed discussion, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 7.

a. Admissibility

Evidence of a victim's sexual conduct is generally inadmissible in all criminal sexual conduct (CSC) prosecutions, unless, and then only to the extent that, (1) the evidence is material to a fact at issue; (2) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (3) the evidence involves either the victim's past sexual conduct with the actor or specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. See MCL 750.520j(1); MRE 404(a)(3).

Specifically, MCL 750.520j(1) provides:

> "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under [MCL 750.520b to MCL 750.520g][37] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > (a) Evidence of the victim's past sexual conduct with the actor.
> >
> > (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

[37] The cited statutes describe CSC offenses.

See also MRE 404(a)(3), which permits, in CSC cases, the admission of "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

"In certain limited situations, evidence that is not admissible under one of the statutory exceptions [in MCL 750.520j(1)(a) or MCL 750.520j(1)(b)] may nevertheless be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation."*People v Benton*, 294 Mich App 191, 197 (2011). "When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case." *Benton*, 294 Mich App at 198. If a trial court determines that evidence of a victim's past sexual conduct is not admissible under one of the statutory exceptions, it must consider whether admission is required to preserve the defendant's constitutional right to confrontation; if the evidence is not so required, the court "'should . . . favor exclusion' of [the] evidence." *Id.* at 197, quoting *People v Hackett*, 421 Mich 338, 339 (1984)

"'[P]ast' sexual conduct refers to conduct that has occurred before the evidence is offered at trial." *People v Adair*, 452 Mich 473, 483 (1996). In *Adair*, the defendant was charged with sexually assaulting his wife and sought to introduce evidence of specific incidents when he and his wife engaged in consensual sexual relations *after* the alleged assault. *Id.* at 475. In deciding whether subsequent sexual relations are sufficiently probative to be admitted, a court should consider (1) the length of time between the alleged assault and the subsequent sexual relations, and (2) whether the complainant and the defendant had a personal relationship before the alleged assault. *Id.* at 486-487. In explaining its reasoning, the Court stated:

> "On a common-sense level, a trial court could find that the closer in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with [the] alleged assailant, the stronger the argument would be that if indeed [he or] she had been sexually assaulted, [he or] she would not have consented to sexual relations with [the alleged assailant] in the immediate aftermath of sexual assault. Accordingly, the evidence may be probative. Conversely, the greater the time interval, the less probative

> force the evidence may have, depending on the circumstances.
>
> Even so, time should not be the only factor. The trial court should also carefully consider the circumstances and nature of the relationship between the complainant and the defendant. If the two did not have a personal relationship before the alleged sexual assault, then any consensual sexual relations after the alleged sexual assault would likely be more probative than if the two had been living together in a long-term marital relationship. Additionally, the trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to consensual sexual relations in spite of an earlier sexual assault. Depending on the circumstances, the trial court may find that these other considerations have intensified the inflammatory and prejudicial nature of subsequent consensual sexual conduct evidence and properly conclude that it should be precluded or limited. Moreover, the Legislature, by the use of the term 'unless and only to the extent that' in the rape-shield statute, expressly limited admission of such evidence to what is necessary for the defense. Therefore, the trial court appropriately should limit the scope of sexual conduct evidence where constitutionally possible." *Adair*, 451 Mich at 486-487.

b. Notice Requirements

MCL 750.520j(2) requires the defendant to provide notice of his or her intent to offer evidence of the complainant's prior sexual conduct:

> "If the defendant proposes to offer evidence described in [MCL 750.520j(1)(a)] or [MCL 750.520j(1)(b)], the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under [MCL 750.520j(1)]. If new information is discovered during the course

> of the trial that may make the evidence described in [MCL 750.520j(1)(a)] or [MCL 750.520j(1)(b)] admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under [MCL 750.520j(1)]."

3. Victim's Credibility

Evidence of character is generally inadmissible to prove conduct. MRE 404(a). However, MRE 404(a)(4) permits a witness's credibility to be attacked or supported through impeachment, opinion or reputation testimony, or inquiry into specific instances of conduct, as permitted by MRE 607, MRE 608 or MRE 609. For a detailed discussion of these court rules, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

B. Cross-Examination Regarding Victim's Civil Suit

"It is a well-settled rule of law in Michigan that where civil actions have been commenced on the same matter as the action being tried, it is reversible error for the trial court to refuse to allow inquiry and argument regarding such connected action since the bias or interest of a witness is a proper subject of inquiry."[38] *People v Johnston*, 76 Mich App 332, 336 (1977). In *Johnston*, "Although more latitude in the cross-examination of the witness . . . would have been preferable," the trial court did not commit reversible error in limiting defense counsel's cross-examination of the victim regarding the victim's filed civil suit against the apartment complex where she lived and the defendant worked where "[the] defendant's counsel succeeded in getting before the jury the fact that [the victim] had indeed started [a civil] suit against the apartment complex[, and] . . . the trial transcript show[ed] that, without objection, defense counsel referred to the civil suit in his summation when he was discussing reasons why the [victim] might have fabricated her accusation against the defendant." See also *People v Adamski*, 198 Mich App 133, 141-142 (1993) ("trial court erred in prohibiting [the] defendant[-father, accused of having sexual intercourse with his 14-year-old daughter,] from cross-examining [his daughter] with regard to a civil action she had brought or was about to bring, through her mother, against [the] defendant[-father][]").

[38] For a discussion on the relationship between criminal or juvenile proceedings and civil actions instituted by crime victims, see Chapter 10.

C. Expert Testimony

A brief discussion on expert testimony is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

1. Admissibility

MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

After a court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." MCL 600.2164a(1). The party wishing to present expert testimony by video communication equipment must file a motion (and serve a copy of it) at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party "initiat[ing] the use of video communication equipment [under MCL 600.2164a] shall pay the cost for its use, unless the court otherwise directs." MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1).

If the court determines that the expert testimony meets the requirements of MRE 702, it must next determine whether the probative value of the expert testimony "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" See MRE 403. However, on request, the trial judge may decide that a limiting instruction is an appropriate alternative to excluding the evidence. *People v Christel*, 449 Mich 578, 587 (1995).

Opinions and diagnoses may be admissible under MRE 803(6).

2. Factual Basis for Opinion

MRE 703 governs the bases of opinion testimony:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

MRE 703 "permits 'an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony.'" *People v Fackelman*, 489 Mich 515, 534 (2011), quoting 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703).

3. Court-Appointed Expert

A court is authorized to appoint expert witnesses in any case. MRE 706. The court may seek nominations by the parties and appoint an agreed-upon expert, or appoint an expert of the court's own selection. MRE 706(a).

An expert must consent to act as a witness before a court may appoint him or her. MRE 706(a). The court must inform an appointed expert of his or her duties, either in writing (a copy of which must be filed with the court clerk) or at a conference where all the parties are able to participate. *Id.*

The appointed expert witness must disclose any findings to all parties, and may be required to participate in a deposition or to testify at trial. MRE 706(a). If testifying, the expert witness is subject to cross-examination by any party (including the party calling the expert witness). *Id.*

4. Expert Testimony by Physician

An examining physician's testimony may be admissible if the expert possesses specialized knowledge that will assist the trier of fact in understanding the evidence or determining a fact in issue under MRE 702. *People v Mays*, 425 Mich 98, 113, 115 (1986) (a consolidated case involving two different defendants and separate sets of facts).

- As it related to defendant-Mays, the *Mays* Court held that a medical expert's opinion "that the physical examination revealed abrasions at the entrance of the [victim's] vagina[and] . . . that [the victim] had been penetrated against her will" was admissible where the medical expert's opinion "was grounded upon objective evidence[,] cross-examination was available, and was used, to expose its true basis[, and t]he use of force or coercion [was] relevant . . . in light of [the] defendant's claim that the acts were consensual."

- As it related to defendant-Smith, the *Mays* Court held that the trial court erroneously admitted the medical expert's testimony where "[the medical expert's] opinion that the victim was sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/ gynecologist, but, rather, on the emotional state of, and the history given by, the [victim]."

"[A]n examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings *and* the complainant's medical history." *People v Thorpe*, 504 Mich 230, 255 (2019). However, "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id.* at 235 ("an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the 'conclusion [is] nothing more than the doctor's opinion that the victim had told the truth'"; "[s]uch testimony is not permissible because a 'jury [is] in just as good a position to evaluate the victim's testimony as' the doctor"), quoting *People v Smith (Joseph)*, 425 Mich 98, 109 (1986) (alteration in the original). See also *People v Del Cid (On Remand)*, ___ Mich App ___, ___ (2020) (an examining physician's testimony regarding a child-complainant's "possible sexual abuse" was inadmissible without corroborating physical evidence).

For additional information on expert testimony by physicians in criminal sexual conduct cases or expert testimony by Sexual Assault Nurse Examiners (SANEs), see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 8.

5. Expert Testimony on Syndrome Evidence

In some cases, "expert testimony is needed when a witness' actions or responses are incomprehensible to average people."" *People v Christel*, 449 Mich 578, 592 (1995).

a. Battered Woman Syndrome[39]

Expert testimony on the "generalities or characteristics" associated with battered woman syndrome is admissible for the narrow purpose of describing the victim's distinctive pattern of behavior that was brought out at trial. *People v Daoust*, 228 Mich App 1, 10 (1998), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008).[40]

Expert testimony relating to the characteristics associated with battered woman syndrome is admissible when the witness is properly qualified and the testimony is relevant and helpful to the jury's evaluation of the complainant's credibility. *Christel*, 449 Mich at 579-580. The expert's testimony is admissible to help explain the complainant's behavior, but the testimony is not admissible to express the expert's opinion of whether the complainant was a battered woman or to comment on the complainant's honesty. *Id.* at 580.

b. Sexually Abused Child Syndrome

"'[C]ourts should be particularly insistent in protecting innocent defendants in child sexual abuse cases' given 'the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury.'" *People v Musser*, 494 Mich 337, 362-363 (2013) (holding that a detective who was not qualified as an expert witness was still subject to the same limitations as an expert because he "'gave . . . the same aura of superior knowledge that accompanies expert witnesses in other trials'" and because, as a police officer, jurors may have been inclined to place undue weight on his testimony), quoting *People v Peterson*, 450 Mich 349, 371 (1995), modified 450 Mich 1212.

[39]The better term for *battered woman/spouse syndrome* is *battered* ***partner*** *syndrome*. "Because abusive conduct and victimization are neither gender-specific nor exclusive to married couples, the broader term 'battered partner syndrome' used by the Court of Appeals of Washington is the most appropriate." *People v Spaulding*, ___ Mich App ___, ___ (2020), citing *State v Cook*, 164 Wash App 845, 847, 852-853 (2006), overruled in part on other grounds by *State v Magers*, 164 Wash 2d 174, 185-186 (2008).

[40] For more information on the precedential value of an opinion with negative subsequent history, see our note.

Accordingly, an expert witness's testimony is limited. *Peterson*, 450 Mich at 352. The expert witness may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of the victim,[41] or (3) testify to the defendant's guilt. *Id*. at 352.

Despite these limitations, "(1) an expert may testify in the prosecutor's case-in-chief [(rather than only in rebuttal)] regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson*, 450 Mich at 352-353.

A defendant must raise certain issues before expert testimony is admissible to show that the victim's behavior was consistent with sexually abused victims generally:

> "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse." *Peterson*, 450 Mich at 373-374.

Where the defense theory raised the issue of the complainant's postincident behavior (attempting suicide), it was not an abuse of discretion to admit expert testimony comparing the child-victim's postincident behavior with that of sexually abused children. *People v Lukity*, 460 Mich 484, 500-502 (1999). The Court stated:

> "Under *Peterson*, [450 Mich at 349,] raising the issue of a complainant's post[]incident behavior opens the door to expert testimony that the complainant's behavior was

[41] See *People v Thorpe*, 504 Mich 230, 235 (2019) ("expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity"; "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury").

> consistent with that of a sexual abuse victim. Accordingly, the trial court did not abuse its discretion in allowing [the expert] to testify.
>
> "Moreover, [the] defendant effectively cross-examined [the expert] and convincingly argued in closing that the fact that a behavior is 'consistent' with the behavior of a sexual abuse victim is not dispositive evidence that sexual abuse occurred. Specifically, [the defendant] argued that 'almost any behavior is not inconsistent with being a victim of sexual assault.'" *Lukity*, 460 Mich at 501-502.

In *Peterson*, the Michigan Supreme Court found that the trial itself was "an almost perfect model for the limitations that must be set in allowing expert testimony into evidence in child sexual abuse cases." *Peterson*, 450 Mich at 381. In that case, the victim delayed reporting the abuse for several years, but the defendant did not ask the victim any questions suggesting that the delay in reporting was inconsistent with the alleged abuse nor did the defendant attack the victim's credibility. *Id.* at 358. The trial court allowed a single expert to clarify, during the prosecutor's case-in-chief, that child sexual abuse victims frequently delay reporting the abuse. *Id.* at 359-360. The expert's testimony helped to dispel common misperceptions held by jurors regarding the reporting of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility. *Id.* at 379-380.

There is a bright-line rule that "an examining physician's opinion that a complainant was sexually abused is admissible only if supported by physical findings." *People v Del Cid (On Remand)*, ___ Mich App ___, ___ (2020). Expert testimony regarding "'probable pediatric sexual abuse' . . . based solely on [the expert's] own opinion that [the complainant's] account of the [sexual] assaults was 'clear, consistent, detailed and descriptive' . . . clearly falls within *Smith's*[42] holding that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the 'conclusion [is] nothing

[42] In *People v Smith (Joseph)*, 425 Mich 98, 112 (1986), the expert testimony was improperly admitted where the expert's "opinion that the complainant had been sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but rather, on the emotional state of, and the history given by, the complainant."

more than the doctor's opinion that the victim had told the truth.' An examining physician's opinion is objectionable when it is solely based 'on what the victim . . . told' the physician. Such testimony is not permissible because a 'jury [is] in just as good a position to evaluate the victim's testimony as' the doctor." *People v Thorpe*, 504 Mich 230, 255 (2019) (alterations in original). In *Thorpe*, "the Court of Appeals found no error in [the expert's] testimony, reasoning that [the expert] did not opine on whether the complainant was abused by [the defendant] but only diagnosed the complainant with 'probable pediatric sexual abuse.'" *Id*. at 264. However, the Michigan Supreme Court disagreed and stated that "[r]egardless of whether 'probable pediatric sexual abuse' is a term of art that can be used as a diagnosis with or without physical findings, . . . [the expert's] testimony had the clear impact of improperly vouching for [the complainant's] credibility." *Id*.

An examining physician's diagnosis that a complainant was a victim of "possible pediatric sexual abuse" is a distinction without a meaningful difference from a diagnosis of "probable pediatric sexual abuse." *Del Cid*, ___ Mich App at ___. Testimony of either diagnosis is inadmissible in the absence of any physical findings. *Id*. at ___. Even if *possible* sexual abuse was considered significantly different from *probable* sexual abuse, the diagnosis would be inadmissible under MRE 403 because "[t]estimony that the 'diagnosis' is merely 'possible' has very little probative value while . . . such testimony is highly prejudicial." *Id*. at ___. *People v Harbison*, the companion case in *People v Thorpe*, 504 Mich 230 (2019), "recognized that a 'diagnosis' of sexual abuse absent physical findings is a term of art and has no probative value at trial." *Del Cid*, ___ Mich App at ___. "That the [*Harbison*] Court spoke disapprovingly of such diagnoses without qualification supports [the] conclusion that a diagnosis of possible pediatric sexual abuse is also inadmissible without corroborative physical findings." *Id*. at ___.

6. Expert Testimony on Human Trafficking Victims

"Expert testimony as to the behavioral patterns of human trafficking victims and the manner in which a human trafficking victim's behavior may deviate from societal expectations is admissible as evidence in court in a prosecution under [the Human Trafficking Act, MCL 750.462a *et seq*.,] if the

expert testimony is otherwise admissible under the rules of evidence and laws of this state." MCL 750.462g(2).

6.9 Evidentiary Issues: Hearsay

This section discusses hearsay issues as they relate to cases pertaining to crime victims. For a more detailed discussion of the hearsay rules as well as the exclusions from and exceptions to the hearsay rules, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

MRE 801(c) defines *hearsay* as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a).

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. The rules of evidence and some statutory provisions also establish hearsay exceptions for cases pertaining to crime victims. See e.g., MRE 803; MRE 803A; MRE 804; MCL 768.26; MCL 768.27c. The following exclusions from and exceptions to the hearsay rule are commonly relied on in cases pertaining to crime victims:

- testimonial evidence of threats (i.e., statements not offered to prove the truth of the matter asserted or admissions by a party-opponent), see MCL 768.27c; MRE 801(a); MRE 801(d)(2);
- present sense impressions, see MRE 803(1).
- excited utterances, see MRE 803(2);
- statements of existing mental, emotional, or physical condition, see MRE 803(3);
- statements made for purposes of medical treatment or diagnosis, see MRE 803(4);
- recorded recollection, see MRE 803(5);
- records of regularly conducted activity, see MRE 803(6);
- general records and reports, see MRE 803(8);
- statements corroborating a child's statement about a sexual act, see MRE 803A;
- former testimony or statements of unavailable witness, see MRE 804(b)(1); MRE 804(b)(2); MRE 804(b)(6);

- catch-all hearsay exceptions, see MRE 803(24); MRE 804(b)(7).

"Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy." *People v Meeboer (After Remand)*, 439 Mich 310, 322 (1992). However, evidence that falls within a hearsay exception may still be inadmissible if it violates the Confrontation Clause.[43] *People v Dendel (On Second Remand)*, 289 Mich App 445, 472 (2010) ("[U]nder *Crawford*,[44] out-of-court statements are not exempt from confrontation merely because they come within a hearsay exception, including hearsay exceptions traditionally considered to be imbued with indicia of reliability.").

A. Testimonial Evidence of Threats

1. Threats That Are Not Hearsay

A threat may be a non-assertive verbal act and, thus, not hearsay if it is not offered to prove the truth of the matter asserted. See generally MRE 801(a). Such a threat may, for example, be circumstantial evidence of the declarant's state of mind, including consciousness of guilt, or it may explain a witness's inability to identify the defendant in court. See e.g., *People v Sholl*, 453 Mich 730, 740 (1996).

A threat may also be non-hearsay if it is an admission by a party opponent under MRE 801(d)(2).

In the following cases, a threat against a crime victim or witness was ruled admissible either as an admission by a party-opponent or as evidence offered for a purpose other than to show the truth of the matter asserted (i.e. non-hearsay):

- *Sholl*, 453 Mich 730 (1996) (statements showed consciousness of guilt):

The defendant was convicted of CSC-III against a woman with whom he was in a dating relationship. *Sholl*, 453 Mich at 731-732. At trial, the investigating officer testified outside the presence of the jury that, after the trial started, the complainant called him to report that a third party had told her that the defendant had threatened her. *Id.* at 738-739. The officer further testified outside the jury's presence that he asked the defendant if he had talked about killing the complainant, in

[43] An in depth discussion of confrontation issues is outside the scope of this publication. For more information on the Confrontation Clause, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

[44] *Crawford v Washington*, 541 US 36 (2004).

response to which the defendant "acknowledged that, while intoxicated, he 'probably did say something like that.'" *Id*. at 739. The trial court ruled that the officer could testify as to statements made to him by the defendant. *Id*. The officer then testified in the presence of the jury that he asked the defendant if he had threatened to shoot the complainant and that the defendant responded that he "'probably would have said something like that.'" *Id.* at 740. The Supreme Court found no error in admission of this evidence, holding:

> "A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt.
>
> As the circuit court observed, a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case." *Sholl*, 453 Mich at 740 (internal citations omitted).

- *People v Kowalak (On Remand)*, 215 Mich App 554 (1996) (admission by party-opponent):

The defendant was charged with first-degree murder for killing his 82-year-old mother. *Kowalak*, 215 Mich App at 555. At the defendant's preliminary examination, a witness testified that she had spoken with the victim both by telephone and in person shortly before her death. *Id.* at 555-556. During these conversations, the victim told the witness that the defendant had threatened to kill the victim. *Id*. at 556. Applying MRE 801(d)(2), the Court of Appeals concluded that the defendant's threat to his mother was an admission by a party opponent and thus not hearsay.[45] *Kowalak*, 215 Mich App at 556-557.

2. Threats Falling Under Hearsay Exception

MCL 768.27c establishes an exception to the hearsay rule for certain statements purporting "to narrate, describe, or explain

[45] In the *Kowalak* case, there were two statements being analyzed: (1) the defendant's statement to the victim threatening to kill her, and (2) the witness's testimony recounting the victim's statement concerning the threat made by the defendant. See *Kowalak*, 215 Mich App at 556-557. Only the defendant's statement was considered nonhearsay under MRE 801(d)(2); the Court concluded that the other statement (the witness's testimony) was admissible hearsay under the excited utterance exception. *Kowalak,* 215 Mich App at 556-557.

the infliction or threat of physical injury upon the declarant."[46] MCL 768.27c(1)(a). However, "[n]othing in [MCL 768.27c] shall be construed to abrogate any privilege conferred by law."[47] MCL 768.27c(4).

A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

> "(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer." MCL 768.27c(1).

"MCL 768.27c contains no requirement that the complainant-declarant be unavailable in order to admit evidence of a statement that otherwise satisfies the statutory requirements." *People v Olney*, 327 Mich App 319, 326 (2019) ("[t]he circuit court erred as a matter of law in holding that there is an 'unavailability' requirement under MCL 768.27c," and "consequently abused its discretion when it granted defendant's motion to quash on that basis.").

MCL 768.27c(1)(a) "places a factual limitation on the admissibility of statements[,]" and MCL 768.27c(1)(c) "places a temporal limitation on admissibility." *People v Meissner*, 294 Mich App 438, 446 (2011). Together, these provisions "indicate that a hearsay statement can be admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury." *Id.* at 446-447. In

[46] "[MCL 768.27c] applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006." MCL 768.27c(6). "[A] preliminary examination is a type of evidentiary hearing" to which MCL 768.27c applies. *People v Olney (On Remand)*, ___ Mich App ___, ___ (2020).

[47] See Section 3.5 for additional information on privileges.

Meissner, the victim gave a verbal statement and prepared a written statement for the police that she had been threatened by the defendant (1) on previous occasions, (2) that morning at her home, and (3) again that same day, via text message, after telling the defendant she had contacted the police. *Id.* at 442-443. The Court of Appeals found that "[t]he [trial] court could . . . determine that [the victim's] statements met [MCL 768.27c](1)(a) because the statements described text messages that threatened physical injury, and met [MCL 768.27c](1)(c) because [the victim] made the statements at or very near the time she received one or more of the threatening text messages." *Meissner*, 294 Mich App at 447.

For purposes of MCL 768.27c(1)(d), "circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

> (a) Whether the statement was made in contemplation of pending or anticipated litigation[48] in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section." MCL 768.27c(2).

MCL 768.27c(2) expressly states that the court is not limited to the listed factors when determining "circumstances relevant to the issue of trustworthiness[;]" the listed factors are merely "a nonexclusive list of possible circumstances that may demonstrate trustworthiness." *Meissner*, 294 Mich App at 448-449.

Notice requirements apply if a prosecutor intends to introduce evidence of a declarant's statement under MCL 768.27c:

> "(3) If the prosecuting attorney intends to offer evidence under [MCL 768.27c], the prosecuting attorney shall disclose the evidence, including the

[48] Statements made in contemplation of the "pending or anticipated litigation" referenced in MCL 768.27c(2)(a) "pertain[] to litigation in which the declarant could gain a property, financial, or similar advantage, such as divorce, child custody, or tort litigation." *Meissner*, 294 Mich App at 450. In cases where the declarant is an alleged victim of domestic violence, that provision "does not pertain to the victim's report of the charged offense." *Id.* at 450 (rejecting the defendant's contention that the trial court was required "to disregard or discredit [the alleged domestic violence victim's] statements [to police] on the ground they were made in contemplation of litigation").

> statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

"MCL 768.27c(3) does not require [that] the prosecution give a written notice of its intent to offer evidence. Rather, . . . the statute only requires that the prosecuting attorney *disclose* the evidence itself to the defendant at least 15 days in advance of trial." *People v Jurewicz*, 329 Mich App 377, 394 (2019) (admission of the prosecution witnesses' hearsay statements violated MCL 768.27c(3) when the prosecution disclosed the statements 14 days and 11 days before trial, but because "[t]here was no shortage of evidence against the defendant in this case, . . . the failure to strictly comply with the disclosure provision of MCL 768.27c(3) was . . . harmless").

B. Present Sense Impression

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

> "**(1) Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1).

The Michigan Supreme Court requires three conditions to be satisfied before evidence may be admitted under the present sense impression exception. *People v Hendrickson*, 459 Mich 229, 235-236 (1998). In *Hendrickson*, the Court stated:

> "The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Hendrickson*, 459 Mich at 236.

A slight lapse in time between the event and the description may still satisfy the *substantially contemporaneous* requirement. *Hendrickson*, 459 Mich at 236. In *Hendrickson*, the victim called 911 and explained that she had just been beaten by her husband. *Id.* at 232. The Court concluded that her phone call satisfied the *substantially contemporaneous* requirement because the victim's statement "was that the beating had just taken place" and "the

defendant was in the process of leaving the house as the victim spoke."[49] *Id.* at 237. See also *People v Chelmicki*, 305 Mich App 58, 63 (2014) ("statements [contained in the victim's police statement] were admissible . . . as a present sense impression" where the "statement provided a description of the events that took place inside the apartment[,] . . . the victim perceived the event personally[, and] . . . the statement was 'substantially contemporaneous' with the event, as the evidence showed, at most, a lapse of 15 minutes between the time police entered the apartment and the time the victim wrote the statement[]").

To establish a foundation for admission of the statement, corroboration (independent evidence of the event) is required. *Hendrickson*, 459 Mich at 237-238. Sufficient corroboration exists if it "assures the reliability of the statement." *Id.* at 237-238. "[T]he sufficiency of the corroboration depends on the particular circumstances of each case." *Id.* In *Hendrickson*, the prosecution sought to introduce photographs of the victim's injuries as independent evidence of the beating. *Id.* at 233. The Court concluded that the photographs provided sufficient corroborating evidence of the event because the "photographs show[ed] the victim's injuries [and] were taken near the time the beating [was] alleged to have occurred. In addition, the injuries depicted in the photographs were consistent with the type of injuries sustained after a beating." *Id.* at 239.

C. Excited Utterances

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(2) Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2).

There are two requirements that must be met before a statement may be admitted as an excited utterance:

> (1) there must be a startling event, and
>
> (2) the statement must be made while still under the excitement caused by the startling event. *People v Smith (Larry)*, 456 Mich 543, 550 (1998).

[49] See Section 6.6(C)(6) for additional information on audiotaped evidence.

"There is no express time limit for excited utterances." *People v Walker (Walker I)*, 265 Mich App 530, 534 (2005), vacated in part on other grounds *People v Walker (Walker II)*, 477 Mich 856 (2006)[50] (victim's statements made to a neighbor two hours after the final assault were admissible as excited utterances where the evidence showed that the victim was beaten throughout the night, escaped two hours after the final assault, and was visibly upset, crying, shaking, and hysterical). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *People v Smith* (*Larry*), 456 Mich 543, 551-553 (1998) (victim's statement made ten hours after sexual assault was admissible as an excited utterance where the victim's uncharacteristic actions during the time between the event and the statement "describe[d] a continuing level of stress arising from the assault that precluded any possibility of fabrication"). See also *People v Layher*, 238 Mich App 573, 584 (1999) (5-year-old victim's statements made during therapy one week after the alleged assault were admissible as excited utterances where "[t]he[] circumstances, combined with [the] complainant's young age, mental deficiency, and the relatively short interval between the assault and the statement, militate against the possibility of fabrication and support an inference that the statement was made out of a continuing state of emotional shock precipitated by the assault[]"). But see *People v Gee*, 406 Mich 279, 283 (1979), where the Michigan Supreme Court found reversible error in the admission of the complainant's statements made 12-20 hours after the sexual assault, because the "lapse between event and statement was enough time for consideration of self-interest[,]" and there was "no plausible explanation for the delay which would excuse the delay and permit an extension of the excited utterance exception to the hearsay rule to these facts." *Id.* at 283.

Admission of an excited utterance under MRE 803(2) "does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted. Rather, MRE 1101(b)(1) and MRE 104(a) instruct that when a trial court makes a determination under MRE 803(2) about the existence of a startling event or condition, the court may consider the out-of-court statement itself in concluding whether the startling event or condition has been established." *People v Barrett*, 480 Mich 125, 139 (2008).

[50] For more information on the precedential value of an opinion with negative subsequent history, see our note.

D. Statements of Existing Mental, Emotional, or Physical Condition

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." MRE 803(3).

Before a statement may be admitted under MRE 803(3), the court must conclude that the declarant's state of mind is relevant to the case. *Int'l Union UAW v Dorsey* (*On Remand*), 273 Mich App 26, 36 (2006). A "victim's state of mind is usually only relevant in homicide cases when self-defense, suicide, or accidental death are raised as defenses to the crime." *People v Smelley*, 285 Mich App 314, 325 (2009), vacated in part on other grounds 485 Mich 1019 (2010)[51] (trial court abused its discretion by admitting statements that purported to show the victim's state of mind before the victim was killed when the victim's "state of mind was not a significant issue in th[e] case and did not relate to any element of the crime charged or any asserted defense"). See also *People v Ortiz*, 249 Mich App 297, 307-310 (2001) (victim's statements of being afraid of the defendant, believing he was stalking her, of his threats to kill her, that she anticipated dying, that she was enforcing the child support order and changing her will, and that she changed the locks on her door after the defendant broke into her home were admissible under MRE 803(3) to show "[e]vidence of the victim's state of mind, evidence of the victim's plans, which demonstrated motive (the end of the marriage and the tension between the victim and [the] defendant), and evidence of statements that [the] defendant made to cause the victim fear[, and] . . . [t]hey were relevant to numerous issues in the [first-degree premeditated murder] case, including the issues of motive, deliberation, and premeditation and the issue whether the victim would have engaged in consensual sexual relations with [the] defendant the week before her death").

[51] For more information on the precedential value of an opinion with negative subsequent history, see our note.

Where the declarant states that he or she is afraid, the statement may be admissible to show the declarant's state of mind. *In re Utrera*, 281 Mich App 1, 18-19 (2008). In *In re Utrera*, the Michigan Court of Appeals affirmed the trial court's decision to admit statements the declarant (a child) made to her therapist regarding the fear the child felt towards her mother; the Court of Appeals concluded that these hearsay statements were admissible because they were relevant to the case and pertained to the declarant's then-existing mental or emotional condition. *Id.* at 18 (child's statements made to her therapist that she was afraid of her mother because the mother and the mother's boyfriend yelled, threw things, and engaged in incidents of domestic violence were admissible in termination of parental rights proceeding under MRE 803(3) because the statements pertained to the child's then-existing mental or emotional condition and relevant to show that the parent-child relationship was disrupted).

E. Statements Made for Purposes of Medical Treatment or Diagnosis

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment.** Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." MRE 803(4).

The rationales for admitting statements under MRE 803(4) are "'(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.'" *Merrow v Bofferding*, 458 Mich 617, 629 (1998) (declarant's statement that his self-inflicted wound occurred after a "fight with his girlfriend" was inadmissible under MRE 803(4) because it was not reasonably necessary for diagnosis and treatment), quoting *Meeboer (After Remand)*, 439 Mich at 322.

1. Trustworthiness: Age of Declarant

In assessing the trustworthiness of a declarant's statements, Michigan appellate courts have drawn a distinction based on the declarant's age. For declarants over the age of ten, a rebuttable presumption arises that they understand the need to speak truthfully to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662 (1992). For declarants ten years of age and younger, a trial court must inquire into the declarant's understanding of the need to be truthful with medical personnel. *Meeboer (After Remand)*, 439 Mich at 326; *Van Tassel (On Remand)*, 197 Mich App at 662. To do this, a trial court must "consider the totality of circumstances surrounding the declaration of the out-of-court statement." *Id.* at 324. In *Meeboer*, the Michigan Supreme Court established ten factors to address when considering the totality of the circumstances in cases involving victims under the age of ten:

- The age and maturity of the declarant.
- The manner in which the statement was elicited.
- The manner in which the statement was phrased.
- The use of terminology unexpected of a child of similar age.
- The circumstances surrounding initiation of the examination.
- The timing of the examination in relation to the assault or trial.
- The type of examination.
- The relation of the declarant to the person identified as the assailant.
- The existence of or lack of motive to fabricate.
- The corroborative evidence relating to the truth of the child's statement. *Meeboer*, 439 Mich at 324-326.

The *Meeboer* factors have no application in a criminal sexual conduct case involving a complainant over age ten. *Van Tassel (On Remand)*, 197 Mich App at 662. However, to comply with the Michigan Supreme Court remand order, the *Van Tassel* Court applied the *Meeboer* factors and concluded that the complainant's hearsay statements were trustworthy and properly admitted by the trial court. *Van Tassel (On Remand)*, 157 Mich App at 663-664.

For the hearsay exception on statements about sexual acts made by children under age ten, see MRE 803A. For a detailed discussion of MRE 803A, see Section 6.9(I).

2. Trustworthiness: Statements to Psychologists

Regardless of the declarant's age, statements made to psychologists may be less reliable and thus less trustworthy than statements made to medical doctors. *Meeboer (After Remand)*, 439 Mich at 327; *People v LaLone*, 432 Mich 103, 109-110 (1989).

In *LaLone*, 432 Mich at 116, a first-degree criminal sexual conduct case, the Michigan Supreme Court overturned the trial court's decision to admit a psychologist's testimony regarding statements made by her 14-year-old patient who was the complainant. The decision was based in part on the difficulty in determining the trustworthiness of statements to a psychologist. *Id*. at 109-110. The Michigan Supreme Court revisited this question in *Meeboer* (*After Remand*), 439 Mich at 329, reiterating that statements to psychologists may be less reliable than those to physicians. However, the *Meeboer* Court stated *LaLone* "does not preclude admission of statements where an analysis of the totality of the circumstances surrounding the declaration of the hearsay statement supports the underlying requirements of MRE 803(4)." *Meeboer (After Remand)*, 439 Mich at 328.

3. Reasonable Necessity: Statements Identifying Assailant

When a sexual assault victim seeks medical treatment for an injury, it is possible that the victim's statements to the treating medical professional may identify the assailant as the "cause or external source" of the injury. If this occurs, trial courts may be called upon to determine whether the assailant's identity is "reasonably necessary to . . . diagnosis and treatment." MRE 803(4).

The following cases set forth some general principles for determining whether an assailant's identity is medically relevant:

- ***People v Meeboer (After Remand)*, 439 Mich 310 (1992):**

In three consolidated cases, all involving criminal sexual conduct (CSC) against children aged seven and under, the Michigan Supreme Court found that statements identifying an

assailant may be necessary for the declarant's diagnosis and treatment—and thus admissible under MRE 803(4) under the following circumstances:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases . . . .
>
> Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.
>
> In addition to the medical aspect . . . , the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household. . . . [S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. . . .
>
> A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.
>
> Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." *Meeboer (After Remand)*, 439 Mich at 328-330.

- *People v Duenaz*, **306 Mich App 85, 96, 97 (2014)**

On appeal from his convictions of CSC-I and CSC-II, defendant argued that the trial court abused its discretion in admitting statements that the victim made to an examining physician that implicated defendant in the offenses. The Court of Appeals held that the defendant's identity as the assailant "'was reasonably necessary to the victim's medical diagnosis and treatment[]'" because defendant "was a family friend who managed to take the child with him more than once." *Duenaz*, 306 Mich App at 96-97, quoting *Meeboer*, 439 Mich at 334.

- *People v Van Tassel (On Remand)*, **197 Mich App 653 (1992):**

In this CSC-I case, the 13-year-old complainant identified her father as her assailant during a health interview that preceded a medical examination ordered by the trial court in a separate abuse and neglect proceeding. *Van Tassel* (*On Remand*), 197 Mich App at 656. The Court held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment:

> "The fact that child protective services were alerted [after the victim identified her assailant] does not turn the question of the assailant's identity into an issue of social disposition. The victim was removed from her home and allowed to physically heal. She began psychological therapy, and was at the time of trial receiving therapy. Treatment and removal from an abusive environment is medically beneficial to the victim of a sexual abuse crime and resulted from the victim's identification of the assailant to her doctor. The questions and answers regarding the identity of her assailant can therefore be regarded as reasonably necessary to this victim's medical diagnosis and treatment." *Van Tassel*, 197 Mich App at 660-661.

F. Recorded Recollection

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(5) Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to

> enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness'[s] memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." MRE 803(5).

The following three conditions must be met for evidence to be admissible under the recorded recollection exception to the hearsay rule:

> "(1) the document pertains to matters about which the declarant once had knowledge,
>
> (2) the declarant has an insufficient recollection of those matters at trial, and
>
> (3) the document was made or adopted by the declarant while the matter was fresh in his or her memory." *People v Chelmicki*, 305 Mich App 58, 64 (2014), citing *People v Dinardo*, 290 Mich App 280, 293 (2010).

In *Chelmicki*, 305 Mich App at 61-62, the victim prepared a written police statement shortly after a domestic violence incident, and at trial, the victim "recalled certain events after reading [her written statement], but otherwise testified that the statement did not refresh her recollection." The "statements were admissible . . . as a past recollection recorded" because "[t]he police statement pertained to a matter about which the declarant had sufficient personal knowledge, she demonstrated an inability to sufficiently recall those matters at trial, and the police statement was made by the victim while the matter was still fresh in her memory." *Id*. at 63-64.

G. Records of a Regularly Conducted Activity

In cases involving crime victims, MRE 803(6) contemplates admission of records such as police reports and medical records concerning the victim.[52] Under MRE 803(6), "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in

[52] Police reports may be admissible under this rule, or under MRE 803(8), as public records. See Section 6.9(H).

> any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." MRE 803(6).

See *Merrow*, 458 Mich at 626-628 (despite the medical personnel's inability to identify the person who provided the medical history, a statement made in the patient's medical history record regarding the patient's cause of injury was admissible under MRE 803(6) where the hospital record was kept by the hospital in the regular course of business); *People v Jobson*, 205 Mich App 708, 713 (1994) ("[police] activity log sheet, which police officers are required to complete, was properly admitted [into evidence under] MRE 803(6)[and MRE 803(7)][]").

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. *People v Huyser*, 221 Mich App 293, 296-299 (1997) (medical expert's report lacked trustworthiness of a report generated exclusively for business purposes when the medical expert examined the sexual assault victim and prepared the report in contemplation of trial). "The hearsay exception in MRE 803(6) is based on the inherent trustworthiness of business records[, and t]hat trustworthiness is undermined when the records are prepared in anticipation of litigation." *People v McDaniel*, 469 Mich 409, 414 (2003).

A business record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. See MRE 805.

A document that is admissible under MRE 803(6) may be properly authenticated without the introduction of extrinsic evidence. See MRE 902, governing the authentication of a business record by the

written certification of the custodian or other qualified person, which provides in part:

> "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> * * *
>
> **(11) Certified Records of Regularly Conducted Activity**. The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that-
>
> > (A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
> >
> > (B) The record was kept in the course of the regularly conducted business activity; and
> >
> > (C) It was the regular practice of the business activity to make the record.
>
> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

H. Public Records and Reports

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

"**(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases

> matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624."[53] MRE 803(8).

Due to Confrontation Clause concerns, MRE 803(8) precludes the admission of certain police reports in criminal cases. For a detailed discussion of an individual's Sixth Amendment right to confrontation in a criminal case, see the Michigan Judicial Institutes's *Evidence Benchbook*, Chapter 3.

MRE 803(8)(B) does not allow the introduction of evaluative or investigative reports. *Bradbury v Ford Motor Co*, 419 Mich 550, 553-554 (1984). The exception extends only to "reports of objective data observed and reported by [public agency] officials." *Id.* at 554. See also *People v Shipp*, 175 Mich App 332, 334-335, 339-340 (1989) (portions of an autopsy report containing the medical examiner's conclusion and opinion that death ensued after attempted strangulation and blunt instrument trauma were improperly admitted into evidence under MRE 803(8); however, the medical examiner's recorded observations about the decedent's body were admissible).

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. See MRE 805.

I. Child's Statement About Sexual Act

In criminal and juvenile delinquency proceedings only,[54] a child's initial statement regarding certain sexual acts involving the child is admissible, provided it corroborates the declarant's testimony during the same proceeding and:

> "(1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

[53] MCL 257.624 prohibits the use of an accident report required Chapter VI of the Michigan Vehicle Code, MCL 257.601–MCL 257.624b, in a court action.

[54] See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A. For additional information on MCR 3.972(C), see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 11.

(4) the statement is introduced through the testimony of someone other than the declarant." MRE 803A.

1. Spontaneity of the Statement

Generally, in order for a statement to be spontaneous under MRE 803A, "the declarant-victim [must] initiate the *subject of sexual abuse*." *People v Gursky*, 486 Mich 596, 613 (2010). The spontaneity of statements subject to analysis under MRE 803A fall into three groups: (1) purely impulsive statements (those that "'come out of nowhere'" or "'out of the blue'"); (2) non sequitur statements (those "made as a result of prompt, plan, or questioning[,]" but "are in some manner atypical, unexpected, or do not logically follow from the prompt"); and (3) statements made in answer to open-ended and nonleading questions but "include answers or information outside the scope of the questions" (these are the most likely to be nonspontaneous and require extra scrutiny). *Gursky*, 486 Mich at 610-612. To find spontaneity in statements falling into the third category of possible spontaneous statements, "the child must broach the subject of sexual abuse, [and] any questioning or prompts from adults must be nonleading and open-ended[.]" *Id.* at 626. The *Gursky* Court emphasized that its holding does *not* automatically preclude a statement's admissibility under MRE 803A simply because the statement was made as a result of adult questioning. *Gursky*, 486 Mich at 614. "When questioning is involved, trial courts must look specifically at the questions posed in order to determine whether the questioning shaped, prompted, suggested, or otherwise implied the answers." *Id.* at 615. In *Gursky*, the facts of the case showed that (1) the victim did not initiate the subject of sexual abuse; (2) the victim "did not come forth with her statements on her own initiative, and thus that the statements were not necessarily products of her creation; and (3) the adult questioning the victim "specifically suggested defendant's name to [the victim.]" *Id.* at 616-617. Therefore, the Court concluded that the victim's statements were not spontaneous and, thus, inadmissible under MRE 803A. *Gursky*, 486 Mich at 617.

The *Gursky* Court went on to stress that spontaneity is not the only factor a court must look at in order to determine the admissibility of a statement pursuant to MRE 803A; even after finding that a statement is spontaneous, the trial court "must nevertheless also conduct the separate analyses necessary to determine whether the statement meets the other independent requirements of MRE 803A." *Gursky*, 486 Mich at 615-616.

See also *People v Dunham*, 220 Mich App 268, 272 (1996) (six-year-old victim's statements during divorce proceedings to the Friend of the Court mediator were properly admitted under MRE 803A where "the victim made the statements in response to the customary, open-ended questions [the mediator] asked of all children of divorcing parents[,] . . . [and] the eight- or nine-month delay in reporting the sexual abuse was excusable on the basis of the victim's well-grounded fear of [the] defendant[]").

2. Timing of Statement

A sexual assault victim's delay in reporting the sexual assault for several days after returning from a trip with the defendant-father was excusable under MRE 803A(3) where the nine-year-old victim feared "reprisal against her father."*People v Hammons*, 210 Mich App 554, 558 (1995). See also *Dunham*, 220 Mich App at 272 (six-year-old victim's statements during divorce proceedings to the Friend of the Court mediator were properly admitted under MRE 803A where "the victim made the statements in response to the customary, open-ended questions [the mediator] asked of all children of divorcing parents[,] . . . [and] the eight- or nine-month delay in reporting the sexual abuse was excusable on the basis of the victim's well-grounded fear of [the] defendant[]").

When evaluating whether a delay in disclosure is excusable under MRE 803A, the Michigan Supreme Court in *People v Douglas (Jeffrey) (Douglas II)*, 496 Mich 557, 589-590 (2014), aff'g in part and rev'g in part *People v Douglas (Jeffery) (Douglas I)*, 296 Mich App 186 (2012), noted, in dicta, that:

> "[W]e agree with the observations in Judge Ronayne Krause's concurring opinion in the Court of Appeals that, when evaluating whether a delay in disclosure is excusable under MRE 803A, courts should bear in mind that 'MRE 803A(3) requires any circumstance that would be similar *in its effect* on a victim as fear in inducing a delay in reporting, not a circumstance that is necessarily similar *in nature* to fear,' and that '[n]othing in the rule even requires that any "other equally effective circumstance" must have been affirmatively created by the defendant.' *Douglas[I]*, 296 Mich App at 211 (Ronayne Krause, J., concurring). We need not set forth a list of circumstances that are similar to fear in their effect on a child, as the determination whether such circumstances exist

should be done by the trial court on a case-by-case basis."

3. First Corroborative Statement Requirement

"MRE 803A . . . permits only the first corroborative statement as to each 'incident that included a sexual act performed with or on the declarant by the defendant.' Though the [rule] does not define the term 'incident,' it is commonly understood to mean 'an occurrence or event,' or 'a distinct piece of action, as in a story.'" *Douglas II*, 496 Mich at 575, aff'g in part and rev'g in part 296 Mich App 186 (2012) (citation omitted). Consequently, a child-victim's disclosure to a forensic interviewer of a sexual act that is inadmissible under MRE 803A because it was not the child's first corroborative statement "does not become admissible under MRE 803A simply because her first disclosure of [a separate] incident followed shortly after it." *Douglas II*, 496 Mich at 576 (also holding that the evidence was inadmissible under the residual hearsay exception, MRE 803(24), and ultimately concluding that the evidentiary errors required reversal and a new trial).

However, a statement that is inadmissible under MRE 803A because it is a subsequent corroborative statement, is not precluded from being admitted via another hearsay exception. *People v Katt*, 468 Mich 272, 294-297 (2003) (child victim's statements to her social worker that the defendant sexually abused her were not admissible under MRE 803A, but were under MRE 803(24)[55]).

4. Notice Requirement

The proponent of the MRE 803A statement must notify the adverse party of his or her "intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement." MRE 803A. See *Dunham*, 220 Mich App at 272-273 (finding that "[the] defendant was not prejudiced by the prosecutor's failure to inform him about her plan to introduce testimony pursuant to [MRE 803A] until the day before trial[where] . . . [the] defendant should have anticipated the potential testimony because the victim's mother testified at [the] defendant's preliminary examination that she became aware of the sexual

[55] For a discussion of MRE 803(24), see Section 6.9(K).

abuse after the victim spoke with a mediator and because the mediator's name appeared on the witness list[]").

J. Statements Made by Unavailable Declarant

In cases involving crime victims, the complaining witness is sometimes unavailable to testify at trial or other court proceedings. In such cases, the prosecutor may seek admission of the witness's earlier testimony or other statement as substantive evidence at trial under MRE 804(b)(1), MRE 804(b)(2), and MRE 804(b)(6).

A declarant is *unavailable* when:

- the court exempts the declarant from testifying about his or her statement on the ground of privilege; or
- the declarant persistently refuses to testify about his or her statement despite being ordered to do so; or
- the declarant cannot remember the subject matter of his or her statement; or
- the declarant cannot be present or testify due to death or current physical or mental condition; or
- the party offering the statement has not been able to procure the declarant's attendance at the hearing (or testimony, in the case of MRE 804(b)(2)-(4)) "by process or reasonable means, and in a criminal case, [by] due diligence[.]" MRE 804(a).

"A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." MRE 804(a). The plain language of MRE 804(a) "mandates that the court consider whether the conduct of the proponent of the statement was *for the purpose of* causing the declarant to be unavailable." *People v Lopez*, 501 Mich 1044, 1044 (2018) (although the trial court "found that the witness was unavailable because he felt threatened by the prosecutor," it "did not consider whether the prosecutor *intended* to cause the declarant to refuse to testify when engaging in that conduct") (emphasis added).

When declaring a declarant unavailable as a witness under MRE 804(a), the court should "make a record of [the declarant's] unavailability[.]" *People v Garay*, 320 Mich App 29, 37 (2017) (while "the trial court's decision to declare [two child-witnesses] unavailable was within the range of reasonable and principled outcomes[under MRE 804(a)]" following "testimony at trial

regarding the dangerous character of the [witnesses'] neighborhood, [a] Facebook threat [they received], and the [witnesses'] father's refusal to allow [them] to testify out of fear for their safety show[ed] that the reason for the refusal to testify was self-preservation[,] . . . the better practice would have been to make a record of their unavailability by examining each [witness] as to any threats received and the factors that influenced their refusal to testify[]").

The following cases set out examples when a declarant has been found to be unavailable:

- *People v Garay*, **320 Mich App 29 (2017)**

  "The trial court did not abuse its discretion in declaring [two child-witnesses] to be unavailable[]" where the witnesses' father refused to allow them to testify after they were threatened. *Garay*, 320 Mich App at 36-37. Although this situation "is not expressly addressed under MRE 804(a), . . . it is of the same character as other situations outlined in the rule." *Garay*, 320 Mich App at 36-37 (finding that "[g]iven [the witnesses'] father's refusal to allow them to testify and his refusal to respond to the trial court's attempts for contact, [the witnesses] were certainly unavailable according to the ordinary meaning of the word[]").

- *People v Garland*, **286 Mich App 1 (2009)**

  The trial court properly found that the victim was unavailable as defined in MRE 804(a)(4), where "the victim was experiencing a high-risk pregnancy, . . . lived in Virginia, and . . . was unable to fly or travel to Michigan to testify[.]" *Garland*, 286 Mich App at 7.

- *People v Adams*, **233 Mich App 652 (1999)**

  "[A]ll too often, the victims of domestic assault and abuse are fearful and reluctant to assist in the prosecution of their assailants, often as a result of a defendant's or his [or her] family's intimidation tactics or out of fear of future reprisals. These fears are too often justified." *Adams*, 233 Mich App at 658-659 (holding that the declarant-complainant was unavailable for purposes of MRE 804(a)(2) where she had been previously threatened by individuals connected to the defendant and she abruptly left the courthouse before testifying).

1. Former Testimony

"The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[56] MRE 804(b)(1).

"Former testimony is admissible at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *Garland*, 286 Mich App at 6-7 (2009), citing MRE 804(b)(1); *Crawford v Washington*, 541 US 36, 68 (2004). See also *People v Garay*, 320 Mich App 29, 39 (2017) ("[b]ecause [the witnesses] were unavailable for trial and [the] defendant cross-examined them at the preliminary examination, the admission of their preliminary examination testimony did not violate defendant's right of confrontation[;]" similarly, admission of the testimony was not an abuse of discretion under MRE 804(b)(1)). For a detailed discussion of a defendant's right of confrontation, see the Michigan Judicial Institutes's *Evidence Benchbook*, Chapter 3.

For former testimony to be admissible under MRE 804(b)(1), two requirements must be met: (1) the proffered testimony must have been made at "another hearing," and (2) the party against whom the testimony is offered must have "had an opportunity and similar motive to develop the testimony." *People v Farquharson*, 274 Mich App 268, 272, 275 (2007). See also MRE 804(b)(1). In *Farquharson*, 247 Mich App at 272-275, the Court concluded that an investigative subpoena hearing is similar to a grand jury proceeding and thus, constitutes "another hearing" under MRE 804(b)(1). "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony is presented at each proceeding." *Farquharson*, 247 Mich App at 275. In remanding the case for a determination on the "similar

[56] See also MCL 768.26, which permits "[t]estimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, [to] be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify."

motive" prong, the Court adopted a nonexhaustive list of factors that courts should use in determining whether a similar motive exists under MRE 804(b)(1):

> "(1) whether the party opposing the testimony 'had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue';
>
> (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and
>
> (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities)." *Farquharson*, 274 Mich App at 278.

See *Garay*, 320 Mich App at 37 ("[t]he trial court did not abuse its discretion by admitting the preliminary examination testimony of [the unavailable witnesses] under MRE 804(b)(1)[]" where "there [was] no dispute that the preliminary-examination testimony was given 'at another hearing of the same or a different proceeding[,]' . . . [the] defendant had 'an opportunity and similar motive to develop the testimony' at the preliminary examination[in addition to] . . . an 'interest of substantially similar intensity' in proving or disproving the testimony of [the witnesses, and] . . . although the burden of proof was lower at the preliminary examination, [the] defendant had a similar motive to cross-examine [the witnesses] at both proceedings . . . to show that their testimony . . . lacked credibility or was not accurate[, a]nd [where the] defendant did, in fact, cross-examine [the witnesses] with regard to their credibility[]") (internal citations omitted).

2. Statement Under Belief of Impending Death

"The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

> (2) *Statement Under Belief of Impending Death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the

> declarant believed to be impending death." MRE 804(b)(2).

MRE 804(b)(2) permits the admission of statements made by a declarant at a time when the declarant believed his or her death was imminent. The rule does not require that the declarant actually die in order for the statements to be admissible; the declarant needs only to have believed that his or her death was imminent. *People v Orr*, 275 Mich App 587, 594-596 (2007).

"A declarant's age alone does not preclude the admission of a dying declaration." *People v Stamper*, 480 Mich 1, 5 (2007). In *Stamper*, the declarant was a four-year-old child who stated that he was dead and identified the defendant as the person who inflicted his fatal injuries. *Id.* at 3. The Court affirmed admission of the child's statement, rejecting the defendant's argument that a four-year-old could not be aware of impending death. *Id.* at 5. "Whether a child was conscious of his [or her] own impending death must be determined on a case-by-case basis. As with an adult, if the fact show . . . that the child believed that he [or she] was about to die, statements he [or she] made may be proffered as dying declarations." *Id.*

3. Statements Made by Declarant Made Unavailable by Opponent

"The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

> (6) *Statements by [D]eclarant [M]ade [U]navailable by [O]pponent*. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MRE 804(b)(6).

"[A d]efendant's constitutional right to confrontation[57] is waived under the doctrine of forfeiture by wrongdoing[58] if hearsay testimony is properly admitted because the declarant's unavailability was procured by [the] defendant's

[57] For more information on a defendant's right to confrontation, see the MIchigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

[58] MRE 804(b)(6) is "a codification of the common-law equitable doctrine of forfeiture by wrongdoing[.]" *People v Jones (Kyle)*, 270 Mich App 208, 212 (2006).

> wrongdoing." *Jones (Kyle)*, 270 Mich App at 212-214. However, the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful act has caused a witness to be unavailable to testify at trial. See *Giles v California*, 554 US 353 (2008). The doctrine applies only when the witness's unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness's testimony. *Id.* at 361 (concluding that admission of the murder victim's unconfronted statements violated the defendant's right to confrontation and that the defendant's act of murdering the victim was not committed for the purpose of preventing her testimony; thus the doctrine of forfeiture by wrongdoing did not apply).

K. "Catch-All" Hearsay Exceptions

By invoking MRE 803(24) (witness may be available) or MRE 804(b)(7) (witness must be unavailable), commonly known as "catch-all" hearsay exceptions, a party may seek admission of hearsay statements not covered under one of the firmly established exceptions in MRE 803(1)-(23) or MRE 804(b)(1)-(6).

Under MRE 803(24) and MRE 804(b)(7), the following is not excluded by the hearsay rule:

> "A statement not specifically covered by [MRE 803(1)-(23) or MRE 804(b)(1)-(6), depending on witness availability] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

A statement is admissible under MRE 803(24) or MRE 804(b)(7)[59] upon a showing of (1) circumstantial guarantees of trustworthiness

[59] MRE 804(b)(7) also requires the declarant to be unavailable.

equivalent to those of the established hearsay exceptions, (2) materiality, (3) probative value greater than that of other reasonably available evidence, (4) serving the interests of justice, and (5) sufficient notice. *People v Katt*, 468 Mich 272, 279, 290, 297 (2003) (child victim's statements to her social worker that the defendant sexually abused her were not admissible under MRE 803A, but were under MRE 803(24)). See *People v Geno*, 261 Mich App 624, 625, 631-635 (2004) (child's statement to an interviewer conducting an assessment of the child that the defendant hurts her "here" and pointed to her vaginal area was properly admitted under MRE 803(24)).

See, however, *Douglas II*, 496 Mich at 578, aff'g in part and rev'g in part 296 Mich App 186 (2012), where the Court rejected the prosecution's argument that testimony from a forensic interviewer and a video of the interview itself were admissible under MRE 803(24). The statements contained in both the testimony and the video did not meet the admissibility criteria of MRE 803(24) because the statements were not the most probative evidence reasonably available in light of the fact that the statements made to the interviewer were not the first corroborative statements made by the victim; rather, the victim's statements to her mother made prior to the forensic interview constituted the "best evidence." *Douglas II*, 496 Mich at 577. Moreover, the testimony about the victim's statements during the interview did not demonstrate circumstantial guarantees of trustworthiness because the statements were not the first corroborative statements, they were delayed, and were not spontaneous, but rather, were given in response to questions posed in order to investigate the victim's prior disclosure of sexual abuse. *Id.* at 578-579.

6.10 Prosecutorial Discretion

"A prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute [a defendant] or what charges to file [against a defendant]." *People v Williams* (*Anterio*), 244 Mich App 249, 253-254 (2001) (trial court erroneously dismissed domestic assault charges after the victim refused to testify against the defendant where it "characterize[d] the offense as a private crime and . . . suggest[ed] that the victim ha[d] a legal right of any kind to decide whether [the] defendant [was] prosecuted[, which] is clearly inconsistent with the concept of public prosecutions of criminal offenses[,] . . . [because] [p]ut simply, in criminal cases, the prosecutor alone possesses the authority to determine whether to prosecute the accused[]").

Note: "[D]espite the victim's failure to appear on the trial date, the prosecutor arguably had a viable basis to proceed

> by showing that the victim was an unavailable witness [under MRE 804(a)(5)]." *Williams* (*Anterio*), 244 Mich App at 254.

See also *People v Morrow*, 214 Mich App 158, 159, 164-165 (1995) (trial court exceeded its authority when it dismissed the prosecution's case sua sponte where the sole complaining witness recanted her preliminary examination testimony).

However, in limited circumstances, the trial court has authority over the "discharge of the prosecutor's duties . . . [where] those activities or decisions by the prosecutor . . . are unconstitutional, illegal, or ultra vires." *Morrow*, 214 Mich App at 161, 165 (finding that "the prosecutor's decision to proceed with the case even after the sole complaining witness recanted her testimony was [not] unconstitutional, illegal, or ultra vires[]").

6.11 Mistrial: Victim's, Witness's, or Spectator's Prejudicial Effect on Defendant's Right to a Fair Trial[60]

A defendant may seek a mistrial[61] if he or she believes the actions of a victim or spectator violated his or her right a fair trial. "Before ordering a mistrial, the court must, on the record, give each defendant and the prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." MCR 6.417.

"A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514 (1999). "The test to be used in determining whether a mistrial should be declared is not whether there were some irregularities, but whether the defendant had a fair and impartial trial. . . . [A]n unresponsive, volunteered answer to a proper question is not cause for granting a mistrial." *People v Lumsden*, 168 Mich App 286, 298-299 (1988).

"[T]he grant or denial of a mistrial is within the sound discretion of the trial court, and there must be a showing of prejudice to the defendant's rights if error requiring reversal is claimed. [To reverse,] the trial court's

[60]Please see our COVID-19: Procedures Affected webpage on conducting jury trials at this time. Please also see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[61] Note that a motion for mistrial raises the issue of double jeopardy. *People v Dawson*, 431 Mich 234, 235 (1988). The federal and state constitutions prohibit twice placing an individual in jeopardy of life or limb for the same offense. US Const, Am V; Const 1963, art 1, § 15.

ruling must be 'so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice.'" *People v Gonzales (Ronnie)*, 193 Mich App 263, 265 (1992), quoting *People v Holly*, 129 Mich App 405, 415 (1983).

Cases discussing mistrial in response to a victim's, witness's, or spectator's actions in the courtroom include:

- *People v Bauder*, 269 Mich App 174, 195 (2005), abrogated in part on other grounds by *Giles v California*, 554 US 353 (2008), and overruled in part on other grounds by *People v Burns*, 494 Mich 104 (2013)[62] (courtroom outburst by victim's brother did not constitute grounds for mistrial where "[t]he [court] record show[ed] that the trial court twice questioned the jurors regarding their ability to disregard the outburst and to remain fair and impartial[, t]he court was [] meticulous in the steps it took to ensure that [the] defendant received a fair and impartial trial[,] . . . the person yelled that [the] defendant had killed his sister, [which the] defendant did not dispute[, and] . . . the trial court instructed the jury that the outburst was not evidence").

- *People v King (Bradford)*, 215 Mich App 301, 304-305 (1996) (trial court's denial of the defendant's motion for mistrial due to "certain spectators at the trial w[earing] buttons depicting the victim [were] not 'so grossly in error as to deprive [the defendant] of a fair trial or to amount to a miscarriage of justice'. . . [where the buttons] were less than three inches in diameter, . . . not brought to the court's attention until the twelfth day of trial, and were thereafter ordered excluded").

- *Gonzales (Ronnie)*, 193 Mich App at 265 (trial court's denial of the defendant's motion for mistrial following the complainant's outburst during cross-examination that the defendant was a "'murderer'" was not an abuse of discretion where the trial court properly instructed the jury to disregard the complainant's outburst and the defendant's attorney had already brought the defendant's prior incarcerations to the jury's attention before the complainant referred to him as a "'murderer'")

- *Lumsden*, 168 Mich App at 298-299 (no grounds to grant the defendant's motion for mistrial when two prosecutorial witnesses both referenced in the jury's presence to the defendant's alleged connection to other murders where the witnesses' references "were unresponsive, volunteered

[62] For more information on the precedential value of an opinion with negative subsequent history, see our note.

> answers to proper questions[,] . . . [the] references were very fleeting and were not emphasized to the jury[,] . . . [and] . . . had a cautionary [jury] instruction been requested, it could have removed the taint, if any, left by the references[]").

Chapter 7: Victim Impact Statements & Victim's Rights Regarding Parole Recommendations and Decisions

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7.1 Constitutional Right of Crime Victim to Make a Statement at Sentencing[1]

The Michigan Constitution provides crime victims with "[t]he right to make a statement to the court at sentencing." Const 1963, art 1, § 24(1).

7.2 Victim Impact Statement For Sentencing or Disposition[2]

A. Notice Requirements

For felony and misdemeanor convictions, MCL 780.763(1) and MCL 780.823(1) require "[t]he prosecuting attorney, upon and in accordance with the request of the victim, [to] give to the victim notice of the following:

> (a) The defendant's conviction.
>
> (b) The crimes [or offenses] for which the defendant was convicted.
>
> (c) The victim's right to make a written or oral impact statement for use in the preparation of a [PSIR] concerning the defendant.[3]
>
> (d) The address and telephone number of the probation office which is to prepare the [PSIR].
>
> (e) That a [PSIR] and any statement of the victim included in the report will be made available to the defendant unless exempted from disclosure by the court.
>
> (f) The victim's right to make an impact statement at sentencing.
>
> (g) The time and place of the sentencing proceeding."

For juvenile cases, MCL 780.791(1)-(3) set out the notice requirements related to disposition/sentencing:

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[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[3] For misdemeanor convictions, this notice is only required in cases where a PSIR is prepared. MCL 780.823(1)(c).

"(1) The prosecuting attorney, or, pursuant to an agreement under [MCL 780.798a[4]], the court, upon and in accordance with the request of the victim, shall give the victim notice of all of the following:

(a) The offenses for which the juvenile was adjudicated or convicted.

(b) The victim's right to make an impact statement at the disposition hearing or sentencing.

(c) The time and place of the disposition or sentencing proceeding.

(2) If a report is to be prepared for the juvenile's disposition or for a sentencing in a proceeding that is a designated case, the person preparing the report shall give notice to the victim of all of the following:

(a) The victim's right to make an impact statement for use in preparing the report.

(b) The address and telephone number of the person who is to prepare the report.

(c) The fact that the report and any statement of the victim included in the report will be made available to the juvenile unless exempted from disclosure by the court.

(3) A notice under subsection (1) or (2) shall inform the victim that his or her impact statement may be oral or written and may include, but shall not be limited to, any of the following:

(a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.

(b) An explanation of the extent of any economic loss or property damage suffered by the victim.

(c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.

[4] In juvenile cases, MCL 780.798a authorizes "[t]he court [to] perform the notification functions delegated to the prosecuting attorney under [the CVRA] if both of the following circumstances exist: (a) The prosecuting attorney allows the court to perform those functions pursuant to a written agreement. (b) The court performed those functions before the effective date of [1993 PA 341, effective May 1, 1994]."

> (d) The victim's recommendation for an appropriate disposition or sentence."

The prosecutor's failure to inform the victim's family of the date of the defendant's sentencing, which prevented the victim's family from appearing and making an impact statement at sentencing, did not provide grounds for resentencing the defendant. *People v Pfeiffer*, 207 Mich App 151, 159-160 (1994) ("under the circumstances of this case, where the inability of the victim's family to address the court was due to the prosecutor's providing incorrect information regarding the sentencing date to the victim's family, where the court had a victim impact statement in the PSIR, and where the sentencing went forward as scheduled without objection by the prosecutor, the [defendant's] sentence was not invalid, and, therefore, the court was without jurisdiction to resentence[]").

B. Victim Impact Statement in Presentence Report

"The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report [(PSIR).]" MCL 780.764 (applicable to felony cases). See also MCL 780.792(1) (providing a victim of a juvenile involved in juvenile proceedings, including designated proceedings, the same right if a presentence report is prepared in anticipation of disposition or sentencing); MCL 780.824 (providing a victim of a misdemeanor the same right if a PSIR is prepared). In all cases, a victim may request that his or her written impact statement be included in the PSIR or presentence report.[5] MCL 771.14(2)(b); MCL 780.764; MCL 780.792(3); MCL 780.824.

Any of the following listed individuals may also make an impact statement if the victim "is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the [defendant or juvenile]:

> (A) The spouse of the victim.
>
> (B) A child of the victim if the child is 18 years of age or older.
>
> (C) A parent of the victim.
>
> (D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.
>
> (E) A sibling of the victim.

[5] For a detailed discussion of accessibility to victim impact information, see Section 3.6.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m)(*v*) (felony convictions); MCL 780.781(1)(j)(*v*) (juvenile offenses); MCL 780.811(1)(h)(*v*) (misdemeanor convictions).

1. Contents of the Victim Impact Statement

In felony proceedings, if the prosecuting attorney provides notice under MCL 780.763(1), the notice must inform the victim that the victim's impact statement may include but is not limited to the following:

> "(a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
>
> (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
>
> (c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.[6]
>
> (d) The victim's recommendation for an appropriate sentence." MCL 780.763(3)(a)-(d).

See MCL 780.823(3)(a)-(d), which provides substantially similar provisions for misdemeanor proceedings; and MCL 780.791(3)(a)-(d), which provides substantially similar provisions for juvenile proceedings except that it requires the prosecuting attorney (or the court if an agreement under MCL 780.798a exists[7]), and the person preparing the presentence report (if one is being prepared) to also "inform the victim that his or her impact statement may be oral or written[.]"

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[6] For a detailed discussion of restitution, see Chapter 8. For a detailed discussion of crime victim compensation, see Chapter 9.

[7] In juvenile cases, MCL 780.798a authorizes "[t]he court [to] perform the notification functions delegated to the prosecuting attorney under [the CVRA] if both of the following circumstances exist: (a) The prosecuting attorney allows the court to perform those functions pursuant to a written agreement. (b) The court performed those functions before the effective date of [1993 PA 341, effective May 1, 1994]."

2. Availability of Victim Impact Statement Contained in PSIR or Juvenile Presentence Report to Opposing Party

The victim must be notified that the PSIR (or presentence report in juvenile designated cases) and his or her impact statement in the report will be made available to the defendant or juvenile and defense counsel unless the court exempts it from disclosure. MCL 780.763(1)(e); MCL 780.791(2)(c); MCL 780.823(1)(e).

The court *must* exclude from the PSIR "any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual." MCL 771.14(2); MCR 6.425(A)(2); MCR 6.610(G)(1)(b). Upon request, the court must also exempt an address or telephone number that would reveal the location of a victim, witness, or a victim's or witness's family member unless the address is used to identify the location of the crime or to impose conditions of release from custody that are necessary to protect a named individual. MCL 771.14(2); MCR 6.425(A)(2); MCR 6.610(G)(1)(b).

The court *may* exempt from disclosure "information or a diagnostic opinion that might seriously disrupt a program of rehabilitation or sources of information obtained on a promise of confidentiality."[8] MCL 771.14(3); MCL 771.14a(2); MCR 6.425(B). If the court exempts information from disclosure, the court must state on the record its reasons for this action and inform the parties of the nondisclosure. MCL 771.14(3); MCL 771.14a(2); MCR 6.425(B). Information or a diagnostic opinion exempted from disclosure must also be specifically noted in the PSIR. MCL 771.14(3); MCL 771.14a(2); MCR 6.425(B). "To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it." MCR 6.425(B).

> **Note:** "After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the

[8] The court's decision to exempt information from disclosure is subject to appellate review. MCL 771.14(3); MCL 771.14a(2); MCR 6.425(B).

presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to [MCR 6.425(B)]." MCR 6.425(C).

3. Objections to Accuracy or Relevancy of Content in the PSIR or Juvenile Presentence Report

At sentencing, the parties must be given an opportunity to explain or challenge the accuracy or relevancy of any information contained in the PSIR.[9] MCL 771.14(6); MCL 771.14a(4); MCR 6.425(E)(1)(b). The court must resolve challenges to information in the PSIR or make a finding that it will not consider the challenged information. See MCR 6.425(E)(2)(a). See also *People v McAllister*, 241 Mich App 466, 473 (2000) (when a defendant alleges inaccuracies in his or her PSIR, the trial court must respond to those allegations; however, failure to do so may be harmless error where "the alleged inaccuracies have no determinative effect on the sentence[]").

Unless a defendant effectively challenges the contents of his or her PSIR, the contents are presumed accurate and may be relied on by the sentencing court. *People v Callon*, 256 Mich App 312, 334 (2003). On the defendant's effective challenge to the contents of his or her PSIR, "[t]he prosecution 'has the burden to prove the [challenged] fact by a preponderance of the evidence[.]'" *People v Norfleet*, 317 Mich App 649, 669 (2016) (directing removal of effectively challenged statements contained in the PSIR because the prosecutor failed to provide evidence to support them), quoting *People v Waclawski*, 286 Mich App 634, 690 (2009). See also *People v Maben*, 313 Mich App 545, 554 (2015) (holding that the trial court erred in "fail[ing] to adequately resolve [the defendant's] challenges to the accuracy of the PSIR[]" based on the court's erroneous belief that "it was not required to resolve [the] challenges because the PSIR is presumptively accurate[; t]he presumption of accuracy applies only to unchallenged information[]") (citation omitted). A "trial court . . . err[s] [in] refusing to consider [a defendant's] challenges to factual information related in [a victim's] impact statement[]" in the PSIR. *Id.* at 554-555. "[A] trial court is not required to strike a victim's subjective statements about the impact of a defendant's crime

[9] "A challenge to the validity of information contained in the PSIR may be raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand." *People v Lloyd*, 284 Mich App 703, 706 (2009); MCL 769.34(10); MCR 6.429(C).

merely because a defendant disputes those statements[;]" however, "[t]o the extent that the impact section of the PSIR contain[s] factual allegations unrelated to [the defendant's] crime, and which [do] not involve [a victim's] subjective statements, [the defendant is] entitled to challenge the accuracy of the information, particularly considering that the content could have consequences in prison and with the parole board." *Id*. at 555 (citations omitted).

See also MCR 3.943(C)(2), which requires at disposition that the parties "be afforded an opportunity to examine and controvert written reports so received, and in the court's discretion, may be allowed to cross-examine individuals making reports when those individuals are reasonably available." Note that MCR 3.943(C)(2) is applicable to juvenile delinquency proceedings, see MCR 3.901(B)(2), and to designated cases where the court elects to impose a disposition rather than an adult sentence, see MCR 3.955(E).

4. No PSIR or Juvenile Presentence Report Prepared

A court must use a PSIR when sentencing a defendant for a felony offense. MCL 771.14(1); *People v Hemphill*, 439 Mich 576, 579 (1992). Use of a PSIR in misdemeanor cases is discretionary. MCL 771.14(1).[10] Note, however, because a juvenile dispositional proceeding is not a criminal proceeding governed by the Code of Criminal Procedure, MCL 771.1 *et seq*., the court need not consider a PSIR or its equivalent before imposing a juvenile disposition.[11] See *In re Lowe*, 177 Mich App 45, 47 (1989) (finding that the court need not consider a sentencing information report or clinical evaluation report before ordering disposition for a juvenile delinquent brought under the Juvenile Code).

"If no presentence report is prepared[following a misdemeanor conviction], the court shall notify the prosecuting attorney of the date and time of sentencing at least 10 days prior to the sentencing." MCL 780.825(1). See also MCL 780.792(2), which requires "the court [to] notify the prosecuting attorney of the date and time of sentencing at least 10 days prior to the disposition or sentencing[]" of a juvenile where no presentence report is prepared.

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[10] For additional information on PSIRs in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 6.

[11] But see MCR 3.943(C)(1), which permits the court to consider oral and written reports when entering a disposition order.

C. Oral Victim Impact Statement At Sentencing or Disposition

1. Felony Convictions

"The victim has the right to appear and make an oral impact statement at the sentencing of the defendant. If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney."[12] MCL 780.765(1). See also MCR 6.425(E)(1)(c), which requires the court "[a]t sentencing, . . . [and] on the record[, to] give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]"

"Unless the court has determined, in its discretion, that the defendant is behaving in a disruptive manner or presents a threat to the safety of any individuals present in the courtroom, the defendant must be physically present in the courtroom at the time a victim makes an oral impact statement[.]" MCL 780.765(2). "In making its determination, . . . the court may consider any relevant statement provided by the victim regarding the defendant being physically present during that victim's oral impact statement." *Id*.

> **Note:** Incarcerated victims may submit a written statement for the court's consideration at sentencing. MCL 780.752(4).

Any of the following listed individuals may also make an impact statement if the victim "is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

[12] MCL 393.503(1) requires the appointment of a qualified interpreter "[i]n any action before a court or grand jury where a deaf or deaf-blind person is a participant in the action, either as a plaintiff, defendant, or witness[;]" MCR 1.111(B)(1) *requires* the appointment of a foreign language interpreter for a party or testifying witness with limited English proficiency if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[;]" and MCR 1.111(B)(2) *authorizes* the appointment of "a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." See Section 6.7 for additional information on use of interpreters.

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m)(*v*).

A victim has the right under MCL 780.765(1) to appear before the court and make an oral impact statement at *any sentencing or resentencing* of a defendant who was less than 18 years of age at the time he or she committed an offense and is being sentenced or resentenced under MCL 769.25 or MCL 769.25a.[13] MCL 769.25(8); MCL 769.25a(4)(c).

2. Juvenile Adjudications/Designated Case Convictions

"The victim has the right to appear and make an oral impact statement at the juvenile's disposition or sentencing. If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney."[14] MCL 780.793(1). See also MCR 3.943(D)(2),[15] which provides "[t]he victim with the right to be present at the dispositional hearing and to make an impact statement as provided by the Crime Victim's Rights

[13] For additional discussion of resentencing, see Section 7.2(F). For additional information on the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

[14] MCL 393.503(1) requires the appointment of a qualified interpreter "[i]n any action before a court or grand jury where a deaf or deaf-blind person is a participant in the action, either as a plaintiff, defendant, or witness[;]" MCR 1.111(B)(1) *requires* the appointment of a foreign language interpreter for a party or testifying witness with limited English proficiency if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[;]" and MCR 1.111(B)(2) *authorizes* the appointment of "a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." See Section 6.7 for additional information on use of interpreters.

Act, MCL 780.751 *et seq*.[;]" MCR 3.955(A), which requires the court, following a juvenile's conviction in a designated case, to "give the juvenile, the juvenile's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in deciding whether to enter an order of disposition or to impose or delay imposition of sentence." MCR 3.955(A).

"Unless the court has determined, in its discretion, that the juvenile is behaving in a disruptive manner or presents a threat to the safety of any individuals present in the courtroom, the juvenile must be physically present in the courtroom at the time a victim makes an oral impact statement[.]" MCL 780.793(3). "In making its determination, . . . the court may consider any relevant statement provided by the victim regarding the juvenile being physically present during that victim's oral impact statement." *Id*.

Any of the following listed individuals may also make an impact statement if the victim "is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the juvenile:

> (A) The spouse of the victim.
>
> (B) A child of the victim if the child is 18 years of age or older.
>
> (C) A parent of the victim.
>
> (D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.
>
> (E) A sibling of the victim.
>
> (F) A grandparent of the victim.
>
> (G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.781(1)(j)(*v*).

[15] MCR 3.943(D)(2) is applicable to juvenile delinquency proceedings, see MCR 3.901(B)(2), and to designated cases where the court elects to impose a disposition rather than an adult sentence, see MCR 3.955(E).

3. Serious Misdemeanor Convictions

"The victim has a right to submit a written impact statement and has the right to appear and make an oral impact statement at the sentencing of the defendant. If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney. The court shall consider the victim's statement in imposing sentence on the defendant."[16] MCL 780.825(1).

"Unless the court has determined, in its discretion, that the defendant is behaving in a disruptive manner or presents a threat to the safety of any individuals present in the courtroom, the defendant must be physically present in the courtroom at the time a victim makes an oral impact statement[.]" MCL 780.825(2). "In making its determination, . . . the court may consider any relevant statement provided by the victim regarding the defendant being physically present during that victim's oral impact statement." *Id*.

Incarcerated victims may submit a written statement for the court's consideration at sentencing. MCL 780.811(4).

Any of the following listed individuals may also make an impact statement if the victim "is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

> (A) The spouse of the victim.
>
> (B) A child of the victim if the child is 18 years of age or older.
>
> (C) A parent of the victim.
>
> (D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

[16] MCL 393.503(1) requires the appointment of a qualified interpreter "[i]n any action before a court or grand jury where a deaf or deaf-blind person is a participant in the action, either as a plaintiff, defendant, or witness[;]" MCR 1.111(B)(1) *requires* the appointment of a foreign language interpreter for a party or testifying witness with limited English proficiency if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[;]" and MCR 1.111(B)(2) *authorizes* the appointment of "a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." See Section 6.7 for additional information on use of interpreters.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.811(1)(h)(*v*).

D. Court May Consider Other Information

For purposes of sentencing, a trial court may also consider statements of persons who are not *victims* as defined by the CVRA because a sentencing court "is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics." *People v Albert*, 207 Mich App 73, 74 (1994) (attorney representing one of the victims in a civil case against the defendant was permitted to address the court at sentencing). See also *People v Kisielewicz*, 156 Mich App 724, 728-729 (1986) (letters concerning society's perceived need for protection from the offender from persons not considered victims were attached to the PSIR and were properly considered by the trial court at sentencing).

E. Imposition of Offender's Sentence

1. Felony Sentencing

This sub-subsection contains a very brief discussion on the imposition of the offender's sentence as it pertains to crime victims. For a detailed discussion of felony sentencing in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1.

In most cases, a defendant's maximum sentence is determined by the statute under which the prisoner was convicted, and the court fixes only the minimum term to be served by the defendant. MCL 769.8(1). Previously, sentencing courts were generally *required* to either impose a minimum sentence within the appropriate minimum range as calculated under the sentencing guidelines, MCL 769.34(2), or to articulate "a substantial and compelling reason" to depart from that range, MCL 769.34(3). However, in 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US 99 (2013), and *Apprendi v New Jersey*, 530 US 466 (2000), held that "Michigan's sentencing guidelines . . . [are] constitutionally deficient[] . . . [to] the extent [that they] . . . *require* judicial fact-finding

beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range[.]" *People v Lockridge*, 498 Mich 358, 364 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). "To remedy the constitutional violation," the *Lockridge* Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory" and "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[,]"[17] further holding that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the legislative sentencing guidelines "are *advisory* only." *Lockridge*, 498 Mich at 364-365, 391, 399, citing *United States v Booker*, 543 US 220, 233, 264 (2005) (emphasis supplied). "[T]he legislative sentencing guidelines are advisory in every case, regardless of whether the case actually involves judicial fact-finding." *People v Rice (Anthony)*, 318 Mich App 688, 692 (2017) ("conclud[ing] that the *Lockridge* Court rewrote MCL 769.34(2) and [MCL 769.34](3) without exception, rendering the guidelines advisory in all cases[]"). See also *People v Steanhouse*, 500 Mich 453, 466 (2017) (reaffirming "*Lockridge*'s remedial holding rendering the guidelines advisory in all applications[]"). *Lockridge* does not apply retroactively for purposes of collateral review under MCR 6.500 (motion for relief from judgment). *People v Barnes*, 502 Mich 265, 268 (2018).

For purposes of scoring the OVs, some of the OVs take into consideration the impact of a crime on a victim. See, for example, OV 1 (aggravated use of a weapon at or toward a victim, MCL 777.31), OV 3 (physical injury to the victim, MCL 777.33), OV 4 (psychological injury to victim, MCL 777.34), OV 5 (psychological injury to victim's family, MCL 777.35), OV 7 (aggravated physical abuse, MCL 777.37), OV 8 (victim was carried away or held captive, MCL 777.38), OV 9 (number of victims, MCL 777.39), OV 10 (exploitation of a vulnerable victim, MCL 777.40), OV 16 (property obtained, damaged, lost, or destroyed, MCL 777.46), and OV 19 (direct or indirect violation of a PPO, MCL 777.49).

2. Juvenile Offenders

In juvenile proceedings, the court must apply certain statutory factors when deciding whether to try or sentence a juvenile

[17] The *Lockridge* Court also stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Lockridge*, 498 Mich at 365 n 1.

offender as an adult that take into consideration, among other factors, the "seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim." See MCL 712A.2d(2)(a) (setting out factors to consider when determining whether to designate the case for trial as an adult); MCL 712A.18(1)(m)(*i*) (setting out factors to consider when determining whether to enter juvenile disposition or impose sentence following conviction in a designated proceeding); MCL 712A.4(4)(a) (setting out factors to consider when determining whether to waive jurisdiction over a juvenile in a traditional waiver proceeding); MCL 769.1(3)(a) (setting out factors to consider when determining whether to impose sentence or place juvenile on probation and commit him or her to state wardship in automatic waiver proceeding).

For a detailed discussion on designated proceedings, traditional waiver proceedings, and automatic waiver proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapters 14-16.

F. Resentencing

In felony convictions, a victim has the right to appear before the court and make an oral impact statement at any sentencing or resentencing of a defendant who was less than 18 years of age at the time he or she committed an offense and is being sentenced or resentenced under MCL 769.25 or MCL 769.25a.[18] MCL 769.25(8); MCL 769.25a(4)(c); MCL 780.765(1).

In resentencing a defendant after an original sentence is vacated, "[t]he trial court may consider the contents of the [PSIR] when calculating the guidelines and the victims may have their statements included in the PSIR." *People v Davis (Stafano)*, 300 Mich App 502, 509-510 (2013), abrogated in part on other grounds by *People v Hardy*, 494 Mich 430 (2013)[19] (holding that "the trial court was able to consider and decide other issues at resentencing . . .

[18] Effective March 4, 2014, 2014 PA 22 added MCL 769.25 and MCL 769.25a to the Code of Criminal Procedure to address the sentencing of juvenile defendants to life imprisonment without the possibility of parole in light of *Miller v Alabama*, 567 US 460 (2012). For additional information on the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

[19] For more information on the precedential value of an opinion with negative subsequent history, see our note.

includ[ing] consideration of [a] newly appended victim's impact statement").

7.3 Written Statement Regarding Offender's Admission to Problem-Solving Court[20]

A. Offender's Admission to Drug Treatment Court

An individual charged with a criminal offense or a juvenile "alleged to have engaged in activity that would constitute a criminal act if committed by an adult" may be eligible for admission to drug treatment court if he or she meets certain eligibility requirements as set out in MCL 600.1060 *et seq*. MCL 600.1068.[21]

In addition to the rights accorded a crime victim under the CVRA, MCL 600.1068(4) requires a drug treatment court to "permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which either the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the drug treatment court."

B. Offender's Admission to Veterans Treatment Court

A veteran charged with a criminal offense may be eligible for admission to a veterans treatment court if he or she meets certain eligibility requirements as set out in MCL 600.1200 *et seq*. MCL 600.1205(1).

In addition to the rights accorded a victim under the CVRA, MCL 600.1205(4) requires the veterans treatment court to "permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the veterans treatment court."

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[20] For a thorough discussion of problem-solving courts, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9. For a discussion of relevant problem-solving courts as they relate to juveniles, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1. For additional information on problem-solving court programs, including standards and best practice manuals, see http://courts.mi.gov/administration/admin/op/problem-solving-courts/pages/default.aspx.

[21] For a detailed discussion of drug treatment courts, see the Michigan Judicial Institute's *Controlled Substance Benchbook*, Chapter 9.

C. Offender's Admission to Mental Health Court

An individual charged with a criminal offense may be eligible for admission to a mental health court if he or she meets certain eligibility requirements as set out in MCL 600.1090 *et seq*. MCL 600.1094(1).

"In addition to rights accorded a victim under the [CVRA]," MCL 600.1094(4) requires the mental health court to "permit any victim of the offense or offenses of which the individual is charged as well as any victim of a prior offense of which that individual was convicted to submit a written statement to the court regarding the advisability of admitting the individual into the mental health court."

D. Offender's Admission to Juvenile Mental Health Court

A juvenile "alleged to have engaged in activity that would constitute a criminal act if committed by an adult" may be eligible for admission to a juvenile mental health court if he or she meets certain eligibility requirements as set out in MCL 600.1099b *et seq*. MCL 600.1099f(1).

"In addition to rights accorded a victim under the [CVRA]," MCL 600.1099g requires the juvenile mental health court to "permit any victim of the offense or offenses for which the juvenile has been petitioned to submit a written statement to the court regarding the advisability of admitting the juvenile into the juvenile mental health court."

7.4 Victim Impact Statement at Review Hearings[22]

A. Parole Review Proceedings

For purposes of parole review hearings, "[a] victim has the right to do both of the following:

> (a) To address or submit a written statement for consideration by a parole board member or a member of any other panel having authority over the prisoner's release on parole during the time the prisoner's release on parole or commutation of sentencing is being considered.

[22]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

(b) To address the parole board and to present exhibits or other photographic or documentary information to the parole board including at a commutation hearing."[23] MCL 780.771(1)(a)-(b).

> **Note:** "A record of an oral statement or written statement made under [MCL 780.771(1)] is exempt from disclosure under [Michigan's F]reedom of [I]nformation [A]ct [(FOIA]), . . . MCL 15.231 to [MCL] 15.246, and shall not be released." MCL 780.771(4).

The victim's right to submit a statement to or address the parole board extends to situations where the parole board is considering granting medical parole for a medically frail prisoner.[24] See generally MCL 791.235(18).

The parole board must consider the victim's statement before deciding whether to grant or deny parole.[25] MCL 791.235(1). Any of the following listed individuals may also make an impact statement if the victim "is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of

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[23] At the victim's written request, the sheriff or the DOC must provide the victim with notice of his or her "right to address or submit a written statement for consideration by a parole board member or a member of any other panel having authority over the prisoner's release on parole[, and] . . . [of his or her] right to address the parole board and to present exhibits or other photographic or documentary information to the parole board including at a commutation hearing." MCL 780.769(1)(e)-(f). For additional discussion of notification requirements in general, see Chapter 5

[24] See Section 7.9 for information on a victim's right to object to medical parole.

[25] "The release of a prisoner on parole must be granted solely upon the initiative of the parole board. There is no entitlement to parole." MCL 791.235(1).

> the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m)(*v*).

"Not less than 30 days before a review of the prisoner's release, a victim who has requested notice under [MCL 780.769(1)(f)[26]] shall be given written notice by the [DOC] informing the victim of the pending review and of victims' rights under this section. The victim, at his or her own expense, may be represented by counsel at the review." MCL 780.771(2).

"A victim shall receive notice of the decision of the board or panel and, if applicable, notice of the date of the prisoner's release on parole. Notice shall be mailed within a reasonable time after the board or panel reaches its decision but not later than 14 days after the board or panel has reached its decision. The notice shall include a statement of the victim's right to appeal a parole decision, as allowed under . . . MCL 791.234." MCL 780.771(3). For a discussion on the victim's right to appeal a parole decision, see Section 7.10.

B. Automatic Waiver Review Hearings

For a juvenile convicted following an automatic waiver proceeding and placed on probation and committed to state wardship, the prosecuting attorney must, at the victim's request, provide the victim with "notice of a review hearing conducted pursuant to [MCL 769.1b.]" MCL 780.770b. "The victim has the right to make a statement at the [review] hearing, submit a written statement for use at the hearing, or both." *Id.*

Any of the following listed individuals may also make an impact statement if the victim "is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

> (A) The spouse of the victim.
>
> (B) A child of the victim if the child is 18 years of age or older.
>
> (C) A parent of the victim.
>
> (D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

[26] At the victim's request, the sheriff or the DOC must provide the victim with "[n]otice of the decision of the parole board, or any other panel having authority over the prisoner's release on parole, after a parole review, as provided in [MCL 780.771]." MCL 780.769(1)(f).

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m)(*v*).

For a detailed discussion of review hearings conducted under MCL 769.1b, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16.

C. Juvenile Review Hearings

The prosecuting attorney must, at the victim's request, provide the victim with "notice of a review hearing conducted under . . . MCL 712A.18.[27]" MCL 780.798(9). "The victim has the right to make a statement at the hearing or submit a written statement for use at the hearing, or both." *Id.* See also MCR 3.945(A)(1), which provides the crime victim with "a right to make a statement at the [juvenile's periodic review[28]] hearing or submit a written statement for use at the hearing, or both."

Any of the following listed individuals may also make an impact statement if the victim "is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the juvenile:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

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[27] **Note** that MCL 712A.18 does not contemplate any type of review hearing. However, MCL 712A.18e contemplates review hearings for juveniles who were committed as state wards under MCL 712A.18(1)(e).

[28] MCR 3.945(A)(1) requires the court to "conduct periodic hearings to review the dispositional orders in delinquency cases in which the juvenile has been placed outside the home. Such review hearings must be conducted at intervals designated by the court, or may be requested at any time by a party or by a probation officer or caseworker." For additional information on dispositional review hearings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 12.

> (G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.781(1)(j)(*v*).

For additional information on review hearings conducted under MCL 712A.18, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

D. Probation Review Hearings

The Code of Criminal Procedure, MCL 771.2(2), permits a sentencing court, with certain restrictions, to reduce a probationary term for a defendant who has completed one-half of the original felony probation period, "[i]f, after a hearing to review the case and the defendant's conduct while on probation, the court determines that the defendant's behavior warrants a reduction in the probationary term[.]" "The victim must be notified of the date and time of the hearing and be given an opportunity to be heard." *Id*. "The court shall consider the impact on the victim and repayment of outstanding restitution caused by reducing the defendant's probationary term." *Id*.

7.5 Victim Impact Statement at Public Hearing on Medical Probation or Compassionate Release[29]

A very brief discussion on medical probation and compassionate release as it pertain to crime victims is contained in this section. For additional discussion of the topic, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

A. Medical Probation

"Subject to [MCL 771.3g(4)], a court may enter an order of probation placing a prisoner on medical probation under the charge and supervision of a probation officer if the court finds that the prisoner requires acute long-term medical treatment or services, or that the prisoner is physically or mentally incapacitated with a medical condition that renders the prisoner unable to perform activities of basic daily living and the prisoner requires 24-hour care." MCL 771.3g(3).

[29]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

MCL 771.3g(4) lists preconditions that must be satisfied before a prisoner can be placed on medical probation. For purposes of crime victims, MCL 771.3g(4)(c) requires "[t]he court [to] conduct[] a public hearing in which the prosecuting attorney of the county and each victim who requests notice in the manner provided in the William Van Regenmorter crime victim's rights act, . . . MCL 780.751 to [MCL] 780.834, are provided adequate notice of the hearing and an opportunity to be hearing during the hearing." For a discussion on victim notification under the CVRA, see Chapter 5.

B. Compassionate Release

"Subject to [MCL 771.3h(3)], a court may grant compassionate release to a prisoner if the court finds that the prisoner has a life expectancy of not more than 6 months and that the release of the prisoner would not reasonably pose a threat to public safety or the prisoner. If a court grants a prisoner compassionate release, the court shall enter an amended judgment of sentence specifying that the prisoner is released from the term of imprisonment imposed for the offense for which the prisoner was originally convicted." MCL 771.3h(2).

MCL 771.3h(3) lists preconditions that must be satisfied before a prisoner can be placed on compassionate release. For purposes of crime victims, MCL 771.3h(3)(c) requires "[t]he court [to] conduct[] a public hearing in which the prosecuting attorney of the county and each victim who requests notice in the manner provided in the William Van Regenmorter crime victim's rights act, . . . MCL 780.751 to [MCL] 780.834, are provided adequate notice of the hearing and an opportunity to be hearing during the hearing." For a discussion on victim notification under the CVRA, see Chapter 5.

7.6 Victim Impact Statement at Public Hearing on Reprieve, Commutation, or Pardon[30]

A very brief discussion of reprieves, commutations, and pardons as it pertains to crime victims is contained in this section. Additional discussion of the topic is beyond the scope of this benchbook.

MCL 791.234(6)(a)-(f) provide that prisoners who are sentenced to life imprisonment for certain enumerated offenses[31] are not eligible for parole, and are instead subject to the provisions of MCL 791.244 and

[30]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[31] For a list of the enumerated offenses, see MCL 791.234(6)(a)-(f).

MCL 791.244a (governing reprieves, commutations, and pardons). The power to grant a reprieve, commutation, or pardon resides solely with the governor. Const 1963, art 5, § 14.

"Except in cases in which a commutation is requested based in part on a prisoner's medical condition and in which the governor has requested that the parole board expedite its review and hearing process under [MCL 791.244a]," MCL 791.244(2) sets out the required procedures the parole board must follow after initiating or receiving a prisoner's application for reprieve, commutation, or pardon. On its own initiative or upon receiving a meritorious application for a reprieve, commutation, or pardon, the parole board must, within 270 days, make a full investigation and decide whether to hold a public hearing. MCL 791.244(2)(e). "Not fewer than 30 days before conducting the public hearing, [the parole board must] provide written notice of the public hearing by mail to the attorney general, the sentencing trial judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice under the [CVRA], MCL 780.751 to [MCL] 780.834." MCL 791.244(2)(g).

If the governor requests the parole board "to expedite the review and hearing process for a reprieve, commutation, or pardon based in part on a prisoner's medical condition," MCL 791.244a(2) sets out the required procedures the parole board must follow. On its own initiative or upon receiving a meritorious application for a reprieve, commutation, or pardon under MCL 791.244a(2), the parole board must, within 90 days, make a full investigation and decide whether to hold a public hearing. MCL 791.244a(2)(e). "Not fewer than 30 days before conducting the public hearing, [the parole board must] provide written notice of the public hearing by mail to the attorney general, the sentencing judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice under the [CVRA], MCL 780.751 to [MCL] 780.834." MCL 791.244a(2)(g).

> **Note:** When a prisoner requests a reprieve, commutation, or pardon, MCL 780.769(1)(h)-(j) require, at the victim's request, the sheriff or the DOC to notify the victim (1) that the Michigan Parole Board has decided to review the prisoner's application for a reprieve, commutation, or pardon, (2) that of a public hearing on the reprieve, commutation, or pardon, and (3) whether the "reprieve, commutation, or pardon has been granted or denied upon conclusion of [the] public hearing."
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> When a juvenile requests a reprieve, commutation, or pardon, MCL 780.798(4)(h)-(i) require, at the victim's request, the sheriff or the DOC to notify the victim of a public hearing on the reprieve, commutation, or pardon of a juvenile's sentence and whether the "reprieve, commutation, or pardon

has been granted or denied upon conclusion of the public hearing."

At the public hearing under either MCL 791.244 or MCL 791.244a, the victim must "be given an opportunity to address and be questioned by the parole board . . . or to submit written testimony for the hearing." MCL 791.244(2)(h); MCL 791.244a(2)(h).

7.7 Victim Impact Statement at Sex Offenders Registration Act (SORA) Hearings[32]

A very brief discussion on the impact a crime victim has on an offender's registration requirements under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, is contained in this section. For a detailed discussion of the SORA in general, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10.

A. Hearing on Offender's Disputed "Romeo & Juliet" Exception Claim

MCL 28.723a provides exceptions to the sex offender registration requirement under the SORA in very specific cases involving certain tier II and tier III offenses. These exceptions, commonly referred to as "Romeo & Juliet" provisions, are found in MCL 28.722(u)(*v*), MCL 28.722(u)(*vi*), and MCL 28.722(w)(*iv*).[33]

> **Note:** The Romeo & Juliet exceptions in MCL 28.722(u)(*v*), MCL 28.722(u)(*vi*), and MCL 28.722(w)(*iv*) apply to criminal and juvenile cases pending on July 1, 2011, and to criminal and juvenile cases brought on or after July 1, 2011. MCL 28.723a(7).

Under MCL 28.723a(1), "[i]f an individual pleads guilty to or is found guilty of a listed offense or is adjudicated as a juvenile as being responsible for a listed offense but alleges that he or she is not required to register under [the SORA] because [MCL 28.722(u)(*v*)] or [MCL 28.722(u)(*vi*)] applies or [MCL 28.722(w)(*iv*)] applies, and the prosecuting attorney disputes that allegation, the court shall conduct a hearing on the matter before sentencing or disposition to determine whether the individual is required to register under [the SORA]."

[32]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[33] For a detailed discussion of the SORA's "Romeo & Juliet" provisions, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10.

The prosecuting attorney must notify the victim of the date, time, and place of the hearing. MCL 28.723a(4). The victim may exercise the following rights at the hearing:

- The victim may submit a written statement to the court.
- The victim may attend the hearing and make a written or oral statement to the court.
- The victim may refuse to attend the hearing.
- The victim may attend the hearing and refuse to testify or make a statement. MCL 28.723a(5).

B. Hearing to Discontinue Registration

An offender who meets certain statutory requirements and who was convicted of a listed offense may petition the appropriate court to discontinue registering under the SORA. MCL 28.728c.[34] The offender must file a copy of the petition with the prosecuting attorney who prosecuted the underlying criminal case or, "for a conviction that occurred in another state or country, the prosecuting attorney for the county of his or her residence, at least 30 days before a hearing is held on the petition." MCL 28.728c(7). "The prosecuting attorney may appear and participate in all proceedings regarding the petition and may seek appellate review of any decision on the petition." *Id.*

> **Note:** If an offender previously filed a petition under MCL 28.728c, and after a hearing, the court denied the petition, the offender may not file a subsequent petition. MCL 28.728c(4).

If the prosecuting attorney knows the name of the victim involved in the offense, the prosecuting attorney must provide the victim with written notice that a petition was filed and provide a copy of the petition. MCL 28.728c(8). The prosecuting attorney must send the notice by first-class mail to the victim's last known address. *Id.* The notice must include information about the victim's rights as described in MCL 28.728c(10). MCL 28.728c(8).

Before the court makes any decision on the petition, the victim has the right to attend any proceeding held on the petition and to present a written or oral statement to the court.[35] MCL 28.728c(10). However, a victim must not be *required* to appear at any proceeding against his or her will. *Id.*

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[34] MCL 28.728c is the only means by which an offender may obtain judicial review of his or her registration requirements under the SORA. MCL 28.728c(4).

7.8 Victim Impact Statement at Setting Aside Conviction or Adjudication Hearings[36]

A very brief discussion on setting aside convictions and adjudications as it pertains to crime victims is contained in this section. For a detailed discussion on setting aside convictions in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3, and on setting aside adjudications in general, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21.

In certain circumstances, a person may apply to have a conviction set aside under MCL 780.621(1). "A copy of the application shall be served upon the attorney general and upon the office of each prosecuting attorney who prosecuted the crime or crimes the applicant seeks to set aside, and an opportunity shall be given to the attorney general and to the prosecuting attorney to contest the application. If a conviction was for an assaultive crime or a serious misdemeanor, the prosecuting attorney shall notify the victim of the assaultive crime or serious misdemeanor of the application under . . . MCL 780.772a[37] [or MCL] 780.827a.[38] The notice shall be by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under this act concerning that conviction and to make a written or oral statement."MCL 780.621(11).

> In certain circumstances, a person may apply to have a juvenile adjudication set aside under MCL 712A.18e(1). "A copy of the application shall be served upon the attorney general and, if applicable, upon the office of the prosecuting attorney who prosecuted the offense. The attorney general and the prosecuting attorney shall have an opportunity to contest the application. If the

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[35] The court must consider this statement (or an impact statement submitted by the victim under the CVRA), along with several other factors, when determining whether to allow a tier I offender discontinue registration under MCL 28.728c(12) or a tier III offender discontinue registration under MCL 28.728c(13). See MCL 28.728c(11).

[36] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[37] MCL 780.772a provides that "[i]f a defendant applies to have a conviction for an assaultive crime set aside under . . . [MCL] 780.621 to [MCL] 780.624, and if the name of the victim is known by the prosecuting attorney, the prosecuting attorney shall give to the victim of the assaultive crime written notice of the application and forward a copy of the application to the victim. The notice shall be by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under [MCL 780.621 *et seq*.] concerning that conviction and make a written or oral statement. . . ."

[38] MCL 780.827a provides that "[i]f a defendant applies to have a conviction for a serious misdemeanor set aside under . . . [MCL] 780.621 to [MCL] 780.624, and if the name of the victim is known by the prosecuting attorney, the prosecuting attorney shall give to the victim of the serious misdemeanor written notice of the application and forward a copy of the application to the victim. The notice shall be by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under [MCL 780.621 *et seq*.] concerning that conviction and make a written or oral statement."

adjudication was for an offense that if committed by an adult would be an assaultive crime or a serious misdemeanor, and if the name of the victim is known to the prosecuting attorney, the prosecuting attorney shall give the victim of that offense written notice of the application and forward a copy of the application to the victim under . . . MCL 780.796a.[39] The notice shall be sent by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under this section concerning that adjudication and to make a written or oral statement. . . ." MCL 712A.18e(7).

7.9 Victim's Right to Object to Medical Parole

"Except for a prisoner who was convicted of any crime that is punishable by a term of life imprisonment without parole or a violation of . . . .MCL 750.520b, the parole board may grant a medical parole for a prisoner determined to be medically frail. A decision to grant a medical parole must be initiated on the recommendation of the bureau of health care services."[40] MCL 791.235(10).

"The process for a parole determination under [MCL 791.235(10)] does not change or affect any of the rights afforded to a victim under the William Van Regenmorter Crime Victim's Rights Act, 1985 PA 87, MCL 780.751 to [MCL] 780.834." MCL 791.235(18). For a discussion on additional rights the victim has during parole review proceedings, see Section 7.4(A).

A. Notice of Parole Board's Recommendation

"If the parole board determines that a prisoner is medically frail and is going to be considered for parole under this subsection, the parole board shall provide the notice and medical records required under [MCL 791.234(18)]." MCL 791.235(10). Before granting parole to the prisoner under MCL 791.235(10), MCL 791.234(18) requires the parole board to provide notice "to the prosecuting attorney of the county in which the prisoner was convicted" and "to any known victim or, in the case of a homicide, the victim's immediate family, that it is considering a prisoner for parole under [MCL

[39] MCL 780.796a(1) provides that "[i]f a juvenile applies to have a conviction for an assaultive crime or serious misdemeanor or an adjudication for an offense that if committed by an adult would be an assaultive crime or a serious misdemeanor set aside under . . . MCL 712A.18e, and the prosecuting attorney knows the victim's name, the prosecuting attorney shall give the victim of the offense written notice of the application and forward a copy of the application to the victim. The notice shall be by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under . . . MCL 712A.18e, concerning that adjudication and make a written or oral statement."

[40] For specific steps the bureau of health care services must take to determine if a prisoner is medically frail, see MCL 791.235(10).

791.235(10)]". MCL 791.234(18) also requires the parole board to provide relevant medical records to the prosecuting attorney at the same time it provides notice.

B. Objecting to Parole Board's Recommendation

"The prosecuting attorney or victim or, in the case of a homicide, the victim's immediate family, may object to the parole board's decision to recommend parole by filing a motion in the circuit court in the county in which the prisoner was convicted within 30 days of receiving notice under [MCL 791.234(18)]. Upon notification under [MCL 791.234(18)] and request by the victim, or, in the case of a homicide, the victim's immediate family, the prosecuting attorney must confer with the victim, or in the case of a homicide, the victim's immediate family, before making a decision regarding whether or not to object to the parole board's determination. A motion filed under this subsection must be heard by the sentencing judge or the judge's successor in office. The prosecuting attorney shall inform the parole board if a motion was filed under this subsection. A prosecutor who files a motion under this subsection may seek an independent medical examination of the prisoner being considered for parole under [MCL 791.235(10)]. If an appeal is initiated under this subsection, a subsequent appeal under [MCL 791.234(11)[41]] may not be initiated upon the granting of parole." MCL 791.234(19).

In "a hearing conducted on a motion filed under [MCL 791.234(19)]:

> (a) The prosecutor and the parole board may present evidence in support of or in opposition to the determination that a prisoner is medically frail, including the results of any independent medical examination.
>
> (b) The sentencing judge or the judge's successor shall determine whether the prisoner is eligible for parole as a result of being medically frail." MCL 791.234(20).

"The decision of the sentencing judge or the judge's successor on a motion filed under [MCL 791.234(19)] is binding on the parole board with respect to whether a prisoner must be considered medically frail or not. However, the decision of the sentencing judge or the judge's successor is subject to appeal by leave to the court of appeals granted to the department, the prosecuting attorney, or the victim or victim's immediate family in the case of a homicide." MCL 791.234(21).

[41] MCL 791.234(11) permits the prosecuting attorney or the victim to appeal a parole board's decision to grant a prisoner's release on parole. See Section 7.10 for additional information.

C. Decision on Parole Board's Recommendation

"Unless the prosecutor of the county from which the prisoner was committed files a motion under [MCL 791.234(19)], the parole board may grant parole to a prisoner who is determined to be medically frail. If a motion is filed under [MCL 791.234(19)] and the court finds that the prisoner is eligible for parole as a result of being medically frail, and if no additional appeals are pending, the parole board may grant parole to the prisoner under this subsection."[42] MCL 791.235(10). For additional conditions that apply if medical parole is granted to a medically frail prisoner, see MCL 791.235.

7.10 Victim's Right to Appeal Parole Decision[43]

"Except as provided in [MCL 791.234(19)[44]] and [MCL 791.234a[45]], a prisoner's release on parole is discretionary with the parole board. The action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal must be to the circuit court in the county from which the prisoner was committed, by leave of the court." MCL 791.234(11). See also MCR 7.118(D)(1)(a) (governing circuit court appeals of parole board decisions, see MCR 7.118(A)), which provides that "[o]nly the prosecutor or a victim may file an application for leave to appeal [the parole board's decision]."[46]

A. Application For Leave to Appeal

"An application for leave to appeal must be filed within 28 days[47] after the parole board mails a notice of action granting parole and a copy of any written opinion to the prosecutor and the victim, if the victim requested notification under MCL 780.771."[48] MCR 7.118(D)(2).

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[42] "The requirements of [MCL 791.233(1)(b)-(d), (f)] and [MCL 791.234(1)-(4), (7), (13)-(17)] do not apply to a parole granted under this subsection." MCL 791.235(10).

[43] For more information on circuit court appeals of parole board decisions, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Chapter 2.

[44] "If an appeal is initiated under [MCL 791.234(19)], a subsequent appeal under [MCL 791.234(11)] may not be initiated upon the granting of parole." MCL 791.234(19).

[45] MCL 791.234a governs placement of a prisoner in a special alternative incarceration (SAI) unit. For additional information on SAI programs, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

[46] "There is no appeal of right from a decision of the parole board." MCR 7.118(B).

[47] But see MCR 7.118(E), which permits a late application under certain circumstances.

"An application for leave must comply with MCR 7.105, must include statements of jurisdiction and venue, and must be served on the parole board and the prisoner.[49] If the victim seeks leave, the prosecutor must be served. If the prosecutor seeks leave, the victim must be served if the victim requested notification under MCL 780.771." MCR 7.118(D)(3). For additional information on the procedures required for application for leave to appeal from the Michigan Parole Board, see MCR 7.118(D).

B. Parole Eligibility Report

At the victim's request, he or she must "receive the parole eligibility report, any prior parole eligibility reports that are mentioned in the parole board's decision, and any parole guidelines that support the action taken." MCR 7.118(C). See MCL 791.235(7), which requires a parole eligibility report to be prepared, sets the parameters within which it must be prepared, and sets out certain information that must be included in the report.

C. Delay of Execution

"An order of parole issued under MCL 791.236 shall not be executed until 28 days after the mailing of the notice of action." MCR 7.118(F)(1).

D. Stay of Order of Parole

"If an order is issued under MCL 791.235 before completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required." MCR 7.118(F)(2).

E. Decision to Grant Leave to Appeal

Within 28 days after the victim files an application for leave to appeal, the circuit court must determine whether to grant leave to appeal. MCR 7.118(G)(1). "If the court does not make its determination within 28 days, the court shall enter an order to produce the prisoner before the court for a show cause hearing to determine whether the prisoner shall be released on parole pending

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[48] MCL 780.771(3) requires "[the] victim [to] receive notice of the decision of the board or panel, and if applicable notice of the date of the prisoner's release on parole." See also MCL 780.769(1)(f), which requires, at the victim's request, the sheriff or the DOC to provide the victim with "[n]otice of the decision of the parole board, or any other panel having authority over the prisoner's release on parole, after a parole review, as provided in [MCL 780.771]." MCL 780.769(1)(f).

[49] See SCAO form CC 404, *Notice to Prisoner on Application for Leave to Appeal Decision of Parole Board.*

disposition of the appeal." MCR 7.118(G)(2). For the procedures that must be followed if leave to appeal is granted, see MCR 7.118(H).

"If a decision of the parole board is reversed or remanded, the [Michigan Parole B]oard shall review the matter and take action consistent with the circuit court's decision within 28 days." MCR 7.118(J)(1). "If the circuit court order requires the board to undertake further review of the file or to reevaluate its prior decision, the board shall provide the parties with an opportunity to be heard." MCR 7.118(J)(2).

> "An appeal of a circuit court decision is by emergency application for leave to appeal to the Court of Appeals under MCR 7.205(F)[50], and the Court of Appeals shall expedite the matter." MCR 7.118(I). "An appeal to the Court of Appeals does not affect the [Michigan Parole B]oard's jurisdiction to act under [MCR 7.118(J)]." MCR 7.118(J)(3).

[50] Formerly MCR 7.205(E).

Chapter 8: Restitution

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8.1 Constitutional Right to Restitution

The Michigan Constitution provides crime victims with "[t]he right to restitution." Const 1963, art 1, § 24(1).

8.2 Authority to Order Restitution In General[1]

A. General Overview

In general, restitution must be ordered at sentencing and is mandatory under several penal, procedural, and regulatory provisions:

- **Felony Cases**
  - In felony cases, the court must order on the record the dollar amount of restitution the defendant must pay to make full restitution when sentencing the defendant. MCL 769.1a(2); MCL 769.34(6); MCL 771.3(1)(e); MCL 780.766; MCR 6.425(E)(1)(f); MCR 6.425(E)(1)(f). If ordered to pay restitution under the Code of Criminal Procedure or the CVRA at sentencing, upon parole, a parolee's parole order must contain a condition to pay restitution. MCL 791.236(5).
- Juvenile **Proceedings**
  - In cases involving a juvenile offense, the court must order full restitution at the juvenile's dispositional hearing. MCL 712A.18(7); MCL 712A.30(2); MCL 780.794.
- Misdemeanor **Cases**
  - In misdemeanor cases, the court must order on the record the dollar amount of restitution the defendant must pay to make full restitution when sentencing the defendant. MCL 769.1a(2); MCL 771.3(1)(e); MCL 780.826; MCR 6.610(G)(1)(d).

"Within 7 days after sentencing, the court must date and sign a written judgment of sentence that includes," among other things, "the dollar amount of restitution that the defendant is ordered to pay." MCR 6.427 (only applicable in felony and misdemeanor cases).

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

"[A] restitution order is governed by the statute in effect at the time of sentencing." *People v Lueth*, 253 Mich App 670, 693 (2002) (finding that the amended statutory language of MCL 780.767(1), which was not in effect at the time of some of the committed offenses, but was in effect at the time of sentencing, applied (eliminating the court's obligation to consider a defendant's ability to pay when ordering restitution)).

> **Note:** Although the *Lueth* Court did not specifically address the amendment of MCL 780.795 (which also eliminated the court's obligation to consider the defendant's ability to pay in juvenile proceedings), its holding would presumably extend to this statute as well.

B. Responsibility for Payment

"[A] trial court can[not] require a defendant's spouse to tender financial resources to pay a defendant's restitution obligation[.]" *People v Spears-Everett*, 329 Mich App 1, 14 (2019) (MCL 769.1a, MCL 780.766 and MCR 6.425(E) "make clear that [defendant's spouse's] income cannot be used to satisfy restitution[, and] . . . any indication in the trial court's order, even if unintentional, that [defendant's spouse] can be held liable for defendant's restitution payments is improper").

C. Persons or Entities Entitled to Restitution

1. Felony Cases

"Except as provided in [MCL 780.766(8)], when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution[2] to any victim of the defendant's course of conduct that gives rise to the conviction[3] or to the victim's estate. For an offense that is

[2] The phrase *full restitution* means "'restitution that is complete and maximal.'" *People v Turn*, 317 Mich App 475, 479 (2016), quoting *People v Garrison*, 495 Mich 362, 365 (2014). For additional information on determining the amount of restitution, see Section 8.5.

[3] Where the defendant's "illegal acts involving [a victim] d[o] not give rise to [the] defendant's convictions, [that victim] is not entitled to any restitution." *People v Corbin*, 312 Mich App 352, 354 (2015) (citing *People v McKinley*, 496 Mich 410, 419 (2014), and holding that the trial court erred in awarding restitution where the defendant admitted to having engaged in criminal sexual conduct with a victim, but the prosecutor voluntarily dismissed the charge because the statute of limitations had expired). See Section 8.2(G), for addition information on MCL 780.766(2)'s requirement that restitution be based on loss resulting from the defendant's criminal course of conduct.

resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section."[4] MCL 780.766(2). See also MCL 769.1a(2); MCR 6.425(E)(1)(f) (requiring court, *at sentencing*, to "order the dollar amount of restitution that the defendant must pay to make full restitution . . .").

> **Note:** MCL 780.766b also requires the court to order restitution "[w]hen sentencing a defendant convicted of a [human trafficking] offense described in . . . MCL 750.462a to [MCL] 750.462h . . . for the full amount of loss suffered by the victim." For additional information on ordering restitution in human trafficking cases, see Section 8.14.

MCL 780.766(8) requires payment of restitution to entities other than the victim in certain circumstances:

> "The court shall order restitution to the crime victim services commission [(CVSC)] or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. . . ." See also MCL 769.1a(8).
>
> > **Note:** "The Legislature intended to include insurance companies and the state as victims who may seek restitution for money paid to a victim for a defendant's criminal act." *People v Byard*, 265 Mich App 510, 513 (2013), citing *People v Orweller*, 197 Mich App 136, 139 (1992). "The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim, not the amount

[4] For additional information on ordering restitution in conjunction with delayed or deferred proceedings, see Section 8.11.

> paid by an insurer or other entity." *People v Bell*, 276 Mich App 342, 347 (2007). For additional information on determining the victim's amount of restitution, see Section 8.5."

"[T]he statutory language [of MCL 780.766(2)] does not include any mitigating language predicated on the preclusion of recovery, or a finding of no damages, in a separate suit[;]" the only exception to the court's statutorily mandated duty to order restitution to a victim is under MCL 780.766(8): "when 'the victim or victim's estate has received or is to receive compensation for that loss[.]'" *People v Lee (Edward)*, 314 Mich App 266, 274-275 (2016) ("an award of restitution may [not] be precluded by the result of civil proceedings[;] . . . the fact that civil damages are not available . . . does not necessarily mean that restitution is also unavailable[]").

"[A]n order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. [However, t]he court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action." MCL 780.766(8). See also MCL 769.1a(8).

An individual or entity that has compensated a victim need not file a claim to receive restitution under MCL 780.766(8). *Byard*, 265 Mich App at 513 (finding that "there [was] no statutory requirement that a party [who compensated the victim or the victim's estate for a loss incurred by the victim] file a claim to receive restitution[]").

"If a person or entity entitled to restitution under [MCL 780.766] cannot be located, refuses to claim the restitution within 2 years after the date on which he or she could have claimed the restitution, or refuses to accept the restitution, the restitution to which that person or entity is entitled shall be deposited in the crime victim's rights fund created under . . . MCL 780.904, or its successor fund." MCL 780.766(21). See also MCL 769.1a(8).

2. Juvenile Proceedings

"Except as provided in [MCL 780.794(8)], at the dispositional hearing or sentencing for an offense, the court shall order, in addition to or in lieu of any other disposition or penalty authorized by law, that the juvenile make full restitution[5] to

any victim of the juvenile's course of conduct that gives rise to the disposition or conviction or to the victim's estate. For an offense that is resolved informally by means of a consent calendar diversion or by another informal method that does not result in a dispositional hearing, by assignment to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section."[6] MCL 780.794(2). See also MCL 712A.2f(7)(a), requiring upon issuance of a written consent calendar case plan, the court to include, among other provisions, "a requirement that the juvenile pay restitution under the [CVRA][;]"[7] MCL 712A.18(7), requiring the court to order the juvenile *or the juvenile's parent* to pay restitution as provided in MCL 712A.30 and MCL 780.794; MCL 780.786b(1), requiring "[a]s part of any other order removing any case from the adjudicative process, the court [to] order the juvenile *or the juvenile's parents* to provide full restitution as provided in [MCL 780.794]." (Emphasis added.)[8]

MCL 780.794(8) requires payment of restitution to entities other than the victim in certain circumstances:

> "The court shall order restitution to the [CVSC] or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the offense. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. . . ." MCL 780.794(8). See also MCL 712A.30(8).

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[5] The phrase *full restitution* means "'restitution that is complete and maximal.'" *People v Turn*, 317 Mich App 475, 479 (2016), quoting *People v Garrison*, 495 Mich 362, 365 (2014). Although the *Turn* case addressed MCL 780.766(2) and not MCL 780.794(2) specifically, its finding would presumably extend to MCL 780.794(2) (which contains similar language as MCL 780.766(2)). For additional information on determining the amount of restitution, see Section 8.5.

[6] For additional information on ordering restitution in conjunction with delayed or deferred proceedings, see Section 8.11.

[7] For additional information on placing a case on the consent calendar as it relates to crime victims, see Section 4.5(C).

[8] For additional information on ordering the juvenile's parent to pay restitution, see Section 8.13.

Note: "The Legislature intended to include insurance companies and the state as victims who may seek restitution for money paid to a victim for a defendant's criminal act." *Byard*, 265 Mich App at 513, citing *Orweller*, 197 Mich App at 139.

"[A]n entity that compensated a victim 'for a loss incurred by the victim' is entitled to receive restitution 'to the extent of the compensation paid for *that loss*,' clearly meaning the loss of the victim, not the loss of the compensating entity." *In re McEvoy*, 267 Mich App 55, 76 (2005). Although the *In re McEvoy* Court analyzed MCL 712A.30(8), its holding extends to MCL 780.794(8), the corresponding CVRA provision with substantially similar language. See I*n re McEvoy*, 267 Mich App at 63. For additional information on determining the victim's amount of restitution, see Section 8.5.

"[A]n order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. [However, t]he court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action." MCL 780.794(8). See also MCL 712A.30(8).

An individual or entity that has compensated a victim need not file a claim to receive restitution under MCL 780.794(8). See *Byard*, 265 Mich App at 513 (finding that "there [was] no statutory requirement that a party [who compensated the victim or the victim's estate for a loss incurred by the victim] file a claim to receive restitution[]").[9]

"If a person or entity entitled to restitution under [MCL 780.794] cannot be located, refuses to claim the restitution within 2 years after the date on which he or she could have claimed the restitution, or refuses to accept the restitution, the restitution to which that person or entity is entitled shall be deposited in the crime victim's rights fund created under . . .

[9]Although the *Byard* Court addressed MCL 780.766(8) and not MCL 780.794(8) specifically, its holding would presumably extend to MCL 780.794(8) (which contains substantially similar language as MCL 780.766(8)).

MCL 780.904, or its successor fund." MCL 780.794(21). See also MCL 712A.30(8).

3. Misdemeanor Cases

"Except as provided in [MCL 780.826(8)], when sentencing a defendant convicted of a misdemeanor, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution[10] to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section."[11] MCL 780.826(2). See MCL 769.1a(2); MCR 6.610(G)(1)(d) (requiring court, *at sentencing*, to "order the dollar amount of restitution that the defendant must pay to make full restitution . . .").

MCL 780.826(8) requires payment of restitution to entities other than the victim in certain circumstances:

> "The court shall order restitution to the [CVSC] or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the misdemeanor. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. . . ." MCL 780.826(8). See also MCL 769.1a(8).
>
> > **Note:** "The Legislature intended to include insurance companies and the state as victims

[10] The phrase *full restitution* means "'restitution that is complete and maximal. *People v Turn*, 317 Mich App 475, 479 (2016), quoting *People v Garrison*, 495 Mich 362, 365 (2014). Although the *Turn* case addressed MCL 780.766(2) and not MCL 780.826(2) specifically, its finding would presumably extend to MCL 780.826(2) (which contains similar language as MCL 780.766(2)). For additional information on determining the amount of restitution, see Section 8.5.

[11] For additional information on ordering restitution in conjunction with delayed or deferred proceedings, see Section 8.11.

> who may seek restitution for money paid to a victim for a defendant's criminal act." *Byard*, 265 Mich App at 513, citing *Orweller*, 197 Mich App at 139. "The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim, not the amount paid by an insurer or other entity." *People v Bell*, 276 Mich App 342, 347 (2007). Although the *Bell* Court did not specifically address MCL 780.826(8), its holding would presumably extend to that statute as well. For additional information on determining the victim's amount of restitution, see Section 8.5.

"[A]n order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. [However, t]he court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action." MCL 780.826(8). See also MCL 769.1a(8).

An individual or entity that has compensated a victim need not file a claim to receive restitution under MCL 780.826(8). See *Byard*, 265 Mich App at 513 (finding that "there [was] no statutory requirement that a party [who compensated the victim or the victim's estate for a loss incurred by the victim] file a claim to receive restitution[]").[12]

"If a person or entity entitled to restitution under [MCL 780.826] cannot be located, refuses to claim the restitution within 2 years after the date on which he or she could have claimed the restitution, or refuses to accept the restitution, the restitution to which that person or entity is entitled shall be deposited in the crime victim's rights fund created under . . . MCL 780.904, or its successor fund." MCL 780.826(18). See also MCL 769.1a(8).

D. Victim is a Minor

"If the victim is a minor, the order of restitution shall require the defendant to pay to a parent of the victim an amount that is determined to be reasonable for any of the following that are

[12]Although the *Byard* Court addressed MCL 780.766(8) and not MCL 780.826(8) specifically, its holding would presumably extend to MCL 780.826(8) (which contains substantially similar language as MCL 780.766(8)).

actually incurred or reasonably expected to be incurred by the parent as a result of the crime:

> (a) Homemaking and child care expenses.
>
> (b) Income loss not ordered to be paid under [MCL 780.766(4)(h), MCL 780.794(4)(h), or [MCL 780.826(4)(h)].
>
> (c) Mileage.
>
> (d) Lodging or housing.
>
> (e) Meals.
>
> (f) Any other cost incurred in exercising the rights of the victim or a parent under [the CVRA]." MCL 780.766(24); MCL 780.794(24); MCL 780.826(21).

E. Individuals Not Entitled to Restitution

A person charged with a crime, offense, or serious misdemeanor arising out of the same transaction as the charge against the defendant or juvenile is ineligible for restitution. See MCL 780.752(3), MCL 780.781(3), and MCL 780.811(3), which specifically excludes individuals charged with a crime or offense arising out of the same transaction as the defendant's or juvenile's charge from exercising privileges and rights established for crime victims.

Incarcerated individuals are not eligible to exercise privileges and rights established for crime victims. Note, however, that incarcerated individuals may submit a written statement for the court's consideration at sentencing. MCL 780.752(4); MCL 780.811(4).

F. Impact of Other Proceedings Affecting Court's Obligation to Order Restitution

1. Civil Proceedings

"The existence of [a] civil settlement between [the defendant] and the [victim] does not relieve the sentencing court of its statutorily mandated duty to order restitution. *Bell*, 276 Mich App at 349-350 (finding that "[a] civil agreement between [the defendant] and the [victim] that limits claims against [the defendant] should not be construed as establishing a waiver of a mandatory provision of criminal law requiring the payment of restitution to the victims of crimes or to entities that have compensated those victims[]").

"[T]he existence of [pending civil] litigation [between the victim and the defendant] should not automatically preclude an order of full restitution." *People v Avignone*, 198 Mich App 419, 423 (1993) (although pending civil actions between the victim and the defendant "would accurately determine the amount of [the] defendants' liability to [the victim,] . . . the pending litigation alone was a[n in] sufficient reason to justify ordering less than full restitution[]").[13]

"[A]n award of restitution may [not] be precluded by the result of civil proceedings[;] . . . the fact that civil damages are not available . . . does not necessarily mean that restitution is also unavailable." *People v Lee (Edward)*, 314 Mich App 266, 275-276 (2016) ("the mere fact that the [victim] may not be entitled to civil damages . . . does not render the trial court's restitution order erroneous or excessive or establish that the [victim] did not incur any loss due to [the] defendant's conduct[]").

"[T]he amount of civil damages to which one is entitled is not necessarily equivalent to the amount of loss that one has experienced for purposes of the CVRA, and 'the statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding.'" *People v Lee (Edward)*, 314 Mich App at 278-279 (finding that the victim was not collaterally estopped from seeking restitution where the issue in the criminal case, "whether the [victim was] entitled under the CVRA to restitution as a victim that suffered a loss due to [the] defendant's criminal conduct[,]" was not the same as the issue decided in the civil case that barred the victim from seeking civil damages because the victim's claim arose out of a debt that was extinguished as a matter of law), quoting *In re McEvoy*, 267 Mich App 55, 67 (2005).

2. Plea Agreements

"[B]ecause restitution is . . . mandatory under the CVRA, restitution must be ordered in addition to any other penalty, regardless of the terms of a plea agreement." *Bell*, 276 Mich App at 347, citing *People v Ronowski*, 222 Mich App 58, 61 (1997).

[13] Although the *Avignone* Court did not specifically address MCL 780.794(2) or MCL 780.826(2), its holding would presumably extend to these statutes as well.

G. Restitution Must Be Based on Loss Resulting From Offender's Criminal Course of Conduct

"Although courts must order defendants to pay 'full restitution,' their authority to order restitution is not limitless[;] . . . the losses included in a restitution order must be the result of [the] defendant's criminal course of conduct." *People v Garrison*, 495 Mich 362, 372 (2014) (concluding that MCL 780.766(1)'s definition of "'victim' as 'an individual who suffers *direct* or threatened physical, financial, or emotional harm *as a result* of the commission of a crime'" and MCL 780.766(2)'s limitation of ordering restitution "only for damage or loss that results from a 'defendant's course of conduct that gives rise to the conviction . . . [,]'" limits the sentencing court's authority to include in a restitution order only the losses that are "the result of [the] defendant's criminal course of conduct[]").[14] Additionally, "MCL 780.766(2) does not authorize trial courts to impose restitution based solely on uncharged conduct[;]"[15] rather, "MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded." *People v McKinley*, 496 Mich 410, 421 (2014), overruling *People v Gahan*, 456 Mich 264, 270 (1997), "to the extent that [it] held that MCL 780.766(2) 'authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction.'"[16] See also *People v Raisbeck*, 312 Mich App 759, 771-772 (2015) (citing *McKinley*, 496 Mich at 419-424, and holding that where the prosecutor specifically "charged [the defendant] with committing a single [racketeering] crime against 18 named individuals[,]" rather than "with committing a crime against any and all victims of her scheme[,]" the trial court "erred by ordering restitution for those individuals who were not named in the information[]"); *People v Corbin*, 312 Mich App 352, 361-362 (2015) (citing *McKinley*, 496 Mich at 419, and holding that although the defendant, when tendering his guilty plea with respect to charged criminal sexual conduct involving one victim, admitted to engaging in criminal sexual

[14] Although the Michigan Supreme Court's holding in *Garrison* did not specifically address MCL 780.794 or MCL 780.826, its holding regarding restitution orders including only losses that are "the result of [the] defendant's criminal course of conduct[]" would presumably extend to those statutes as well.

[15] The Court noted that, for purposes of the *McKinley* opinion, "'uncharged conduct' refers to criminal conduct that the defendant allegedly engaged in that was not relied on as a basis for any criminal charge and therefore was not proved beyond a reasonable doubt to a trier of fact." *McKinley*, 496 Mich at 413 n 1.

[16] The *McKinley* holding would presumably extend to the corresponding language in MCL 780.794(2) and MCL 780.826(2). See *McKinley*, 496 Mich at 418 n 8, which states that "other statutes allowing for the assessment of restitution . . . have identical language for all relevant purposes[; s]ee, e.g., MCL 769.1a(2); MCL 780.826(2)." See also *People v Foster*, 319 Mich App 365, 379 (2017) ("because MCL 769.1a(2) contains language identical to MCL 780.766(2) and MCL 769.1a(2) could be considered the precedential equal of MCL 780.766(2), the rule set forth in *McKinley* for MCL 780.766(2) should extend to MCL 769.1a(2)[]").

conduct with a second victim, the trial court erred in awarding restitution to the second victim where the prosecutor had voluntarily dismissed the charge involving that victim because the statute of limitations had expired).

However, neither "the rule announced in *McKinley*, [496 Mich at 421, which determined the court could not impose restitution for uncharged conduct under MCL 780.766(2), n]or its analytical framework, renders unconstitutional a situation in which restitution is part of a negotiated plea agreement." *People v Foster*, 319 Mich App 365, 379, 383 (2017) ("[d]efendant's agreement to have . . . misdemeanor charges dismissed but still pay the restitution owed to [the victim] was '[i]n essence, . . . the act of self-conviction by the defendant in exchange for various official concessions[]'"), quoting *People v Killebrew*, 416 Mich 189, 199 (1982).

"The purpose of restitution is to 'allow crime victims to recoup losses suffered as a result of criminal conduct.'" *People v Newton*, 257 Mich App 61, 68 (2003), quoting *People v Grant (Dennis)*, 455 Mich 221, 230 (1997). The following cases address whether the court had the authority to issue restitution:

- **Restitution not authorized for general cost of investigating and prosecuting criminal activity:**[17]

  - *People v Wahmhoff*, 319 Mich App 264, 276 (2017) (finding that the court was not authorized to order restitution to a governmental entity for the general costs of criminal investigations and prosecutions, including salary or overtime compensation paid as a cost of investigation unrelated to the particular criminal offense, or for routine purchase or maintenance costs for equipment).[18]

  - *People v Gaines*, 306 Mich App 289, 322 (2014) (finding that because the payment of costs associated with investigating a crime would occur regardless of whether the defendant committed a crime, MCL 780.766(1) did not authorize the trial court to order "restitution for officer investigation[,] . . . [the cost of] a forensic analyst[,] . . . and [the cost of] discs . . . []").[19]

[17]But see, MCL 769.1f(2), which permits the reimbursement of costs associated with investigating and prosecuting certain offenses.

[18] The court may award restitution for governmental costs "expended . . . beyond the ordinary costs of investigation or operation[]" if the prosecution establishes "with reasonable certainty, the amount of any loss that (1) did not constitute an ordinary, general cost of investigation or operation and (2) was directly caused by [the] defendant's criminal offense." *Wahmhoff*, 319 Mich App at 275-276.

- *Newton*, 257 Mich App at 69-70 (finding that "under the plain language of [MCL 780.766(1)], the general cost of investigating and prosecuting criminal activity is not direct 'financial harm as a result of a crime'" justifying restitution to the governmental or legal entity involved in the investigation and prosecution).

- **Restitution authorized for loss of specific costs:**

  - *People v Fawaz*, 299 Mich App 55, 66-67 (2012) (finding that the court was authorized to order restitution to an insurance company for "costs associated with investigating a[n insured-]defendant's illegal activity" where "the victim[-insurance company] spent time and labor costs investigating [the fire the defendant set on his home] when it could have spent those resources investigating other, non-fraudulent insurance claims[, and] [t]he resources [the victim-insurance company] spent determining that [the] defendant's claim was fraudulent were part of the 'actual losses suffered by the victim[-insurance company][]').[20]

  - *People v Allen (Regina)*, 295 Mich App 277, 282-283 (2011) (finding that the court was authorized to order restitution to a medical prescription insurer for the loss of time its employee expended on investigating the defendant's attempted prescription fraud when, even though the employee "was a salaried, full-time employee [who worked] in a department dedicated to investigating fraud[,] . . . the loss to [the victim-insurance company] was *not* [the employee's] salary or the [victim-insurance company's] budget; [the victim-insurance company would likely have incurred those costs regardless of [the defendant's] criminal conduct[, but r]ather, it was the loss of time [that the employee spent investigating the defendant's fraud] that amounted to a direct financial harm[]").

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[19] The *Gaines* Court also "reject[ed] the prosecutor's argument that the trial court could have alternatively ordered the [investigating and prosecuting] costs to be repaid under the general taxing authority of MCL 769.34(6), . . . [because] 'MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute.'" *Gaines*, 306 Mich App at 323-324, n 10, quoting *People v Cunningham*, 496 Mich 145, 158 n 11 (2014).

[20] Note, however, that the trial court did not err when it excluded the victim-insurance company's legal fees in connection with the defendant's deposition from the restitution award because the prosecution failed to establish that those fees were investigatory. *Fawaz*, 299 Mich App at 67.

- *People v Crigler*, 244 Mich App 420, 427 (2001) (finding that the court was authorized to order restitution to a narcotics enforcement team for the loss of "buy money" used during the commission of an unlawful drug transaction).

8.3 Standard of Review

"An order of restitution is generally reviewed for an abuse of discretion. Although the trial court's calculation of a restitution amount is reviewed for an abuse of discretion, its factual findings are reviewed for clear error. An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. A trial court also necessarily abuses its discretion when it makes an error of law. When the question of restitution involves a matter of statutory interpretation, review de novo applies. Statutory interpretation is a question of law subject to a review de novo." *In re White*, ___ Mich App ___, ___ (2019) (cleaned up).

8.4 Applicability of Caselaw Interpreting Restitution Statutes

"The [J]uvenile [C]ode employs the same statutory scheme for restitution found in the [CVRA], and contains identical language in various corresponding provisions. Accordingly, the Legislature's overall intent in mandating restitution for crime victims may be discerned from the comprehensive scheme governing victims under the CVRA as well as the [J]uvenile [C]ode. Further, our courts' interpretation of provisions in the CVRA is properly applied to statutory interpretation of substantively identical corresponding provisions in the [J]uvenile [C]ode." *In re McEvoy*, 267 Mich App 55, 63 (2005). Presumably, this holding can be extended to other statutes and codes corresponding to the CVRA, such as the Code of Criminal Procedure and the Department of Corrections Act.

8.5 Amount of Restitution

"[T]he Sixth Amendment erects no obstacle to judicial fact-finding as to the amount [of restitution] owed[.]"*People v Corbin*, 312 Mich App 352, 372 (2015) (rejecting the defendant's argument that "restitution is a form of punishment[]" that must be determined by a jury under *Apprendi v New Jersey*, 530 US 466 (2000), and its progeny). See also *People v Foster*, 319 Mich App 365, 389 (2017) ("because a restitution order is not a penalty, the Sixth Amendment protections recognized in *Apprendi* do not apply").

At sentencing or disposition, the court must order a defendant or juvenile convicted of a crime, misdemeanor, or offense to "make *full restitution* to any victim of the [defendant's or juvenile's] course of conduct that gives rise to the [disposition or] conviction or to the victim's estate." MCL 769.1a(2) (Code of Criminal Procedure provision corresponding to the CVRA and applicable to felonies, misdemeanors, or ordinance violations); MCL 780.766(2) (CVRA provision applicable to felonies); MCL 780.794(2) (CVRA provision applicable to misdemeanors); MCL 780.826(2) (CVRA provision applicable to juveniles) (emphasis added). See also MCR 6.425(E)(1)(e); MCR 6.610(G)(1)(d). "Our [Michigan] Supreme Court has defined the phrase 'full restitution' to mean 'restitution that is complete and maximal.'" *People v Turn*, 317 Mich App 475, 479 (2016), quoting *People v Garrison*, 495 Mich 362, 365 (2014).[21]

A. Determining Amount of Restitution Generally

"Restitution awarded by a sentencing court is not a substitute for civil damages[.]" *People v Tyler*, 188 Mich App 83, 89 (1991). "In determining the amount of restitution to order under [MCL 780.766 or MCL 780.794], the court shall consider the amount of the loss sustained by any victim as a result of the offense."[22] MCL 780.767(1); MCL 780.795(1).[23] See also MCL 712A.31(1); *People v Fawaz*, 299 Mich App 55, 65 (2012), quoting *People v Bell*, 276 Mich App 342, 347 (2007) ("'The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim'"). "'[T]he focus is consistently not on what a defendant took, but what a victim lost because of the defendant's criminal activity.'" *In re White*, ___ Mich App ___, ___ (2019), quoting *People v Gubachy*, 272 Mich App 706, 713 (2006).

"[T]he standard to be applied when calculating a restitution amount [under the CVRA] is simply one of reasonableness[;] . . . [w]here the evidence provides a reasonably certain factual foundation for a restitution amount, the statutory standard is met." *People v Corbin*, 312 Mich App 352, 365 (2015), rejecting, as abrogated by statute, the

[21] Although the *Turn* case addressed MCL 780.766(2) and not MCL 780.794(2) nor MCL 780.826(2) specifically, its finding would presumably extend to MCL 780.794(2) and MCL 780.826(2) (which both contain similar language as MCL 780.766(2)).

[22] In ordering restitution against a juvenile offender, the court may, in certain circumstances and after certain requirements have been met, order the juvenile's supervisory parent(s) to "pay any portion of the restitution ordered that is outstanding." See MCL 780.766(15); MCL 780.794(15). For additional information on ordering the juvenile's supervisory parent(s) to pay the juvenile's restitution, see Section 8.13.

[23] "The defendant's ability to pay is irrelevant; only the victim's actual losses from the criminal conduct are to be considered." *In re Lampart*, 306 Mich App 226, 233 (2014), citing *People v Crigler*, 244 Mich App 420, 428 (2001). "The defendant's ability to pay only becomes an issue when enforcement of the restitution order has begun." *People v Odom*, 327 Mich App 297, 316 (2019) (trial court did not err when it refused to modify restitution order where defendant claimed that the amount constituted an undue hardship).

"'easily ascertained and measured' formulation" set out in *People v Heil*, 79 Mich App 739, 748-749 (1977), and its progeny. There is no "need for absolute precision, mathematical certainty, or a crystal ball[; however,] . . . speculative or conjectural losses are not 'reasonably expected to be incurred.'" *Corbin*, 312 Mich App at 365, quoting MCL 780.766(4)(a). The amount of restitution ordered must also have evidentiary support. *People v Guajardo*, 213 Mich App 198, 200 (1995). Evidence in support of the loss may come from facts found in a defendant's presentence report, from the content of a victim impact statement, or from information adduced at sentencing. *People v Grant (Dennis)*, 455 Mich 221, 233-234 (1997); *People v Hart*, 211 Mich App 703, 706 (1995)

> **Note:** "[C]ompensating a victim for his or her loss encompasses more than simply returning lost or stolen property." *In re White*, ___ Mich App ___, ___ (2019). "Rather, restitution can be awarded for other types of losses, such as compensation for the time it takes employees to take inventory and reequip trucks stolen by a defendant, lost profits, or the value of time and resources spent investigating a fraudulent insurance claim." *Id*. at ___ (internal citations omitted). The amount of the victim's loss may include interest. *People v Law*, 459 Mich 419, 424 (1999) (finding that "because a monetary loss includes the use value of money, i.e., interest, [MCL 780.767's[24]] focus on 'the loss sustained by any victim' indicates that interest is a legitimate element of monetary restitution under the CVRA").[25] "Such forms of restitution are awarded to make victims as whole as they can be and to fully compensate them for their losses." *White*, ___ Mich App at ___.

"The law . . . does not require a defendant convicted by plea to specifically refer to each stolen item in order for the prosecution to obtain a restitution order for stolen goods." *People v Bryant (Bud)*, 319 Mich App 207, 213 (2017) (disagreeing with the defendant's argument that "because, as part of the factual basis for his plea, he only admitted to stealing one gun, he cannot be ordered to pay restitution for anything other than that single gun[,]" and finding that the defendant was properly ordered to pay restitution under MCL 780.766(2) and MCL 769.1a for all of the homeowner's losses

[24] Although the *Law* Court did not specifically address MCL 780.795(1) (which contains substantially similar language as MCL 780.766(1)), its holding would presumably extend to juvenile offenses as well.

[25] "Having determined that interest is allowed under the CVRA, the question becomes how to properly calculate the restitution amount to include the appropriate amount of interest. To be clear, it must be understood that . . . foregone interest is one aspect of the victim's actual loss and the court must first determine it and add it to the underlying amount to establish the corpus, or principal, of the restitution." *Law*, 459 Mich at 428.

associated with the entire course of the defendant's criminal conduct when the felony-firearm conviction "was necessarily based on the predicate felony of second-degree home invasion[;] . . . '[w]hile the home invasion charge was dismissed, its *commission* was part and parcel of the felony-firearm conviction,' and 'the course of conduct for the home invasion included stealing the victim's belongings'"), applying *People v McKinley*, 496 Mich 410 (2014), and *Corbin*, 312 Mich App at 352.

1. Court May Order Collection of Additional Information

For purposes of felony cases, "[t]he court may order the probation officer to obtain information pertaining to the amounts of loss described in [MCL 780.767(1)]. The probation officer shall include the information collected in the [PSIR[26]] or in a separate report, as the court directs." MCL 780.767(2). "The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the matters described in [MCL 780.767(1)]." MCL 780.767(3).

> **Note:** See also MCR 6.425(A)(1)(f)-(g), which requires the probation officer to investigate and report in writing the results of the investigation to the court that includes, among other information, "information concerning the financial, social, psychological, or physical harm suffered by the victim of the offense, including the restitution needs of the victim, . . . [and] if provided and requested by the victim, a written victim's impact statement as provided by law[.]"

For purposes of juvenile proceedings, "[t]he court may order the person preparing a report for the purpose of disposition to obtain information pertaining to the factors set forth in [MCL 780.795(1)]. That person shall include the information collected in the disposition report or in a separate report, as the court directs."[27] MCL 780.795(2). See also MCL 712A.31(2). "The court shall disclose to the juvenile, the juvenile's supervisory parent, and the prosecuting attorney all portions of the disposition or other report pertaining to the matters described in [MCL 780.795(1)]." MCL 780.795(3). See also MCL 712A.31(3).

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[26] For additional information on PSIRs as they pertain to crime victims, see Section 7.2.

[27] For additional information on juvenile dispositions, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 10.

2. Victim Impact Statement May Include Restitution Information

For purposes of restitution, a victim's impact statement[28] may include:

> "(a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
>
> (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
>
> (c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage." See MCL 780.763(3)(a)-(c); MCL 780.791(3)(a)-(c); MCL 780.823(3)(a)-(c).

3. Disputing Restitution Ordered

A court must resolve by a preponderance of the evidence any dispute about the proper amount of restitution. MCL 780.767(4); MCL 780.795(4); MCR 6.425(E)(2)(b); MCR 6.610(G)(1)(d). See also *People v Gilmore*, ___ Mich ___, ___ (2020) (requiring preponderance standard where there was "no agreement in place regarding restitution"). "The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." MCL 780.767(4); MCL 780.795(4); MCR 6.425(E)(2)(b); MCR 6.610(G)(1)(d). See also MCL 712A.31(4).

"Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence."[29] *Grant (Dennis)*, 455 Mich at 243.

"Pursuant to MRE 1101(b)(3), the Michigan Rules of Evidence apply to all proceedings except certain miscellaneous proceedings, including 'sentencing.' . . . [A restitution] hearing [is] exclusively conducted for purposes of sentencing. See MCL 780.766(2) ('when *sentencing* a defendant convicted of a crime, the court shall order' restitution when appropriate) (emphasis added)." *People v Matzke*, 303 Mich App 281, 284 (2013). Thus,

[28] For additional information on victim impact statements, see Chapter 7.

[29] Although the *Grant* Court did not specifically address MCL 780.795(4), its holding would presumably extend to this statute as well.

because the rules of evidence are not applicable, "under the plain language of MRE 1101[,] hearsay evidence may be properly considered at a restitution hearing[.]" *Matzke*, 303 Mich App at 284-285.

B. Crime Resulted in Victim's Property Damage, Destruction, Loss, or Seizure

"If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:

> (a) Return the property to the owner of the property or to a person designated by the owner.
>
> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (*i*) or (*ii*), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
>
> > (*i*) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
> >
> > (*ii*) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
>
> (c) Pay the costs of the seizure or impoundment, or both." MCL 780.766(3).

See also MCL 769.1a(3) (corresponding provision in the Code of Criminal Procedure, applicable to felonies, misdemeanors, and ordinance violations); MCL 780.794(3) and MCL 712A.30(3), which contain substantially similar language for purposes of calculating restitution for juvenile offenses that result in a victim's property damage, destruction, loss, or seizure; and MCL 780.826(3), which contains substantially similar language for purposes of calculating

restitution for misdemeanors that result in a victim's property damage, destruction, loss, or seizure.

MCL 780.766(3)(a)-(c), MCL 780.794(3)(a)-(c), and MCL 780.826(3)(a)-(c) provide a sentencing court with "specific instructions . . . regarding what must be included in a restitution order when a crime 'results in damage to or loss or destruction of property of a victim[.]'" *People v Garrison*, 495 Mich 362, 368-369 (2014).[30] However, "nothing in the text of the statutes indicates that courts may only award restitution for the types of losses described in those subsections. On the contrary, . . . [courts must] order restitution that is 'full,' which means complete and maximal." *Garrison*, 495 Mich at 369, 373-374 (finding that MCL 780.766(3) "do[es] not contain an exhaustive list of all types of restitution available under Michigan law for victims who suffer property damage or loss[,]"[31] and that despite MCL 780.766(3) not including victims' travel expenses, the sentencing court kept within MCL 780.766(2)'s "statutory duty to [order the defendant to] pay 'full restitution'" when it ordered the defendant to pay for travel expenses the victims incurred to "recover their [stolen] property, inventory their losses, and explain their losses in court [because] the[se] travel expenses were a direct result of [the] defendant's criminal course of conduct" against them).

Juveniles. "MCL 712A.30(3) and MCL 712A.31(1) and [MCL 712A.31(4) (Juvenile Code provisions addressing restitution for property loss/damage)] do not consider whether a victim actually pays to return his or her stolen or damaged property to the condition it was in before it was stolen or damaged by a respondent. Rather, [those provisions] only establish that a victim should be compensated for his or her loss on the basis of the evidence presented to the trial court." *In re White*, ___ Mich App ___, ___ (2019).

1. Lost Income

If the evidence demonstrates loss based on the replacement value of stolen items as well as expected profits, the trial court may consider lost profits in assessing restitution. *People v Cross (Clifton)*, 281 Mich App 737, 738-740 (2008) (trial court's order of restitution for income loss was supported by prosecutorial

[30] *Garrison* only discussed MCL 780.766. However, MCL 780.794 and MCL 780.826 contain substantially similar provisions, and the *Garrison* holding presumably extends to those statutes as well.

[31] Although the Michigan Supreme Court's holding in *Garrison* did not specifically address MCL 780.794(3) or MCL 780.826(3), its holding that MCL 780.766(3) "do[es] not contain an exhaustive list of all types of restitution available under Michigan law for victims who suffer property damage or loss" would presumably extend to those statutes as well.

evidence and by "the victim's extensive, essentially expert, testimony[]").

2. Insurance Policy Covering Damaged Property

The amount of restitution ordered must be based on the value of the victim's actual loss and not based on the replacement value of the damaged property. *In re McEvoy*, 267 Mich App 55, 77-78 (2005) (trial court erred in ordering an amount of restitution based on the amount the insurance company compensated the victim to replace the damaged property rather than the actual loss sustained by the victim of having to purchase replacement coverage insurance).[32]

3. Decrease in Property Value

"The value of a victim's loss due to damaged property . . . is not based on the cost to repair it or to return it to the condition it was in before the damage." *In re White*, ___ Mich App ___, ___ (2019). "Rather, the value of a victim's loss due to damaged property is based on the decrease in the property's fair market value due to the damage." *Id*. at ___. Accordingly, where the respondent stole the victim's vehicle and the police ultimately returned it to the victim dirty and missing a key fob, the victim's decision to turn over the vehicle to a dealership and lease a new vehicle did not entitle him to the restitution amount ordered by the trial court. *Id*. at ___. In *White*, "the trial court ordered respondent to pay [approximately $1,500] in restitution to [the victim], in part, to compensate [the victim] for leasing a new vehicle on the basis of his feeling unsafe in his vehicle because of its missing key." *Id*. at ___. "[A]ny restitution awarded solely to compensate [the victim] for leasing his new vehicle was an error of law and an abuse of discretion because it compensated [the victim] for replacing his vehicle, not for its loss in value." *Id*. at ___. Further, because "petitioner failed to present evidence showing the fair market value of [the victim's] vehicle when he turned it over to the dealer and whether its fair market value decreased because the missing key could physically unlock and start it, . . . petitioner failed to meet its burden to show that [the victim] was entitled

[32] The court must order restitution to an entity that "compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss." MCL 769.1a(8) (Code of Criminal Procedure provision corresponding to the CVRA and applicable to felonies, misdemeanors, or ordinance violations); MCL 780.766(8) (CVRA provision applicable to felonies); MCL 780.794(8) and MCL 712A.30(8) (CVRA and corresponding Juvenile Code provisions applicable to cases involving juvenile offenses); MCL 780.826(8) (CVRA provision applicable to misdemeanors). For additional information on a court issuing restitution to an entity that compensated the victim, see Section 8.2(C)

to [approximately $1,500] in restitution because the amount was speculative with regard to any reduction in value of his vehicle when turned in to the dealer without replacement of the locks and ignition in exchange for a leased vehicle." *Id*. at ___.

C. Crime Resulted in Victim's Physical or Psychological Injury

"If a crime results in physical or psychological injury to a victim, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:

(a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.

(b) Pay an amount equal to the reasonably determined cost of physical and occupational therapy and rehabilitation actually incurred and reasonably expected to be incurred.

(c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime.

(d) Pay an amount equal to the reasonably determined cost of psychological and medical treatment for members of the victim's family actually incurred and reasonably expected to be incurred as a result of the crime.

(e) Pay an amount equal to the reasonably determined costs of homemaking and child care expenses actually incurred and reasonably expected to be incurred as a result of the crime or, if homemaking or child care is provided without compensation by a relative, friend, or any other person, an amount equal to the costs that would reasonably be incurred as a result of the crime for that homemaking and child care, based on the rates in the area for comparable services.

(f) Pay an amount equal to the cost of actual funeral and related services.

(g) If the deceased victim could be claimed as a dependent by his or her parent or guardian on the parent's or guardian's federal, state, or local income tax

> returns, pay an amount equal to the loss of the tax deduction or tax credit. The amount of reimbursement shall be estimated for each year the victim could reasonably be claimed as a dependent.
>
> (h) Pay an amount equal to income actually lost by the spouse, parent, sibling, child, or grandparent of the victim because the family member left his or her employment, temporarily or permanently, to care for the victim because of the injury." MCL 780.766(4).

See also MCL 769.1a(4)-(5) (corresponding provision in the Code of Criminal Procedure, applicable to felonies, misdemeanors, and ordinance violations);[33] MCL 780.794(4) and MCL 712A.30(4)-(5), which contain substantially similar language for purposes of calculating restitution for juvenile offenses that result in a victim's physical or psychological injury, serious bodily impairment, or death; MCL 780.826(4), which contains substantially similar language for purposes of calculating restitution for misdemeanors that result in a victim's physical or psychological injury, serious bodily impairment, or death.

1. Psychological Expenses

> "[F]uture (not yet incurred) psychological expenses indisputably fall within the ambit of MCL 780.766(4)(a)[; however], the prosecution must demonstrate by an evidentiary preponderance that the claimed expenses are 'reasonably expected to be incurred.'" *People v Corbin*, 312 Mich App 352, 366 (2015) (quoting MCL 780.766(4)(a) and holding that an expert witness's "inability to provide the court with cost figures specific to [the victim,]" or "with sufficient grounds for a reasonably accurate restitution award predicated on the 'direct' harm [the victim] sustained as a result of the commission of the crime[,]" "render[ed] the court's estimates fatally uncertain[]").

2. Income Loss

> "Th[e] Court [of Appeals] has interpreted the word 'income' as used in the [CVRA] to mean '"[t]he return in money from one's business, labor, or capital invested; gains, profits, salary, wages, etc."'" *People v Turn*, 317 Mich App 475, 480 (2016), quoting *People v Corbin*, 312 Mich App 352, 371 (2015).

[33] Note, however, that "[u]nlike the CVRA, the general restitution statute[, MCL 769.1a(4)(a)-(b),] permits restitution only for '*actual* medical and related professional services.'" *People v Corbin*, 312 Mich App 352, 360 (2015).

Monetary loss. The victim "suffered a monetary loss[]" under the CVRA when he "had to use [accumulated] sick, personal, and vacation time [to which he would have otherwise been entitled to receive monetary compensation for not using,] in order to recuperate from . . . injuries[]" inflicted by the defendant; because the victim "lost the ability to use that paid leave time in the future, and . . . the opportunity to be paid for that time upon termination of his employment[,]" the time constituted income loss under MCL 780.766(4)(c) "even though [the victim] was paid by [the] employer for the time he used." *People v Turn*, 317 Mich App 475, 478, 480, 481 (2016) (additionally concluding that "the restitution order [did] not entitle [the victim] to be paid twice for the same time because, although [the victim's] employer paid him the wages he would have earned if he had not used his accumulated time, [the victim] was not compensated by his employer for the loss of his accumulated leave time even though that time had monetary value[]").

Lost earning capacity. "[L]ost earning capacity is not the same as [the] 'income loss[]'" that may be awarded under MCL 780.766(4)(c). *Corbin*, 312 Mich App at 371 (holding that where the victim "never had an 'income' that [the] defendant's conduct caused him to lose[,]" the trial court erred in awarding restitution for lost wages; "[e]ven assuming that [a victim]'s loss of the ability to earn income . . . correlates to 'income loss,' the court [must make an] . . . effort to calculate after-tax income loss, as required by [MCL 780.766(4)(c)]").

Victim's family. The court's authority to reimburse a victim for lost wages under MCL 780.766(4)(c) does not extend to the victim's family. *People v Paquette*, 214 Mich App 336, 346 (1995) (finding that the "[a]fter-tax income losses [under MCL 780.766(4)(c) (formerly MCL 780.766(5)(c))] may be provided to the 'victim'; however, there is no such provision for the 'victim's family' members[]"). Although the *Paquette* Court did not specifically address MCL 780.794(4)(c) or MCL 780.826(4)(c), its holding would presumably extend to those statutes as well.

D. Court May Increase Restitution for Victim's Serious Bodily Impairment or Death

In felony cases, "[i]f a crime resulting in bodily injury also results in the death of a victim or serious impairment of a body function of a victim, the court may order up to 3 times the amount of restitution otherwise allowed under this section." MCL 780.766(5). See also MCL 780.794(5), which contains substantially similar language for

purposes of juvenile offenses that result in the victim's serious bodily impairment or death; MCL 780.826(4), which contains substantially similar language for purposes of misdemeanors that result in the victim's serious bodily impairment or death.

"[T]he plain language of [MCL 780.826(5)] gives the trial court discretion to order as much as triple the amount of any other restitution allowed, but neither limits nor specifies what the trial court may consider in exercising the discretion to do so." *People v Lloyd*, 301 Mich App 95, 96-98 (2013) (finding that the trial court was authorized to order three times the amount of restitution under MCL 780.826(5) where "[t]he victim lost her eye and now wears a prosthetic" after the defendant struck her in the eye with a high-heeled shoe), citing *People v Byard*, 265 Mich App 510, 512 (2005). See also *Byard*, 265 Mich App at 511-512 (where the restitution order reimbursed the victim's insurance company for compensating the victim for injuries suffered as a result of the defendant's crime under MCL 780.766(8),[34] the court was authorized under MCL 780.766(5) to increase the amount of restitution ordered to compensate the victim directly for the victim's pain and suffering).

E. Coconspirators and Codefendants Jointly and Severally Liable

Coconspirators and codefendants may be held jointly and severally liable for the full amount of a victim's loss. See *People v Grant*, 455 Mich 221, 236-237 (1997) (reinstating restitution order that held the defendant and his coconspirators jointly and severally liable for the victim's loss because "each conspirator is held criminally responsible for the acts of his [or her] associates committed in furtherance of the [conspiracy]"); *People v Lee (Edward)*, 314 Mich App 266, 279-280 (2016) (trial court did not err "in holding [the defendant and his] codefendants jointly and severally liable for the victim's [restitution award;]" although "[the] defendant was not convicted of conspiracy, . . . [he was] responsible for his acts and for the acts of those with whom he acted in concert to cause the [victim's] losses[]").

[34] MCL 780.766(8) requires the court to "order restitution to the [CVSC] or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss." In *Byard*, 265 Mich App at 513-514, the Court of Appeals upheld the amount of restitution the defendant was ordered to pay to the insurance company, but found that the trial court erroneously reimbursed the entire amount to the insurance company when the amount should have been split between the amount covered by the insurance company and the amount the Michigan Catastrophic Claims Association (MCCA) reimbursed the insurance company for of the victim's losses exceeding $250,000. For additional information on persons or entities entitled to restitution, see Section 8.2.

Because MCL 780.766(2) makes restitution "a mandatory part of a convicted defendant's sentence, . . . a trial court may order a co-defendant to pay the entirety of the restitution owed to a crime victim without violating the principle of proportionality." *People v Foster*, 319 Mich App 365, 387 (2017). The principle of proportionality set forth in *People v Milbourn*, 435 Mich 630 (1990), is inapplicable because "[i]n the case of a sentence involving imprisonment, a court may exercise discretion in choosing between a range of possible years[, whereas i]n the case of a sentence involving restitution, the court is not granted discretion to order that the defendant be responsible for any amount less than full restitution."

8.6 Time Requirements to Pay Restitution

"If not otherwise provided by the court under this subsection, restitution shall be made immediately. However, the court may require that the defendant make restitution under [MCL 780.766] within a specified period or in specified installments." MCL 780.766(10). See also MCL 769.1a(10), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations; MCL 780.794(10) and MCL 712A.30(10), applicable to juvenile proceedings; and MCL 780.826(10), applicable to misdemeanors.

8.7 Satisfaction of Restitution

"An order of restitution entered under [MCL 780.766, MCL 780.794, or MCL 780.826] remains effective until it is satisfied in full." MCL 780.766(13); MCL 780.794(13); MCL 780.826(13). See also MCL 712A.30(13) and MCL 769.1a(13), the corresponding Juvenile Code and Code of Criminal Procedure provisions.

Committee Tip:

A restitution order is unaffected by the termination of probation. See MCL 780.766(10), MCL 780.794(10), and MCL 780.826(10), which provide the court with authority to issue restitution "within a specified period or in specified installments[]";[35] *MCL 780.766(11), MCL 780.794(11), and MCL 780.826(11), which require "any restitution ordered under [MCL*

[35] If the restitution order does not specify when payment is due, "restitution shall be made immediately." MCL 780.766(10); MCL 780.794(10); MCL 780.826(10). See Section 8.6 for additional information on time requirements for paying restitution.

> *780.766, MCL 780.794, or MCL 780.826] [to] be a condition of that probation[]";[36] MCL 780.766(13), MCL 780.794(13), and MCL 780.826(13), which require "[a]n order of restitution entered under [MCL 780.766, MCL 780.794, or MCL 780.826] [to] remain[] effective until it is satisfied in full."*

For a detailed discussion of enforcement of restitution orders, see Section 8.19

8.8 Alternative Means to Pay Restitution

A. Restitution Paid in Services in Lieu of Money

"If the victim or victim's estate consents, the order of restitution may require that the [defendant or juvenile] make restitution in services in lieu of money." MCL 780.766(6); MCL 780.794(6); MCL 780.826(6). See also MCL 712A.30(6), the corresponding provision in the Juvenile Code applicable to juvenile proceedings; and MCL 769.1a(6), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations.

B. Restitution Paid by Bail Money

"If bond or bail is discharged, the court shall enter an order with a statement of the amount to be returned to the depositor. If the court ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court shall order the fine, costs, restitution, assessment, or other payment collected out of cash bond or bail personally deposited by the defendant under this chapter, and the cash bond or bail used for that purpose shall be allocated as provided in [MCL 775.22[37]]."[38] MCL 765.15(2). See also MCL 780.66(8) and MCL 780.67(7), which contain substantially similar language for a bail deposit or bail bond collected for traffic offenses and misdemeanors.

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[36] See Section 8.10 for additional information on restitution ordered as a condition of probation.

[37] For additional information on MCL 775.22, see Section 8.23.

[38] "Upon presentation of a certified copy of the order, the treasurer or clerk having the cash, check, or security shall pay or deliver it as provided in the order to the person named in the order or to that person's order." MCL 765.15(2). "If the cash, check, or security is in the hands of the sheriff or any officer other than the treasurer or clerk, the officer holding it shall dispose of the cash, check, or security as the court orders upon presentation of a certified copy of the court's order." MCL 765.15(3).

A defendant who pays his or her bail or bond by a cash deposit must be notified that on conviction "the cash deposit may be used to collect a fine, costs, restitution, assessment, or other payment pursuant to [MCL 765.15(2)]." MCL 765.6c. See also MCL 780.66(1) and MCL 780.67(1)(a), which contain substantially similar language for a bail deposit or bail bond collected for traffic offenses and misdemeanors.

C. Restitution Paid by Proceeds From Property Forfeiture

"When property is forfeited under [MCL 600.4701 *et seq.*], the unit of government that seized or filed a lien against the property may sell the property that is not required to be destroyed by law and that is not harmful to the public and may dispose of the proceeds and any money, including any interest earned on money deposited in a financial institution as described in [MCL 600.4703(6)], negotiable instrument, security, or other thing of value that is forfeited under this chapter in the following order of priority:

> (a) Pay any outstanding security interest of a secured party who did not have prior knowledge of, or consent to the commission of, the crime, or did not acquire his or her interest as the result of a transfer that is void under [MCL 600.4703(7)].
>
> (b) Satisfy any order of restitution in the prosecution for the crime.
>
> (c) Pay the claim of each person who shows that he or she is a victim of the crime to the extent that the claim is not covered by an order of restitution.
>
> (d) Pay any outstanding lien against the property that has been imposed by a governmental unit.
>
> (e) Pay the proper expenses of the proceedings for forfeiture and sale, including, but not limited to, expenses incurred during the seizure process and expenses for maintaining custody of the property, advertising, as well as reasonable prosecution and court costs.
>
> (f) The balance remaining after the payment of restitution, the claims of victims, outstanding liens, and expenses shall be distributed by the court having jurisdiction over the forfeiture proceedings to the unit or units of government substantially involved in effecting the forfeiture. Seventy-five percent of the money received by a unit of government under this

> subdivision shall be used to enhance enforcement of the criminal laws and 25% of the money shall be used to implement the [CVRA]. A unit of government receiving money under this subdivision shall report annually to the department of management and budget the amount of money received under this subdivision that was used to enhance enforcement of the criminal laws and the amount that was used to implement the [CVRA]." MCL 600.4708(1).

See also MCL 257.625n(7), which contains substantially similar language for vehicle forfeiture under the Michigan Vehicle Code for certain offenses involving driving while intoxicated, reckless driving, and driving without a license; MCL 750.159r(1), which contains substantially similar language for property forfeiture under the criminal enterprise chapter of the Michigan Penal Code.

8.9 Restitution As Part of Plea Agreement

Although "allowing a trial court to order restitution for uncharged conduct . . . offend[s] the defendant's due process right to have the prosecution prove to a trier of fact every element of the charge beyond a reasonable doubt[,]" where "the defendant expressly agrees to pay restitution to receive the benefit of a bargain struck with the prosecution[,]" the defendant's due process right is not implicated in the case and "[the] defendant intentionally relinquishes his[or her] right to have the prosecution prove every element of the charge beyond a reasonable doubt." *People v Foster*, 319 Mich App 365, 382-383 (2017) (finding that the defendant's "agreement to have . . . misdemeanor charges dismissed, but still pay the restitution owed to [the victim] was '[i]n essence, . . . the act of self-conviction by the defendant in exchange for various official concessions[]'"), citing *People v McKinley*, 496 Mich 410, 413 n 1 (2014), and *People v Killebrew*, 416 Mich 189, 199 (1982).

Neither "the rule announced in *McKinley*, [496 Mich at 421, which determined the court could not impose restitution for uncharged conduct under MCL 780.766(2), n]or its analytical framework, renders unconstitutional a situation in which restitution is part of a negotiated plea agreement." *Foster*, 319 Mich App at 379.

8.10 Restitution Ordered As a Condition of Probation, Parole, or Conditional Sentence

A. Felony Cases

"If the defendant is placed on probation or paroled or the court imposes a conditional sentence as provided in . . . the code of criminal procedure, . . . MCL 769.3, any restitution ordered under this section shall be a condition of that probation, parole, or sentence."[39] MCL 780.766(11). See MCL 769.1a(11), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations; MCL 771.3(1)(e), which also requires an order of probation to contain a provision requiring the probationer to pay restitution to a victim of the probationer's "course of conduct giving rise to [his or her] conviction or to the victim's estate" under the Code of Criminal Procedure; and MCL 791.236(5), which also requires a parole order to contain a provision requiring the prisoner to "pay restitution [ordered under the CVRA, MCL 780.766 *et seq.*, or the Code of Criminal Procedure, MCL 769.1a *et seq.*,[40]] to the victim of the prisoner's crime or the victim's estate" under the Department of Corrections Act.[41]

The sentencing court may not condition a grant of parole on the offender's full or partial payment of restitution. *People v Gosselin*, 493 Mich 900 (2012) (citing *People v Greenberg*, 176 Mich App 296, 310-311 (1989), and holding that "[t]he trial court had no authority to impose the [requirement that the defendant pay one-third of her] restitution obligation as a condition of parole[]"). "The Department of Corrections has exclusive jurisdiction over paroles," and although MCL 780.766 "provides that any restitution ordered shall be a condition of parole and that the parole board may revoke parole if the defendant fails to comply[,]" the sentencing court has no authority to make "payment of restitution a prerequisite for

[39] However, "a trial court's restitution award that is based solely on uncharged conduct may [not] be sustained." *People v McKinley*, 496 Mich 410, 413, 418 n 8 (2014) (applying MCL 780.766(2) and noting that "MCL 771.3(1)(e)[] . . . contains identical language to MCL 780.766(2) for all purposes relevant to our analysis[; s]imilarly, other statutes allowing for the assessment of restitution also have identical language for all relevant purposes[; s]ee, e.g., MCL 769.1a(2); MCL 780.826(2)[]"). For purposes of the *McKinley* opinion, the Michigan Supreme Court stated that "the phrase 'uncharged conduct' refers to criminal conduct that the defendant allegedly engaged in that was not relied on as a basis for any criminal charge and therefore was not proved beyond a reasonable doubt to a trier of fact." *McKinley*, 496 Mich 410, 413 n 1 (2014).

[40] For additional information on restitution ordered under the CVRA and the Code of Criminal Procedure, see Section 8.2.

[41] For additional information on placing a defendant on probation or parole, or imposing a conditional sentence under MCL 769.3, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

obtaining parole or early release." *Greenberg*, 176 Mich App at 310-311.

1. Wage Assignment for Employed Defendant

"In each case in which payment of restitution is ordered as a condition of probation, the court shall order any employed defendant to make regularly scheduled restitution payments. If the defendant misses 2 or more regularly scheduled payments, the court shall order the defendant to execute a wage assignment to pay the restitution." MCL 780.766(18). See also MCL 771.3(2)(f), which authorizes "[a]s a condition of probation, the court [to] require the probationer to . . . [a]gree to pay by wage assignment any restitution, assessment, fine, or cost imposed by the court."[42]

2. Review of Compliance with Restitution Order

a. Restitution as Condition of Probation

"The probation officer assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. If the restitution was ordered to be made within a specific period of time, the probation officer assigned to the case shall review the case at the end of the specific period of time to determine if the restitution has been paid in full. The final review shall be conducted not less than 60 days before the probationary period expires. If the probation officer determines at any review that restitution is not being paid as ordered, the probation officer shall file a written report of the violation with the court on a form prescribed by the state court administrative office[43] or shall petition the court for a probation violation. The report or petition shall include a statement of the amount of the arrearage and any reasons for the arrearage known by the probation officer. The probation officer shall immediately provide a copy of the report or petition to the prosecuting attorney. If a petition or motion is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance."

[42] For a complete list of conditions the court may require of a probationer, see MCL 771.3(2).

[43] See SCAO From MC 258, *Report of Nonpayment of Restitution*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/probation/mc258.pdf.

MCL 780.766(18). See also MCL 769.1a(15), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations.

b. Restitution as Condition of Parole

"In each case in which payment of restitution is ordered as a condition of parole, a parole officer assigned to a case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. The final review shall be conducted not less than 60 days before the expiration of the parole period. If the parole officer determines that restitution is not being paid as ordered, the parole officer shall file a written report of the violation with the parole board on a form prescribed by the parole board. The report shall include a statement of the amount of arrearage and any reasons for the arrearage known by the parole officer. The parole board shall immediately provide a copy of the report to the court, the prosecuting attorney, and the victim." MCL 791.236(13).

3. Failure to Comply With Restitution Order

If restitution is not being paid or has not been paid as ordered,

- the court may revoke probation if the defendant has not made a good faith effort to comply with the order, see MCL 780.766(11) and MCL 769.1a(11).

- the parole board may revoke parole if the defendant has not made a good faith effort to comply with the order, see MCL 780.766(11), and MCL 769.1a(11).

- the court may modify the method of paying restitution if requested by the defendant and certain conditions are met, see MCL 780.766(12) and MCL 769.1a(12).[44] See also MCL 771.3(1)(e), which includes as a condition of probation that "[a]n order for payment of restitution may be modified and shall be enforced as provided in [MCL 769.1a]."

- "the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or all of the amount

[44] A court has authority to amend the probation order "in form or substance at any time." MCL 771.2(5). See Section 8.15 for additional information on modifying payment of restitution under the CVRA and the Code of Criminal Procedure.

of money owed to the extent permitted by law" if the defendant has a manifest hardship,[45] see MCR 6.425(E)(3)(b).

- the prosecuting attorney, victim, victim's estate, or any other person named in the restitution order may enforce the restitution order "in the same manner as a judgment in a civil action or a lien." See MCL 769.1a(13); MCL 780.766(13).[46]

a. Revocation of Probation or Parole

"The court may revoke probation or impose imprisonment under the conditional sentence and the parole board may revoke parole if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke probation or parole or impose imprisonment, the court or parole board shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay." MCL 780.766(11).[47] "Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so."[48] MCL 780.766(14).[49]

MCR 6.425(E)(3)(a) also prohibits the court from sentencing a defendant to a term of incarceration or revoking a probation "for failure to comply with an order to pay money unless the court finds, on the record, that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order." "The court

[45] For a list of criteria the court must consider to determine if the defendant has a manifest hardship under MCR 6.425(E)(3)(b), see Section 8.10(A)(3)(a).

[46] See Section 8.19 for additional information on civil enforcement of restitution orders.

[47] See also MCL 769.1a(11), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations.

[48] See, however, MCR 6.931(F)(10), which prohibits the court from revoking probation and "commit[ting] [a] juvenile to the Department of Corrections [(DOC)] for failing to comply with a restitution order."

[49] See also MCL 769.1a(14), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations.

shall consider the following criteria in determining manifest hardship:

> (*i*) Defendant's employment status and history.
>
> (*ii*) Defendant's employability and earning ability.
>
> (*iii*) The willfulness of the defendant's failure to pay.
>
> (*iv*) Defendant's financial resources.
>
> (*v*) Defendant's basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.
>
> (*vi*) Any other special circumstances that may have bearing on the defendant's ability to pay."[50] MCR 6.425(E)(3)(c).

When "determining whether to revoke a defendant's probation on the basis of manifest hardship or lack of a good faith effort to satisfy a restitution obligation," MCL 769.1a(11), MCL 780.766(11), and MCR 6.425(E)(3)(c), "do not speak to any *requirement* that a defendant's net income be considered in the trial court's decision." *People v Spears-Everett*, 329 Mich App 1, 16 (2019) ("declin[ing] defendant's invitation to adopt a bright-line rule that *requires* a trial court to consider only net income," and finding "the trial court [did not] err[] when it used [defendant's] gross income, rather than net income, in determining her restitution payment schedule.") (emphasis added).

b. Failure to Pay Must be Willful for Incarceration

In addition to violating the statutes governing restitution, "a sentence that exposes an offender to incarceration unless he [or she] pays restitution or some other fine violates the Equal Protection Clauses of [US Const, Am XIV] and [Const 1963, art 1, § 2] because it results in unequal punishments for offenders who have and do not have sufficient money. In accordance with the right to equal protection, [MCL 769.1a(14)[51]] prohibits

[50] See also the Michigan Judicial Institute's checklists, flowcharts, and benchcards on ability to pay and probation violations.

incarceration as a consequence for failure to pay unless the failure was willful." *People v Collins*, 239 Mich App 125, 135-136 (1999) (internal citations omitted). Similarly, "reward[ing] restitution payments with a suspension of jail time" also violates equal protection principles and the applicable statutory provisions. *Id*. at 136.

B. Juvenile Proceedings

"If the juvenile is placed on probation, any restitution ordered under this section shall be a condition of that probation." MCL 780.794(11). See also MCL 712A.30(11), the corresponding Juvenile Code provision.[52]

"If the court imposes restitution as a condition of probation, the court shall require the juvenile to do either of the following as an additional condition of probation:

> (a) Engage in community service or, with the victim's consent, perform services for the victim.[53]
>
> (b) Seek and maintain paid employment and pay restitution to the victim from the earnings of that employment." MCL 712A.18(8).

1. Wage Assignment for Employed Juvenile

"In each case in which payment of restitution is ordered as a condition of probation, the court shall order any employed juvenile to make regularly scheduled restitution payments. If the juvenile misses 2 or more regularly scheduled payments, the court shall order the juvenile to execute a wage assignment to pay the restitution." MCL 780.794(18).

2. Review of Compliance with Restitution Order as Condition of Probation

"The juvenile caseworker or probation officer assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. If the restitution was

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[51] Although the *Collins* Court analyzed MCL 769.1a(14) specifically, its holding would presumably extend to MCL 780.766(14) (which contains substantially similar language for restitution issued under the CVRA).

[52] For additional information on restitution ordered under the CVRA and the Juvenile Code, see Section 8.2. For additional information on placing a juvenile on probation, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 10.

[53] See also MCL 780.794(6), which permits the court to "require that the juvenile make restitution in services in lieu of money" if the victim or the victim's estate consents.

ordered to be made within a specific period of time, the juvenile caseworker or probation officer assigned to the case shall review the case at the end of the specific period of time to determine if the restitution has been paid in full. The final review shall be conducted not less than 60 days before the probationary period expires. If the juvenile caseworker or probation officer determines at any review the restitution is not being paid as ordered, the juvenile caseworker or probation officer shall file a written report of the violation with the court on a form prescribed by the state court administrative office[54] or shall petition the court for a probation violation. The report or petition shall include a statement of the amount of the arrearage, and any reasons for the arrearage known by the juvenile caseworker or probation officer. The juvenile caseworker or probation officer shall immediately provide a copy of the report or petition to the prosecuting attorney. If a petition or motion is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance." MCL 780.794(18). See also MCL 712A.30(18), the corresponding Juvenile Code provision.

3. Failure to Comply With Restitution Order

If restitution is not being paid or has not been paid as ordered,

- the court may revoke probation if the juvenile has not made a good faith effort to comply with the order, see MCL 780.794(11) and MCL 712A.30(11). See also MCL 712A.18(9), which provides for revocation of probation for nonpayment.

- the court may alter the terms and conditions of probation. See MCL 712A.18(9).

- the court may modify the method of paying restitution if requested by the juvenile and certain conditions are met, see MCL 780.794(12) and MCL 712A.30(12).[55]

- the prosecuting attorney, victim, victim's estate, or any other person named in the restitution order may

[54] See SCAO From MC 258, *Report of Nonpayment of Restitution*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/probation/mc258.pdf.

[55] See Section 8.15 for additional information on modifying payment of restitution under the CVRA and the Code of Criminal Procedure.

file a civil suit to enforce the restitution order. See MCL 712A.30(13); MCL 780.794(13).[56]

The court may also "revoke or alter the terms of conditions of probation" if the juvenile intentionally refuses to perform required community service. See MCL 712A.18(9).

a. Revocation of Probation

"The court may revoke probation if the juvenile fails to comply with the order and if the juvenile has not made a good faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the juvenile's employment status, earning ability, and financial resources, the willfulness of the juvenile's failure to pay, and any other special circumstances that may have a bearing on the juvenile's ability to pay." MCL 780.794(11). See also MCL 712A.30(11), the corresponding Juvenile Code provision; and MCL 712A.18(9), which provides for revocation of probation "[i]f the court finds that the juvenile is in intentional default of the payment of restitution" under the Juvenile Code.

b. Alter Terms and Conditions of Probation

"If the court finds that the juvenile is in intentional default of the payment of restitution, a court may . . . alter the terms and conditions of probation for nonpayment of restitution." MCL 712A.18(9).

c. Limitation on Detaining or Imprisoning Juvenile for Nonpayment

"Notwithstanding any other provision of this section, a juvenile shall not be detained or imprisoned for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court determines that the juvenile has the resources to pay the ordered restitution and has not made a good faith effort to do so." MCL 780.794(14). See also MCL 712A.30(14), the corresponding Juvenile Code provision.

[56] See Section 8.19 for additional information on civil enforcement of restitution orders.

C. Misdemeanor Cases

"If the defendant is placed on probation or the court imposes a conditional sentence as provided in . . . the code of criminal procedure, . . . MCL 769.3, any restitution ordered under this section shall be a condition of that probation or sentence."[57] MCL 780.826(11). See MCL 769.1a(11), which also contains substantially similar language for restitution ordered under the Code of Criminal Procedure; MCL 771.3(1)(e), which also requires the order of probation to contain a provision requiring the probationer to pay restitution to a victim of the probationer's "course of conduct giving rise to [his or her] conviction or to the victim's estate" under the Code of Criminal Procedure.[58]

1. Wage Assignment for Employed Defendant

"In each case in which payment of restitution is ordered as a condition of probation, the court shall order any employed defendant to make regularly scheduled restitution payments. If the defendant misses 2 or more regularly scheduled payments, the court shall order the defendant to execute a wage assignment to pay the restitution." MCL 780.826(15). See also MCL 771.3(2)(f), which authorizes "[a]s a condition of probation, the court [to] require the probationer to . . . [a]gree to pay by wage assignment any restitution, assessment, fine, or cost imposed by the court."[59]

2. Review of Compliance with Restitution Order as Condition of Probation

"The probation officer assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. If the restitution was ordered to be made within a specific period of time, the probation officer

[57] However, "a trial court's restitution award that is based solely on uncharged conduct may [not] be sustained." *People v McKinley*, 496 Mich 410, 413, 418 n 8 (2014) (applying MCL 780.766(2) and noting that "MCL 771.3(1)(e)[] . . . contains identical language to MCL 780.766(2) for all purposes relevant to our analysis[; s]imilarly, other statutes allowing for the assessment of restitution also have identical language for all relevant purposes[; s]ee, e.g., MCL 769.1a(2); MCL 780.826(2)[]"). For purposes of the *McKinley* opinion, the Michigan Supreme Court stated that "the phrase 'uncharged conduct' refers to criminal conduct that the defendant allegedly engaged in that was not relied on as a basis for any criminal charge and therefore was not proved beyond a reasonable doubt to a trier of fact." *McKinley*, 496 Mich 410, 413 n 1 (2014).

[58] For additional information on restitution ordered under the CVRA and the Code of Criminal Procedure, see Section 8.2. For additional information on placing a defendant on probation or imposing a conditional sentence under MCL 769.3, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

[59] For a complete list of conditions the court may require the probationer to do, see MCL 771.3(2).

assigned to the case shall review the case at the end of the specific period of time to determine if the restitution has been paid in full. The final review shall be conducted not less than 60 days before the probationary period expires. If the probation officer determines at any review that restitution is not being paid as ordered, the probation officer shall file a written report of the violation with the court on a form prescribed by the state court administrative office[60] or shall petition the court for a probation violation. The report or petition shall include a statement of the amount of the arrearage and any reasons for the arrearage known by the probation officer. The probation officer shall immediately provide a copy of the report or petition to the prosecuting attorney. If a petition or motion is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance." MCL 780.826(15). See also MCL 769.1a(15), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations.

3. Failure to Comply with Restitution Order

If restitution is not being paid or has not been paid as ordered,

- the court may revoke probation if the defendant has not made a good faith effort to comply with the order, see MCL 780.826(11) and MCL 769.1a(11).

- the court may modify the method of paying restitution if requested by the defendant and certain conditions are met, see MCL 780.826(12) and MCL 769.1a(12).[61] See also MCL 771.3(1)(e), which includes as a condition of probation that "[a]n order for payment of restitution may be modified and shall be enforced as provided in [MCL 769.1a]."

- the prosecuting attorney, victim, victim's estate, or any other person named in the restitution order may file a civil suit to enforce the restitution order. See MCL 769.1a(13); MCL 780.826(13).[62]

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[60] See SCAO From MC 258, *Report of Nonpayment of Restitution*.

[61] A court has authority to amend the probation order "in form or substance at any time." MCL 771.2(5). See Section 8.15 for additional information on modifying payment of restitution under the CVRA and the Code of Criminal Procedure.

[62] See Section 8.19 for additional information on civil enforcement of restitution orders.

a. Revocation of Probation

"The court may revoke probation or impose imprisonment under the conditional sentence if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke probation or impose imprisonment, the court shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay." MCL 780.826(11). See also MCL 769.1a(11), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations.

b. Limitation on Imprisoning, Jailing, or Incarcerating Defendant for Nonpayment

"Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or otherwise for failure to pay restitution as ordered under this section unless the court determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so." MCL 780.826(14). See also MCL 769.1a(14), the corresponding Code of Criminal Procedure provision applicable to felonies, misdemeanors, and ordinance violations.

In addition to violating the statutes governing restitution, "a sentence that exposes an offender to incarceration unless he [or she] pays restitution or some other fine violates the Equal Protection Clauses of [US Const, Am XIV] and [Const 1963, art 1, § 2] because it results in unequal punishments for offenders who have and do not have sufficient money. In accordance with the right to equal protection [MCL 769.1a(14)[63]] prohibits incarceration as a consequence for failure to pay unless the failure was willful." *People v Collins*, 239 Mich App 125, 135-136 (1999) (internal citations omitted). Similarly, "reward[ing] restitution payments with a suspension of jail time" also violates equal protection principles and the applicable statutory provisions. *Id.* at 136.

[63] Although the *Collins* Court analyzed MCL 769.1a(14) specifically, its holding would presumably extend to MCL 780.826(14) (which contains substantially similar language for restitution issued under the CVRA).

8.11 Restitution Ordered in Conjunction With Assignment to Youthful Trainee Status or Delayed Sentence/ Deferred Judgment

A. Felony Cases

"For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under [MCL 780.766]."[64] MCL 780.766(2). See also MCL 762.13(1)(b) and MCL 762.13(1)(d), which require the court to order restitution as a condition of probation under MCL 771.3(1)(e) for assignment to youthful trainee status; MCL 771.1(1)-(2) and MCL 771.3(1)(e), which require the court to order restitution as a condition of probation for imposition of a delayed sentence; MCL 771.3(9), which requires the court to order restitution as a condition of probation under MCL 771.3(1)(e) for imposition of a deferred sentence.

B. Juvenile Proceedings

"For an offense that is resolved informally by means of a consent calendar diversion or by another informal method that does not result in a dispositional hearing, by assignment to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under [MCL 780.794]."[65] MCL 780.794(2). See also MCL 712A.18(1)(m) and MCL 712A.30(11), which require the court to order restitution as a condition of probation for imposition of a delayed sentence.

C. Misdemeanor Cases

"For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under [MCL 780.826]."[66] MCL 780.826(2). See also MCL 762.13(3), which requires

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[64] For additional information on delayed or deferred proceedings, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

[65] For additional information on delayed imposition of sentence, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 15.

[66] For additional information on delayed or deferred proceedings, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

the court to order restitution as a condition of probation under MCL 771.3(1)(e) for assignment to youthful trainee status; MCL 771.1(1)-(2) and MCL 771.3(1)(e), which require the court to order restitution as a condition of probation for imposition of a delayed sentence; MCL 771.3(10), which requires the court to order restitution as a condition of probation under MCL 771.3(1)(e) for imposition of a delayed or deferred sentence.

D. Problem-Solving Courts

Deferred judgment, delayed sentencing, and discharge and dismissal of proceedings may be obtained under certain circumstances in drug treatment courts, veterans treatment courts, and mental health courts.[67]

1. Drug Treatment Court

An individual charged with a criminal offense or a juvenile "alleged to have engaged in activity that would constitute a criminal act if committed by an adult" may be eligible for admission to drug treatment court if he or she meets certain eligibility requirements as set out in MCL 600.1060 *et seq*. MCL 600.1068(1).

"In order to continue to participate in and successfully complete a drug treatment court program, an individual shall . . . [p]ay all court ordered restitution."[68] MCL 600.1074(1)(c).

2. Veterans Treatment Court

A veteran charged with a criminal offense may be eligible for admission to a veterans treatment court if he or she meets certain eligibility requirements as set out in MCL 600.1200 *et seq*. MCL 600.1205(1).

"In order to continue to participate in and successfully complete a veterans treatment court program, an individual shall . . . [p]ay all court-ordered restitution."[69] MCL 600.1208(1)(c).

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[67] For a thorough discussion of problem-solving courts, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9. For a discussion of relevant problem-solving courts as they relate to juveniles, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1. For additional information on problem-solving court programs, including standards and best practice manuals, see http://courts.mi.gov/administration/admin/op/problem-solving-courts/pages/default.aspx.

[68] See MCL 600.1074(1) for a complete list of requirements that must be met.

[69] See MCL 600.1208(1) for a complete list of requirements that must be met.

3. Mental Health Court

An individual charged with a criminal offense may be eligible for admission to a mental health court if he or she meets certain eligibility requirements as set out in MCL 600.1090 *et seq.* MCL 600.1094(1).

"In order to continue to participate in and successfully complete a mental health court program, an individual shall comply with all court orders, violations of which may be sanctioned at the court's discretion." MCL 600.1097(1). "The court shall require that a participant pay all . . . restitution[.]" MCL 600.1097(3).[70]

4. Juvenile Mental Health Court

A juvenile "alleged to have engaged in activity that would constitute a criminal act if committed by an adult" may be eligible for admission to a juvenile mental health court if he or she meets certain eligibility requirements as set out in MCL 600.1099b *et seq.* MCL 600.1099f(1).

"In order to continue to participate in and successfully complete a juvenile mental health court program, a juvenile shall comply with all court orders, violations of which may be sanctioned at the court's discretion." MCL 600.1099j(1). "The court shall require that a juvenile pay all . . . restitution[.]" MCL 600.1099j(3).[71]

8.12 Deducting Restitution From Prisoner's, Jail Inmate's, or Juvenile Delinquent's Account

A. Paying Restitution When Offender is Sentenced to Prison

"If a [defendant or juvenile] who has been sentenced to the [DOC] is ordered to pay restitution under [MCL 780.766 or MCL 780.794], and if the [defendant or juvenile] receives more than $50.00 in a month, the [DOC] shall deduct 50% of the amount over $50.00 received by the [defendant or juvenile] for payment of the restitution. The [DOC] shall promptly send the deducted money to the court or to the crime victim as provided in the order of restitution when it accumulates to an amount that exceeds $100.00, or when the [defendant or juvenile] is paroled, transferred to

[70] See MCL 600.1097(3) for a complete list of requirements that must be met.

[71] See MCL 600.1099j(3) for a complete list of requirements that must be met.

community programs, or discharged on the maximum sentence." MCL 780.767a(1); MCL 780.796b(1). See also MCL 791.220h(1), the corresponding Department of Corrections Act provision.[72]

"[When] a [defendant or juvenile] who is ordered to pay restitution under [MCL 780.766, MCL 780.794, or MCL 780.826] is remanded to the jurisdiction of the [DOC], the court shall provide a copy of the order of restitution to the [DOC] when the [defendant or juvenile] is remanded to the [DOC]'s jurisdiction." MCL 780.766(19); MCL 780.794(19); MCL 780.826(16). See also MCL 712A.30(19) and MCL 769.1a, the corresponding Juvenile Code and Code of Criminal Procedure provisions.

"The [DOC] . . . shall notify the [defendant or juvenile] and the court in writing of all deductions and payments made under [MCL 780.767a or MCL or 780.796b]." MCL 780.767a(3); MCL 780.796b(4). See also MCL 791.220h(1), the corresponding Department of Corrections Act provision.

"The requirements of [MCL 780.767a or MCL 780.796b] remain in effect until all of the restitution has been paid." MCL 780.767a(3); MCL 780.796b(4). See also MCL 791.220h(1), the corresponding Department of Corrections Act provision.

"The [DOC] . . . shall not enter into any agreement with a [defendant or juvenile] that modifies the requirements of [MCL 780.767a or MCL 780.796b]. An agreement in violation of this subsection is void." MCL 780.767a(3); MCL 780.796b(4). See also MCL 791.220h(3), the corresponding Department of Corrections Act provision.

1. Use of Funds From Prisoner Lawsuit to Pay Restitution

Civil judgments or settlements the DOC owes to the prisoner for claims that arose during the prisoner's incarceration must be used to satisfy a restitution order:

> "Any funds owed by the Michigan [DOC] or to be paid on behalf of one or more of its employees to satisfy a judgment or settlement to a person for a claim that arose while the person was incarcerated, shall be paid to satisfy any order(s) of restitution imposed on the claimant that the [DOC] has a

[72] MCL 769.1/ also requires the DOC to deduct money from the prisoner's account to pay fines, costs, assessments, and fees the court imposed under MCL 769.1k in the same manner as proscribed under MCL 780.767a(1), MCL 780.796b(1), and MCL 791.220h(1), but requires the DOC to give restitution orders issued under MCL 780.767a(1), MCL 780.796b(1), and MCL 791.220h(1) priority.

> record of. The payment shall be made as described in [MCL 791.220h(1)]. The obligation to pay the funds, described in this section, shall not be compromised. As used in this section, 'fund' or 'funds' means that portion of a settlement or judgment that remains to be paid a claimant after statutory and contractual court costs, attorney fees, and expenses of litigation, subject to the court's approval, have been deducted." MCL 791.220h(2).

Damages awarded to a prisoner in a civil action brought against the prison must be used to satisfy a restitution order:

> "Subject to . . . MCL 791.220h, and the [CVRA], . . . MCL 780.751 to [MCL] 780.834, any damages awarded to a prisoner in connection with a civil action brought against a prison or against an official, employee, or agent of a prison shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner, including, but not limited to, restitution orders issued under the state correctional facility reimbursement act, . . . MCL 800.401 to [MCL] 800.406, the prisoner reimbursement to the county act, . . . MCL 801.81 to [MCL] 801.93, . . . MCL 801.301, and the [CVRA] . . . MCL 780.751 to [MCL] 780.834, any outstanding costs and fees, and any other debt or assessment owed to the jurisdiction housing the prisoner. The remainder of the award after full payment of all pending restitution orders, costs, and fees shall be forwarded to the prisoner." MCL 600.5511(2).
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> > **Note:** "Before payment of any damages awarded to a prisoner in connection with a civil action described in [MCL 600.5511(2)], the court awarding the damages shall make reasonable effort to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of damages." MCL 600.5511(3).

2. Use of Inmate Wages to Pay Restitution

MCL 800.327a(1)-(2) permits eligible inmates to work in specified private manufacturing or service enterprises that meet certain criteria. Wages paid to the inmate are distributed as set out in MCL 800.327a(3), and include payment of restitution:

> "If the inmate has been ordered by the court to pay restitution to the victim of his or her crime, 20% shall be paid for the restitution on the inmate's behalf, in accordance with the court order, until the amount of restitution is satisfied. If restitution is satisfied or if the inmate was not made subject to restitution, 10% shall be added to the escrow account under [MCL 800.327a(3)(b)(*iv*)[73]] and 10% shall be deposited with the state treasurer and credited to the crime victims rights fund created in . . . MCL 780.904, in addition to the amount in [MCL 800.327a(3)(b)(*v*)[74]]." MCL 800.327a(3)(*i*).

B. Paying Restitution When Offender is Sentenced to Jail

"If a [defendant or juvenile] who has been sentenced to jail is ordered to pay restitution under [MCL 780.766, MCL 780.794, or MCL 780.826], and if the defendant receives more than $50.00 in a month, the sheriff may deduct 50% of the amount over $50.00 received by the defendant for payment of the restitution, and 5% of the amount over $50.00 received by the [defendant or juvenile] to be retained by the sheriff as an administrative fee. The sheriff shall promptly send the money deducted for restitution to the court or to the crime victim as provided in the order of restitution when it accumulates to an amount that exceeds $100.00, or when the [defendant or juvenile] is released to probation or discharged on the maximum sentence." MCL 780.767a(2); MCL 780.796b(2); MCL 780.830a(1).

"The . . . sheriff . . . shall notify the [defendant or juvenile] and the court in writing of all deductions and payments made under [MCL 780.767a, MCL 780.796b, or MCL 780.830a]." MCL 780.767a(3); MCL 780.796b(4); MCL 780.830a(2).

"The requirements of [MCL 780.767a, MCL 780.796b, or MCL 780.830a] remain in effect until all of the restitution has been paid." MCL 780.767a(3); MCL 780.796b(4); MCL 780.830a(2).

"The . . . sheriff shall not enter into any agreement with a [defendant or juvenile] that modifies the requirements of [MCL 780.767a, MCL 780.796b, or MCL 780.830a]. An agreement in violation of this

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[73] MCL 800.327a(3)(*iv*) requires "[t]en percent [to] be held by the [DOC] in an escrow account for the inmate, and [to] be returned to the inmate upon his or her release."

[74] MCL 800.327a(3)(*v*) requires "[t]he balance remaining after the deductions specified in [MCL 800.327a(3)(*i*)-(*iv*)] [to] be deposited with the state treasurer and credited to the general fund, as partial reimbursement to the state for the cost of that inmate's imprisonment and care."

subsection is void." MCL 780.767a(3); MCL 780.796b(4); MCL 780.830a(2).

C. Paying Restitution When Juvenile is Placed in Juvenile Facility

"If a juvenile who has been placed in a juvenile facility is ordered to pay restitution under [MCL 780.794], and if the juvenile receives more than $50.00 in a month, the [DHHS] or the county juvenile agency, as applicable, may deduct 50% of the amount over $50.00 received by the juvenile for payment of the restitution. The [DHHS] or the county juvenile agency, as applicable, shall promptly send the deducted money to the court or to the crime victim as provided in the order of restitution when it accumulates to an amount that exceeds $100.00, or when the juvenile is released from the juvenile facility." MCL 780.796b(3).

"The . . . [DHHS][] or county juvenile agency, as applicable, shall notify the juvenile and the court in writing of all deductions and payments made under [MCL 780.796b]." MCL 780.796b(4).

"The requirements of [MCL 780.796b] remain in effect until all of the restitution has been paid." MCL 780.796b(4).

"The . . . [DHHS][] or county juvenile agency shall not enter into any agreement with a juvenile that modifies the requirements of [MCL 780.796b]. An agreement in violation of this subsection is void." MCL 780.796b(4).

D. Challenging Remission of Funds

When the court orders restitution, "the 'defendant's ability to pay is irrelevant; only the victim's actual losses from the criminal conduct are to be considered.' The defendant's ability to pay only becomes an issue when enforcement of the restitution order has begun." *People v Odom*, 327 Mich App 297, 317 (2019) (trial court did not err in "refus[ing] to modify its order of restitution" where the defendant provided "no evidence that the [Department of Corrections] violated MCL 791.220h or that any other type of enforcement [was] taken on the restitution order"), quoting *In re Lampert*, 306 Mich App 266, 233 (2014).

8.13 Ordering Parent of Juvenile Offender to Pay Restitution

"If the court determines that a juvenile is or will be unable to pay all of the restitution ordered, after notice to the juvenile's parent or parents and

an opportunity for the parent or parents to be heard, the court may order the parent or parents having supervisory responsibility for the juvenile at the time of the acts upon which an order of restitution is based to pay any portion of the restitution ordered that is outstanding. An order under this subsection does not relieve the juvenile of his or her obligation to pay restitution as ordered, but the amount owed by the juvenile shall be offset by any amount paid by his or her parent."[75] MCL 780.766(15); MCL 780.794(15). See also MCL 712A.30(15) and MCL 712A.18(7), corresponding in the Juvenile Code provisions.

"In determining whether to order the juvenile's supervisory parent to pay restitution under [MCL 780.794(15)], the court shall consider the financial resources of the juvenile's supervisory parent and the other factors specified in [MCL 780.794(16)]." MCL 780.795(1). See also MCL 712A.31(1), the corresponding Juvenile Code provision.

"[T]he [J]uvenile [C]ode does not limit the amount of restitution for which a supervisory parent may be held liable." *In re McEvoy*, 267 Mich App 55, 66-67 (2005) (rejecting the appellant-supervisory parent's argument that MCL 712A.30 "should be read *in pari materia* with the parental liability act (PLA), MCL 600.2913, to engraft onto the [J]uvenile [C]ode the PLA's limitation of $2,500 liability in civil court actions[,]" and noting that the "specific provision for a setoff [under MCL 712A.30(9) and MCL 780.794(9)] clearly recognizes that the statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding[]").[76]

A. Restitution Order Issued Against Juvenile Offender's Parent

"If the court orders a parent to pay restitution under [MCL 780.766(15) or MCL 780.794(15)], the court shall take into account the parent's financial resources and the burden that the payment of restitution will impose, with due regard to any other moral or legal financial obligations the parent may have. If a parent is required to pay restitution under [MCL 780.766(15) or MCL 780.794(15)], the court shall provide for payment to be made in specified installments and within a specified period of time." MCL 780.766(16); MCL 780.794(16). See also MCL 712A.30(16), the corresponding Juvenile Code provision.

[75] For purposes of issuing restitution against the juvenile offender's parent(s), "'parent' does not include a foster parent." MCL 780.766(15)(b).

[76] For additional information on required setoffs for damages or compensation, see Section 8.16.

B. Burden of Proof

"The burden of demonstrating the financial resources of the juvenile's supervisory parent and the other factors specified in [MCL 780.794(16)] shall be on the supervisory parent." MCL 780.795(4). See MCL 712A.31(4), the corresponding Juvenile Code provision.

C. Parent May Petition for Modification of Restitution

"A parent who has been ordered to pay restitution under [MCL 780.766(15) or MCL 780.794(15)] may petition the court for a modification of the amount of restitution owed by the parent or for a cancellation of any unpaid portion of the parent's obligation. The court shall cancel all or part of the parent's obligation due if the court determines that payment of the amount due will impose a manifest hardship on the parent and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim." MCL 780.766(17); MCL 780.794(17). See also MCL 712A.30(17), the corresponding Juvenile Code provision.

D. Constitutional Challenges

1. No Due Process Violation

Because the Juvenile Code provisions, MCL 712A.30(15)-(17),[77] "which, together, provide authority for and limitations on imposing payment of restitution on the supervisory parent of a juvenile offender[,]" . . . bear a reasonable relation to a permissible legislative objective," the supervisory parent's due process rights are not violated. *In re McEvoy*, 267 Mich App at 68-70 (finding that there was no violation of the appellant-supervisory parent's due process rights because "[MCL 712A.30(15)] does not impose liability solely on the basis of familial relationship[, but rather] . . . reasonably imposes liability on the parent responsible for supervising the child[;]" "although there is no statutory limitation on the amount of restitution, under [MCL 712A.30(16)], a court must consider the parent's financial resources, the burden of the payment of restitution, and any other moral or legal financial obligations that the parent may have[;]" and MCL 712A.30(17)] mandates that the court cancel all or part of the parent's obligation if

[77] Although the *In re McEvoy* Court analyzed MCL 712A.30(15)-(17) its holding extends to MCL 780.766(15)-(17) and MCL 780.794(15-(17) the corresponding CVRA provisions with substantially similar language. See I*n re McEvoy*, 267 Mich App at 63.

payment of the amount due will impose a manifest hardship on the parent[]").

2. No Bill of Attainder Violation

"The Michigan Legislature is prohibited from enacting bills of attainder. US Const, art I, § 10, cl 1; Const 1963, art 1, § 10. A legislative act that determines guilt and inflicts punishment on an identifiable group of individuals without the protections of a judicial trial is a bill of attainder." *In re McEvoy*, 267 Mich App at 72.

"[T]he burdens placed on [supervisory] parents by MCL 712A.30 do not make those burdens punishment within the meaning of the proscriptions against bills of attainder." *In re McEvoy*, 267 Mich App at 73 (noting that "the mere fact that harm is inflicted by the government does not make it punishment; there may be reasons other than punishment for a deprivation[]").[78] Specifically, the *In re McEvoy* Court held:

> "A determination whether a statute inflicts forbidden punishment implicates three specific inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably furthers nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish. Applying this analysis, we conclude that the burdens placed on parents by MCL 712A.30 do not make those burdens punishment within the meaning of the proscriptions against bills of attainder.
>
> The challenged statutory provisions for restitution do not fall within the historical meaning of legislative punishment and are not validly characterized as punishment in the constitutional sense. The statutory enactments at issue[, MCL 712A.30(15)-(17),] were designed to protect the rights of crime victims and they underscore the compensatory nature of restitution in Michigan. These laws authorize the payment of restitution because the victims of cries have suffered

[78] Although the *In re McEvoy* Court analyzed MCL 712A.30, its holding extends to MCL 780.766 and MCL 780.794, the corresponding CVRA provisions with substantially similar language. See I*n re McEvoy*, 267 Mich App at 63.

> significant losses. The fact that a restitution order is intended to cause 'financial pain' does not transform the restitution order into a primarily penal sanction.
>
> Moreover, [MCL 712A.30] furthers nonpunitive legislative purposes. . . . [T]he Legislature's enactments providing for restitution 'were intended to enable victims to be compensated fairly for their suffering at the hands of convicted offenders.' . . . Authorizing courts to hold supervisory parents secondarily accountable for restitution not only furthers the goal of making innocent victims whole, but also promotes increased parental supervision in society in general.
>
> The statute incorporates provisions to mitigate any excessive financial burden imposed on parents through protections in [MCL 712A.30(16)] and [MCL 712A.30(17)]. These subsections temper any potentially harsh ramifications of the statute and mandate that a court cancel all or part of the ordered restitution if the order imposes a manifest hardship on the parents. . . .
>
> Given the above factors, the law must be held to be an act of nonpunitive legislative policymaking. Unless an enactment is punitive in its purpose and effect, there is no bill of attainder. [MCL 712A.30] does not constitute a bill of attainder." *In re McEvoy*, 267 Mich App at 73-74 (internal citations omitted).

8.14 Ordering Restitution in Human Trafficking Offenses

A court must order a person convicted of violating MCL 750.462a–MCL 750.462h (human trafficking crimes) to pay restitution for the "full amount of loss suffered by the victim." MCL 780.766b.

"In addition to restitution ordered under [MCL 780.766[79]], the court may order the defendant to pay all of the following:

> (a) Lost income, calculated by whichever of the following methods results in the largest amount:

[79] For a detailed discussion of ordering restitution under MCL 780.766, see Section 8.2.

(*i*) The gross amount received by the defendant from or the value to the defendant of the victim's labor or services.

(*ii*) The value of the victim's labor or services as calculated under the minimum wage law of 1964, 1964 PA 154, . . . or the federal minimum wage, whichever results in the largest value.

(*iii*) Income loss as determined under [MCL 780.766(4)(c)].

(b) The cost of transportation, temporary housing, and child care expenses incurred by the victim because of the offense.

(c) Attorney fees and other costs and expenses incurred by the victim because of the offense, including, but not limited to, costs and expenses relating to assisting the investigation of the offense and for attendance at related court proceedings as follows:

(*i*) Wages lost.

(*ii*) Child care.

(*iii*) Transportation.

(*iv*) Parking.

(d) Any other loss suffered by the victim as a proximate result of the offense." MCL 780.766b.

Because the expenses listed in MCL 780.766b(c)(*i*)-(*ii*) are "already authorized under MCL 780.766(4)(c) and [MCL 780.766(4)(e)] for *any* crime that causes physical injury or psychological injury[,] . . . the Legislature was not expanding the restitution authority of sentencing courts in MCL 780.766b. Instead, it appears the Legislature was ensuring that sentencing courts did not overlook types of losses that were likely to be common in the human-trafficking context." *People v Garrison*, 495 Mich 362, 371 (2014).

8.15 Modifying Method of Paying Restitution[80]

"Subject to [MCL 780.766(18), MCL 780.794(18), or MCL 780.826(15)[81]], a [defendant or juvenile] who is required to pay restitution and who is not in willful default of the payment of the restitution may at any time petition the [sentencing judge or court] or his or her successor to modify

[80]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

the method of payment. If the court determines that payment under the order will impose a manifest hardship on the [defendant or juvenile] or his or her immediate family, and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim, the court may modify the method of payment." MCL 780.766(12); MCL 780.794(12); MCL 780.826(12). See also MCL 712A.30(12) and MCL 769.1a(12), the corresponding Juvenile Code and Code of Criminal Procedure provisions.

> **Note:** The court may, in certain circumstances and after certain requirements have been met, modify a juvenile's supervisory parent's restitution. See MCL 780.766(15); MCL 780.794(15). For additional information on modifying a juvenile's supervisory parent's restitution, see Section 8.13.

A court may exercise its discretion to modify the method of payment under MCL 780.766(12) "even where the defendant's restitution stemmed from a plea agreement." *People v George*, 495 Mich 940, 940 (2014) (noting that "[t]he statute makes no distinction between restitution ordered as part of a plea agreement or otherwise").

8.16 Required Setoffs for Damages or Compensation Setoff

"Any amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim's estate by an award from the [CVSC] made after an order of restitution under [MCL 780.766, MCL 780.794, or MCL 780.826]." MCL 780.766(9); MCL 780.794(9); MCL 780.826(9). See also MCL 712A.30(9) and MCL 769.1a(9), the corresponding Juvenile Code and Code of Criminal Procedure provisions.

The amount of court-ordered restitution may not be reduced by the amount of an unpaid civil judgment obtained by the victim against the defendant. *People v Dimoski*, 286 Mich App 474, 482 (2009). The distinction between restitution and civil damages is reflected in the setoff scheme of MCL 780.766(9),[82] which provides that "[a]ny amount paid to

[81] These provisions require the court to "order any employed [defendant or juvenile] to make regularly scheduled restitution payments[, and i]f the [defendant or juvenile] misses 2 or more regularly scheduled payments, the court shall order the [defendant or juvenile] to execute a wage assignment to pay the restitution."MCL 780.766(18); MCL 780.794(18); MCL 780.826(15).

[82] See also MCL 780.794(9) and MCL 780.826(9), the corresponding juvenile and misdemeanor CVRA provisions with substantially similar language. Presumably, the *Dimoski* holding would apply to those statutes, as well.

a victim or victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or victim's estate . . . ." *Dimoski*, 286 Mich App at 478. "Although [a] victim [may] have the benefit of both a civil judgment and a restitution order to obtain monetary relief from [a] defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed." *Id*. at 482.

8.17 Restitution Survives Victim's and Offender's Death

A. Death of Offender

Because the nature of restitution is compensatory, not punitive, a restitution order survives the defendant's death and may be enforced against the deceased defendant's estate. See *People v Peters*, 449 Mich 515, 523 (1995) (finding that "where the intent behind a fine or order is to compensate the victim, the fine or order may survive the death of the offender[;]" in this case, the restitution order did not abate on the defendant's death because "the [restitution] order was designed [by the parties in a stipulation order as a way] to compensate [the victims] for [a substantial portion of their losses suffered as a result of the defendant's criminal conduct, and] . . . the fact that [the] defendant, now his estate, will experience some 'financial pain' d[id] not transform the restitution order into a primarily penal sanction[]").

B. Death of Victim

"If the victim is deceased or dies, the court shall order that the restitution or remaining restitution be made to those entitled to inherit from the victim's estate." MCL 780.766(7); MCL 780.794(7); MCL 780.826(7). See also MCL 712A.30(7) and MCL 769.1a(7), the corresponding Juvenile Code and Code of Criminal Procedure provisions.

8.18 Amendment to Restitution Order

"The court may amend an order of restitution entered under [MCL 780.766, MCL 780.794, or MCL 780.826] on a motion filed by the prosecuting attorney, the victim, or the defendant based upon new or updated information related to the injury, damages, or loss for which the restitution was ordered." MCR 6.430(A). See also MCL 780.766(22); MCL 780.794(22), and MCL 780.826(19) for substantially similar language.

A. Filing

"The moving party must file the motion and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced. Upon receipt of a motion, the clerk shall file it under the same case number as the original conviction. If an appeal is pending when the motion is filed, the moving party must serve a copy on the appellate court." MCR 6.430(B).

B. Service and Notice of Hearing

"If the defendant is the moving party, he/she shall serve a copy of the motion and notice of its filing on the prosecuting attorney and the prosecutor shall then serve a copy of the motion and notice upon the victim. If the prosecutor is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the victim. If the victim is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the prosecutor. The home address, home telephone number, work address, and work telephone number of the victim, if included on a motion to amend restitution, is nonpublic. The non-moving party is permitted but not required to respond. Any response to the motion shall comply with the time for service of the response as provided in MCR 2.119(C)(2). The court shall provide written notice of hearing on the motion to the defendant and prosecutor. The prosecutor shall then serve notice of hearing upon the victim." MCR 6.430(C).

C. Appearance

"As permitted by MCR 6.006(A), the court may allow the defendant to appear by two-way interactive video technology to conduct the proceeding between a courtroom and a prison, jail, or other location." MCR 6.430(D).

MCR 6.006(A) permits the court to use two-way interactive video technology to conduct "hearings on postjudgment motions to amend restitution." The use of the two-way interactive video technology "must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).

D. Ruling

"The court, in writing, shall enter an appropriate order disposing of the motion and, if the motion is granted, enter an order amending the restitution. If an appeal was pending when the motion was filed,

the moving party must provide a copy of the order to the appellate court." MCR 6.006(E).

E. Appeal

"An appeal from this subsection is processed as provided by MCR 7.100 *et seq.*, and 7.200 *et seq.*" MCR 6.006(F).

8.19 Enforcement of Restitution Orders

"An order of restitution is a judgment and lien against all property of the [individual] for the amount specified in the order of restitution. The lien may be recorded as provided by law." MCL 780.766(13); MCL 780.794(13); MCL 780.826(13). See also MCL 712A.30(13) and MCL 769.1a(13), the corresponding Juvenile Code and Code of Criminal Procedure provisions.

The prosecuting attorney, victim, victim's estate, or any other person or entity named in the restitution order may enforce the restitution order "in the same manner as a judgment in a civil action or a lien." MCL 712A.30(13); MCL 769.1a(13); MCL 780.766(13); MCL 780.794(13); MCL 780.826(13). "The court shall not impose a fee on a victim, victim's estate, or prosecuting attorney for enforcing an order of restitution." MCL 780.766(20); MCL 780.794(20); MCL 780.826(17).

Where the defendant fails to pay restitution in full, the court may enforce its restitution order. See *People v Norman*, 183 Mich App 203, 206 (1989) (finding "[w]hen a court issues an order and that order is violated, the case returns to the court for enforcement"), superseded by statute on other grounds; MCL 600.611 (providing circuit courts with the "jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments"); MCL 600.1701(e) (providing the court with contempt powers for the "nonpayment of any sum of money which the court has ordered to be paid").[83] See also MCL 780.766(13), MCL 780.794(13), and MCL 780.826(13), which provide that "[a]n order of restitution entered under [MCL 780.766, MCL 780.794, or MCL 780.826] remains effective until it is satisfied in full[;]"[84] MCL 780.766(14), which provides, in relevant part, that "[n]otwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for . . . failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not

[83] For additional information on MCL 600.1701 and the court's contempt powers, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

[84] See also MCL 712A.30(13) and MCL 769.1a(13), the corresponding Juvenile Code and Code of Criminal Procedure provisions with substantially similar language.

made a good faith effort to do so."[85] Accordingly, while a "'defendant's ability to pay is irrelevant'" when ordering restitution, it does "become[] an issue when enforcement of the restitution order has begun." *People v Odom*, 327 Mich App 297, 317 (2019) (concluding that defendant's ability to pay claim was not ripe where no enforcement action was taken on the restitution order).

> **Note:** See generally *In re Reiswitz*, 236 Mich App 158, 168, 171 (1999) (finding the probate court in a juvenile delinquency proceeding had authority under MCL 712A.18(2) to enforce a preexisting reimbursement order against a juvenile's parent after the juvenile reached the age of majority and thus no longer under the court's jurisdiction). The *Reiswitz* Court noted that "the fact that [MCL 712A.18(2)] specifically indicate[d] that '[t]he court shall provide for the collection of all amounts ordered to be reimbursed,' coupled with the fact that [MCL 712A.18(2)] address[ed] the collection of delinquent accounts, is a clear indication that the reimbursement section establish[ed] a legally enforceable continuing reimbursement obligation."

8.20 Offender Declares Bankruptcy

"A court that receives notice that a defendant who has an obligation to pay restitution under [MCL 780.766, MCL 780.794, or MCL 780.826] has declared bankruptcy shall forward a copy of that notice to the prosecuting attorney. The prosecuting attorney shall forward the notice to the victim at the victim's last known address." MCL 780.766(23); MCL 780.794(23); MCL 780.826(20).

8.21 Unclaimed or Refused Restitution

"If a person or entity entitled to restitution under [MCL 780.766, MCL 780.794, or MCL 780.826] cannot be located, refuses to claim the restitution within 2 years after the date on which he or she could have claimed the restitution, or refuses to accept the restitution, the restitution to which that person or entity is entitled shall be deposited in the crime victim's rights fund created under . . . MCL 780.904, or its successor fund. However, a person or entity entitled to that restitution may claim that restitution any time by applying to the court that originally ordered and collected it. The court shall notify the [CVSC] of the application and the commission shall approve a reduction in the court's revenue transmittal

[85] See also MCL 780.794(14) and MCL 780.826(14), which contain substantially similar language as MCL 780.766(14); MCL 712A.30(14) and MCL 769.1a(14), the corresponding Juvenile Code and Code of Criminal Procedure provisions with substantially similar language.

to the crime victim's rights fund equal to the restitution owed to the person or entity. The court shall use the reduction to reimburse that restitution to the person or entity." MCL 780.766(21); MCL 780.794(21); MCL 780.826(18).

8.22 No Remission of Restitution

A. Conviction or Adjudication is Set Aside

If a defendant successfully moves to set aside his or her conviction, he or she is not entitled to remission of restitution that is paid as a consequence of the conviction that is set aside.[86] See MCL 780.622(2), which prevents a defendant who successfully moves to set aside a conviction from recouping "any fine, costs, or other money paid as a consequence of [the] conviction that is set aside."[87]

If a juvenile successfully moves to set aside his or her adjudication, he or she is not entitled to remission of restitution that is paid as a consequence of the adjudication that is set aside.[88] See MCL 712A.18e(11)(a), which prevents a juvenile who successfully moves to set aside an adjudication from recouping "any fine, costs, or other money paid as a consequence of [the] adjudication that is set aside."[89]

B. Restitution Order is Reversed

Although the Revised Judicature Act requires a court to award restitution plus interest of any amount of money collected on any judgment or decree that is later reversed, see MCL 600.1475, because the trial court acts "as a conduit in channeling [a] defendant's [criminal] restitution payments to the victim[, i]t d[oes] not have the

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[86] But see *Nelson v Colorado*, 581 US ___ (2017) (holding that a Colorado statute requiring a petitioner to "prove [his or] her innocence by clear and convincing evidence to obtain [a] refund of costs, fees, and restitution paid pursuant to an invalid conviction[] . . . does not comport with [the Fourteenth Amendment's guarantee of] due process[]"). It is unclear whether the *Nelson* holding applies to the setting aside of a conviction under MCL 780.622(2). See SCAO Memorandum, *Refunding of Assessments if Conviction Invalidated*, for additional discussion.

[87] For additional information on setting aside convictions, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3.

[88] But see *Nelson v Colorado*, 581 US ___ (2017) (holding that a Colorado statute requiring a petitioner to "prove [his or] her innocence by clear and convincing evidence to obtain [a] refund of costs, fees, and restitution paid pursuant to an invalid conviction[] . . . does not comport with [the Fourteenth Amendment's guarantee of] due process[]"). It is unclear whether the *Nelson* holding applies to the setting aside of an adjudication under MCL 712A.18e(11)(a). See SCAO Memorandum, *Refunding of Assessments if Conviction Invalidated*, for additional discussion.

[89] For additional information on setting aside adjudications, see the Michigan Judicial Institute's *Juvenile Justice Benchbook,* Chapter 21.

restitutional amount in its possession and therefore [the county] ha[s] no statutory duty to refund it to [the] defendant[]" on reversal of the restitution order.[90] *People v Diermier*, 209 Mich App 449, 451 (1995).

8.23 Allocation of Payments[91]

A. Felony Cases

"If a person is subject to any combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments arising out of the same criminal proceeding, money collected from that person for the payment of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments ordered to be paid in that proceeding shall be allocated as provided in [MCL 780.766a]." MCL 780.766a(1). See also MCL 775.22(1), the corresponding Code of Criminal Procedure provision; MCL 780.905(6).

"If a person is subject to fines, costs, restitution, assessments, probation or parole supervision fees, or other payments in more than 1 proceeding in a court and if a person making a payment on the fines, costs, restitution, assessments, probation or parole supervision fees, or other payments does not indicate the proceeding for which the payment is made, the court shall first apply the money paid to a proceeding in which there is unpaid restitution to be allocated as provided in [MCL 780.766a]." MCL 780.766a(1).

"Except as otherwise provided in this subsection, if a person is subject to payment of victim payments and any combination of other fines, costs, assessments, probation or parole supervision fees, or other payments, 50% of each payment collected by the court from that person shall be applied to payment of victim payments, and the balance shall be applied to payment of fines, costs, supervision fees, and other assessments or payments." MCL 780.766a(2). See also MCL 775.22(2), the corresponding Code of Criminal Procedure provision.

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[90] But see *Nelson v Colorado*, 581 US ___ (2017) (finding that "[w]hen a criminal conviction is invalidated by a reviewing court and no retrial will occur, . . . the *State* [is] obliged to refund . . . restitution exacted from the defendant upon, and as a consequence of, the conviction[]") (emphasis added). See SCAO Memorandum, *Refunding of Assessments if Conviction Invalid*ated, for additional discussion.

[91] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

"If a person making a payment indicates that the payment is to be applied to victim payments, or if the payment is received as a result of a wage assignment under [MCL 780.766] or from the [DOC] or sheriff under [MCL 780.767a], the payment shall first be applied to victim payments."[92] MCL 780.766a(2).

"If any fines, costs, supervision fees, or other assessments or payments remain unpaid after all of the victim payments have been paid, any additional money collected shall be applied to payment of those fines, costs, supervision fees, or other assessments or payments. If any victim payments remain unpaid after all of the fines, costs, supervision fees, or other assessments or payments have been paid, any additional money collected shall be applied to payment of those victim payments." MCL 780.766a(2). See also MCL 775.22(2), the corresponding Code of Criminal Procedure provision.

"In cases involving prosecutions for violations of state law, money allocated under [MCL 780.766a(2)] for payment of fines, costs, probation and parole supervision fees, and assessments or payments other than victim payments shall be applied in the following order of priority:

(a) Payment of the minimum state cost prescribed by . . . MCL 769.1j.

(b) Payment of other costs.

(c) Payment of fines.

(d) Payment of probation or parole supervision fees.

(e) Payment of assessments and other payments, including reimbursement to third parties who reimbursed a victim for his or her loss." MCL 780.766a(3). See also MCL 775.22(3), the corresponding Code of Criminal Procedure provision.

"In cases involving prosecutions for violations of local ordinances, money allocated under [MCL 780.766a(2)] for payment of fines, costs, and assessments or payments other than victim payments shall be applied in the following order of priority:

(a) Payment of the minimum state cost prescribed by . . . MCL 769.1j.

(b) Payment of fines and other costs.

[92] For additional information on wage assignment under MCL 780.766, see Section 8.10(A)(1), and for additional information on deducting restitution under MCL 780.767a, see Section 8.12.

(c) Payment of assessments and other payments." MCL 780.766a(4). See also MCL 775.22(4), the corresponding Code of Criminal Procedure provision.

B. Juvenile Proceedings

"If a juvenile is subject to any combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments arising out of the same criminal proceeding, money collected from that juvenile for the payment of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments ordered to be paid in that proceeding shall be allocated as provided in [MCL 780.794a]." MCL 780.794a(1). See also MCL 712A.29(1), the corresponding Juvenile Code provision; MCL 780.905(6).

"If a person is subject to fines, costs, restitution, assessments, probation or parole supervision fees, or other payments in more than 1 proceeding in a court and if a person making a payment on the fines, costs, restitution, assessments, probation or parole supervision fees, or other payments does not indicate the proceeding for which the payment is made, the court shall first apply the money paid to a proceeding in which there is unpaid restitution to be allocated as provided in [MCL 780.794a]." MCL 780.794a(1).

"Except as otherwise provided in this subsection, if a juvenile is subject to payment of victim payments and any combination of other fines, costs, assessments, probation or parole supervision fees, or other payments, 50% of each payment collected by the court from that juvenile shall be applied to payment of victim payments, and the balance shall be applied to payment of fines, costs, supervision fees, and other assessments or payments." MCL 780.794a(2). See also MCL 712A.29(2), the corresponding Juvenile Code provision, except that it requires 50% of the money collected from the juvenile *or his or her parent* to be applied to the payment of victim payments.

"If a person making a payment indicates that the payment is to be applied to victim payments, or if the payment is received as a result of a wage assignment under [MCL 780.794] or from the [DOC], sheriff, [DHHS], or county juvenile agency under [MCL 780.796b], the payment shall first be applied to victim payments."[93] MCL 780.794a(2).

[93] For additional information on wage assignment under MCL 780.794, see Section 8.10(B)(1), and for additional information on deducting restitution under MCL 780.796b, see Section 8.12.

"If any fines, costs, supervision fees, or other assessments or payments remain unpaid after all of the victim payments have been paid, any additional money collected shall be applied to payment of those fines, costs, supervision fees, or other assessments or payments. If any victim payments remain unpaid after all of the fines, costs, supervision fees, or other assessments or payments have been paid, any additional money collected shall be applied to payment of those victim payments." MCL 780.794a(2). See also MCL 712A.29(2), the corresponding Juvenile Code provision.

"In cases involving prosecutions for violations of state law, money allocated under [MCL 780.794a(2)] for payment of fines, costs, probation and parole supervision fees, and assessments or payments other than victim payments shall be applied in the following order of priority:

> (a) Payment of the minimum state cost prescribed by . . . MCL 769.1j.
>
> (b) Payment of other costs.
>
> (c) Payment of fines.
>
> (d) Payment of probation or parole supervision fees.
>
> (e) Payment of assessments and other payments, including reimbursement to third parties who reimbursed a victim for his or her loss." MCL 780.794a(3). See also MCL 712A.29(3), the corresponding Juvenile Code provision.[94]

"In cases involving prosecutions for violations of local ordinances, money allocated under [MCL 780.794a(2)] for payment of fines, costs, and assessments or payments other than victim payments shall be applied in the following order of priority:

> (a) Payment of the minimum state cost prescribed by . . . MCL 769.1j.
>
> (b) Payment of fines and other costs.
>
> (c) Payment of assessments and other payments." MCL 780.794a(4). See also MCL 712A.29(4), the corresponding Juvenile Code provision.[95]

[94] MCL 712A.29(5) requires "[m]oney allocated for payment of costs under [MCL 712A.29(3) [to] be paid to the county treasurer for deposit in the general fund of the county[; and m]oney allocated for payment of fines under [MCL 712A.29(3)] [to] be paid to the county treasurer to be used for library purposes as provided by law."

C. Misdemeanor Cases

"If a person is subject to any combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments arising out of the same criminal proceeding, money collected from that person for the payment of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments ordered to be paid in that proceeding shall be allocated as provided in [MCL 780.826a]." MCL 780.826a(1). See also MCL 775.22(1), the corresponding Code of Criminal Procedure provision; MCL 780.905.

"If a person is subject to fines, costs, restitution, assessments, probation or parole supervision fees, or other payments in more than 1 proceeding in a court and if a person making a payment on the fines, costs, restitution, assessments, probation or parole supervision fees, or other payments does not indicate the proceeding for which the payment is made, the court shall first apply the money paid to a proceeding in which there is unpaid restitution to be allocated as provided in [MCL 780.826a]." MCL 780.826a(1).

"Except as otherwise provided in this subsection, if a person is subject to payment of victim payments and any combination of other fines, costs, assessments, probation or parole supervision fees, or other payments, 50% of each payment collected by the court from that person shall be applied to payment of victim payments, and the balance shall be applied to payment of fines, costs, supervision fees, and other assessments or payments." MCL 780.826a(2). See also MCL 775.22(2), the corresponding Code of Criminal Procedure provision.

"If a person making a payment indicates that the payment is to be applied to victim payments, or if the payment is received as a result of a wage assignment under [MCL 780.826] or from the sheriff under [MCL 780.830a], the payment shall first be applied to victim payments."[96] MCL 780.826a(2).

"If any fines, costs, supervision fees, or other assessments or payments remain unpaid after all of the victim payments have been paid, any additional money collected shall be applied to payment of those fines, costs, supervision fees, or other assessments or

[95] MCL 712A.29(6) requires "[o]ne-third of the money allocated for payment of fines and costs under [MCL 712A.29(4)] [to] be paid to the treasurer of the political subdivision whose ordinance was violated, and 2/3 of that money [to] be paid to the county treasurer for deposit in the general fund of the county."

[96] For additional information on wage assignment under MCL 780.826, see Section 8.10(C)(1), and for additional information on deducting restitution under MCL 780.830a, see Section 8.12.

payments. If any victim payments remain unpaid after all of the fines, costs, supervision fees, or other assessments or payments have been paid, any additional money collected shall be applied to payment of those victim payments." MCL 780.826a(2). See also MCL 775.22(2), the corresponding Code of Criminal Procedure provision.

"In cases involving prosecutions for violations of state law, money allocated under [MCL 780.826a(2)] for payment of fines, costs, probation and parole supervision fees, and assessments or payments other than victim payments shall be applied in the following order of priority:

> (a) Payment of the minimum state cost prescribed by . . . MCL 769.1j.
>
> (b) Payment of other costs.
>
> (c) Payment of fines.
>
> (d) Payment of probation or parole supervision fees.
>
> (e) Payment of assessments and other payments, including reimbursement to third parties who reimbursed a victim for his or her loss." MCL 780.826a(3). See also MCL 775.22(3), the corresponding Code of Criminal Procedure provision.

"In cases involving prosecutions for violations of local ordinances, money allocated under [MCL 780.826a(2)] for payment of fines, costs, and assessments or payments other than victim payments shall be applied in the following order of priority:

> (a) Payment of the minimum state cost prescribed by . . . MCL 769.1j.
>
> (b) Payment of fines and other costs.
>
> (c) Payment of assessments and other payments." MCL 780.826a(4). See also MCL 775.22(4), the corresponding Code of Criminal Procedure provision.

Chapter 9: Crime Victim Services Commission and Compensation Awards

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9.1 Crime Victim Services Commission (CVSC)[1]

The Michigan Crime Victim Services Commission (CVSC) is a state agency within the Michigan Department of Health and Human Services (DHHS) charged with providing funding and services to crime victims in Michigan.[2] DHHS, *Crime Victim Services*.

The CVSC's responsibilities include administering the state's crime victim compensation program, federal Victims of Crime Act (VOCA) victim assistance grants, assessment collections, and the disbursements from the crime victim's rights fund; and providing training and technical assistance for victim advocates in public and private agencies throughout Michigan. MCL 18.353 (powers and duties of commission); MCL 780.903 (duties of commission); MCL 780.906–MCL 780.907 (disbursement of funds to pay for crime victim rights services).

For information on the CVSC in general, including its contact information, see the DHHS, *Crime Victim Services*.

9.2 Compensation Awards Eligibility[3]

One of the CVSC's duties is to "[i]nvestigate and determine claims for awards and reinvestigate or reopen cases as the commission considers necessary." MCL 18.353(1)(c).[4]

A. Persons Eligible for Compensation Awards

"Except as provided in [MCL 18.354(2)], the following persons are eligible for awards:

(a) A victim or an intervenor of a crime.

(b) A surviving spouse, parent, grandparent, child, sibling, or grandchild of a victim of a crime who died as a direct result of the crime.

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the [CVSC][]").

[3]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[4] See MCL 18.353(1) for a complete list of duties.

(c) A surviving person related to the victim by blood or affinity, a guardian, personal representative, or member of the same household as the victim.

(d) A health care provider seeking payment under [MCL 18.355a]." MCL 18.354(1).

Note: A person, who is otherwise eligible under MCL 18.354(1)(a)-(c), may see a reduction in his or her compensation award or a rejection to receive an award altogether if the commission determines that the victim's misconduct contributed to his or her injury. See MCL 18.361(6). For additional information, see Section 9.9(C).

A victim of human trafficking may also be eligible for compensation under the Human Trafficking Victims Compensation Act, MCL 752.981 *et seq.* For additional information on the Human Trafficking Victims Compensation Act, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 3.

1. Minimum Loss Requirement

"An award shall not be made on a claim unless the claimant has incurred a minimum out-of-pocket loss of $200.00 or has lost at least 2 continuous weeks' earnings or support, but the commission *may* waive the limitations of this subsection in the case of a claimant retired by reason of age or disability. If the claimant is a victim of criminal sexual conduct in the first, second, or third degree, the commission *may* waive the limitations of this subsection. The commission *shall* waive this limitation for health care providers seeking payment under [MCL 18.355a]." MCL 18.354(3) (with emphasis).

2. Payment to Health Care Provider for Sexual Assault Medical Forensic Examination

"A health care provider is eligible to be paid for a sexual assault medical forensic examination under this section only if that examination includes all of the following:

(a) The collection of a medical history.

(b) A general medical examination, including, but not limited to, the use of laboratory services and the dispensing of prescribed pharmaceutical items.

(c) One or more of the following:

(*i*) A detailed oral examination.

(*ii*) A detailed anal examination.

(*iii*) A detailed genital examination.

(d) Administration of a sexual assault evidence kit under . . . MCL 333.21527, and related medical procedures and laboratory and pharmacological services."[5] MCL 18.355a(1).

Note: "A health care provider shall not submit a bill for any portion of the costs of a sexual assault medical forensic examination to the victim of the sexual assault, including any insurance deductible or co-pay, denial of claim by an insure, or any other out-of-pocket expense." MCL 18.355a(2) See also Mich Admin Code, R 18.355(3), which contains similar language.

"Except with the victim's consent or as otherwise provided in this subsection, information collected by the commission under this section that identifies a victim of sexual assault is exempt from disclosure under the freedom of information act, . . . MCL 15.231 to [MCL] 15.246, shall not be obtained by subpoena or in discovery, and is inadmissible as evidence in any civil, criminal, or administrative proceeding. Information collected by the commission under this section that identifies a victim of sexual assault is confidential and shall only be used for the purposes expressly provided in this act, including, but not limited to, investigating and prosecuting a civil or criminal action for fraud related to reimbursement provided by the commission under this section." MCL 18.355a(9).

"A victim of sexual assault shall not be required to participate in the criminal justice system or cooperate with law enforcement as a condition of being administered a sexual assault medical forensic examination. For payments authorized under this section or for payments made to victims under [MCL 18.356], administration to the victim of a sexual assault medical forensic examination satisfies the requirements for prompt law enforcement reporting and victim cooperation under [MCL 18.356] and [MCL 18.360]."[6] MCL 18.355a(10).

[5] For additional information on providing payment to a health care provider, see MCL 18.355a.

[6] For additional information on the investigation requirements set out in MCL 18.356 and MCL 18.360, see Section 9.5.

B. Persons Not Eligible for Compensation Awards

"A person is not eligible to receive an award if the person is either of the following:

(a) Criminally responsible for the crime.

(b) An accomplice to the crime." MCL 18.354(2).

Victims confined in correctional facilities at the time of the crime are also ineligible for awards of compensation. See MCL 18.360(d).

9.3 Filing a Claim for Compensation

"A claim may be filed by the person eligible to receive an award or, if a person is a minor, by his or her parent or guardian." MCL 18.355(1). "[The] claim shall be filed in the commission's office in person or by mail[, and t]he commission shall accept for filing" the claim if it is submitted on an approved form,[7] by a person who is eligible for compensation,[8] and who "alleges the jurisdictional requirements set forth in this act[.]" MCL 18.355(4). See Mich Admin Code, R 18.353, which also requires the claim to be submitted on an approved form.

Once an eligible person listed in MCL 18.354(1)(a)-(c) files a claim for compensation, "the commission shall promptly notify the prosecuting attorney of the county in which the crime is alleged to have occurred." MCL 18.355(5).

A. Time Requirements to File Claim

"Except as provided in [MCL 18.355(3)], a claim shall be filed by the claimant not later than 1 year after the occurrence of the crime upon which the claim is based, except as follows:

> (a) If police records show that a victim of criminal sexual conduct in the first, second, or third degree was less than 18 years of age at the time of the occurrence and that the victim reported the crime before attaining 19 years of age, a claim based on that crime may be filed by a person listed in [MCL 18.354(1)(a)-(c)[9]] not later than 1 year after the crime was reported.

[7] See DHHS form DCH-0560, *Crime Victim Compensation Application*.

[8] For additional information on compensation awards eligibility, see Section 9.2.

[9] For a discussion of MCL 18.354(1)(a)-(c), see Section 9.2(A).

> (b) A claim may be filed within 1 year after the discovery by a law enforcement agency that injuries previously determined to be accidental, of unknown origin, or resulting from natural causes, were incurred as the result of a crime." MCL 18.355(2).

MCL 18.355(3) permits, "[u]pon petition by the claimant and for good cause shown, the commission [to] extend the period in which a claim may be filed under [MCL 18.355(2)]."

> **Note:** Although a claim is subject to the time limits set out under MCL 18.355(2), "if [the] claim is filed after the time limits in [MCL 18.355(2)], the commission may presume that good cause to file a claim late exists unless contrary evidence exists." Mich Admin Code, R 18.354.

B. Deferred Proceedings

Once an eligible person listed in MCL 18.354(1)(a)-(c)[10] files a claim for compensation, "the commission shall promptly notify the prosecuting attorney of the county in which the crime is alleged to have occurred." MCL 18.355(5).

"If, within 20 days after the notification, the prosecuting attorney advises the commission that a criminal prosecution is pending upon the same alleged crime and requests that action by the commission be deferred, the commission shall defer the proceedings until the criminal prosecution is concluded. When the criminal prosecution is concluded, the prosecuting attorney shall promptly notify the commission." MCL 18.355(5).

A deferred proceeding does not "prohibit the commission from granting emergency awards pursuant to [MCL 18.359] or from paying a health care provider under [MCL 18.355a]."[11]

9.4 Claimant May Request Closed Session

"A claimant who wishes to have matters of intimate personal privacy considered in a closed session of the [commission[12]] shall request a closed session, in writing, not less than 10 days prior to the scheduled

[10] For a list of persons eligible for compensation awards, see Section 9.2(A).

[11] For additional information on emergency awards, see Section 9.8, and for additional information on the health care providers compensation awards eligibility, see Section 9.2(A)(2).

[12] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

date of the meeting of the [commission] where the claim shall be considered. The 10-day requirement may be waived at the discretion of the [commission] for good cause." Mich Admin Code, R 18.364(1).

"All documents referred to by the [commission] during the course of a closed session shall be considered part of the minutes of the closed session and are exempt from disclosure as provided by . . . [the freedom of information act, MCL 15.231–MCL 15.246]." Mich Admin Code, R 18.364(2). "When the [commission], in the course of its deliberations, is required to utilize or refer to documents which are exempt from disclosure by law or these rules, the chair shall announce in the preceding open portion of the meeting that the consideration of material which is exempt from discussion or disclosure by law or by these rules is required. The [commission] shall then take a roll call vote on the question of closing the session. Upon the recording of a 2/3 vote of the [commission] to close the session, the [commission] shall go into closed session to discuss and consider the material." Mich Admin Code, R 18.364(3).

9.5 Determining Validity of Claim

"When a claim is accepted for filing, an investigation and examination shall be conducted to determine the validity of the claim. The investigation shall include an examination of papers filed in support of the claim, official records and reports concerning the crime, and an examination of medical and hospital reports relating to the injury upon which the claim is based." MCL 18.356(1). See also MCL 18.353(1)(c). In addition to its other duties listed in MCL 18.353, the commission must also "[d]irect medical examinations of victims[,]" and "[t]ake or cause to be taken affidavits or depositions within or without the state."[13] MCL 18.353(1)(d); MCL 18.353(1)(f).

> **Note:** "All claims which arise from the death of an individual as a direct result of a crime shall be considered together, and the total compensation awarded for all claims which arise from the death of an individual shall not exceed the maximum aggregate award." MCL 18.356(1).

"A claim shall be investigated and determined regardless of whether the alleged criminal was apprehended, prosecuted, convicted, acquitted, or found not guilty of the crime in question, unless the disposition is a direct result of willful noncooperation by the victim or other claimant with the

[13] "To receive an award, a claimant shall cooperate with the law enforcement agency investigating the crime giving rise to the claim and with the investigators, agents and representatives of the commission. If a claimant refuses to cooperate, the commission may deny the claim or reduce the size of an award." Mich Admin Code, R 18.355(1). See Section 9.9 for additional information on determining award amounts.

law enforcement agency or the prosecuting attorney. In the event of determination of willful noncooperation by the victim or other claimant, the commission shall reject the claim." MCL 18.356(2).

A. Verification of Facts

Through its investigation, the commission must verify certain facts before it makes any award to a claimant:

> "An award shall not be made unless the investigation of the claim verifies the following facts:
>
> (a) A crime was committed.
>
> (b) The crime directly resulted in personal physical injury to, or death of, the victim.
>
> (c) Police records show that the crime was reported promptly to the proper authorities. An award shall not be made if the police records show that the report was made more than 48 hours after the occurrence of the crime unless any of the following circumstances apply:
>
> (*i*) The crime was criminal sexual conduct committed against a victim who was less than 18 years of age at the time of the occurrence and the crime was reported before the victim attained 19 years of age.
>
> (*ii*) The commission, for good cause shown, finds the delay was justified.
>
> (*iii*) The commission is making a payment under [MCL 18.355a].
>
> (d) That the crime did not occur while the victim was confined in a federal, state, or local correctional facility." MCL 18.360.

"When an award cannot be made because the law enforcement agency, medical providers, or employer cannot verify the claim, the claimant shall be given written notice of the particular deficiencies of verification. The information requested by the commission as necessary to verify the claim shall be supplied by the claimant. If the claimant does not comply within a reasonable period of time, the claim shall be denied in whole or in part as appropriate." Mich Admin Code, R 18.355(2).

B. Report of Decision

A "person authorized to decide a claim" may make an initial decision regarding the claim.[14] See MCL 18.356(3)-(4). The decision may be based on "the papers filed in support of the claim and the report of the investigation of the claim." MCL 18.356(3).

"If the person authorized to decide a claim under [MCL 18.353(2)] is convinced that a decision should not be made without a hearing, that person may request the commission to conduct a hearing under [MCL 18.357[15]]." MCL 18.356(3). "If a request for a hearing is made . . . pursuant to [MCL 18.356(3)], a hearing shall be ordered." MCL 18.357(1).

"After an examination of the papers filed in support of claim and the report of investigation, and if no hearing is requested under [MCL 18.356(3)], a decision granting or denying the award shall be made." MCL 18.356(4).

"A written report setting forth the decision and reasons for the decision shall be sent to the claimant." MCL 18.356(5).

C. Burden of Proof

"The final burden of proof of the authenticity and eligibility of a claim, or any part of a claim, rests with the claimant." Mich Admin Code, R 18.355(2).

9.6 Right to Full Commission Review of Claim or Evidentiary Hearing

If the commission member assigned to decide a claim "is unable to decide [the] claim in favor of the claimant or denies the claim in whole or in part, the claimant shall be advised in writing, of the right to full [commission] review of the claim or an evidentiary hearing before the full [commission] at the option of the claimant." Mich Admin Code, R 18.365(1).

[14] Persons authorized to decide a claim are the full commission, a commission member, or a staff member. See MCL 18.353(1)-(2).

[15] For additional information on hearings under MCL 18.357, see Section 9.6.

A. Application for Full Commission Review or Evidentiary Hearing

"Within 30 days after receipt of the report of the decision, a *claimant* may apply in writing to the commission for consideration of the decision by the full commission."MCL 18.357(1) (with emphasis). See Mich Admin Code, R 18.365(2), which also provides a claimant (or his or her attorney) with the right to make a written application within 30 days of receiving the report of decision "to the [commission[16]] at its Lansing office for consideration of the decision by the full [commission] or an evidentiary hearing, if desired."

"Within 30 days after the filing of the report, a *commission member* may apply in writing to the commission for consideration of the decision by the full commission." MCL 18.357(2) (with emphasis). See Mich Admin Code, R 18.365(2), which also provides a commission member with the right to make a written application within 30 days of receiving the report of decision "to the [commission] at its Lansing office for consideration of the decision by the full [commission] or an evidentiary hearing, if desired."

"Upon receiving an application under [MCL 18.357(1)] or [MCL 18.357(2)], the commission shall review the record, and affirm or modify the decision, or hold a hearing, if ordered." MCL 18.357(3). See also Mich Admin Code, R 18.366(1).

An evidentiary hearing *must* be held if a request for a hearing:

- is made by a claimant;
- is made pursuant to MCL 18.356(3) (request by the person authorized to decide the claim); or
- is made by a commission member under MCL 18.357(2). MCL 18.357(1)-(2). See also Mich Admin Code, R 18.366(2).

B. Notification of Date, Time, and Place of Appeal

"The secretary of the [commission[17]] shall notify the claimant, the claimant's attorney, or the [commission] member requesting the appeal of the date, time, and place when the appeal will be considered." Mich Amin Code, R 18.365(2).

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[16] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

[17] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

C. Commission's Duties at Evidentiary Hearing

"If an evidentiary hearing is requested, one shall be held and the [commission] shall do the following:

> (a) Hold a hearing.
>
> (b) Administer oaths or affirmations.
>
> (c) Examine any person under oath or affirmation.
>
> (d) Issue subpoenas requiring the attendance and testimony of witnesses and the production of books, papers, documents and other evidence.
>
> (e) Review the record and any additional material in support of the claim." Mich Admin Code, R 18.366(2).

If the claimant has additional information for the commission to consider, the claimant must submit the information to the commission "not less than 10 days prior to [the] hearing." Mich Admin Code, R 18.365(2).

In its discretion, the commission, "for good cause shown, may consider additional information submitted at the hearing." Mich Admin Code, R 18.365(3).

D. Admissibility of Evidence at Evidentiary Hearing

"At [the evidentiary] hearing any relevant evidence, not legally privileged, is admissible." MCL 18.356(3).

E. Final Decision

1. No Application Filed for Review or Evidentiary Hearing

"If the commission does not receive an application pursuant to [MCL 18.357(1)] or [MCL 18.357(2)], any original decision under [MCL 18.356[18]] shall become the commission's final decision." MCL 18.357(3).

2. Application Filed for Review

"Upon receiving an application under [MCL 18.357(1)] or [MCL 18.357(2)], the commission shall review the record, and

[18] See Section 9.5(B) for additional information on decisions being decided under MCL 18.356.

affirm or modify the decision, or hold a hearing, if ordered. The commission's action under this section is final. The commission shall file a written report setting forth its decision and if the decision varies from the report of any original decision it shall set forth its reasons for the decision." MCL 18.357(3). See also Mich Admin Code, R 18.367(1), which contains similar provisions except that it specifically requires the commission's chairperson[19] to prepare the written report.

"The proposed decision, with any amendments thereto, shall become the final decision of the [commission], for purposes of judicial review, on the date the chair of the [commission] signs and dates such decision, if at least 1 other board member has also signed the final decision." Mich Admin Code, R 18.367(2).

3. Notification of Final Decision

"The [commission[20]] shall immediately file its final decision with the secretary of the [commission]. The secretary shall, within 15 days after such filing, notify the claimant of the final decision of the [commission] and furnish a copy of the decision. Such notification shall advise the claimant of the statutory 30-day period after receipt of the [commission's] final decision for filing a petition in the court of appeals for leave to appeal and review the board's decision." Mich Admin Code, R 18.367(3). See also MCL 18.357(4), which contains similar language.

9.7 Appealing Commission's Final Decision to Court of Appeals

"Within 30 days after receiving the copy of the report containing the commission's final decision, the claimant may by leave to appeal commence a proceeding in the court of appeals to review the commission's decision." MCL 18.358(1). The 30-day limit set out in MCL 18.358(1) "reflects no intention to make [that] specified time a jurisdictional limitation[, and] . . . the availability of a delayed appeal is governed by MCR 7.205[.]" *Calloway-Gaines v Crime Victim Services Comm*, 463 Mich 341, 342, 346 (2000) (finding that the Court of Appeals erred in denying the plaintiff-widow's "delayed application for leave to appeal

[19] See MCL 18.352(4), which specifically requires "[t]he governor [to] designate 1 commission member to serve as chairperson at the governor's pleasure."

[20] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

for lack of jurisdiction on the ground that [MCL 18.358] d[id] not permit appeals more than thirty days after the commission's decision[]").

The claimant must serve the commission with notification of the appeal in person or by mail. MCL 18.358(2).

9.8 Emergency Award

"If it appears that the claim is one with respect to which an award probably will be made and undue hardship will result to the claimant if immediate payment is not made, the commission may make an emergency award to the claimant pending a final decision in the case. The amount of the emergency award shall not exceed $500.00. The amount of the emergency award shall be deducted from the final award made to the claimant. The excess of the amount of the emergency award over the amount of the final award, if any, shall be repaid by the claimant to the commission." MCL 18.359.

9.9 Amount of Award and Compensable Expenses

A. Maximum Amounts Available

"Except for a claim under [MCL 18.355a[21]], an award made under this act shall be an amount not more than an out-of-pocket loss, including indebtedness reasonably incurred for medical or other services necessary as a result of the injury upon which the claim is based, together with loss of earnings or support resulting from the injury. The aggregate award under this act shall not exceed $25,000.00 per claimant." MCL 18.361(1).

1. Loss of Earnings or Support

"Unless reduced under this act, an award made for loss of earnings or support shall be in an amount equal to the actual loss sustained. An award shall not exceed $350.00 for each week of lost earnings or support." MCL 18.361(2).

2. Funeral Expenses

"An award made for funeral expenses, including burial expenses, shall not exceed $5,000.00 for each victim.[22] An

[21] For a discussion of claims under MCL 18.355a (claims by health care providers for payment of costs related to sexual assault medical forensic examination), see Section 9.2(A)(2).

award under this subsection shall not exceed an additional $500.00 for each of the following services:

> (a) Grief counseling for the victim's spouse, children, parents, siblings, grandparents, and grandchildren.
>
> (b) Crime scene cleanup services after crime scene cleanup is permitted by the investigating law enforcement agency, if the crime scene is located at the residence of the victim or of a person eligible for an award under [MCL 18.354(1)(b)]." MCL 18.361(3).

"Expenses for flowers, gravestones, catering services, or other personal and family accommodations not directly related to the funeral service and disposition of the body will not be considered." Mich Admin Code, R 18.358(2).

"When the commission awards funeral expenses, which in the absence of commission payment, would be receivable from other public funds, the amount awarded shall not exceed the amount normally paid by other sources." Mich Admin Code, R 18.358(3).

"The costs of transporting the victim's body will be included in the burial benefit under [Mich Admin Code,] R 18.358. Travel costs for family members will not be considered." Mich Admin Code, R 18.359.

3. Treatment

a. Psychological Counseling

> "An award for psychological counseling shall not exceed 35 hourly sessions per victim or intervenor. The award may include not more than 8 family sessions that include any of the victim's or intervenor's spouse, children, parents, or siblings who are not criminally responsible for or an accomplice to the crime. The maximum hourly reimbursement rate shall not exceed $80.00 per hourly session for a therapist or counselor licensed or registered to practice in this state, except that the maximum hourly reimbursement rate shall not exceed $125.00 per hourly session for a psychologist or physician licensed to practice in this state." MCL 18.361(4).

[22] If the date of the injury occurred on or before December 15, 2010, the burial benefit is reduced to $2,000. Mich Admin Code, R 18.358(1).

b. Specialized Treatment From Health Care Facility

"Personal injury victims may be reimbursed for travel costs to and from a particular health care facility where a specific treatment or care unavailable locally is rendered. The [commission[23]] will consider all pertinent medical information in making its decision." Mich Admin Code, R 18.359(2).

B. Reduction of Award for Receipt of Other Payments

"An award shall be reduced by the amount of 1 or more of the following payments received or to be received as a result of the injury:

(a) From or on behalf of the person who committed the crime.

(b) From insurance, but not including disability or death benefits paid or to be paid to a peace officer or a corrections officer on account of injuries sustained in the course of employment.

(c) From public funds, but not including disability or death benefits paid or to be paid to a peace officer or a corrections officer on account of injuries sustained in the course of employment.

(d) From an emergency award under [MCL 18.359[24]]." MCL 18.361(5).

C. Rejection or Reduction of Award for Misconduct

"In making a determination on a claim filed by a person listed in [MCL 18.354(1)(a)-(c)[25]], the commission shall determine whether the victim's misconduct contributed to his or her injury and shall reduce the amount of the award or reject the claim altogether, in accordance with the determination. The commission may disregard for this purpose the victim's responsibility for his or her own injury if the record shows that the injury was attributable to the victim's efforts to prevent a crime or an attempted crime from occurring in

[23] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

[24] For additional information on emergency awards under MCL 18.359, see Section 9.8.

[25] For additional information on persons eligible for compensation awards, see Section 9.2(A).

his or her presence or to apprehend a person who had committed a crime in his or her presence." MCL 18.361(6).

D. Rejection of Award for Lack of Serious Financial Hardship

"In all cases, the commission shall render a decision which will, as nearly as practicable, permit the claimant or family to maintain a reasonable standard of living. Where out-of-pocket expenses or loss of earnings or support significantly lower this standard of living, the commission may consider this serious financial hardship." Mich Admin Code, R 18.361(2).

"Except for a claim under [MCL 18.355a[26]], if the commission finds that the claimant will not suffer serious financial hardship as a result of the loss of earnings or support and the out-of-pocket expenses incurred as a result of the injury if he or she is not granted financial assistance, the commission shall deny the award." MCL 18.361(7).

"In determining the serious financial hardship, the commission shall consider all of the financial resources of the claimant." MCL 18.361(7); Mich Admin Code, R 18.361(1).

E. Rejection of Award for Substantial Unjust Enrichment

"If the commission determines that the payment of an award will cause substantial unjust enrichment and economic benefit to a person criminally responsible for the crime, the commission shall deny the payment." MCL 18.361(8).

F. Rejection or Reduction of Award for Noncooperation

MCL 18.356(2) requires "[a] claim [to] be investigated and determined regardless of whether the alleged criminal was apprehended, prosecuted, convicted, acquitted, or found not guilty of the crime in question,[27] *unless* the disposition is a direct result of willful noncooperation by the victim or other claimant with the law enforcement agency or the prosecuting attorney. In the event of determination of willful noncooperation by the victim or other claimant, the commission *shall* reject the claim." MCL 18.356(2) (with emphasis). See Mich Admin Code, R 18.355(1), which also conditions receipt of an award upon "[the] claimant['s] cooperat[ion] with the law enforcement agency investigating the

[26] For a discussion of claims under MCL 18.355a, see Section 9.2(A)(2).

[27] For additional information on investigating and determining the validity of a claim, see Section 9.5.

crime giving rise to the claim and with the investigators, agents, and representatives of the commission."

Under the administrative code, "[i]f a claimant refuses to cooperate, the commission *may* deny the claim or reduce the size of an award." Mich Admin Code, R 18.355(1) (with emphasis).

9.10 Payment of Award

"The award shall be paid in a lump sum, except that in the case of death or protracted disability the commission may specify that the award shall provide for periodic payments to compensate for loss of earnings or support." MCL 18.362. See also Mich Admin Code, R 18.362(1), which requires "[a]n award [to] be paid in lump sum, except for direct payments to medical care and other providers of services and for periodic payments to compensate for out-of-pocket expenses or loss of earnings or support where protracted disability has occurred."

> **Note:** "When a protracted award is ordered for lost earnings and subsequent medical reports indicate permanent disability, the [commission[28]] shall require the claimant to file with the social security administration for disability benefits. All claimants receiving compensation for lost earnings shall be required to make the application within 1 year from the date of the crime which gave rise to the claim." Mich Admin Code, R 18.360.

A. Award Not Subject to Execution or Attachment

"An award made pursuant to this act shall not be subject to execution or attachment other than for expenses resulting from the injury which is the basis for the claim." MCL 18.362.

B. Request for Further Awards for Compensation

"Upon submittal of additional out-of-pocket expenses or lost earnings, the [commission[29]] shall verify that treatment for the injuries has been rendered to the victim within the preceding 12-month period. If such verification cannot be made, the [commission]

[28] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

[29] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

may deny further awards for compensation." Mich Admin Code, R 18.362(2).

C. Retention of Complete Claim File

"The [commission[30]] shall retain a complete claim file for a period of 4 years following the final disposition of the claims." Mich Admin Code, R 18.362(3).

9.11 Confidentiality

A. Identity of Sexual Assault Victim

"Except with the victim's consent or as otherwise provided in this subsection, information collected by the commission under this section that identifies a victim of sexual assault is exempt from disclosure under the freedom of information act, . . . MCL 15.231 to [MCL] 15.246, shall not be obtained by subpoena or in discovery, and is inadmissible as evidence in any civil, criminal, or administrative proceeding. Information collected by the commission under this section that identifies a victim of sexual assault is confidential and shall only be used for the purposes expressly provided in this act, including, but not limited to, investigating and prosecuting a civil or criminal action for fraud related to reimbursement provided by the commission under this section." MCL 18.355a(9).

B. Intimate Personal Privacy Information Considered in Closed Session

Mich Admin Code, R 18.364(1) requires "[a] claimant who wishes to have matters of intimate personal privacy considered in a closed session of the [commission[31]] [to] request a closed session, in writing, not less than 10 days prior to the scheduled date of the meeting of the [commission] where the claim shall be considered."[32]

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[30] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

[31] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

[32] "The 10-day requirement may be waived at the discretion of the [commission] for good cause." Mich Admin Code, R 18.364(1).

"All documents referred to by the [commission] during the course of a closed session shall be considered part of the minutes of the closed session and are exempt from disclosure as provided by . . . [the freedom of information act, MCL 15.231–MCL 15.246]." Mich Admin Code, R 18.364(2). "When the [commission], in the course of its deliberations, is required to utilize or refer to documents which are exempt from disclosure by law or these rules, the chair shall announce in the preceding open portion of the meeting that the consideration of material which is exempt from discussion or disclosure by law or by these rules is required. The [commission] shall then take a roll call vote on the question of closing the session. Upon the recording of a 2/3 vote of the [commission] to close the session, the [commission] shall go into closed session to discuss and consider the material." Mich Admin Code, R 18.364(3).

C. Claimant's File and Testimony

The record of a proceeding before the commission is a public record, except that a claimant's file and his or her testimony before the commission is exempt from disclosure under the freedom of information act, . . . [MCL 15.231–MCL 15.246]. A record or report obtained by the commission, the confidentiality of which is protected by any other law or rule, shall remain confidential." MCL 18.363.

9.12 Recovery of Award Through Subrogation and Reimbursement

A. Reimbursement By Convicted Felon

"Any court of record, in establishing sentence for a felon convicted of a crime resulting in awards paid under this section, may impose a condition that the sentence include a method for reimbursement to the state, within the ability of the felon to comply, of the costs paid under this act to a victim of a crime for which the conviction was made. Such reimbursement will be paid into the general fund of the state. Such condition of reimbursement may include a provision relating suspension or probation to reimbursement or may be in lieu of other sentencing and shall be enforceable by the court to the degree that failure to meet the terms of reimbursement may be cause for reversion to an alternate sentence or to completion of an unfinished sentence." MCL 18.362

B. Subrogation of Victim's Right to Recover Payments

"Acceptance of an award made pursuant to this act shall subrogate the state, to the extent of the award, to any right or right of action accruing to the claimant or the victim to recover payments on account of losses resulting from the crime with respect to which the award is made." MCL 18.364.

9.13 Inadmissibility in Criminal Proceeding

"For purposes of this act, information relating to the filing of a claim by a claimant before the commission or proceedings before the commission, an emergency award made by the commission pursuant to [MCL 18.359[33]], or final awards made by the commission pursuant to [MCL 18.361(2)[34]] are inadmissible in a criminal proceeding." MCL 18.365.

9.14 Penalties for Fraudulent Claims and Violations of Confidentiality Provisions

A. Fraudulent Claims

MCL 18.366 provides, in relevant part, the following criminal penalties for making fraudulent claims:

> "(1) A person who, with intent to defraud or cheat by falsely presenting the facts and circumstances of a crime to the commission, causes an award of money to be made under this act to any person is guilty of a crime as follows:
>
> > (a) If the award is less than $200.00, a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.
> >
> > (b) If any of the following apply, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00 or 3 times the amount of the award, whichever is greater, or both imprisonment and a fine:
> >
> > > (*i*) The award is $200.00 or more but less than $1,000.00.

[33] For additional information on emergency awards, see Section 9.8.

[34] For additional information on amount of awards, see Section 9.9.

(*ii*) The person violates subdivision (a) and has 1 or more prior convictions for committing or attempting to commit an offense under this section.

(c) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00 or 3 times the amount of the award, whichever is greater, or both imprisonment and a fine:

(*i*) The award is $1,000.00 or more but less than $20,000.00.

(*ii*) The person violates subdivision (b)(*i*) and has 1 or more prior convictions for violating or attempting to violate this section. For purposes of this subparagraph, however, a prior conviction does not include a conviction for violating or attempting to violate subdivision (a) or (b)(*ii*).

(d) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00 or 3 times the amount of the award, whichever is greater, or both imprisonment and a fine:

(*i*) The award is $20,000.00 or more.

(*ii*) The person violates subdivision (c)(*i*) and has 2 or more prior convictions for committing or attempting to commit an offense under this section. For purposes of this subparagraph, however, a prior conviction does not include a conviction for violating or attempting to violate subdivision (a) or (b)(*ii*).

* * *

(3) Awards in violation of this section in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total awards.

(4) If the prosecuting attorney intends to seek an enhanced sentence based upon the defendant having 1

> or more prior convictions, the prosecuting attorney shall include on the complaint and information a statement listing the prior conviction or convictions. The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing. The existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, 1 or more of the following:
>
> (a) A copy of the judgment of conviction.
>
> (b) A transcript of a prior trial, plea-taking, or sentencing.
>
> (c) Information contained in a presentence report.
>
> (d) The defendant's statement.
>
> (5) If the sentence for a conviction under this section is enhanced by 1 or more convictions, those prior convictions shall not be used to further enhance the sentence for the conviction pursuant . . . MCL 769.10, [MCL] 769.11, and [MCL] 769.12."

B. Violating Confidentiality Provisions

MCL 18.366(2) provides a criminal penalty for violating the confidentiality provisions governing the commission:

> "(2) A person who makes public or discloses to an unauthorized person information that is confidential under this act[35] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both."

9.15 Awarding Attorney Fees

"Attorney fees shall only be paid when the [commission[36]] makes an award to the claimant for medical expenses that the claimant has paid or for loss of earnings or loss of support, or both, payable to the claimant. The attorney shall not receive from the claimant or any other source an

[35] For additional information on the confidentiality provisions, see Section 9.11.

[36] The CVSC was formerly the Crime Victims Compensation Board. See MCL 18.352(1) ("[t]he crime victims compensation board formerly created within the department of management and budget under [MCL 18.352] is renamed the crime victim services commission [(CVSC)][]").

attorney fee attributable, in whole or part, to that portion of an award paid to medical providers." Mich Admin Code, R 18.352(1).

Mich Admin Code, R 18.352(2)-(4) set out the maximum amounts for attorney fee awards:

> "(2)When a [commission] member decides a claim in favor of a claimant and the claimant does not appeal to the full [commission], the attorney fee awarded by the [commission] member shall not exceed 15% of the amount awarded to the claimant and is payable from the award.
>
> (3) When the full [commission] decides a claim totally or partially in favor of a claimant and judicial review is not sought within 30 days of the [commission] decision, the attorney fee awarded by the [commission] shall not exceed 15% of the amount awarded to the claimant and is payable from the award.
>
> (4) In cases involving judicial review, where the claimant prevailed in whole or in part, the [commission], upon conclusion of any further review of the claim, shall determine and allow attorney fees pursuant to a fee request which is duly submitted or which has been agreed upon with the attorney of record. For purposes of this subrule only, the attorney fee shall not exceed 25% of the amount awarded to the claimant." Mich Admin Code, R 18.352(2)-(4).

"An attorney shall not charge, demand, receive, or collect any fee for services rendered in connection with any claim or appeal or in conjunction with review before the [commission] or judicial review, except as allowed under this rule. However, an attorney may agree to accept a lesser attorney fee than is allowed by this rule and may agree to waive or not accept any attorney fee." Mich Admin Code, R 18.352(5).

"In the event of subrogation under [MCL 18.364[37]], if private counsel is involved, the chair or [commission] may agree to reimburse attorney fees up to 15% of the amount paid to the board by the victim or claimant. However, for good cause shown, the [commission] may elect to waive the limitation on attorney fees imposed by [Mich Admin Code, R 18.352(1)]." Mich Admin Code, R 18352(6).

"If the [commission] or a member of the [commission] determines that the claimant will not suffer serious financial hardship, then attorney fees shall not be awarded."[38] Mich Admin Code, R 18.352(7).

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[37] For additional information on subrogation under MCL 18.364, see Section 9.12(B).

[38] For additional information on determining a claimant's financial hardship, see Section 9.9(D)

Chapter 10: Civil Actions Filed by Crime Victims

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10.1 Crime Victim May File Civil Action[1]

A crime victim may file a civil action alleging a tort based on the offender's criminal conduct. See MCL 750.4 (preserving civil remedies under the Michigan Penal Code); *People v Veenstra*, 337 Mich 427, 430 (1953) (determining that "the same act may constitute both a crime and a tort[;] the crime is an offense against the public pursued by the sovereign, [and] the tort is a private injury . . . pursued by the injured party[]") (citation and quotations omitted).

"The very same evidentiary facts required to prove civil liability for negligence may be used to prove criminal liability." *People v McMurchy*, 249 Mich 147, 170 (1930).

For the limitations periods for commencement of various actions to recover damages to persons or property, see MCL 600.5805.

A. Victim of Criminal Sexual Conduct

"A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by [MCL 600.5805]." MCL 600.5805(1). For purposes of criminal sexual conduct, MCL 600.5805(6) provides:

> "The period of limitations is 10 years for an action to recover damages sustained because of criminal sexual conduct. For purposes of this subsection, it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the conduct or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication."

"Notwithstanding [MCL 600.5805] and [MCL 600.5851[2]], an individual who, while a minor, is the victim of criminal sexual conduct may commence an action to recover damages sustained because of the criminal sexual conduct at any time before whichever of the following is later:

(a) The individual reaches the age of 28 years.

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2] MCL 600.5851 provides for an extension of time if the victim is under 18 years of age or insane at the time the claim accrues. See MCL 600.5851 for more specific information.

> (b) Three years after the date the individual discovers, or through the exercise of reasonable diligence should have discovered, both the individual's injury and the causal relationship between the injury and the criminal sexual conduct." MCL 600.5851b(1).

"For purposes of [MCL 600.5851b(1)], it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the conduct or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication." MCL 600.5851b(2).

"Regardless of any period of limitation under [MCL 600.5851b(1)] or [MCL 600.5805] or [MCL 600.5851], an individual who, while a minor, was the victim of criminal sexual conduct after December 31, 1996 but before 2 years before [June 12, 2018] may commence an action to recover damages sustained because of the criminal sexual conduct within 90 days after the effective date of the amendatory act that added this section if the person alleged to have committed the criminal sexual conduct was convicted of criminal sexual conduct against any person under . . . MCL 750.520b, and the defendant admitted either of the following:

> (a) That the defendant was in a position of authority over the victim as the victim's physician and used that authority to coerce the victim to submit.
>
> (b) That the defendant engaged in purported medical treatment or examination of the victim in a manner that is, or for purposes that are, medically recognized as unethical or unacceptable." MCL 600.5851b(3).

"[MCL 600.5851b] does not limit an individual's right to bring an action under [MCL 600.5851]." MCL 600.5851b(4).

B. Victim of Female Genital Mutilation

"An individual who is a victim of female genital mutilation may bring an action, in a court of competent jurisdiction, for damages sustained because of the female genital mutilation." MCL 600.2978(1). "In an action under [MCL 600.2978], the court may award all of the following:

> (a) Three times the amount of actual damages sustained.
>
> (b) Damages for noneconomic loss.
>
> (c) Costs and reasonable attorney fees."[3] MCL 600.2978(2).

Notwithstanding MCL 600.5851, "an individual who, while a minor, is the victim of female genital mutilation may commence the action under [MCL 600.2978] or as otherwise allowed by law to recover damages sustained because of the female genital mutilation at any time before the individual reaches the age of 28 years." MCL 600.5851a(1).

10.2 Parent May Be Liable for Juvenile's Negligence

A. Recovery of Civil Damages From Juvenile's Parent

"If requested, a victim shall be provided with a certified copy of the order of an adjudicative hearing for purposes of obtaining relief pursuant to . . . [MCL 600.2913.]" MCL 780.799.

MCL 600.2913 permits certain entities and individuals to "recover damages in an amount not to exceed $2,500.00 in a civil action in a court of competent jurisdiction against the parents or parent of an unemancipated minor, living with his or her parents or parent, who has maliciously or wilfully destroyed real, personal, or mixed property which belongs to the [entity or individual] . . . or who has maliciously or wilfully caused bodily harm or injury to a person."

To hold a parent liable for the juvenile's negligence, the plaintiff has the burden of proving that the requirements of MCL 600.2913 were met. See *McKinney v Caball*, 40 Mich App 389, 390-391 (1972) (finding that MCL 600.2913 "must be strictly construed and should not be extended [to the juvenile's parent] by implication[; rather, the] plaintiff[] ha[s] the burden of proving that their action is authorized by [MCL 600.2913][]").

B. Negligent Parental Supervision

"Parents may be held liable for failing to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to know of the necessity and opportunity for doing so." *Zapalski v Benton*, 178 Mich App 398, 403 (1989) (the parents of a juvenile boy who allegedly sexually assaulted the plaintiff were found not liable for negligently failing to supervise their son where although their son had a history of delinquent behavior, nothing in their son's background would have enabled his parents to foresee his sexually assaultive behavior) (citations omitted). See also *American States Ins Co v Albin*, 118 Mich

[3] "The remedy provided by this section is in addition to any other right or remedy the individual may have at law or otherwise." MCL 600.2978(3).

App 201, 208 (1982) ("where a person is injured by the act of a child which proximately results from negligent parental supervision over the child, the injured party has a valid cause of action against the parents[]").

10.3 Interplay Between Civil Action and Criminal/Juvenile Proceeding[4]

A. Outcome of Case Does Not Bar Filing of Subsequent Case

Res judicata. "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. *Helvering v Mitchell*, 303 US 391, 397 (1938) (finding that because the standard of proof is lower in civil cases than in criminal cases, an acquittal on criminal charges does not bar a subsequent civil suit based on the same conduct).

Double jeopardy. "[A] private party [is not precluded] from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment[; t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v Halper*, 490 US 435, 451 (1989), overruled on other grounds by *Hudson v United States*, 522 US 93 (1997).

Cross-over collateral estoppel. "Although in most cases parties seek to apply collateral estoppel in the context of two civil proceedings, our Supreme Court has recognized 'the application of collateral estoppel in the civil-to-criminal context.'" *People v Ali*, 328 Mich App 538, 542 (2019), quoting *People v Zitka*, 325 Mich App 38, 44-45 (2018). However, "the Supreme Court has cautioned *against* its use." *Ali*, 328 Mich App at 542 (finding as "*persuasive* dictum . . . [t]he concerns outlined in [*People v] Gates*[, 434 Mich 146 (1990),] . . . [that] counsel against giving factual findings made by a court in a child protective proceeding 'cross-over' collateral estoppel effect in a criminal proceeding," and accordingly, "under the rationale in *Gates*, it is improper for a court in a criminal case to give preclusive effect to findings in a child protective proceeding.").[5] But see *Yates v*

[4]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[5] "Although varying individual constitutional interests are at stake in both [criminal and child protective] proceedings, it nevertheless remains true that these proceedings are fundamentally different: one is civil, the other criminal; they both serve different purposes and implicate different state interests (enforcement of the criminal laws and the safety and security of the child); each involves different burdens of proof and different procedural requirements; and criminal proceedings tend to be more adversarial in nature." *Ali*, 328 Mich App at 548.

United States, 354 US 298, 335 (1957), overruled on other grounds by *Burks v United States*, 437 US 1 (1978) ("doctrine of collateral estoppel [was] not made inapplicable by the fact that this [was] a criminal case, where the prior proceedings were civil in nature").

B. Expungement of Conviction or Adjudication Does Not Impact Civil Action

If a juvenile or defendant successfully moves to set aside his or her adjudication or conviction, it does not affect the crime victim's right to "prosecute or defend a civil action for damages." MCL 712A.18e(11)(c); MCL 780.622(5).[6]

C. Usage of Judgment or Order in Subsequent Case

"A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree." MCL 600.2106.

If requested, a victim is also entitled to "a certified copy of the order of an adjudicative hearing for purposes of obtaining relief pursuant to . . . [MCL 600.2913 (recovering civil damages from the juvenile's parent)[7]]." MCL 780.799.

1. Use of Defendant's Conviction or Plea in Subsequent Case

Evidence of a defendant's prior criminal conviction is relevant under MRE 401 and may be admissible under MRE 402 in a subsequent civil case based on the same conduct as long as it is not "precluded by the Michigan or federal constitution, the rules of evidence, or other rules adopted by the Supreme Court." *Waknin v Chamberlain*, 467 Mich 329, 333 (2002) ("the fact that [the] defendant had been convicted of assault and battery for the same conduct that [the victim] [sought subsequent] civil damages for" was relevant and admissible).

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[6] For additional information on setting aside adjudications, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21. For additional information on setting aside convictions, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3.

[7] For additional information on MCL 600.2913, see Section 10.2(A).

In addition, all evidence, including the evidence of a defendant's prior criminal conviction in a subsequent civil case based on the same conduct must not violate MRE 403 (i.e. its admission must not be unfairly prejudicial). *Waknin*, 467 Mich at 333-336 (concluding that the "trial court abused its discretion in precluding evidence of [the] defendant's conviction on the basis that its probative value was substantially outweighed by the danger of unfair prejudice[]"). Specifically,

> "Where a civil case arises from the same incident that resulted in a criminal conviction, the admission of evidence of the criminal conviction during the civil case is prejudicial for precisely the same reason it is probative. That fact does not, without more, render admission of evidence of a criminal conviction unfair, i.e., substantially more prejudicial than probative." *Waknin*, 467 Mich at 336.

A judgment of conviction of a felony or certain misdemeanors may be admissible as substantive evidence of conduct at issue in a subsequent civil case. See MRE 803(22), which specifically excludes from the hearsay rule (regardless of declarant availability):

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, [may be admissible] to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

> **Note:** By its terms, MRE 803(22) is limited to convictions and does not extend the hearsay exception to judgments of acquittal.

MRE 803(22) must be read in conjunction with MRE 410, which limits the use of pleas and plea-related statements. Under MRE 410, the following evidence is not admissible in a civil or criminal proceeding against a defendant who made a plea or participated in plea discussions:

> "(1) A plea of guilty which was later withdrawn;
>
> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> (3) Any statement made in the course of any proceedings under MCR 6.302[8] or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."[9]

However, such statements are admissible in a subsequent civil proceeding if "another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it . . . ." MRE 410.

2. Use of Evidence From Juvenile Delinquency Case in Subsequent Case

MCL 712A.23 restricts the use of evidence from juvenile delinquency cases in subsequent proceedings:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]." MCL 712A.23.

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[8] MCR 6.302 addresses the requirements for guilty and nolo contendere pleas in felony cases.

[9] "MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority. It only requires that the defendant's statement be made 'in the course of plea discussions' with the prosecuting attorney." *People v Smart*, 497 Mich 950, 950 (2015), overruling *People v Hannold*, 217 Mich App 382 (1996), to the extent that it conflicts with the holding in *Smart*. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

> The conviction of a juvenile in a designated proceeding has "the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7). Accordingly, the prohibition contained in MCL 712A.23 does not apply to evidence obtained at trial in a designated proceeding or to a conviction in such a proceeding.

10.4 Privilege Against Self-Incrimination

Both the state and federal constitutions prohibit compelled self-incrimination in a criminal case. US Const, Am V (no person "shall be compelled in any criminal case to be a witness against himself [or herself]"); Const 1963, art 1, §17 ("[n]o person shall be compelled in any criminal case to be a witness against himself [or herself]").[10] See also *People v Hana*, 443 Mich 202, 219, 225-226 (1993) (privilege against self-incrimination applies to the adjudicative phase of a juvenile waiver hearing).

"The [Michigan constitutional] privilege against self-incrimination [also] applies to a civil proceeding at which evidence is sought which might subject the witness to criminal prosecution." *In re Stricklin*, 148 Mich App 659, 664 (1986). See also *People v Wyngaard*, 462 Mich 659, 671-672 (2000) ("[the Fifth Amendment] prohibition [against compelled self-incrimination] 'not only permits a person to refuse to testify against himself [or herself] at a criminal trial in which he [or she] is a defendant, but also 'privileges him [or her] not to answer official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings[]'"), quoting *Minnesota v Murphy*, 465 US 420, 426 (1984).

A. Assertion of Privilege Does Not Prevent All Testimony

Although the self-incrimination privilege applies in a civil proceeding, see *Phillips v Deihm*, 213 Mich App 389, 400 (1995), it does not protect a witness from answering a question unless doing so may incriminate him or her in a crime, see MCL 600.2154, which specifically provides:

> "Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil

[10] For additional information on the privilege against self-incrimination, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

> suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses."

A witness in a civil suit must take the stand when called as a witness and may not invoke the privilege "'until testimony sought to be elicited will in fact tend to incriminate.'" *People v Ferency*, 133 Mich App 526, 533-534 (1984), quoting *Brown v United States*, 356 US 148, 155 (1958). The trial judge must determine that the witness's answer does not have a tendency to incriminate him or her before ordering the witness to respond. *Ferency*, 133 Mich App at 534. This inquiry should be conducted outside a jury's presence. See *In re Stricklin*, 148 Mich App at 666.

B. Assertion of Privilege May Raise Adverse Inferences

"[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause. The privilege against self-incrimination under the Michigan Constitution is no more extensive than the privilege afforded by the Fifth Amendment of the United States Constitution." *Phillips*, 213 Mich App at 400-401 ("because [the defendant] did not respond to [the] plaintiff's evidence, the trial court did not violate [the defendant's] privilege against self-incrimination in granting [the] plaintiff's motion for summary disposition with respect to liability[]").

C. Stay Civil Proceeding Pending Outcome of Criminal Proceeding

To protect a person's privilege against self-incrimination, courts may stay civil proceedings pending the outcome of criminal proceedings. *Landis v North American Co*, 299 US 248, 254-255 (1936). A court has inherent authority to stay a proceeding pending the outcome of a separate action even though the parties to both proceedings are not the same. *Id*.

10.5 Interplay Between Restitution and Civil Damages

A restitution order entered in a criminal case does not act as a bar to the recovery of damages in a civil action arising out of the same incident. *Aetna Casualty & Surety Co v Collins*, 143 Mich App 661, 663 (1985);

Pilgrim's Rest Baptist Church v Pearson, 310 Mich App 318, 325-326 (2015). See also *People v Orweller*, 197 Mich App 136, 140 (1992) (recognizing that restitution is not a substitute for civil damages). "[T]he fact that civil damages are not available . . . does not necessarily mean that restitution is also unavailable." *People v Lee (Edward)*, 314 Mich App 266, 275 (2016) ("an award of restitution may [not] be precluded by the result of civil proceedings[]").

"[T]he amount of civil damages to which one is entitled is not necessarily equivalent to the amount of loss that one has experienced for purposes of the CVRA, and 'the statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding." *Lee (Edward)*, 314 Mich App at 278-279 (finding that the victim was not collaterally estopped from seeking restitution where the issue in the criminal case, "whether the [victim was] entitled under the CVRA to restitution as a victim that suffered a loss due to [the] defendant's criminal conduct[,]" was not the same as the issue decided in the civil case that barred the victim from seeking civil damages because the victim's claim arose out of a debt that was extinguished as a matter of law). The distinction between restitution and civil damages is reflected in the setoff provisions in the CVRA, MCL 780.766(9), MCL 780.794(9), and MCL 780.826(9), which "clearly recognize[] that the statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding." *People v Dimoski*, 286 Mich App 474, 479 (2009),[11] quoting *In re McEvoy*, 267 Mich App 55, 67 (2005). Specifically, MCL 780.766(9), MCL 780.794(9), and MCL 780.826(9) provide, in relevant part, that "[a]ny amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or victim's estate . . . ."

"Although [a] victim [may] have the benefit of both a civil judgment and a restitution order to obtain monetary relief from [a] defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed." *Dimoski*, 286 Mich App at 482.

10.6 Profits From Crime

In all criminal and juvenile cases, the defendant or juvenile is prevented from deriving any profit from the crime he or she committed until certain monetary obligations have been met:

[11] Although the *Dimoski* Court primarily discussed MCL 780.766(9), its holding would presumably apply to MCL 780.794(9) and MCL 780.826(9) as well. For additional information on the setoff provisions, see Section 8.16.

"(1) A person convicted of a crime [or a juvenile adjudicated for an offense] shall not derive any profit from the sale of any of the following until the victim receives any restitution or compensation ordered for him or her against the defendant [or juvenile], expenses of incarceration [or detention] are paid under subsection (3), and any balance in the escrow account created under subsection (2) is paid under subsection (4):

(a) The person's recollections of or thoughts or feelings about the offense committed by the person.

(b) Memorabilia related to the offense committed by the person.

(c) The person's property if its value has been enhanced or increased by the person's notoriety.

(2) Upon the conviction of a defendant [or disposition of a juvenile] for a crime involving a victim, and after notice to all interested parties, an attorney for the county in which the conviction occurred or the attorney general may petition the court in which the conviction [or disposition] occurred to order that the defendant [or juvenile] forfeit all or any part of proceeds received or to be received by the defendant [or juvenile] or the defendant's [or juvenile's] representatives or assignees from any of the following:

(a) Contracts relating to the depiction of the crime or the defendant's [or juvenile's] recollections, thoughts, or feelings about the crime, in books, magazines, media entertainment, or live entertainment.

(b) The sale of memorabilia relating to the crime.

(c) The sale of property of the defendant [or juvenile], the value of which has been enhanced or increased by the defendant's [or juvenile's] notoriety arising from the crime.

(3) Proceeds ordered forfeited under subsection (2) shall be held in an escrow account for a period of not more than 5 years.

(4) During the existence of an escrow account created under subsection (3), proceeds in the account shall be distributed in the following priority to satisfy the following:

(a) An order of restitution entered under [MCL 780.766, MCL 780.794, or MCL 780.826[12]].

(b) Any civil judgment in favor of the victim against the defendant [or juvenile].

(c) Any reimbursement ordered under the prisoner reimbursement to the county act, . . . MCL 801.81 to [MCL] 801.93, or the state correctional facility reimbursement act, . . . MCL 800.401 to [MCL] 800.406[, or any reimbursement for detention ordered under MCL 712A.18].

(d) Fines, costs, and other assessments ordered against the defendant [or juvenile].

(5) A balance remaining in an escrow account created under subsection (3) at the end of the escrow period shall be paid to the crime victim's rights fund created in . . . MCL 780.904." See MCL 780.768(1)-(5); MCL 780.797(1)-(5); MCL 780.831(1)-(5).

[12] For additional information on restitution orders entered under the CVRA, see Chapter 8.

Glossary

A

Accomplice

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *accomplice* is "any person who knowingly aids or assists another person in the commission of a crime, either before, during, or after the crime." Mich Admin Code, R 18.351(1)(a).

Activities of daily living

- For purposes of MCL 791.235, *activities of daily living* is "basic personal care and everyday activities as described in 42 CFR 441.505, including, but not limited to, tasks such as eating, toileting, grooming, dressing, bathing, and transferring from 1 physical position to another, including, but not limited to, moving from a reclining position to a sitting or standing position." MCL 791.235(22)(a).

Adjudication

- For purposes of MCL 600.5805 and MCL 600.5851b, *adjudication* is "an adjudication of 1 or more offenses under . . . MCL 712A.1 to [MCL] 712A.32." MCL 600.5805(16)(a); MCL 600.5851b(5)(a).

Aggravated stalking

- For purposes of MCL 750.411i, "[a]n individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:

  (a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of

the actions is in violation of an injunction or preliminary injunction.

(b) At least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

(c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the same household as the victim.

(d) The individual has been previously convicted of a violation of [MCL 750.411i] or [MCL 750.411h]." MCL 750.411i(2).

Appearance ticket

- For purposes of MCL 764.9c–MCL 764.9g, *appearance ticket* "means a complaint or written notice issued and subscribed by a police officer or other public servant authorized by law or ordinance to issue it directing a designated person to appear in a designated local criminal court at a designated future time in connection with his or her alleged commission of a designated violation or violations of state law or local ordinance for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both." MCL 764.9f(1)

Assaultive crime

- For purposes of MCL 712A.18e, MCL 765.6b, MCL 780.751 *et seq.*, MCL 780.621, or MCL 780.781 *et seq.*, *assaultive crime* is "that term as defined in . . . MCL 770.9a." MCL 712A.18e(7)(a). MCL 770.9a defines *assaultive crime* as any of the following offense against a person described in the following statutes:

  - assault against a Department of Health and Human Services[1] employee causing serious bodily impairment, MCL 750.81c(3).

  - felonious assault, MCL 750.82.

  - assault with intent to murder, MCL 750.83.

[1] MCL 400.226(A) renamed the Family Independence Agency (FIA) as the Department of Health and Human Services (DHHS).

- assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation, MCL 750.84.
- assault with intent to maim, MCL 750.86.
- assault with intent to commit a felony, MCL 750.87.
- assault with intent to rob (unarmed), MCL 750.88.
- assault with intent to rob (armed), MCL 750.89.
- intentional assaultive conduct against pregnant individual with intent to cause great bodily harm or death to embryo or fetus and causing miscarriage or stillbirth, MCL 750.90a.
- assaultive conduct against pregnant individual causing miscarriage, stillbirth, death to embryo or fetus, or great bodily harm to embryo or fetus, MCL 750.90b(a)-(b).
- attempted murder, MCL 750.91.
- a violation of MCL 750.200 to MCL 750.212a (governing explosives, bombs, and harmful devices).
- first-degree murder, MCL 750.316.
- second-degree murder, MCL 750.317.
- manslaughter, MCL 750.321.
- kidnapping, MCL 750.349.
- prisoner taking another as hostage, MCL 750.349a.
- kidnapping child under 14, MCL 750.350.
- mayhem, MCL 750.397.
- stalking, MCL 750.411h(2)(b); MCL 750.411h(3).
- aggravated stalking, MCL 750.411i.
- first-degree criminal sexual conduct (CSC-I), MCL 750.520b.
- second-degree criminal sexual conduct (CSC-II), MCL 750.520c.
- third-degree criminal sexual conduct (CSC-III), MCL 750.520d.

- fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e.
- assault with intent to commit criminal sexual conduct (CSC), MCL 750.520g.
- armed robbery, MCL 750.529.
- carjacking, MCL 750.529a.
- unarmed robbery, MCL 750.530.
- a violation of MCL 750.543a to MCL 750.543z (governing terrorist crimes).

C

Case or court proceeding

- For purposes of MCR 1.111, *case or court proceeding* is "any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

Child

- For purposes of the Child Protection Law, MCL 722.621 *et seq.*, *child* is "a person under 18 years of age." MCL 722.622(f).

Child abuse

- For purposes of the Child Protection Law, MCL 722.621 *et seq.*, *child abuse* is "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy."MCL 722.622(g).

Child neglect

- For purposes of the Child Protection Law, MCL 722.621 *et seq.*, *child neglect* is "harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:

(*i*) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or by the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care.

(*ii*) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk." MCL 722.622(k).

Civil infraction

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *civil infraction* "has the meaning prescribed by [MCL 257.6a[2]]." Mich Admin Code, R 18.351(1)(c). MCL 257.6a defines *civil infraction* as "an act or omission prohibited by law which is not a crime as defined in . . . [MCL] 750.5[,] . . . and for which civil sanctions may be ordered."

Claimant

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq*. (by authority under Mich Admin Code, R 18.351(2)), *claimant* is "a victim or intervenor who is injured, or any other person eligible for an award under [MCL 18.354(1)] or [MCL 18.355(1)], who files a claim under this act." MCL 18.351(a).

Closed session

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *closed session* is "a meeting or part of a meeting of the commission which is closed to the public in order to protect certain rights of confidentiality."Mich Admin Code, R 18.351(1)(d).

Commission

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq*. (by authority under Mich Admin Code, R

[2] The administrative rule refers to MCL 257.6. However, the definition of *civil infraction* is found in MCL 257.6a.

18.351(2)), *commission* is "the crime victim services commission[(CVSC)]." MCL 18.351(b).

Confidential communication

- For purposes of MCL 600.2157a, *confidential communication* is "information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim." MCL 600.2157a(1)(a).

Confidential files

- For purposes of MCR 3.903, *confidential files* "means[:]

  (a) that part of a file made confidential by statute or court rule, including, but not limited to,

  (*i*) the diversion record of a minor pursuant to . . . MCL 722.821 *et seq.*;

  (*ii*) the separate statement about known victims of juvenile offenses, as required by . . . MCL 780.751 *et seq.*;

  (*iii*) the testimony taken in a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);

  (*iv*) the dispositional reports pursuant to MCR 3.943(C)(3) and MCR 3.973(E)(4);

  (*v*) biometric data required to be maintained under MCL 28.243;

  (*vi*) reports of sexually motivated crimes, MCL 28.247;

  (*vii*) test results of those charged with certain sexual or substance offense offenses, MCL 333.5129;

  (b) the contents of a social file maintained by the court, including materials such as

  (*i*) youth and family record fact sheet;

  (*ii*) social study;

  (*iii*) reports (such as dispositional, investigative, laboratory, medical, observation, psychological,

psychiatric, progress, treatment, school, and police reports);

(*iv*) [DHHS] records;

(*v*) correspondence

(*vi*) victim statements;

(*vii*) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver." MCR 3.903(A)(3).

Convicted

- For purposes of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, *convicted* is "1 of the following:

  (*i*) Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses, including, but not limited to, a tribal court or a military court, and including a conviction subsequently set aside under . . . MCL 780.621 to [MCL] 780.624.

  (*ii*) Either of the following:

  (A) Being assigned to youthful trainee status under . . . MCL 762.11 to [MCL] 762.15, before October 1, 2004. This sub-subparagraph does not apply if a petition was granted under [MCL 28.728c] at any time allowing the individual to discontinue registration under this act, including a reduced registration period that extends to or past July 1, 2011, regardless of the tier designation that would apply on and after that date.

  (B) Being assigned to youthful trainee status under . . . MCL 762.11 to [MCL] 762.15, before October 1, 2004 if the individual is convicted of any other felony on or after July 1, 2011.

  (*iii*) Having an order of disposition entered under . . . MCL 712A.18, that is open to the general public under . . . MCL 712A.28, if both of the following apply:

  (A) The individual was 14 years of age or older at the time of the offense.

  (B) The order of disposition is for the commission of an offense that would classify the individual as a tier III offender.

(*iv*) Having an order of disposition or other adjudication in a juvenile matter in another state or country if both of the following apply:

(A) The individual is 14 years of age or older at the time of the offense.

(B) The order of disposition or other adjudication is for the commission of an offense that would classify the individual as a tier III offender." MCL 28.722(b).

Conviction

- For purposes of the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *conviction* is "a judgment entered by a court upon a plea of guilty, guilty but mentally ill, or nolo contendere, or upon a jury verdict or court finding that a defendant is guilty or guilty but mentally ill." MCL 780.621a(a).

Co-occurring disorder

- For purposes of the Revised Judicature Act, Chapter 10B (Mental Health Court), MCL 600.1090 *et seq.*, and Chapter 10C (Juvenile Mental Health Court), MCL 600.1099b *et seq.*, *co-occurring disorder* is "having 1 or more disorders relating to the use of alcohol or other controlled substances of abuse as well as any serious mental illness, serious emotional disturbance, or developmental disability. A diagnosis of co-occurring disorders occurs when at least 1 disorder of each type can be established independent of the other and is not simply a cluster of symptoms resulting from 1 disorder." MCL 600.1090(a); MCL 600.1099b(a).

Counseling

- For purposes of Article 15, Part 181 (Counseling) of the Public Health Code MCL 333.18101 *et seq.*, *counseling* is "the rendering to individuals, groups, families, organizations, or the general public a service involving the application of clinical counseling principles, methods, or procedures for the purpose of achieving social, personal, career, and emotional development and with the goal of promoting and enhancing healthy self actualizing and satisfying lifestyles whether the services are rendered in an educational, business, health, private practice, or human services setting. The practice of counseling does not include the practice of psychology except for those preventive techniques, counseling techniques, or behavior modification techniques for which the licensed professional counselor or limited licensed counselor has been specifically trained. The

practice of counseling does not include the practice of medicine such as prescribing drugs or administering electroconvulsive therapy. A counselor shall not hold himself or herself out as a psychologist as defined in [MCL 333.18201]. A counselor shall not hold himself or herself out as a marriage and family counselor providing marriage counseling pursuant to [MCL 339.1501[3]]." MCL 333.18101(d).

County juvenile agency

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, *county juvenile agency* is "that term as defined in . . . MCL 45.622." MCL 780.781(1)(a). MCL 45.622 defines *county juvenile agency* as "a county that has approved a resolution in accordance with [MCL 45.623]." MCL 45.622.

Course of conduct

- For purposes of MCL 750.411h and MCL 750.411i, *course of conduct* is "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose."[4] MCL 750.411h(1)(a); MCL 750.411i(1)(a).

Court

- For purposes of the Juvenile Code, MCL 712A.1 *et seq.* and the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, *court* refers to "the family division of circuit court." MCL 712A.1(1)(e); MCL 780.781(1)(b).

Courtroom support dog

- For purposes of MCL 600.2163a, *courtroom support dog* is "a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a

[3] MCL 339.1501 was repealed effective January 1, 1996. See 1995 PA 126.

[4] See *Pobursky v Gee*, 249 Mich App 44, 47 (2001), where the Court of Appeals addressed the phrase "2 or more separate noncontinuous acts" under MCL 750.411h to mean "acts [that] are distinct from one another [and] are not connected in time and space." In *Pobursky*, 249 Mich App at 48, the Court of Appeals found that "while [the] petitioner alleged a series of acts evidencing a continuity of purpose, the acts were not separate and noncontinuous" where the "petitioner alleged a single incident comprising a series of continuous acts, each immediately following the other, in which [the] respondent inflicted physical harm and threatened further harm." Specifically, the "[r]espondent allegedly attacked petitioner, hurled him over a bench into a wall or plate glass window, and then choked him while repeatedly threatening him[,]" all in one evening. *Id.* at 45.

courtroom support dog prior to September 27, 2018." MCL 600.2163a(1)(a).

Court records

- For purposes of MCR 8.119(I), *court records* are "all documents and records of any nature that are filed with or maintained by the clerk in connection with the action." MCR 8.119(I)(5).

Credible threat

- For purposes of MCL 750.411i, *credible threat* is "a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual." MCL 750.411i(1)(b).

Crime

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq*. (by authority under Mich Admin Code, R 18.351(2)), *crime* is "an act that is 1 of the following:

  (*i*) A crime under the laws of this state or the United States that causes an injury within this state.[5]

  (*ii*) An act committed in another state that if committed in this state would constitute a crime under the laws of this state or the United States, that causes an injury within this state or that causes an injury to a resident of this state within a state that does not have a victim compensation program eligible for funding from the victims of crime act of 1984[(VOCA), 42 USC 10603].

  (*iii*) An act of international terrorism as defined in . . . 18 USC 2331, committed outside the territorial jurisdiction of the United States that causes an injury to a resident of this state." MCL 18.351(c).

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *crime is* "an act or omission forbidden by law which is not designated as a civil infraction and which is punishable, upon

[5] For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), "[a] claim resulting from the operation of a motor vehicle shall not be awarded, except when the claimed injuries are the result of a crime and not a civil infraction under state law. In appropriate circumstances, the board will refer the claimant to the department of state assigned claims plan. Mich Admin Code, R 18.357.

conviction, by imprisonment, a fine which is not a civil fine, or other penal discipline." Mich Admin Code, R 18.351(1)(e).

- For purposes of MCL 600.4708, *crime* is "committing, attempting to commit, conspiring to commit, or soliciting another person to commit any of the following offenses in connection with which the forfeiture of property is sought:

  (*i*) A violation of . . . the natural resources and environmental protection act, . . . MCL 324.11101 to [MCL] 324.11153.

  (*ii*) A violation of . . . the natural resources and environmental protection act, . . . MCL 324.12101 to [MCL] 324.12117.

  (*iii*) A criminal violation of . . . the natural resources and environmental protection act, . . . MCL 324.41301 to [MCL] 324.41325, or a permit issued under that part involving a prohibited species that is an aquatic species.

  (*iv*) A violation of . . . the medicaid false claim act, . . . MCL 400.604, [MCL] 400.605, [or MCL] 400.607.

  (*v*) A violation of . . . the Michigan antitrust reform act, . . . MCL 445.772 [or MCL] 445.773.

  (*vi*) A violation described in . . . the uniform securities act (2002), . . . MCL 451.2508.

  (*vii*) A violation of . . . MCL 722.675 [or MCL] 722.677.

  (*viii*) A violation of any of the following:

    (A) . . . the Michigan penal code, . . . MCL 750.49, [MCL] 750.75, [MCL] 750.94, [MCL] 750.95, [MCL] 750.96, [MCL] 750.100, [MCL] 750.104, [MCL] 750.105, [MCL] 750.110, [MCL] 750.110a, [MCL] 750.112, [MCL] 750.117, [MCL] 750.118, [MCL] 750.119, [MCL] 750.120, [MCL] 750.121, [MCL] 750.124, [MCL] 750.145c, [MCL] 750.145d, [MCL] 750.157q, [MCL] 750.157r, [MCL] 750.174, [MCL] 750.175, [MCL] 750.176, [MCL] 750.180, [MCL] 750.181, [MCL] 750.182, [MCL] 750.213, [MCL] 750.214, [MCL] 750.218, [MCL] 750.219a, [MCL] 750.224, [MCL] 750.248, [MCL] 750.249, [MCL] 750.250, [MCL] 750.251, [MCL] 750.252, [MCL] 750.253, [MCL] 750.254, [MCL] 750.255, [MCL] 750.263, [MCL] 750.264, [MCL] 750.271, [MCL] 750.272, [MCL] 750.273, [MCL] 750.274, [MCL] 750.300, [MCL] 750.356, [MCL] 750.357, [MCL] 750.357a, [MCL] 750.359, [MCL] 750.360, [MCL] 750.459, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.530, [MCL]

750.531, [MCL] 750.535, [MCL] 750.540c, [or MCL] 750.540g, or former [MCL 750.106].

(B) . . . the Michigan penal code, . . . MCL 750.462a to [MCL] 750.462h.

(C) . . . the Michigan penal code, . . . MCL 750.543a to [MCL] 750.543z.

(*ix*) A violation of . . . MCL 752.791 to [MCL] 752.797.

(*x*) A violation of . . . the occupational code, . . . MCL 339.601." MCL 600.4701(a).

- For purposes of the Michigan Penal Code, MCL 750.1 *et seq.*, *crime* "means an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by any 1 or more of the following:

  (a) Imprisonment

  (b) Fine not designated a civil fine.

  (c) Removal from office.

  (d) Disqualification to hold an office of trust, honor, or profit under the state.

  (e) Other penal discipline." MCL 750.5.

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, *crime* is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony." MCL 780.752(1)(b).

Criminally responsible

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *criminally responsible* is "legally accountable or legally answerable for a crime." Mich Admin Code, R 18.351(1)(f).

Criminal sexual conduct

- For purposes of MCL 600.5805 and MCL 600.5851b, *criminal sexual conduct* is "conduct prohibited under . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g." MCL 600.5805(16)(b); MCL 600.5851b(5)(b).

Custodian of the videorecorded statement

- For purposes of MCL 600.2163a, *custodian of the videorecorded statement* is "the department of health and human services [(DHHS)], investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by . . . MCL 722.628." MCL 600.2163a(1)(b).

- For purposes of MCL 712A.17b, *custodian of the videorecorded statement* is "the investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by . . . MCL 722.628." MCL 712A.17b(1)(a).

D

Dangerous weapon

- For purposes of MCL 712A.2(a)(1)(B),[6] *dangerous weapon* is defined as one or more of the following:

  "(*i*) A loaded or unloaded firearm, whether operable or inoperable.

  (*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

  (*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

  (*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*)." MCL 712A.2(a)(1)(B).

Dating relationship

- For purposes of MCL 400.1501, MCL 600.2950, MCL 764.9c, and MCL 764.15a, *dating relationship* means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." It "does not include a casual relationship or an ordinary fraternization between 2

[6] Substantially similar definitions of the term *dangerous weapon* are contained in MCL 600.606(2)(b), MCL 764.1f(2)(b), and MCR 6.903(I).

individuals in a business or social context." MCL 400.1501(b); MCL 600.2950(30)(a); MCL 764.9c(3)(a); MCL 764.15a(b).

- For purposes of MCL 764.15c, *dating relationship* is "that term as defined in . . . MCL 600.2950." MCL 764.15c(5)(a).

Deaf interpreter

- For purposes of the Deaf Persons' Interpreters Act, MCL 393.502 *et seq.*, *intermediary interpreter* is "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Deaf person

- For purposes of the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*, *deaf person* is "a person whose hearing is totally impaired or whose hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is through other sensory input; including, but not limited to, lip reading, sign language, finger spelling, or reading." MCL 393.502(b).

Deaf-blind person

- For purposes of the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*, *deaf-blind person* is "a person who has a combination of hearing loss and vision loss, such that the combination necessitates specialized interpretation of spoken and written information in a manner appropriate to that person's dual sensory loss." MCL 393.502(c).

Declarant

- For purposes of MCL 768.27c, *declarant* is "a person who makes a statement." MCL 768.27c(5)(a).

Defendant

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, *defendant* is "a person charged with, convicted of, or found not guilty by reason of insanity of committing a crime against a victim." MCL 780.752(1)(d).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811 *et seq.*, *defendant* is "a person charged with or

convicted of having committed a serious misdemeanor against a victim." MCL 780.811(1)(c).

Delinquency proceedings

- For purposes of MCR 3.935, *delinquency proceeding* is "a proceeding concerning an offense by a juvenile, as defined in MCR 3.903(B)(3)." MCR 3.903(A)(5).

Dependent

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *dependent* is "a person who receives at least 1/2 of his or her support from a deceased victim or claimant and includes a child of the victim born after his or her death." Mich Admin Code, R 18.351(1)(g).

Designated case

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, *designated case* is "a case designated as a case in which the juvenile is to be tried in the same manner as an adult under . . . MCL 712A.2d." MCL 780.781(1)(d).

Developmental disability

- Unless the context of a statute requires otherwise, MCL 330.1100, for purposes of Chapter 1 (Department of Mental Health) of the Mental Health Code, MCL 330.1100a *et seq.*, *developmental disability* is "either of the following:

  (a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:

    (*i*) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

    (*ii*) Is manifested before the individual is 22 years old.

    (*iii*) Is likely to continue indefinitely.

    (*iv*) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

      (A) Self-care.

      (B) Receptive and expressive language.

      (C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(*v*) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided." MCL 330.1100a(25)(a)-(b).

- For purposes of the Revised Judicature Act, Chapter 10B (Mental Health Court), MCL 600.1090 *et seq.*, and Chapter 10C (Juvenile Mental Health Court), MCL 600.1099b *et seq.*, *developmental disability* is "that term as defined in . . . MCL 330.1100a." MCL 600.1090(a); MCL 600.1099b(c).

- For purposes of MCL 600.2163a and MCL 712A.17b, *developmental disability* is "that term as defined in . . . MCL 330.1100a, except that, for the purposes of implementing [MCL 600.2163a and MCL 712A.17b], developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment." MCL 600.2163a(1)(c); MCL 712A.17b(1)(b).

Domestic violence

- For purposes of MCL 600.2157a, *domestic violence* is "that term as defined in . . . [MCL] 400.1501[.]"MCL 600.2157a(1)(b)

- For purposes of MCL 765.6b, *domestic violence* is "that term as defined in . . . MCL 400.1501." MCL 765.6b(6)(b). MCL 400.1501, defines *domestic violence* as follows:

  "'Domestic violence' means the occurrence of any of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

(*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 400.1501(d).[7]

- For purposes of MCL 768.27c, *domestic violence* means "an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27c(5)(b).

Domestic violence incident

- For purposes of MCL 764.15c, *domestic violence incident* is "an incident reported to a law enforcement agency involving allegations of 1 or both of the following:

  (*i*) A violation of a personal protection order issued under . . . MCL 600.2950, or a violation of a offense by a juvenile.

  (*ii*) A crime committed by an individual against his or her spouse or former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual

[7] Several other statutes refer to this definition of *domestic violence* by reference. See, e.g., MCL 600.2157a (admissibility of statements between domestic violence counselor and victim), MCL 600.2972 (motion to seal court records in domestic violence case), MCL 712.1 (safe delivery of newborns), MCL 750.136b (child abuse), MCL 765.6b (release of defendant subject to protective conditions), and MCL 780.951 (presumption regarding self defense).

who resides or has resided in the same household." MCL 764.15c(5)(b).

Drug treatment court

- For purposes Chapter 10A (Drug Treatment Court) of the Revised Judicature Act, MCL 600.1060 *et seq.*, *drug treatment court* is "a court supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol. A drug treatment court shall comply with the 10 key components promulgated by the national association of drug court professionals, which include all of the following essential characteristics:

  (*i*) Integration of alcohol and other drug treatment services with justice system case processing.

  (*ii*) Use of a nonadversarial approach by prosecution and defense that promotes public safety while protecting any participant's due process rights.

  (*iii*) Identification of eligible participants early with prompt placement in the program.

  (*iv*) Access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

  (*v*) Monitoring of participants effectively by frequent alcohol and other drug testing to ensure abstinence from drugs or alcohol.

  (*vi*) Use of a coordinated strategy with a regimen of graduated sanctions and rewards to govern the court's responses to participants' compliance.

  (*vii*) Ongoing close judicial interaction with each participant and supervision of progress for each participant.

  (*viii*) Monitoring and evaluation of the achievement of program goals and the program's effectiveness.

  (*ix*) Continued interdisciplinary education in order to promote effective drug court planning, implementation, and operation.

(*x*) The forging of partnerships among other drug courts, public agencies, and community-based organizations to generate local support." MCL 600.1060(c).

E

Electronic monitoring device

- For purposes of MCL 765.6b(6), *electronic monitoring device* is "any electronic device or instrument that is used to track the location of an individual or to monitor an individual's blood alcohol content, but does not include any technology that is implanted or violates the corporeal body of the individual." MCL 765.6b(6)(c)

Emotional distress

- For purposes of MCL 750.411h and MCL 750.411i, *emotional distress* is "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b); MCL 750.411i(1)(c).

Enterprise

- For purposes of MCL 750.159r, *enterprise* is "includes an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity. Enterprise includes illicit as well as licit enterprises." MCL 750.159f(a).

F

Facility

- For purposes of MCL 780.756, MCL 780.763a, 780.769a, 780.770 ("and not with reference to a juvenile facility"), *facility* is "that term as defined . . . MCL 330.1100b." MCL 780.752(1)(e). MCL 330.1100b(1) defines *facility* as "a residential facility for the care or treatment of individuals with serious mental illness, serious emotion disturbance, or developmental disability that is either a state facility or a licensed facility." MCL 330.1100b(1).

Family or household member

- For purposes of MCL 400.1501, *family or household member* includes any of the following:

  "(*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a dating relationship.

  (*iv*) An individual with whom the person is or has engaged in a sexual relationship.

  (*v*) An individual to whom the person is related or was formerly related by marriage.

  (*vi*) An individual with whom the person has a child in common.

  (*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)." MCL 400.1501(e).

- For purposes of MCL 768.27c (admitting evidence of infliction or threat of physical injury in domestic violence cases), *family or household member* means any of the following:

  "(*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a child in common.

  (*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 768.27c(5)(c).

Felony

- For purposes of the Code of Criminal Procedure, MCL 761.1 *et seq.*, *felony* is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f).

Female genital mutilation

- For purposes of MCL 600.2978, *female genital mutilation* is "that term as defined in [MCL 600.5851a]." MCL 600.2978(4)(a). MCL 600.5851a defines *female genital mutilation* as "conduct that is a violation of . . . MCL 750.136, or, if it were to occur in this state, would be a violation of . . . MCL 750.136." MCL 600.5851a(2).

Final disposition

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, *final disposition* is "the ultimate termination of the criminal prosecution of a defendant including, but not limited to, dismissal, acquittal, or imposition of sentence by the court." MCL 780.751(1)(f).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811 *et seq.*, *final disposition* is "the ultimate termination of the criminal prosecution of a defendant including, but not limited to, dismissal, acquittal, or imposition of sentence by the court." MCL 780.811(1)(d).

Foreign protection order

- For purposes of MCL 764.15c, *foreign protection order* is "that term as defined in . . . MCL 600.2950h." MCL 764.15c(5)(c). MCL 600.2950h(a) defines *foreign protection order* as "an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection."

H

Harassment

- For purposes of MCL 750.411h and MCL 750.411i, *harassment* is "conduct directed toward a victim that includes, but is not

limited to, repeated or continuing specified juvenile violation that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(c); MCL 750.411i(1)(d).

Health care provider

- For purposes of MCL 18.355a, *health care provider* is "any of the following:

  (*i*) A health professional licensed or registered under . . . MCL 333.16101 to [MCL] 333.18838.

  (*ii*) A health facility or agency licensed under . . . MCL 333.20101 to [MCL] 333.22260.

  (*iii*) A local health department as that term is defined in . . . MCL 333.1105." MCL 18.355a(11)(a).

Hospital

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, *hospital* is "that term as defined in . . . MCL 330.1100b." MCL 780.752(1)(i). MCL 330.1100b(7) defines *hospital* (or *psychiatric hospital*) as "an inpatient program operated by the department for the treatment of individuals with serious mental illness or serious emotional disturbance or a psychiatric hospital or psychiatric unit licensed under [MCL 330.1137]." MCL 330.1100b(7).

Household

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *household* is "persons who dwell together as a family under 1 roof and who are related by blood, marriage, or judicial decree." Mich Admin Code, R 18.351(1)(h).

I

Identity theft

- For purposes of the CVRA, *identity theft* is "that term as defined in [MCL 445.63]." MCL 780.754a(2); MCL 780.783b(2); MCL 780.814a(2). MCL 445.63(k) defines *identity theft* as "engaging in

an act or conduct prohibited under [MCL 445.65(1)]." MCL 445.63(k).

Informed consent

- For purposes of MCL 765.6b, *informed consent* is when "the victim was given information concerning all of the following before consenting to participate in electronic device: (*i*) [t]he victim's right to refuse to participate in that monitoring and the process for requesting the court to terminate the victim's participation after it has been ordered[,] (*ii*) [t]he manner in which the monitoring technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements[,] (*iii*) [t]he boundaries imposed on the defendant during the monitoring program[,] (*iv*) [s]anctions that the court may impose on the defendant for violating an order issued under this subsection[,] (*v*) [t]he procedure that the victim is to follow if the defendant violates an order issued under this subsection or if monitoring equipment fails to operate properly[,] (*vi*) [i]dentification of support services available to assist the victim to develop a safety plan to use if the court's order issued under this subsection is violated or if the monitoring equipment fails to operate properly[,] (*vii*) [i]dentification of community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other help in addressing the consequences and effects of domestic violence[,] (*viii*) [t]he nonconfidential nature of the victim's communications with the court concerning electronic monitoring and the restrictions to be imposed upon the defendant's movements." MCL 765.6b(6)(d).

Inmate

- For purposes of the Interstate Corrections Compact, MCL 3.981 *et seq.*, *inmate* is "a male or female offender who is committed, under sentence to or confined in a penal or correctional institution." MCL 3.981, Article II.

Insane

- For purposes of MCL 600.5851, *insane* is "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." MCL 600.5851(2).

Intermediary interpreter

- For purposes of the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*, *intermediary interpreter* is "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Interpret

- For purposes of MCR 1.111, *interpret* is "the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(5).

Intervenor

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq.*, *intervenor* is "a person who goes to the aid of one who has become a victim of a crime and who suffers personal physical injury." MCL 18.351(1)(d).

Intimate personal privacy

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *intimate personal privacy* is "matters dealing with the mental or physical health of a person or the details or a crime involving sexual assault in any degree." Mich Admin Code, R 18.351(1)(i).

Investigating law enforcement agency

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *investigating law enforcement agency* is "the local, county, or state law enforcement agency with the primary responsibility for investigating an alleged sexual assault offense case and includes the employees of that agency[, and] . . . includes a law enforcement agency of a community college or university if that law enforcement agency of a community college or university is responsible for collecting sexual assault evidence." MCL 752.952(b).

J

Juvenile

- For purposes of the Juvenile Code, MCL 712A.1 *et seq.*, *juvenile* is "a person who is less than 17 years of age who is the subject of a delinquency petition." MCL 712A.1(1)(i).

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, *juvenile* is "a person within the jurisdiction of the circuit court under . . . MCL 600.606." MCL 780.752(1)(g).

- For purposes of MCL 780.766(15) (governing restitution under the CVRA, Article 1 (Felony Article)), *juvenile* is "a person within the court's jurisdiction under . . . MCL 712A.2d [or MCL] 712A.4." MCL 780.766(15).

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, *juvenile* is "an individual found within the court's jurisdiction under [MCL 712A.2(a)(1)] . . ., for an offense, including, but not limited to, an individual in a designated case." MCL 780.781(1)(e).

- For purposes of Michigan Court Rules subchapter 3.900, "[w]hen used in delinquency proceedings, unless the context otherwise indicates[,]" *juvenile* is "a minor alleged or found to be within the jurisdiction of the court for having committed an offense." MCR 3.903(B)(2).

- For purposes of Michigan Court Rules subchapter 6.900, "unless the context otherwise indicates[,]" *juvenile* is "a person 14 years of age or older, who is subject to the jurisdiction of the court for having allegedly committed a specified juvenile violation on or after the person's 14th birthday and before the person's 17th birthday." MCR 6.903(E).

Juvenile facility

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.* or CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, *juvenile facility* is "a county facility, institution operated as an agency of the county or the [F]amily [D]ivision of [C]ircuit [C]ourt, or an institution or agency described in the [Y]outh [R]ehabilitation [S]ervices [A]ct, [MCL 803.301 *et seq.*], to which a juvenile has been committed or in which a juvenile is detained." MCL 780.752(1)(h); MCL 780.781(1)(f).

Juvenile mental health court

- For purposes of the Revised Judicature Act, Chapter 10C (Juvenile Mental Health Court), MCL 600.1099b *et seq.*, *juvenile mental health court* is "all of the following:

(*i*) A court-supervised treatment program for juveniles who are diagnosed by a mental health professional with having a serious emotional disturbance, co-occurring disorder, or developmental disability.

(*ii*) Programs designed to adhere to the 7 common characteristics of a juvenile mental health court as described under [MCL 600.1099c(3)].

(*iii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the Bureau of Justice Assistance, or amended, that include all of the following characteristics:

(A) A broad-based group of stakeholders representing the criminal justice system, the juvenile justice system, the mental health system, the substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

(B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for juveniles with mental illnesses, and that take into account the relationship between mental illness and a juvenile's offenses, while allowing the individual circumstances of each case to be considered.

(C) Participants are identified, referred, and accepted into mental health courts, and then linked to community-based service providers as quickly as possible.

(D) Terms of participation are clear, promote public safety, facilitate the juvenile's engagement in treatment, are individualized to correspond to the level of risk that each juvenile presents to the community, and provide for positive legal outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, 2013 PA 93, MCL 780.981 to [MCL] 780.1003, provide legal counsel to juvenile respondents to explain program requirements, including voluntary participation, and guide juveniles in decisions about program involvement. Procedures exist in the juvenile mental health court to address, in a timely fashion, concerns about a juvenile's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights. Information gathered as part of the participants' court-ordered treatment program or services is safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice, if applicable, juvenile justice, and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants to achieve treatment and criminal and juvenile justice goals by regularly reviewing and revising the court process.

(I) Criminal and juvenile justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the juvenile mental health court, its performance is assessed periodically, procedures are modified accordingly, court processes are institutionalized, and support for the court in the community is cultivated and expanded." MCL 600.1099b(e).

Juvenile offense

- For purposes of MCL 712A.30 and MCL 712A.31 (governing restitution under the Juvenile Code), *juvenile offense* is "a violation by a juvenile of a penal law of this state or a violation by a juvenile of an ordinance of a local unit of government of

this state punishable by imprisonment or by a fine that is not a civil fine." MCL 712A.30(1)(a).

L

Law enforcement agency

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *law enforcement agency* is "the local, county, or state law enforcement agency and includes the employees of that agency[, and] . . . includes a law enforcement agency of a community college or university." MCL 752.952(c).

Licensed professional counselor

- For purposes of Article 15, Part 181 (Counseling) of the Public Health Code, MCL 333.18101 *et seq.*, *licensed professional counselor* is "an individual licensed under this article to engage in the practice of counseling." MCL 333.18101(b).

Limited English proficient

- A *limited English proficient* (LEP) person is "a person who does not speak English as his or her primary language, and who has a limited ability to read, write, speak, or understand English, and by reason of his or her limitations, is not able to understand and meaningfully participate in the court process." Administrative Order No. 2013-8.[8]

Limited licensed counselor

- For purposes of Article 15, Part 181 (Counseling) of the Public Health Code, MCL 333.18101 *et seq.*, *limited licensed counselor* is "an individual who has been granted a limited license by the board to offer counseling services under the supervision of a licensed professional counselor." MCL 333.18101(c).

Listed offense

- For purposes of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, *listed offense* is a "tier I, tier II, or tier III offense" as defined in the SORA. MCL 28.722(j).

Listed sexual act

[8] Effective September 11, 2013, Administrative Order No. 2013-8 was adopted as part of ADM File No. 2012-03.

- For purposes of MCL 750.145c, *listed sexual act* is "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(i).

Loss of support

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), a *loss of support* is "the cessation of a victim's earnings that were actually paid to or for a dependent prior to the victim's death and not reimbursed from insurance or public funds after the victim's death." Mich Admin Code, R 18.351(1)(k).

M

Magistrate

- For purposes of the Code of Criminal Procedure, MCL 761.1 *et seq.*, *magistrate* is "a judge of the district court or a judge of a municipal court. Magistrate does not include a district court magistrate, except that a district court magistrate may exercise the powers, jurisdiction, and duties of a magistrate if specifically provided in this act, the revised judicature act . . . , MCL 600.101 to [MCL] 600.9947, or any other statute. This definition does not limit the power of a justice of the supreme court, a circuit judge, or a judge of a court of record having jurisdiction of criminal cases under this act, or deprive him or her of the power to exercise the authority of a magistrate." MCL 761.1(*l*).

Medically frail

- For purposes of MCL 791.234 and MCL 791.235, *medically frail* is a description of "an individual who is a minimal threat to society as a result of his or her medical condition, who has received a risk score of low on a validated risk assessment, whose recent conduct in prison indicates he or she is unlikely to engage in assaultive conduct, and who has 1 or both of the following:

  (*i*) A permanent or terminal physical disability or serious and complex medical condition resulting in the inability to do 1 or more of the following without personal assistance:

    (A) Walk.

(B) Stand.

(C) Sit.

(*ii*) A permanent or terminal disabling mental disorder, including dementia, Alzheimer's, or similar degenerative brain disorder that results in the need for nursing home level of care, and a significantly impaired ability to perform 2 or more activities of daily living." MCL 791.235(22)(c).

Member of the clergy

- For purposes of the Child Protection Law, MCL 722.621 *et seq.*, *member of the clergy* is "a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization."MCL 722.622(n).

Mental health court

- For purposes of Chapter 10B (Mental Health Court) of the Revised Judicature Act, MCL 600.1090 *et seq.*, *mental health court* is "any of the following:

  (*i*) A court-supervised treatment program for individuals who are diagnosed by a mental health professional with having a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.

  (*ii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the bureau of justice assistance that include all of the following characteristics:

  (A) A broad-based group of stakeholders representing the criminal justice system, mental health system, substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

  (B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for defendants with mental illnesses, and that take into account the relationship between mental illness and a defendant's offenses, while allowing the individual circumstances of each case to be considered.

  (C) Participants are identified, referred, and accepted into mental health courts, and then linked to

community-based service providers as quickly as possible.

(D) Terms of participation are clear, promote public safety, facilitate the defendant's engagement in treatment, are individualized to correspond to the level of risk that each defendant presents to the community, and provide for positive legal outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, . . . MCL 780.981 to [MCL] 780.1003, provide legal counsel to indigent defendants to explain program requirements, including voluntary participation, and guides defendants in decisions about program involvement. Procedures exist in the mental health court to address, in a timely fashion, concerns about a defendant's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights as defendants. Information gathered as part of the participants' court-ordered treatment program or services are safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants achieve treatment and criminal justice goals by regularly reviewing and revising the court process.

(I) Criminal justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the mental health court, its performance is assessed periodically, and procedures are modified accordingly, court processes are institutionalized, and

support for the court in the community is cultivated and expanded." MCL 600.1090(e).

Mental health professional

- For purposes of the Revised Judicature Act, Chapter 10C (Juvenile Mental Health Court), MCL 600.1099b *et seq.*, *mental health professional* is "an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following:

  (*i*) A physician.

  (*ii*) A psychologist.

  (*iii*) A registered professional nurse licensed or otherwise authorized to engage in the practice of nursing under part 172 of the public health code, 1978 PA 368, MCL 333.17201 to [MCL] 333.17242.

  (*iv*) A licensed master's social worker licensed or otherwise authorized to engage in the practice of social work at the master's level under part 185 of the public health code, 1978 PA 368, MCL 333.18501 to [MCL] 333.18518.

  (*v*) A licensed professional counselor licensed or otherwise authorized to engage in the practice of counseling under part 181 of the public health code, 1978 PA 368, MCL 333.18101 to [MCL] 333.18117.

  (*vi*) A marriage and family therapist licensed or otherwise authorized to engage in the practice of marriage and family therapy under part 169 of the public health code, 1978 PA 368, MCL 333.16901 to [MCL] 333.16915." MCL 600.1099b(f).

Minor

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *minor* is "a person who is less than 18 years of age." Mich Admin Code, R 18.351(1)(m).

- For purposes of MCL 770.9b, *minor* is "an individual less than 16 years of age." MCL 770.9b(3)(a).

Misconduct

- For purposes of MCL 18.361(6), *misconduct* "includes but is not limited to provocation of or participation in a crime contemporaneous with or immediately preceding the injury." MCL 18.361(6).

Misdemeanor

- For purposes of MCL 780.826 (governing restitution under CVRA, Article 3 (Misdemeanor Article)), *misdemeanor* is "a violation of a law of this state or a local ordinance that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, but that is not a felony." MCL 780.826(1)(a).

N

Noneconomic loss

- For purposes of MCL 600.2978, *noneconomic loss* is "damages or loss due to pain, suffering, inconvenience, physical impairment, or physical disfigurement, loss of society and companionship, loss of consortium, or other noneconomic loss." MCL 600.2978(4)(b).

Nonoffending parent or legal guardian

- For purposes of MCL 600.2163a and MCL 712A.17b, *nonoffending parent or legal guardian* is "a natural parent, stepparent, adoptive parent, or legally appointed or designated guardian of a witness who is not alleged to have committed a violation of the laws of this state, another state, the United States, or a court order that is connected in any manner to a witness's videorecorded statement." MCL 600.2163a(1)(d); MCL 712A.17b(1)(c).

O

Offense

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, and except as otherwise defined in Article 2, *offense* is one or more of the following:

  "(*i*) A violation of a penal law of this state for which a juvenile offender, if convicted as an adult, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony.

  (*ii*) A violation of [MCL 750.81] (assault and battery, including domestic violence), [MCL 750.81a] (assault;

infliction of serious injury, including aggravated domestic violence), [MCL 750.115] (breaking and entering or illegal entry), [MCL 750.136b(7)] (child abuse in the fourth degree), [MCL 750.145] (contributing to the neglect or delinquency of a minor), [MCL 750.145d] (using the internet or a computer to make a prohibited communication), [MCL 750.233] (intentionally aiming a firearm without malice), [MCL 750.234] (discharge of a firearm intentionally aimed at a person), [MCL 750.235] (discharge of an intentionally aimed firearm resulting in injury), [MCL 750.335a] (indecent exposure), or [MCL 750.411h] (stalking) . . . .

(*iii*) A violation of [MCL 257.601b(2)] (injuring a worker in a work zone) or [MCL 257.617a] (leaving the scene of a personal injury accident) . . ., or a violation of [MCL 257.625] (operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance,[9] or with unlawful blood alcohol content) . . ., if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

(*iv*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of . . . MCL 436.1701, if the violation results in physical injury or death to any individual.

(*v*) A violation of [MCL 324.80176(1)] or [MCL 324.80176(3)] (operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with unlawful blood alcohol content) . . ., if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.[10]

(*vi*) A violation of a local ordinance substantially corresponding to a law enumerated in subparagraphs (*i*) to (*v*).

(*vii*) A violation described in subparagraphs (*i*) to (*vi*) that is subsequently reduced to a violation not included in subparagraphs (*i*) to (*vi*)." MCL 780.781(1)(g)(*i*)-(*vii*).

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[9] Effective March 31, 2013, MCL 257.625 was amended to include "other intoxicating substance[s]" in its various provisions dealing with the unlawful operation of a motor vehicle. MCL 780.781(1)(g) has not yet been amended to reflect this change.

[10] Effective March 31, 2015, MCL 324.80176(1) and MCL 324.80176(3) were amended to replace the term *vessel* with the term *motorboat*, to replace the term *intoxicating* with the term *alcoholic*, and to include "any amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in [MCL 333.7214(a)(*iv*)]" in its provisions dealing with the unlawful operation of a motorboat. MCL 780.781(1)(g) has not yet been amended to reflect this change.

- For purposes MCL 780.794 (governing restitution under CVRA, Article 2 (Juvenile Article)), *offense* is "a violation of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine." MCL 780.794(1)(a).

Offense by a juvenile

- For purposes of Michigan Court Rules subchapter 3.900, "[w]hen used in delinquency proceedings, unless the context otherwise indicates[,]" *offense by a juvenile* is "an act that violates a criminal statute, a criminal ordinance, a traffic law, or a provision of MCL 712A.2(a) or [MCL 712A.2(d)]." MCR 3.903(B)(3).

Other services necessary

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *other services necessary* is "recognized treatment, convalescent aides, supplies, and other equipment needed by the victim because of physical incapacity sustained as a direct result of the crime." Mich Admin Code, R 18.351(1)(n).

Out-of-pocket loss

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq*. (by authority under Mich Admin Code, R 18.351(2)), *out-of-pocket loss* is "the unreimbursed and unreimbursable expenses[11] or indebtedness reasonably incurred for medical care, psychological counseling, replacement services, any nonmedical remedial treatment rendered in accordance with a recognized religious method of healing, or other services necessary as a result of the injury upon which a claim is based." MCL 18.351(1)(e).

P

Party

[11] For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353),Mich Admin Code, R 18.351(1)(q) defines *unreimbursed and unreimbursable expenses* as "expenses for which the claimant has no means of payment other than the claimant's assets or through an award of the commission."

- For purposes of MCR 1.111, *party* is "a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

Participant

- For purposes of Chapter 10A (Drug Treatment Court) of the Revised Judicature Act, MCL 600.1060 *et seq.*, *participant* is "an individual who is admitted into a drug treatment court." MCL 600.1060(d).

- For purposes of the Revised Judicature Act, Chapter 10B (Mental Health Court), MCL 600.1090 *et seq.*, *participant* is "an individual who is admitted into a mental health court." MCL 600.1090(f).

- For purposes of the Revised Judicature Act, Chapter 10C (Juvenile Mental Health Court), MCL 600.1099b *et seq.*, *participant* is "a juvenile who is admitted into a juvenile mental health court." MCL 600.1099b(g).

Peace officer

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *peace officer* is "an employee of this state, or any political subdivision thereof, who is employed as a police officer, sheriff, firefighter, conservation officer, or similar officer exercising powers of a police officer." Mich Admin Code, R 18.351(1)(o).

Person

- For purposes of the CVRA, Articles 1-3, MCL 780.751 *et seq.*, MCL 780.781 *et seq.*, and MCL 780.811 *et seq.*, *person* is "an individual, organization, partnership, corporation, or governmental entity." MCL 780.752(1)(j); MCL 780.781(1)(h); MCL 780.811(1)(e).

Personal physical injury

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq.* (by authority under Mich Admin Code, R 18.351(2)), *personal physical injury* is "actual bodily harm and includes pregnancy."[12] MCL 18.351(1)(f).

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[12] For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), the commission will not reimburse a claimant for loss, damage, or theft of personal property, or for "[n]oneconomic detriment in the form of pain, suffering, inconvenience, physical impairment, or other nonpecuniary damage[.]" Mich Admin Code, R 18.356(1)-(2).

Pharmacist

- For purposes of Article 15, Part 177 (Pharmacy Practice and Drug Control) of the Public Health Code, MCL 333.17701 *et seq.*, *pharmacist* is "an individual licensed under this article to engage in the practice of pharmacy." MCL 333.17707(3).

Pharmacy

- For purposes of Article 15, Part 177 (Pharmacy Practice and Drug Control) of the Public Health Code, MCL 333.17701 *et seq.*, *pharmacy* is "a building or part of a building in which the practice of pharmacy is conducted. For the purpose of a duty placed on a pharmacy under this part, 'pharmacy' means the person to which the pharmacy license is issued, unless otherwise specifically provided." MCL 333.17707(6).

Practice of counseling

- For purposes of Article 15, Part 181 (Counseling) of the Public Health Code, MCL 333.18101 *et seq.*, *practice of counseling* is "the rendering to individuals, groups, families, organizations, or the general public a service involving the application of clinical counseling principles, methods, or procedures for the purpose of achieving social, personal, career, and emotional development and with the goal of promoting and enhancing healthy self actualizing and satisfying lifestyles whether the services are rendered in an educational, business, health, private practice, or human services setting. The practice of counseling does not include the practice of psychology except for those preventive techniques, counseling techniques, or behavior modification techniques for which the licensed professional counselor or limited licensed counselor has been specifically trained. The practice of counseling does not include the practice of medicine such as prescribing drugs or administering electroconvulsive therapy. A counselor shall not hold himself or herself out as a psychologist as defined in [MCL 333.18201]. A counselor shall not hold himself or herself out as a marriage and family counselor providing marriage counseling pursuant to [MCL 339.1501]." MCL 333.18101(d).

Practice of pharmacy

- For purposes of Article 15, Part 177 (Pharmacy Practice and Drug Control) of the Public Health Code, MCL 333.17701 *et seq.*, *practice of pharmacy* is "a health service, the clinical application of which includes the encouragement of safety and efficacy in the prescribing, dispensing, administering, and use of drugs and related articles for the prevention of illness, and

the maintenance and management of health. Practice of pharmacy includes the direct or indirect provision of professional functions and services associated with the practice of pharmacy. Professional functions associated with the practice of pharmacy include:

(a) The interpretation and evaluation of the prescription.

(b) Drug product selection.

(c) The compounding, dispensing, safe storage, and distribution of drugs and devices.

(d) The maintenance of legally required records.

(e) Advising the prescriber and the patient as required as to contents, therapeutic action, utilization, and possible adverse reactions or interactions of drugs." MCL 333.17707(8).

Practice of psychology

- For purposes of Article 15, Part 182 (Psychology) of the Public Health Code, MCL 333.18201 *et seq.*, *practice of psychology* is "the rendering to individuals, groups, organizations, or the public of services involving the application of principles, methods, and procedures of understanding, predicting, and influencing behavior for the purposes of the diagnosis, assessment related to diagnosis, prevention, amelioration, or treatment of mental or emotional disorders, disabilities or behavioral adjustment problems by means of psychotherapy, counseling, behavior modification, hypnosis, biofeedback techniques, psychological tests, or other verbal or behavioral means. The practice of psychology shall not include the practice of medicine such as prescribing drugs, performing surgery, or administering electro-convulsive therapy." MCL 333.18201(1)(b).

Preliminary inquiry

- For purposes of Subchapter 3.900 of the Michigan Court Rules, "unless the context otherwise indicates[,]" *preliminary inquiry* is an "informal review by the court to determine appropriate action on a petition." MCR 3.903(A)(23).

Prescriber

- For purposes of the Article 15, Part 177 (Pharmacy Practice and Drug Control) of the Public Health Code, MCL 333.17701 *et seq.*, *prescriber* is "a licensed dentist, a licensed doctor of medicine, a licensed doctor of osteopathic medicine and surgery, a licensed doctor of podiatric medicine and surgery, a

licensed optometrist certified under part 174 to administer and prescribe therapeutic pharmaceutical agents, a licensed veterinarian, or another licensed health professional acting under the delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery." MCL 333.17708(2).

Prescription

- For purposes of the Article 15, Part 177 (Pharmacy Practice and Drug Control) of the Public Health Code, MCL 333.17701 *et seq.*, *prescription* is "an order by a prescriber to fill, compound, or dispense a drug or device written and signed; written or created in an electronic format, signed, and transmitted by facsimile; or transmitted electronically or by other means of communication. An order transmitted in other than written or hard-copy form shall be electronically recorded, printed, or written and immediately dated by the pharmacist, and that record is considered the original prescription. In a health facility or agency licensed under article 17 or other medical institution, an order for a drug or device in the patient's chart is considered for the purposes of this definition the original prescription. . . ." MCL 333.17708(3).

Prisoner

- For purposes of MCL 771.3g and MCL 771.3h, *prisoner* is "an individual committed or sentenced to imprisonment under [MCL 769.28]." MCL 771.3g(7)(c).

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, *prisoner* is "a person who has been convicted and sentenced to imprisonment or placement in a juvenile facility for having committed a crime or an act that would be a crime if committed by an adult against a victim." MCL 780.752(1)(k).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811 *et seq.*, *prisoner* is "a person who has been convicted and sentenced to imprisonment for having committed a serious misdemeanor against a victim" MCL 780.811(1)(e).

Privileged communication

- For purposes of Chapter 7 (Rights of Recipients of Mental Health Services) of the Mental Health Code, MCL 330.1700 *et seq.*, *privileged communication* is "a communication made to a psychiatrist or psychologist in connection with the

examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law." MCL 330.1700(h).

Prosecuting Attorney

- For purposes of the Code of Criminal Procedure, MCL 761.1 *et seq.*, *prosecuting attorney* is "the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, or, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based." MCL 761.1(r).

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, *prosecuting attorney* is "the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or a special prosecuting attorney." MCL 780.752(1)(*l*).

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, *prosecuting attorney* is "the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, or, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision that enacted the ordinance upon which the violation is based." MCL 780.781(1)(i).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811 *et seq.*, *prosecuting attorney* is "the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, or, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision that enacted the ordinance upon which the violation is based." MCL 780.811(1)(g).

Psychologist

- For purposes of Article 15, Part 182 (Psychology) of the Public Health Code, MCL 333.18201 *et seq.*, *psychologist* is "an

individual licensed under this article to engage in the practice of psychology." MCL 333.18201(1)(a).

Q

Qualified interpreter

- For purposes of the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*, *qualified interpreter* is "a person who is certified through the national registry of interpreters for the deaf or certified through the state by the division." MCL 393.502(f).

R

Records

- For purposes of MCR 3.218 and "unless the context otherwise indicates," *records* is "any case-specific information the friend of the court office maintains in any media[.]" MCR 3.218(A)(1).

- For purposes of Subchapter 3.900 of the Michigan Court Rules, "unless the context otherwise indicates[,]" *records* is "defined in MCR 1.109 and MCR 8.119 and include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders." MCR 3.903(A)(25).

- "For purposes of [MCR 8.119], *records* are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G)." MCR 8.119(A).

Replacement services

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq.*, *replacement services* are "homemaking tasks, child care, transportation, and other services previously performed by the victim that, because of the victim's injury, must temporarily or permanently be performed by a person other than the victim." MCL 18.351(1)(g).

Resident

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *resident* is "a person who is living in this state when the crime occurs. Resident does not include a person who resides in another state or foreign country and who is temporarily in this state for business, recreation, or personal matters." Mich Admin Code, R 18.351(1)(p).

S

School

- For purposes of MCL 750.520o, *school* is "a public school as that term is defined in . . . MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12." MCL 750.520(2)(a).

School bus

- For purposes of MCL 750.520o, *school bus* is "every motor vehicle, except station wagons, with a manufacturers' rated seating capacity of 16 or more passengers, including the driver, owned by a public, private, or governmental agency and operated for the transportation of children to or from school, or privately owned and operated for compensation for the transportation of children to and from school." MCL 750.520o(b).

Security interest

- For purposes of Chapter 47 of the Revised Judicature Act, MCL 600.4701 *et seq.*, *security interest* is "any interest in real or personal property that secures payment or performance of an obligation." MCL 600.4701(e).

Serious emotional disturbance

- For purposes of the Revised Judicature Act, Chapter 10B (Mental Health Court), MCL 600.1090 *et seq.*, and Chapter 10C (Juvenile Mental Health Court), MCL 600.1099b *et seq.*, *serious emotional disturbance* is "that term as defined in . . . MCL 330.1100d." MCL 600.1090(g); MCL 600.1099b(h). MCL 330.1100d defines *serious emotional disturbance* as "a diagnosable mental, behavioral, or emotional disorder affecting a minor that exists or has existed during the past year for a period of time sufficient to meet diagnostic criteria specified in the most recent Diagnostic and Statistical Manual of Mental Disorders

published by the American Psychiatric Association and approved by the department and that has resulted in functional impairment that substantially interferes with or limits the minor's role or functioning in family, school, or community activities. The following disorders are included only if they occur in conjunction with another diagnosable serious emotional disturbance:

(a) A substance use disorder.

(b) A developmental disorder.

(c) 'V' codes in the Diagnostic and Statistical Manual of Mental Disorders." MCL 330.1100d(2).

Serious impairment of a body function of a victim

- For purposes of MCL 780.766(5), *serious impairment of a body function of a victim* "includes, but is not limited to, 1 or more of the following:

  (a) Loss of a limb or use of a limb.

  (b) Loss of a hand or foot or use of a hand or foot.

  (c) Loss of an eye or use of an eye or ear.

  (d) Loss or substantial impairment of a bodily function.

  (e) Serious visible disfigurement.

  (f) A comatose state that lasts for more than 3 days.

  (g) Measurable brain damage or mental impairment.

  (h) A skull fracture or other serious bone fracture.

  (i) Subdural hemorrhage or subdural hematoma.

  (j) Loss of a body organ." MCL 780.766(5).

Serious mental illness

- For purposes of the Revised Judicature Act, Chapter 10B (Mental Health Court), MCL 600.1090 *et seq.*, and Chapter 10C (Juvenile Mental Health Court), MCL 600.1099b *et seq.*, a *serious mental illness* is "that term as defined in . . . MCL 330.1100d." MCL 600.1090(h); MCL 600.1099b(i). MCL 330.1100d(3) defines *serious mental illness* as "a diagnosable mental, behavioral, or emotional disorder affecting an adult that exists or has existed within the past year for a period of time sufficient to meet diagnostic criteria specified in the most recent Diagnostic and

Statistical Manual of Mental Disorders published by the American Psychiatric Association and approved by the department and that has resulted in functional impairment that substantially interferes with or limits 1 or more major life activities. Serious mental illness includes dementia with delusions, dementia with depressed mood, and dementia with behavioral disturbance but does not include any other dementia unless the dementia occurs in conjunction with another diagnosable serious mental illness. The following disorders also are included only if they occur in conjunction with another diagnosable serious mental illness:

(a) A substance use disorder.

(b) A developmental disorder.

(c) A 'V' code in the Diagnostic and Statistical Manual of Mental Disorders." MCL 330.1100d(3).

Serious misdemeanor

- For purposes of MCL 712A.18e, *serious misdemeanor* is "that term as defined in . . . MCL 780.811." MCL 712A.18e(7)(b).

- For purposes of MCL 780.621, *serious misdemeanor* is "that term as defined in . . . MCL 780.811." MCL 780.621(16)(h).

- For purposes of MCL 780.796a, *serious misdemeanor* is "defined in [MCL 780.811]." MCL 780.796a(2)(b).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811 *et seq.*, *serious misdemeanor* is one or more of the following:

  (*i*) assault and battery, including domestic violence, MCL 750.81;

  (*ii*) aggravated assault, including aggravated domestic violence, MCL 750.81a;

  (*iii*) breaking and entering or illegal entry, MCL 750.115;

  (*iv*) fourth-degree child abuse, MCL 750.136b(7);

  (*v*) contributing to the neglect or delinquency of a minor, MCL 750.145;

  (*vi*) using the internet or a computer to make a prohibited communication, MCL 750.145d (specifically, misdemeanor violations of the statute);

(*vii)* intentionally aiming a firearm without malice, MCL 750.233;

(*viii*) discharge of a firearm intentionally aimed at a person, MCL 750.234;

(*ix*) discharge of a firearm intentionally aimed at a person resulting in injury, MCL 750.235;

(*x*) indecent exposure, MCL 750.335a;

(*xi*) stalking, MCL 750.411h;

(*xii*) injuring a worker in a work zone, MCL 257.601b(2);

(*xiii*) leaving the scene of a personal-injury accident, MCL 257.617a;

(*xiv*) operating a vehicle while under the influence of or impaired by intoxicating liquor, a controlled substance, or other intoxicating substance,[13] or with an unlawful blood-alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual;

(*xv*) selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;

(*xvi*) operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or MCL 324.80176(3),[14] if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual;

(*xvii*) a violation of a local ordinance substantially corresponding to a violation listed above; and

(*xviii*) a charged felony or serious misdemeanor that is subsequently reduced or pleaded to a misdemeanor. MCL 780.811(1)(a). MCL 780.811(1)(a)(*i*)-(*xviii*).

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[13] Effective March 31, 2013, MCL 257.625 was amended to include "other intoxicating substance[s]" in its various provisions dealing with the unlawful operation of a motor vehicle. MCL 780.811(1)(a) has not yet been amended to reflect this change.

[14] Effective March 31, 2015, MCL 324.80176(1) and MCL 324.80176(3) were amended to replace the term vessel with the term motorboat, to replace the term intoxicating with the term alcoholic, and to include "any amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in [MCL 333.7214(a)(iv)]" in its provisions dealing with the unlawful operation of a motorboat. MCL 780.811(1)(a) has not yet been amended to reflect this change.

Sexual assault

- For purposes of MCL 18.355a, *sexual assault* is "a criminal violation of . . . MCL 750.520a to [MCL] 750.520n." MCL 18.355a(11)(b).

- For purposes of MCL 600.2157a, *sexual assault* is "assault with intent to commit criminal sexual conduct." MCL 600.2157a(1)(c).

Sexual assault evidence kit

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *sexual assault evidence kit* is "that term as defined in . . . MCL 333.21527." MCL 752.952(d). MCL 333.21527(2) defines *sexual assault evidence kit* as "a standardized set of equipment and written procedures approved by the department of state police that have been designed to be administered to an individual principally for the purpose of gathering evidence of sexual conduct, which evidence is of the type offered in court by the forensic science division of the department of state police for prosecuting a case of criminal sexual conduct under . . . MCL 750.520a to [MCL]750.520*l*."

Sexual assault medical forensic examination (SAFE)

- For purposes of MCL 18.355a, *sexual assault medical forensic examination* is "that term as described in [MCL 18.355a(1)(a)-(d)]." MCL 18.355a(11)(c).

Sexual assault offense

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *sexual assault offense* is "a violation or attempted violation of . . . MCL 750.520b to [MCL] 750.520g." MCL 752.952(e).

Sexual assault of minor

- For purposes of MCL 770.9b(3)(b), *sexual assault of a* minor is "a violation of any of the following[:]"

    - CSC-I against an individual under the age of 16, MCL 750.520b. MCL 770.9b(3)(b)(*i*).

    - CSC-II against an individual under the age of 16, MCL 750.520c. MCL 770.9b(3)(b)(*i*).

- CSC-III involving force or coercion used to accomplish penetration against an individual under the age of 16, MCL 750.520d(1)(b). MCL 770.9b(3)(b)(*i*).

- CSC-III involving penetration of an individual under the age of 16 that the defendant knows or has reason to know is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c). MCL 770.9b(3)(b)(*i*).

- CSC-III involving penetration of an individual under the age of 16 who is related to the defendant by blood or affinity to the third degree, and penetration occurs under circumstances not otherwise addressed in the CSC Act. MCL 750.520d(1)(d). MCL 770.9b(3)(b)(*i*).

- CSC-III involving an individual who is at least age 16 but less than age 18 and is a student at a public or nonpublic school and the defendant is an individual listed in MCL 750.520d(1)(e)(*i*)-(*ii*), MCL 750.520d(1)(e).[15] MCL 770.9b(3)(b)(*i*).

- CSC-III involving penetration of a victim who is at least 13 years old but under the age of 16, MCL 750.520d(1)(a), if the defendant is five or more years older than the victim. MCL 770.9b(3)(b)(*ii*).

- Assault with intent to commit criminal sexual conduct described in MCL 770.9b(3)(b)(*i*)-(*ii*) against an individual under the age of 16, MCL 750.520g. MCL 770.9b(3)(b)(*iii*).

Sexual assault or domestic crisis center

- For purposes of MCL 600.2157a, *sexual assault or domestic violence crisis center* is "an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling." MCL 600.2157a(1)(e).

Sexual assault or domestic violence counselor

- For purposes of MCL 600.2157a, *sexual assault or domestic violence counselor* is "a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling,

[15] MCL 770.9b(3)(b)(*i*) is inconsistent with MCL 750.520d(1)(e). In order for the defendant to be convicted of MCL 750.520d(1)(e), the victim must be at least 16 years of age but less than 18 years of age. However, pursuant to MCL 770.9b, *sexual assault of a minor* requires that the victim be less than 16 years of age.

or other assistance to victims of sexual assault or domestic violence and their families." MCL 600.2157a(1)(d).

Sexual assault victim

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *sexual assault victim* is "an individual subjected to a sexual assault offense and, for the purpose of making communications and receiving notices under [the Sexual Assault Victim's Access to Justice Act], a person designated by the sexual assault victim under [MCL 752.954]." MCL 752.952(f).

Sexual contact

- For purposes of Article 5 (Prevention and Control of Diseases and Disabilities) of the Public Health Code, MCL 333.5101 *et seq.*, *sexual contact* is "that term as defined in . . . MCL 750.520a." MCL 333.5129(12)(a). MCL 750.520a(q) defines *sexual contact* as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (*i*) Revenge[;] (*ii*) To inflict humiliation[;] (*iii*) Out of anger."

Sexual penetration

- For purposes of Article 5 (Prevention and Control of Diseases and Disabilities) of the Public Health Code, MCL 333.5101 *et seq.*, *sexual penetration* is "that term as defined in . . . MCL 750.520a." MCL 333.5129(12)(b). MCL 750.520a(r) defines *sexual penetration* as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

Specified juvenile violations

- For purposes of MCL 712A.2, MCL 600.606, MCL 764.1f, and MCR 6.903, *specified juvenile violations* are as follows:

  - first-degree arson, MCL 750.72;
  - assault with intent to commit murder, MCL 750.83;
  - assault with intent to maim, MCL 750.86;

- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- robbery of a bank, safe, or vault, MCL 750.531;
- assault with intent to do great bodily harm or assault by strangulation or suffocation, MCL 750.84, if armed with a dangerous weapon;
- first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;
- escape or attempted escape from a medium- or high-security facility operated by the Department of Health and Human Services[16] (DHHS) or a county juvenile agency, or from a high-security facility operated by a private agency under contract with the DHHS or a county juvenile agency, MCL 750.186a;
- possession of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7403(2)(a)(*i*);[17]
- manufacture, creation, or delivery of, or possession with intent to manufacture, create, or deliver, 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(*i*);[18]
- an attempt, MCL 750.92, to commit any of the above crimes;
- conspiracy, MCL 750.157a, to commit any of the above crimes;

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[16] MCL 400.226(A) renamed the Family Independence Agency (FIA) as the Department of Health and Human Services (DHHS). Compare MCR 6.903(H)(15) and MCR 3.903(D)(8)(p).

[17] Effective March 1, 2003, 2002 PA 665 amended MCL 333.7403(2)(a)(*i*) to reclassify the minimum amount of the controlled substance required for this offense from 650 grams to 1000 grams.

[18] Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a)(*i*) to reclassify the minimum amount of the controlled substance required for these offenses from 650 grams to 1000 grams.

- solicitation, MCL 750.157b, to commit any of the above crimes;
- any lesser-included offense of a specified juvenile violation, if the juvenile is charged with a specified juvenile violation; and

- any other offense arising out of the same transaction as a specified juvenile violation, if the juvenile is charged with a specified juvenile violation. MCL 712A.2(a)(1)(A)-(I); MCL 600.606(2)(a)-(i); MCL 764.1f(2)(a)-(i); MCR 6.903(H)(1)-(19).

- For purposes of MCL 769.1, *specified juvenile violations* are as follows:
  - first-degree arson, MCL 750.72;
  - assault with intent to commit murder, MCL 750.83;
  - assault with intent to maim, MCL 750.86;
  - attempted murder, MCL 750.91;
  - conspiracy, MCL 750.157a, to commit murder;
  - solicitation, MCL 750.157b, to commit murder;
  - first-degree murder, MCL 750.316;
  - second-degree murder, MCL 750.317;
  - kidnapping, MCL 750.349;
  - first-degree criminal sexual conduct, MCL 750.520b;
  - armed robbery, MCL 750.529; or
  - carjacking, MCL 750.529a. MCL 769.1(1).

Stalking

- For purposes of MCL 750.411h and MCL 750.411i, *stalking* is "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d); MCL 750.411i(1)(e).

Support

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq*. (by authority under Mich Admin Code, R 18.351(2)), *support* is "actual monetary payments made by a victim or intervenor to or for a person principally dependent on the victim or intervenor." MCL 18.351(1)(h).

T

Tier III offender

- For purposes of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., *tier III offender* is a "either of the following:

  (*i*) A tier II offender subsequently convicted of a tier I or II offense.

  (*ii*) An individual convicted of a tier III offense." MCL 28.722(v).

U

Unconsented contact

- For purposes of MCL 750.411h and MCL 750.411i, *unconsented contact* is "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following: (*i*) Following or appearing within the sight of that individual[,] (*ii*) Approaching or confronting that individual in a public place or on private property[,] (*iii*) Appearing at that individual's workplace or resident[,] (*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual[,] (*v*) Contacting that individual by telephone[,] (*vi*) Sending mail or electronic communications to that individual[, and] (*vii*) Placing an object on, or delivering an object to, property owned, leased, or

occupied by that individual." MCL 750.411h(1)(e); MCL 750.411i(1)(f).

V

Valid foreign protection order

- For purposes of MCL 764.15c, *valid foreign protection order* is "a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i." MCL 764.15c(5)(d).

Veteran

- For purposes of Chapter 12 (Veterans Treatment Court[19]) of the Revised Judicature Act, MCL 600.1205 *et seq.*, *veteran* is "an individual who meets both of the following:

  (*i*) Is a veteran as defined in . . . MCL 35.61.[20]

  (*ii*) Served at least 180 days of active duty in the armed forces of the United States."[21] MCL 600.1200(h).

Veterans treatment court

- For purposes of Chapter 12 (Veterans Treatment Courts) of the Revised Judicature Act, MCL 600.1205 *et seq.*, *veterans treatment court* is "a court adopted or instituted under [MCL 600.1201] that provides a supervised treatment program for individuals who are veterans and who abuse or are dependent upon any controlled substance or alcohol or suffer from a mental illness." MCL 600.1200(j).

Victim

- For purposes of the Crime Victims Compensation Board, MCL 18.351 *et seq.* (by authority under Mich Admin Code, R 18.351(2)), *victim* is "a person who suffers a personal physical injury as a direct result of a crime." MCL 18.351(1)(i).

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[19] The title of this chapter as it appears on the Legislature's website appears to be in error. See http://legislature.mi.gov/doc.aspx?mcl-Act-236-of-1961.

[20] MCL 35.61 defines *veteran* as "an individual who served in the United States Armed Forces, including the reserve components, and was discharged or released under conditions other than dishonorable. Veteran includes an individual who died while on active duty in the United States Armed Forces."

[21] "Veterans who served in more than 1 period of war service may combine their active duty days of service to satisfy the length of active duty service required by veteran benefit statutes or acts." MCL 35.62.

- For purposes of Article 5 (Prevention and Control of Diseases and Disabilities) of the Public Health Code, MCL 333.5101 *et seq.*, *victim* is "that term as defined in . . . MCL 750.520a."[22] MCL 333.5129(12)(c).

- For purposes of MCL 600.2157a, *victim* is "a person who was or who alleges to have been the subject of a sexual assault or of domestic violence." MCL 600.2157a(1)(f).

- For purposes of MCL 712A.18e, *victim* is "that term as defined in . . . MCL 780.781." MCL 712A.18e(7)(c).

- For purposes of MCL 712A.30 (governing restitution under the Juvenile Code), *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a juvenile offense. For purposes of [MCL 712A.2], [MCL 712A.3], [MCL 712A.6], [MCL 712A.8], [MCL 712A.9], and [MCL 712A.13], victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or other legal entity that suffers direct physical or financial harm as a result of the commission of a juvenile offense." MCL 712A.30(1)(b).

- For purposes of MCL 750.411h, *victim* is "an individual who is the target of a willful course of conduct involving repeated or continuing harassment." MCL 750.411h(1)(f).

- For purposes of MCL 750.411i, *victim* is "an individual who is the target of a willful course of conduct involving repeated or continuing harassment." MCL 750.411i(1)(g).

- For purposes of the Human Trafficking Victims Compensation Act, MCL 752.981 *et seq.*, *victim* is "a victim of a violation of . . . MCL 750.462a to [MCL] 750.462h." MCL 752.982.

- For purposes of the Code of Criminal Procedure, MCL 769.1a, *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a felony, misdemeanor, or ordinance violation. For purposes of [MCL 769.1a(2)], [MCL 769.1a(3)], [MCL 769.1a(6)], [MCL 769.1a(8)], [MCL 769.1a(9)], and [MCL 769.1a(13)], victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a

[22] MCL 750.520a(s) defines *victim* as "the person alleging to have been subjected to criminal sexual conduct."

result of a felony, misdemeanor, or ordinance violation." MCL 769.1a(1)(b).

- For purposes of MCL 780.621, *victim* is "that term as defined in . . . MCL 780.752, [MCL] 780.781, and [MCL] 780.811." MCL 780.621(16)(i).

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, and except as otherwise defined in Article 1, *victim* is:

  "(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

  (*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):

  (A) The spouse of the deceased victim.

  (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

  (C) A parent of the deceased victim if sub-subparagraphs (A) and (B) do not apply.

  (D) The guardian or custodian of a child of the deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

  (E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

  (F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

  (*iii*) A parent, guardian, or custodian of the victim, if the victim is less than 18 years of age, who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.

  (*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the defendant nor incarcerated.

  (*v*) for the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process,

or consents to the designation as a victim of the following individuals other than the defendant:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m).

- For purposes of MCL 780.766 (governing restitution under CVRA, Article 1 (Felony Article)), *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. As used in [MCL 780.766(2)], [MCL 780.766(3)], [MCL 780.766(6)], [MCL 780.766(8)], [MCL 780.766(9)], and [MCL 780.766(13)] only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime." MCL 780.766(1).

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, and except as otherwise defined in Article 2, *victim* is

  "(*i*) A person who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

  (*ii*) The following individuals other than the juvenile if the victim is deceased, except as provided in subparagraph (*v*):

  (A) The spouse of the deceased victim.

  (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

(C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

(D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

(E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

(F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

(*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the juvenile nor incarcerated, if the parent, guardian, or custodian so chooses.

(*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the juvenile nor incarcerated.

(*v*) for the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the juvenile:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.781(1)(j).

- For purposes of MCL 780.794 (governing restitution under CVRA, Article 2 (Juvenile Article)), *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense. As used in [MCL 780.794(2)], [MCL 780.794(3)], [MCL 780.794(6)],

[MCL 780.794(8)], [MCL 780.794(9)], and [MCL 780.794(13)] only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of an offense." MCL 780.794(1)(b).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811 *et seq.*, and except as otherwise defined in Article 3, *victim* is

  "(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a serious misdemeanor, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

  (*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):

  (A) The spouse of the deceased victim.

  (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

  (C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

  (D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

  (E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

  (F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

  (*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.

  (*iv*) A parent, guardian, or custodian of a victim who is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process if he or she is not the defendant and is not incarcerated.

  (*v*) for the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process,

or consents to the designation as a victim of the following individuals other than the defendant:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.811(1)(h).

- For purposes of MCL 780.826 (governing restitution under CVRA, Article 3 (Misdemeanor Article)), *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a misdemeanor. As used in [MCL 780.826(2)], [MCL 780.826(3)], [MCL 780.826(6)], [MCL 780.826(8)], [MCL 780.826(9)], and [MCL 780.826(13)] only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a misdemeanor." MCL 780.826(1)(b).

Victim payment

- For purposes of MCL 712A.29, *victim payment* is "restitution ordered under [MCL 712A.30] and [MCL 712A.31] and under the crime victim's rights act, . . . MCL 780.751 to [MCL] 780.834, paid to the victim or the victim's estate, but not to a person who reimbursed the victim for his or her loss, or an assessment ordered under . . . MCL 780.905." MCL 712A.29(7).

- For purposes of MCL 775.22, *victim payment* is "restitution ordered to be paid to the victim or the victim's estate, but not to a person who reimbursed the victim for his or her loss, or an assessment ordered under . . . MCL 780.905." MCL 775.22(5).

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.766, *victim payment* is "restitution ordered to be paid to the victim or the victim's estate, but not to a person who

reimbursed the victim for his or her loss; or an assessment ordered under . . . MCL 780.905." MCL 780.766b(5).

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.794, *victim payment* is "restitution ordered to be paid to the victim or the victim's estate, but not to a person who reimbursed the victim for his or her loss; or an assessment ordered under . . . MCL 780.905." MCL 780.794a(5).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.826a, *victim payment* is "restitution ordered to be paid to the victim or the victim's estate, but not to a person who reimbursed the victim for his or her loss; or an assessment ordered under . . . MCL 780.905." MCL 780.826a(5).

Victim's representative

- For purposes of MCL 780.762, *victim's representative* is "any of the following:

  (a) A guardian or custodian of a child of a deceased victim if the child is less than 18 years of age.

  (b) A parent, guardian, or custodian of a victim of an assaultive crime if the victim of the assaultive crime is less than 18 years of age.

  (c) A person who has been designated under [MCL 780.752(2)] to act in place of a victim of an assaultive crime during the duration of the victim's physical or emotional disability." MCL 780.762(3)(a)-(c).

- For purposes of MCL 780.790, *victim's representative* is "any of the following:

  (a) A guardian or custodian of a child of a deceased victim if the child is less than 18 years of age.

  (b) A parent, guardian, or custodian of a victim of an offense that if committed by an adult would be an assaultive crime if the victim of the offense is less than 18 years of age.

  (c) A person who has been designated under [MCL 780.781(2)] to act in place of a victim of an offense that if committed by an adult would be an assaultive crime during the duration of the victim's physical or emotional disability."MCL 780.790(3).

- For purposes of MCL 780.822, *victim's representative* is "any of the following:

(a) A guardian or custodian of a child of a deceased victim if the child is less than 18 years of age.

(b) A parent, guardian, or custodian of a victim of an assaultive serious misdemeanor if the victim of the assaultive serious misdemeanor is less than 18 years of age.

(c) A person who has been designated under [MCL 780.811(2)] to act in place of a victim of an assaultive serious misdemeanor during the duration of the victim's physical or emotional disability." MCL 780.822(3).

- For purposes of MCL 791.269, *victim's representative* is "either of the following:

  (a) If the victim is less than 18 years of age, his or her parent or legal guardian.

  (b) If the victim is deceased or otherwise unable to exercise his or her rights under [MCL 791.269], a member of the victim's immediate family or, if there is no immediate family member, the victim's next of kin." MCL 791.269(2).

Videorecorded statement

- For purposes of MCL 600.2163a, *videorecorded statement* is a witness's statement taken by a custodian of the videorecorded statement as provided in [MCL 600.2163a(7)]. Videorecorded statement does not include a videorecorded deposition taken as provided in [MCL 600.2163a(20)] and [MCL 600.2163a(21)]." MCL 600.2163a(1)(e).

- For purposes of MCL 712A.17b, *videorecorded statement* is a witness's statement taken by a custodian of the videorecorded statement as provided in [MCL 712A.17b(5)]. Videorecorded statement does not include a videorecorded deposition taken as provided in [MCL 712A.17b(16)] and [MCL 712A.17b(17)]." MCL 712A.17b(1)(d).

Vulnerable adult

- For purposes of MCL 600.2163a, *vulnerable adult* is "that term as defined . . . MCL 750.145m." MCL 600.2163a(1)(f). MCL 750.145m defines *vulnerable adult* as "one or more of the following:

  (*i*) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.

(*ii*) An adult as defined in . . . MCL 400.703.

(*iii*) An adult as defined in . . . MCL 400.11." MCL 750.145m(u).

W

Witness

- For purposes of MCL 600.2163a, *witness* is "an alleged victim of an offense listed under [MCL 600.2163a(2)] who is any of the following:

  (*i*) A person under 16 years of age.

  (*ii*) A person 16 years of age or older with a developmental disability.

  (*iii*) A vulnerable adult." MCL 600.2163a(1)(g).

Writing

- For purposes of the administrative rules governing the Crime Victim Services Commission (by authority under MCL 18.353), *writing* is "any of the following:

  (*i*) Handwriting.

  (*ii*) Typewriting.

  (*iii*) Printing.

  (*iv*) Photostating.

  (*v*) Photographing.

  (*vi*) Photocopying.

  (*vii*) Any other means of recording, including the recording of letters, words, pictures, sounds, symbols, or any combination thereof.

  (*viii*) Maps.

  (*ix*) Papers.

  (*x*) Magnetic or punched cards.

  (*xi*) Discs.

  (*xii*) Drums.

(*xiii*) Any other means of recording or retaining meaningful contents." Mich Admin Code, R 18.351(1)(r).

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