Criminal Proceedings Benchbook, Volume 2

Part of the original Circuit Court Benchbook and Criminal Procedure Monograph Series

- Postjudgment Motions
- Sentencing
- Probation Revocation
- Postappeal Relief

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Michigan Supreme Court

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Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. This benchbook was created in 2013 by consolidating materials that were initially published in 2009, 2010, 2012, and 2013. The text has been revised, reordered, and updated through January 1, 2017.

Acknowledgments

The *Criminal Proceedings Benchbook, Volume 2,* is part of a two-volume set. The *Criminal Proceedings Benchbook, Volume 1,* concerns pretrial and trial matters, and the *Criminal Proceedings Benchbook, Volume 2,* concerns posttrial matters.

The *Criminal Proceedings Benchbooks, Volumes 1 and 2*, derive from the former *Circuit Court Benchbook: Criminal Proceedings* and *Criminal Procedure Monograph Series*. The information from those publications has been combined and reorganized to better serve MJI's core audience.

The *Michigan Circuit Court Benchbook* was originally authored by Judge J. Richardson Johnson. In 2009, the *Michigan Circuit Court Benchbook* was revised and broken into three volumes: *Circuit Court Benchbook: Civil Proceedings—Revised Edition*; *Circuit Court Benchbook: Criminal Proceedings—Revised Edition*; and *Evidence Benchbook*. The civil and criminal portions of the benchbook were revised by MJI Research Attorneys Sarah Roth and Lisa Schmitz, who revised the Civil and Criminal volumes, respectively, of the benchbook. The editorial advisory committee members consisted of The Honorable William J. Caprathe, The Honorable J. Richardson Johnson, The Honorable Richard M. Pajtas, The Honorable James R. Redford, and The Honorable Donald E. Shelton.

The *Criminal Procedure Monograph* series formerly contained the following titles:

- Monograph 1: *Issuance of Complaints & Arrest Warrants—Fourth Edition*
- Monograph 2: *Issuance of Search Warrants—Fourth Edition*
- Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition*
- Monograph 4: *Felony Arraignments & Pleas—Third Edition*
- Monograph 5: *Preliminary Examinations—Third Edition*
- Monograph 6: *Pretrial Motions—Third Edition*
- Monograph 7: *Probation Revocation—Fourth Edition*
- Monograph 8: *Felony Sentencing—Revised Edition*

- Monograph 9: *Postconviction Proceedings*

Former MJI *Criminal Procedure Monographs 1-7* were originally authored in 1992 by MJI staff members Leonhard J. Kowalski, Dawn F. McCarty, and Margaret Vroman. The 1992 edition was funded in part by a grant from the W.K. Kellogg Foundation. Subsequent editions of these monographs were revised by MJI Research Attorneys with the assistance of an editorial advisory committee.

Former MJI *Criminal Procedure Monograph 8* was originally authored by former MJI Publications Manager Phoenix Hummel. Ms. Hummel and MJI Research Attorney Lisa Schmitz contributed to the revised edition and were assisted by an editorial advisory committee. MJI Publications Manager Sarah Roth served as editor.

Former *MJI Criminal Procedure Monograph 9* was originally authored by MJI Research Attorney Lisa Schmitz. Former MJI Publication Manager, Phoenix Hummel, served as editor. In addition, Ms. Schmitz was assisted by an editorial advisory committee.

Criminal Proceedings Benchbook, Vol. 2

Summaries of Updates: September 2, 2016–January 1, 2017

Updates have been issued for the *Criminal Proceedings Benchbook, Vol. 2*. A summary of each update appears below. The updates have been integrated into the website version of the benchbook. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 1: Postjudgment Motions

1.3(B)(5) Motion for New Trial

- Expert testimony regarding undisclosed medical examiner photographs "demonstrate[d] that there [was] a reasonable probability that the outcome of the trial [might] have been different had the photographs been disclosed to the defense[]" where the photographs may have revealed that the child-victim's injuries were not intentionally inflicted; accordingly, "the trial court properly concluded that [the] defendant [was] entitled to a new trial[.]" *People v Dimambro*, ___ Mich App ___, ___ (2016).

Chapter 3: Felony Sentencing & Selected Post-Sentencing Issues

3.2(D)(3) Overview of Felony Sentencing

- The trial court must score the now-advisory guidelines before imposing a departure sentence. *People v Geddert*, ___ Mich ___, ___ (2016).

3.4(C) Judicial Factfinding and the *Apprendi*/*Alleyne* Rule

- The trial court must score the now-advisory guidelines before imposing a departure sentence. *People v Geddert*, ___ Mich ___, ___ (2016).

3.9(K)(1) Scoring an Offender's Offense Variables (OVs)

- The term *victim* as used in MCL 777.39 is not limited to *persons* who suffered danger of physical injury or loss of life or

property; rather, "MCL 777.39 allows a trial court, when scoring OV 9, to count as a 'victim' 'one that is acted on' by [the] defendant's criminal conduct and placed in danger of loss of life, bodily injury, or loss of property." *People v Ambrose*, ___ Mich App ___, ___ (2016), quoting *Merriam-Webster's Collegiate Dictionary* (11th ed), p 1394.

3.9(K)(2) Scoring an Offender's Offense Variables (OVs)

- The term *victim* as used in MCL 777.39 is not limited to *persons* who suffered danger of physical injury or loss of life or property; rather, "MCL 777.39 allows a trial court, when scoring OV 9, to count as a 'victim' 'one that is acted on' by [the] defendant's criminal conduct and placed in danger of loss of life, bodily injury, or loss of property." *People v Ambrose*, ___ Mich App ___, ___ (2016) (concluding that where the defendant feloniously assaulted his pregnant girlfriend, the fetus was properly counted as a *victim* under OV 9) (citation omitted).

3.9(N)(2) Scoring an Offender's Offense Variables (OVs)

- Because OV 12 "specifically states that it cannot be scored for criminal acts for which there was a conviction, . . . any criminal act scored under OV 12 would not be a criminal act found by the jury[;]" accordingly, where there was no indication in the record that the defendant admitted committing the contemporaneous felonious criminal acts supporting the score of 10 points for OV 12, and where removing the 10 points resulted in a change in the applicable guidelines range, he was entitled to a remand for possible resentencing under *People v Lockridge*, 498 Mich 358, 395, 397 (2015), and *United States v Crosby*, 397 F3d 103 (CA 2, 2005), even though the "evidence was [otherwise] sufficient to support" the score. *People v Norfleet*, ___ Mich App ___, ___ (2016).

3.9(U)(2)(q) Scoring an Offender's Offense Variables (OVs)

- "[T]he trial court did not err in scoring OV 19 at fifteen points[]" where the defendant fled from police on foot after committing retail fraud and entered a camper parked in a nearby yard for the purpose of hiding from the police. *People v Smith (Chaz)*, ___ Mich App ___, ___ (2016). "Although [the defendant] did not threaten a victim's property or physically destroy the camper that he hid in, he committed the crime of breaking and entering a structure with the intent to commit a felony [(i.e., resisting or obstructing a police officer)] when he entered the camper[,]"

and when he "broke into the camper, he exerted force against the property of another [for purposes of OV 19] by opening the door." *Id*. at ___.

3.9(U)(2)(r) Scoring an Offender's Offense Variables (OVs)

- Where the defendant, "while pleading guilty, . . . admitted that he ran from the police after stealing property . . . and that he broke into [a] camper in order to hide from the police[,] . . . the facts necessary to support a score of fifteen points [for OV 19] were admitted by [the defendant], and his sentence was not constrained by improper judicial fact-finding in violation of the Sixth Amendment[]" under *People v Lockridge*, 498 Mich 358, 373 (2015). *People v Smith (Chaz)*, ___ Mich App ___, ___ (2016), citing *People v Garnes*, ___ Mich App ___, ___ (2016).

3.11(A)(4) Felony Offenses Enumerated in §777.18 (Offenses Predicated on an Underlying Felony)

- A defendant is subject to an enhanced penalty under MCL 333.7410(3) only if the prosecution presents "proof that the defendant specifically intended to deliver a controlled substance to a 'person on or within 1,000 feet of school property or a library[,]'" rather than that the defendant *possessed* the drugs on or within 1,000 feet of school property or a library. *People v English*, ___ Mich App ___, ___ (2016) (opinion by Wilder, P.J.), quoting MCL 333.7410(3).

3.15(A) Establishing a Defendant's Habitual Offender Status

- Effective January 1, 2017, ADM File No. 2013-39 amended MCR 6.112(H) to provide that the trial court may permit amendment of the prosecution's notice of intent to seek an enhanced sentence unless it "would unfairly surprise or prejudice the defendant."

3.29(G) Presentence Investigation Report (PSIR)

- The trial court abused its discretion in finding, based solely on the prosecutor's statements, "that the prosecution met its burden to prove [a] challenged statement in the PSIR[]" indicating that the defendant was affiliated with a gang; "[e]ven assuming the truth of the prosecutor's assertions, they at most established that [the] defendant was at one time affiliated with [the] gang[, and t]hey [did] not establish that [he] *was affiliated*

with it at the time of the alleged crimes or thereafter, as the PSIR suggest[ed]." *People v Norfleet*, ___ Mich App ___, ___ (2016).

3.33(C)(1) Concurrent and Consecutive Sentences

- "[T]rial courts imposing one or more discretionary consecutive sentences are required to articulate on the record reasons for each consecutive sentence imposed." *People v Norfleet*, ___ Mich App ___, ___ (2016) (remanding for resentencing where "the trial court spoke only in general terms" about the defendant's background and history and the nature of the offenses involved and "did not speak separately as to each consecutive sentence[]" imposed under MCL 333.7401(3)).

- "[T]he Sixth Amendment does not prohibit the use of judicial fact-finding to impose [discretionary] consecutive sentencing." *People v Deleon*, ___ Mich App ___, ___ (2016), adopting the rationale of *Oregon v Ice*, 555 US 160, 164 (2009). "Although consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense[,]" and therefore does not implicate *Apprendi v New Jersey*, 530 US 466 (2000), *Alleyne v United States*, 570 US ___ (2013), and *People v Lockridge*, 498 Mich 358 (2015). *Deleon*, ___ Mich App at ___.

3.33(C)(2) Concurrent and Consecutive Sentences

- "[A] trial court may not impose multiple consecutive sentences [under MCL 333.7401(3)] as a single act of discretion nor explain them as such." *People v Norfleet*, ___ Mich App ___, ___ (2016). "The decision as to each consecutive sentence is its own discretionary act and must be separately justified on the record." *Id*. at ___ (remanding for resentencing where the trial court "did not give particularized reasons to impose each sentence under MCL 333.7401(2)(a)(*iv*) consecutive to the other, with reference to the specific offenses and the defendant[]").

3.33(C)(3) Concurrent and Consecutive Sentences

- "[T]he Sixth Amendment does not prohibit the use of judicial fact-finding to impose" a consecutive sentence under MCL 750.520b(3). *People v Deleon*, ___ Mich App ___, ___ (2016). Therefore, although the jury's verdict "did not necessarily incorporate a finding that [the defendant's first-degree criminal sexual conduct] conviction 'ar[ose] from the same transaction' as did his [second-degree criminal sexual conduct] conviction, . . . [the] defendant [had] no Sixth Amendment

right to have a jury make that determination[]" before the trial court could impose a consecutive sentence. *Id.* at ___, quoting MCL 750.520b(3) (second alteration in original).

3.33(C)(12) Concurrent and Consecutive Sentences

- "[W]here a statute grants a trial court . . . discretion to impose a consecutive sentence, the trial court's decision to do so is reviewed on an abuse of discretion standard, i.e., whether the trial court's decision was outside the reasonable and principled range of outcomes." *People v Norfleet*, ___ Mich App ___, ___ (2016) (further noting that "the combined term [resulting from the imposition of consecutive sentences] is not itself subject to a proportionality review[]" under *People v Milbourn*, 435 Mich 630, 635-636 (1990)).

3.41(C) Costs

- "[T]he trial court's policy of not paying [appointed appellate] counsel for time spent in preparing a delayed application for leave to appeal or for preparing [appellate] motions . . . when [the Court of Appeals] ultimately denies leave to appeal 'for lack of merit in the grounds presented' or denies relief on the motions constituted an abuse of discretion." *In re Attorney Fees of Foster*, ___ Mich App ___, ___ (2016).

- Under MCL 768.34, a defendant may not be ordered to repay the cost of appointed counsel if the prosecution enters an order of nolle prosequi. *People v Jose*, ___ Mich App ___, ___ (2016) (additionally holding that MCR 6.005(C) did not provide authority for the trial court to order reimbursement for the work appointed counsel performed before trial where "[t]he court never determined that [the] defendant was 'able to pay part of the cost of a lawyer' and never 'require[d] contribution[]'" under MCR 6.005(C)) (third alteration in original).

3.44 Restitution

- The victim "suffered a monetary loss[]" under the CVRA where he "had to use [accumulated] sick, personal, and vacation time [from his employer] in order to recuperate from . . . injuries[]" inflicted by the defendant. *People v Turn*, ___ Mich App ___, ___ (2016). Because the victim "lost the ability to use and be paid for taking that time in the future, and . . . the ability to be paid for that time upon termination of his employment[,]" the time constituted *income loss* under MCL 780.766(4)(c) "even though

he was paid by his employer for the time he used." *Turn*, ___ Mich App at ___.

3.54(C) Appellate Review of Felony Sentences

- If an appellate court determines that a departure sentence is reasonable, resentencing is not required, even if the lower court erred in scoring the guidelines. *People v Ambrose*, ___ Mich App ___, ___ (2016) (concluding that, "[i]n light of the facts of [the] case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[;]" accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables).

3.54(E)(1)(b) Appellate Review of Felony Sentences

- Although "the [Michigan] Supreme Court stated in [*People v Lockridge*, 498 Mich 358, 394 (2015)], that a defendant cannot establish plain error supporting relief where the court imposed an upwardly departing sentence and explained its reasons on the record[,]" the Court of Appeals was bound under *People v Steanhouse*, 313 Mich App 1, 46-49 (2015), to remand for proportionality review, even if the Court believed that a pre-*Lockridge* departure sentence was reasonable). *People v Stevens (Monica)*, ___ Mich App ___, ___ (2016).

- If an appellate court determines that a departure sentence is reasonable, resentencing is not required, even if the lower court erred in scoring the guidelines. *People v Ambrose*, ___ Mich App ___, ___ (2016) (concluding that, "[i]n light of the facts of [the] case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[;]" accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables).

- The trial court must score the guidelines before imposing a departure sentence. *People v Geddert*, ___ Mich ___, ___ (2016). Where the trial court failed to score points for any offense variables but departed from the guidelines range in part on the basis of conduct that should have been scored under OV 13, resentencing was required under *People v Francisco*, 474 Mich 82 (2006); "[e]ven though the guidelines ranges are now advisory[under *People v Lockridge*, 498 Mich ~~358 (2015)],"~~ ~~resentencing~~ was required "[b]ecause correcting the OV score would change the applicable guidelines range[.]" *Geddert*, ___ Mich at ___.

3.54(E)(2)(a) Appellate Review of Felony Sentences

- Because OV 12 "specifically states that it cannot be scored for criminal acts for which there was a conviction, . . . any criminal act scored under OV 12 would not be a criminal act found by the jury[;]" accordingly, where there was no indication in the record that the defendant admitted committing the contemporaneous felonious criminal acts supporting the score of 10 points for OV 12, and where removing the 10 points resulted in a change in the applicable guidelines range, he was entitled to a remand for possible resentencing under *People v Lockridge*, 498 Mich 358, 395, 397 (2015), and *United States v Crosby*, 397 F3d 103 (CA 2, 2005), even though the "evidence was [otherwise] sufficient to support" the score. *People v Norfleet*, ___ Mich App ___, ___ (2016).

3.56(C)(2) Motion to Correct Invalid Sentence

- "Even though the guidelines ranges are now advisory[under *People v Lockridge*, 498 Mich 358 (2015)]," resentencing was required where the trial court failed to properly score an offense variable and "correcting the OV score would change the applicable guidelines range[.]" *People v Geddert*, ___ Mich ___, ___ (2016), citing *People v Francisco*, 474 Mich 82 (2006).

3.56(C)(3) Motion to Correct Invalid Sentence

- Although "the [Michigan] Supreme Court stated in [*People v Lockridge*, 498 Mich 358, 394 (2015)], that a defendant cannot establish plain error supporting relief where the court imposed an upwardly departing sentence and explained its reasons on the record[,]" the Court of Appeals was bound under *People v Steanhouse*, 313 Mich App 1, 46-49 (2015), to remand for proportionality review, even if the Court believed that a pre-*Lockridge* departure sentence was reasonable). *People v Stevens (Monica)*, ___ Mich App ___, ___ (2016).

- If an appellate court determines that a departure sentence is reasonable, resentencing is not required, even if the lower court erred in scoring the guidelines. *People v Ambrose*, ___ Mich App ___, ___ (2016) (concluding that, "[i]n light of the facts of [the] case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[;]" accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables).

- The trial court must score the guidelines before imposing a departure sentence. *People v Geddert*, ___ Mich ___, ___ (2016). Where the trial court failed to score points for any offense variables but departed from the guidelines range in part on the basis of conduct that should have been scored under OV 13, resentencing was required under *People v Francisco*, 474 Mich 82 (2006); "[e]ven though the guidelines ranges are now advisory[under *People v Lockridge*, 498 Mich 358 (2015)]," resentencing was required "[b]ecause correcting the OV score would change the applicable guidelines range[.]" *Geddert*, ___ Mich at ___.

Chapter 4: Probation Revocation

4.4(A)(1) Conduct That Constitutes a Probation Violation

- The trial court erred in finding—without holding a hearing as required by MCR 6.445(E)—that the defendant had violated the terms of his probation; "while the court did not state the grounds for such a finding," to the extent it was based on crimes that were committed before the defendant was placed on probation, under MCL 771.3(1)(a), "the defendant could not have violated the terms of his probation for having committed an act amounting to a violation of a criminal law that preceded the imposition of the order of probation[.]" *People v Goss*, ___ Mich ___, ___ (2016).

Chapter 6: Habeas Corpus

6.3(D) Federal Habeas Corpus

- Where "the Michigan Court of Appeals 'is the last state court to adjudicate [a] claim on the merits[,]' . . . its opinion is . . . '[t]he relevant state court decision[]'" for purposes of habeas review under 28 USC 2254(d). *Shimel v Warren*, 838 F3d 685, 696 (CA 6, 2016) (rejecting the petitioner's contention that the Sixth Circuit Court of Appeals "should review the decision of the trial court and ignore the factual findings and legal conclusions of the Michigan Court of Appeals[]") (citation omitted; third alteration in original).

- The presumption of correctness in 28 USC 2254(e)(1) "speaks only to the factual determinations made by a 'State court'—it does not differentiate between state trial and state appellate courts[;]" accordingly, it applies to the findings of "'the last state court to adjudicate the claim on the merits[.]'" *Shimel v Warren*, 838 F3d 685, 696-697 (CA 6, 2016) (citation omitted).

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Chapter 1: Postjudgment Motions

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Part A: Procedural Issues

1.1 Trial Court's Authority to Grant Postjudgment Motions

Typically, "[a]fter a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

> "(1) by order of the Court of Appeals,
>
> (2) by stipulation of the parties,
>
> (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
>
> (4) as otherwise provided by law." MCR 7.208(A).

However, a trial court may grant certain timely-filed postjudgment motions described in MCR 7.208(B) after a claim of appeal has been filed (new trial,[1] judgment of acquittal (directed verdict),[2] withdraw a plea,[3] or correct an invalid sentence[4]). See MCR 7.208(A).

1.2 Time for Filing & Hearing Postjudgment Motion After Claim of Appeal Filed

If a claim of appeal has been filed, a motion for a new trial, judgment of acquittal (also called directed verdict), plea withdrawal, or correction of an invalid sentence must be filed as required by MCR 7.208(B)(1) (no later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(*iii*)) or MCR 7.211(C)(1) (motions to remand). See also MCR 6.419(C); MCR 6.429(B)(2); MCR 6.431(A)(2).

If an appeal has been filed, an expedited hearing is required within 28 days of filing, with the transcript to be filed within 28 days of the hearing. MCR 7.208(B)(3). The trial court can adjourn the hearing to secure evidence or for other good cause. *Id*.[5]

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[1] See Section 1.3 for more information on new trial requirements.

[2] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 8, for more information on directed verdict requirements.

[3] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 5, for more information on withdrawing a misdemeanor plea, and Chapter 6, for information on withdrawing a felony plea.

[4] See Section 3.56 for more information on correcting an invalid sentence.

Part B: Substantive Issues

1.3 Motion for New Trial

A. Generally

"The court rules provide several bases for a trial court to award a defendant a new trial." *People v Powell (Willie)*, 303 Mich App 271, 278-280 (2013) (holding that "[t]he trial court could have properly granted [the] defendant's motion for a new trial [based on the improper exclusion of evidence]" under either MCR 2.611(A)(1)(a) (rule of civil procedure)[6] or MCR 6.431(B) (rule of criminal procedure)).

1. Jury Trial

"A motion for a new trial may be filed before the filing of a timely claim of appeal." MCR 6.431(A)(1). "If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence." MCR 6.431(A)(3). If a claim of appeal has been filed, a motion for a new trial must be filed as required by MCR 7.208(B)(1) (no later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(*iii*)) or MCR 7.211(C)(1) (motions to remand). MCR 6.431(A)(2). The court may order a new trial on any ground that would support appellate reversal of the conviction or because the court believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). The court must make a record of its reasons for granting or denying the motion. *Id*. The court may state the reasons on the record or state them in a written ruling made part of the record. *Id*. See also MCL 769.26 and MCL 770.1.

A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627 (1998).

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[5] A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook*, *Vol. 1*, Chapter 1, for more information on foreign language interpreters.

[6] See MCR 6.001(D), providing, in part, that "the rules of civil procedure apply to cases governed by [the rules of criminal procedure], except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, or (3) when a statute or court rule provides a like or different procedure."

MCL 769.26 states:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

MCL 769.26 embodies what is commonly referred to as Michigan's "harmless error rule." *People v Lukity*, 460 Mich 484, 491 (1999). MCL 769.26 not only "creates a presumption that preserved, nonconstitutional error is harmless," it also demands that the defendant (rather than the prosecution) bear the burden of demonstrating that it is "more probable than not" that the error complained of undermined the reliability of the verdict or resulted in a miscarriage of justice. *Lukity*, 460 Mich at 493-494.

"In contrast, [MCL 769.]26 does not apply to preserved, constitutional error." *Lukity*, 460 Mich at 495 n 3. For preserved, constitutional errors, the reviewing court must first determine whether the error is a structural defect that defies harmless error analysis (such as total deprivation of the right to counsel or denial of the right to self-representation). *People v Anderson (James) (After Remand)*, 446 Mich 392, 404-405 (1994). If any of these types of errors occur, automatic reversal is required. *Id.* at 405. If the error is instead a trial error that occurred during the presentation of the case to the jury, it is subject to harmless error analysis, and the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt. *Id*. at 405-406.

Regarding both unpreserved constitutional and nonconstitutional errors, review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-764, 774 (1999). "Reversal is only warranted when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* at 763-764 (internal quotations omitted).

2. Bench Trial

MCR 6.431(C) addresses a motion for new trial after a bench trial. "[O]n granting a new trial and with the defendant's consent, [the court may] vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment." *Id*.

"In a case tried without a jury, the appellant need not file a motion for remand or a motion for a new trial to challenge the great weight of the evidence in order to preserve the issue for appeal." MCR 7.211(C)(1)(c).

B. Grounds for a New Trial

1. Instructional Error[7]

Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the issues to be tried to the jury. *People v Dobek*, 274 Mich App 58, 82 (2007). Even if somewhat imperfect, jury instructions are not erroneous if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v McLaughlin*, 258 Mich App 635, 668 (2003).

The omission of an essential element of a criminal jury instruction is an error of constitutional magnitude. *Carines*, 460 Mich at 761. If the defendant preserves the issue at trial, and the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it was harmless beyond a reasonable doubt. *Id*. at 774. See also *Neder v United States*, 527 US 1, 10 (1999) (indicating that failure to instruct a jury on one of several elements may be subject to a harmless-error analysis). If the defendant fails to preserve the issue at trial, review on appeal is for plain error. *Carines*, 460 Mich at 764. Where an instruction omitted an element of an offense, and "the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *People v Kowalski*, 489 Mich 488, 506 (2011). Furthermore, where a defendant's attorney "clearly expresses satisfaction with a trial court's decision [regarding a jury instruction], counsel's action will be deemed to constitute a

[7] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10, for additional discussion of jury instructions.

waiver[]" of the defendant's claim on appeal that a jury instruction was improper. *Id*. at 503-504 ("by expressly and repeatedly approving the jury instructions on the record, [the] defendant waived any objection to the erroneous instructions[]").

Failure to give a requested jury instruction constitutes "[e]rror that requires reversal . . . when the error is outcome determinative, meaning the error undermined the reliability of the jury verdict." *People v Mitchell (Bradford)*, 301 Mich App 282, 288-289 (2013) (citing *People v Cornell*, 466 Mich 335, 365 (2002), and holding that the trial court's abuse of discretion in failing to give a requested instruction on a lesser included offense constituted error requiring reversal where an inquiry sent by the jury during deliberations "strongly suggest[ed] that it wanted to consider, and likely would have convicted [the] defendant of, a lesser charge").

"It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *People v Duncan (Timothy)*, 462 Mich 47, 48 (2000) (the defendant's two felony-firearm convictions were reversed because the jury was not instructed on any elements of that offense).

"[W]hen a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element," a challenge to the sufficiency of the evidence "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Musacchio v United States*, 577 US ___, ___ (2016). "If a jury instruction requires the jury to find guilt on the elements of the charged crime, a defendant will have had a 'meaningful opportunity to defend' against the charge[, a]nd if the jury instruction requires the jury to find those elements 'beyond a reasonable doubt,' the defendant has been accorded the procedure that [is] required to protect the presumption of innocence." *Id*. at ___ (citations omitted).

"The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, 296 Mich App 326, 330 (2012), citing *People v Wade (Michael)*, 283 Mich App 462, 464-468 (2009). Accordingly, where the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, the error's prejudicial effect was mitigated by the presence of the missing element on the verdict form; thus, no reversible error occurred. *Eisen*, 296 Mich App at 329-331.

2. Jury Misconduct

A juror's misconduct does not automatically warrant a new trial. *People v Strand*, 213 Mich App 100, 103-104 (1995) (trial court did not abuse its discretion when it denied the defendant's motion for a new trial where, after trial, two jurors said they learned of the defendant's prior sexual assault conviction but questioned whether the information was true and said that it did not affect the impartiality of their verdicts). See also *People v Jackson (Andre)*, 292 Mich App 583, 592-593 (2011) (trial court did not abuse its discretion in denying defendant's request for a new trial where a juror was dismissed after disclosing she was "too stressed and overwhelmed to continue[,]" and the trial court did not question the remaining jurors, but questioned the dismissed juror and found that "the remaining jurors had [not] been exposed to improper influences [and] their ability to render a fair and impartial verdict had [not] been compromised"). To obtain a new trial based on juror misconduct, the defendant must show that the misconduct "affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox (After Remand)*, 232 Mich App 541, 557 (1998). Also, "[t]he fact that the jury violated the express instructions of the court is not in and of itself a ground for reversal. Prejudice is not assumed; it must be shown." *People v Rohrer*, 174 Mich App 732, 739 (1989).

A new trial can also be granted based on a juror's failure to disclose information during voir dire. See *People v Hannum*, 362 Mich 660, 666 (1961) (defendant entitled to a new trial where a juror did not disclose that he was a township police officer and special deputy sheriff); and *People v DeHaven*, 321 Mich 327, 329, 334-335 (1948) (trial court erroneously denied the defendant's motion for a new trial where jurors, in effect, falsely denied they or any relative had been involved in a similar case). But see *People v Miller (Michael)*, 482 Mich 540, 542-543, 561 (2008) (denial of motion for new trial proper exercise of discretion where juror testified at a posttrial evidentiary hearing that he concealed the fact that he was a convicted felon so that he could serve on the jury, that he had attempted to be fair during the trial, and that he had not tried to improperly persuade the jury); and *People v Crear*, 242 Mich App 158, 167 (2000) (denial of motion for new trial proper exercise of discretion where juror failed to reveal during voir dire that, two weeks before trial, she was present when the prosecutor spoke to her college class and mentioned the case).

"The rule is well established that jurors may not impeach [i.e., cast doubt on] their verdict by affidavits. To permit this would

open the door for tampering with the jury subsequent to the return of their verdict." *People v Pizzino*, 313 Mich 97, 105 (1945). "Once a jury has been polled and discharged, oral testimony or affidavits by its members or outside parties may only be received on 'extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors or matters of form.'" *People v Riemersma*, 104 Mich App 773, 785 (1981), quoting *Hoffman v Monroe Pub Schools*, 96 Mich App 256, 261 (1980). To establish that an extrinsic influence is error requiring reversal, the defendant must prove: (1) that the jury was exposed to an extraneous influence, and (2) that the extraneous influence created a real and substantial possibility that the jury's verdict was affected. *People v Budzyn*, 456 Mich 77, 88-89 (1997).

The defendant was not "entitled to a new trial [on the ground that] a juror engaged in misconduct" by "conduct[ing] an experiment" in which he, in his own home and before deliberations were complete, "attempted to recreate the crime scene by pointing his own gun at a mirror." *People v Stokes*, 312 Mich App 181, 186, 189 (2015). The juror's "experiment was not an extraneous influence and [could not] be a basis for attacking the jury's verdict[,]" because it was "closely intertwined with [the juror's] deliberative process[]" and was not "premised on anything beyond [the] juror's memory of the testimony[;]" moreover, because "[t]he juror . . . did not share the results of his experiment with any other jurors, . . . no extraneous facts were brought into the jury room." *Stokes*, 312 Mich App at 188-189, citing *People v Fletcher*, 260 Mich App 531, 537, 539, 541-543 (2004) (additional citations omitted).

In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial. *Remmer v United States*, 347 US 227, 229 (1954). The presumption is not conclusive, but the burden rests heavily on the government to establish that such contact with the juror was harmless to the defendant. *Id*.

The remedy for juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. *Smith (Harold) v Phillips (William)*, 455 US 209, 215 (1982).

3. Misconduct Involving the Parties, Witnesses, or Attorneys

Witnesses may give testimony that the court concludes should be struck. The usual remedy is a cautionary instruction. *People v*

Droste, 160 Mich 66, 77-78 (1910). See also *People v Stinson*, 113 Mich App 719, 727 (1982) ("an unresponsive, volunteered answer [given by a police officer] to a proper question [posed by defense counsel] is not cause for granting a mistrial"; "where the trial court sustains an objection to an answer and instructs the jury to disregard the answer, no error occurs"), and *People v Von Everett*, 156 Mich App 615, 622 (1986) (where a police officer's reference to the defendant's "mug shot" was not inherently prejudicial or intentionally injected into the proceedings, and a lay witness's testimony that he had seen the defendant while the defendant was on "parole" was an unresponsive, volunteered answer to a proper question, the trial court did not abuse its discretion in denying a mistrial). However, a different outcome may be warranted where the impermissible testimony was given by a police officer. *People v Holly*, 129 Mich App 405 (1983)[8]. In *Holly*, 129 Mich App at 14-15, the Court of Appeals reviewed a police officer's nonresponsive and inadmissible answer on cross-examination and held:

> "[W]hen an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense. Police witnesses have a special obligation not to venture into such forbidden areas. The police officer's original response was clearly nonresponsive. Being a police sergeant and the officer in charge of the case, he should have known better than to volunteer such information. Inadmissible evidence tying a defendant to other crimes is highly prejudicial."

To the extent that an attorney's remarks are prejudicial, they can be cured by the trial court's instructions that the jury must decide the case based on the evidence, and that the remarks of counsel are not evidence. *People v Thomas (Carl)*, 260 Mich App 450, 456 (2004).

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013) (quoting *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978), and holding that although defense counsel "intended to prejudice the jury[]" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the

[8] But see *Stinson*, 113 Mich App at 727.

jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

A violation of the Fourteenth Amendment Due Process Clause of the United States Constitution occurs when a prosecutor in bad faith fails to preserve potentially exculpatory evidence. *Arizona v Youngblood*, 488 US 51, 57-58 (1988). Whether the prosecutor acted in bad faith is a question of law for the court, not the jury. *People v Cress*, 468 Mich 678, 690 n 4 (2003).

A conviction obtained through the knowing use of perjured testimony violates a defendant's Fourteenth Amendment due process rights, and will be reversed and a new trial ordered if the tainted evidence is material to the defendant's guilt or punishment. *People v Aceval*, 282 Mich App 379, 389 (2009). "To prove that the prosecutor's failure to correct false testimony violated due process rights, [the defendant] must demonstrate that: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Rosencrantz v Lafler*, 568 F3d 577, 583-584 (CA 6, 2009). "[T]he crux of the due process analysis in cases of alleged prosecutorial misconduct is whether the defendant received a fair trial." *Id*. at 391. In *Aceval*, 282 Mich App at 383-384, the prosecutor and trial judge acquiesced in the presentation of perjured testimony to protect the identity of a confidential informant. However, the defendant's first trial resulted in a hung jury and a mistrial, and the defendant ultimately pleaded guilty during his second trial. *Id*. at 394-385, 392. On appeal, the Court of Appeals held that "the complained-of misconduct did not prejudice [the] defendant because he received the remedy that was due him: a new trial." *Id*. at 393. According to the Court, "[a]lthough both the trial court's and the prosecutor's conduct was plainly reprehensible, the blameworthiness of either is not the critical factor, because the primary inquiry is the misconduct's effect on the trial." *Id*. at 392-393. Consequently, the Court declined to bar retrial based on the facts of the case, but noted that its decision "[wa]s not to suggest, however, that prosecutorial misconduct can never invoke the constitutional protection against double jeopardy." *Id*. at 391-392 n 5. The Court emphasized that the defendant was not convicted at the first trial and that a mistrial granted because of "manifest necessity" (in this case, the hung jury) does not generally violate a defendant's double jeopardy protection. *Id*. at 392, 392 n 6.

"It is inconsistent with due process when the prosecution allows false testimony from a state's witness to stand uncorrected." *People v Smith (Feronda)*, 498 Mich 466, 475 (2015), citing *Napue v Illinois*, 360 US 264, 269 (1959) (additional citations omitted). In *Smith (Feronda)*, 498 Mich at 470, "the prosecution breached a duty to correct the substantially misleading, if not false, testimony of a key witness about his formal and compensated cooperation in the government's investigation." The defendant was entitled to a new trial because, "[g]iven the overall weakness of the evidence against the defendant and the significance of the witness's testimony, . . . there [was] a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the verdict." *Smith (Feronda)*, 498 Mich at 470, citing *Napue*, 360 US at 271-272. "Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness," and "[c]apitalizing on [the witness]'s testimony that he had no paid involvement in the defendant's case [was] inconsistent with a prosecutor's duty to correct false testimony." *Smith (Feronda)*, 498 Mich at 480, 487, citation omitted. Because "there [was] a 'reasonable likelihood' that the false impression resulting from the prosecutor's exploitation of the testimony affected the judgment of the jury[,] . . . the defendant [was] entitled to a new trial." *Id*. at 483, quoting *Napue*, 360 US at 271.

See, however, *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding that "the trial court did not abuse its discretion by denying [the] defendant's motion for a new trial based on perjury[]" where, "[e]ven if the prosecutor knowingly presented perjured testimony, the false testimony likely would not have affected the judgment of the jury[;]" although "the inconsistencies [in a key witness's testimony] . . . certainly cast doubt on [the witness's] testimony at trial and raised questions as to his involvement in the [defendant's crimes]," "there was concrete evidence presented which implicated [the] defendant, despite the level of [the witness's] potential involvement[]").

4. Newly Discovered Evidence

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692, quoting *People v Johnson (Johnnie)*, 451 Mich 115, 118 n 6 (1996). "[T]he defendant carries the burden of making the requisite showing

regarding each of the four parts of the *Cress* test." *People v Rao*, 491 Mich 271, 274 (2012).

"[W]hen a defendant knew or should have known that his [or her] codefendant could provide exculpatory testimony, but does not obtain that testimony because the codefendant invoked the privilege against self-incrimination, the codefendant's posttrial statements do not constitute newly discovered evidence, but are merely newly available evidence." *People v Terrell*, 289 Mich App 553, 555 (2010). Although there may be cases in which a codefendant's post-trial or post-conviction exculpatory statements may qualify as newly discovered evidence under MCR 6.431(B), where a defendant "knew or should have known that his [or her] codefendant could offer material testimony as to [the] defendant's role in the charged crime, his [or her] inability or unwillingness to procure that testimony before or during trial should not be redressed by granting him [or her] a new trial." *Terrell*, 289 Mich App at 570.

"[U]nder *Cress*, when a defendant is *aware* of evidence before trial, he or she is charged with the burden of using *reasonable diligence* to make that evidence available and produce it at trial[, and a] defendant who fails to do so cannot satisfy the first and third parts of the *Cress* test." *Rao*, 491 Mich at 283. In *Rao*, 491 Mich at 274-279, the defendant sought a new trial following her conviction of second-degree child abuse, arguing that newly discovered x-rays, taken approximately 18 months after the x-ray evidence admitted at trial, demonstrated that the child's rib fractures were caused by metabolic bone disease. The Michigan Supreme Court concluded that defense counsel's questions to medical experts at trial about whether additional x-rays could have assisted the defense demonstrated that "[the] defendant and defense counsel were aware of this evidence at the time of trial[;]" furthermore, reasonable diligence to acquire the evidence was not demonstrated where the defendant did not "move in the trial court for an order permitting additional x-rays of the child's ribs to be taken." *Id*. at 286, 289-290. The Court explained:

> "When evidence is known to the defendant at the time of trial, but is claimed to have been unavailable, the third part of the *Cress* test is necessarily implicated because it requires a showing that the defendant 'could not, using reasonable diligence, have discovered and produced the evidence at trial[.]' *Cress*, 468 Mich at 692. . . .

> [W]hat constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case. . . . [T]he law affords a defendant procedural avenues to secure and produce evidence and, under *Cress*, a defendant must employ these avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial." *Rao*, 491 Mich at 283-284.

When a third party's confession is the newly discovered evidence on which a defendant's new trial motion is based, the trial court should determine the veracity of the confession in light of established evidence. *Cress*, 468 Mich at 692. "A false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Id.* at 692.

"The discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v Mechura*, 205 Mich App 481, 483 (1994).

The affidavit of a recanting witness may not be sufficient grounds for a new trial. *People v Dupree*, 128 Mich App 368, 370-371 (1983). In *Dupree*, 128 Mich App at 370-371, a prosecution witness stated in an affidavit, and testified at a remand hearing, that he had perjured himself at the defendant's trial, and that he had not actually seen the defendant shoot the victim. The trial court denied the defendant's motion for a new trial on the basis of this evidence, noting that the witness had not been credible at trial, and that the witness's testimony had been cumulative and not essential to the case. *Id*. For these reasons, the trial court did not abuse its discretion in finding that the recanting witness's testimony did not render a different result probable on retrial. *Id*.

The trial court has discretion whether to grant a new trial on the basis of recanted testimony and due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witnesses and other trial witnesses. *People v Canter*, 197 Mich App 550, 560 (1992). Where newly discovered evidence takes the form of recantation testimony, Michigan courts traditionally regard it as suspect and untrustworthy and only reluctantly grant new trials on this basis. *Id.* at 559-560.

"[I]mpeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in [*Cress*, 468 Mich at 692; however,] . . . a material, exculpatory connection must exist

between the newly discovered evidence and significantly important evidence presented at trial[, and] . . . the evidence must make a different result probable on retrial." *People v Grissom*, 492 Mich 296, 299-300 (2012). In *Grissom*, 492 Mich at 300, 305, the defendant was convicted of two counts of first-degree criminal sexual conduct for allegedly raping the complainant in a grocery store parking lot in May 2001. Two years after the defendant's convictions, the prosecutor obtained three police reports from California concerning events that took place in the fall of 2001. *Id*. at 305-311. These reports "show[ed] that the complainant reported to the police, family, or friends that she had been raped by at least eight different people on at least nine separate occasions[,]" including a recanted allegation of rape at a Colorado hotel, an unrecanted allegation of rape in a restaurant parking lot, and an allegation that she had been gang raped by her brother and his friends. *Id*. at 326, 326 n 4 (Kelly, J., concurring). The defendant subsequently moved for relief from judgment on the basis of the newly discovered police reports. *Id*. at 321. The Court of Appeals, citing *People v Davis (David)*, 199 Mich App 502, 516 (1993), affirmed the trial court's denial of the motion, holding that "newly discovered evidence cannot form the basis for granting a new trial if its sole purpose is to impeach a witness's credibility." *Grissom*, 492 Mich at 311.

The Michigan Supreme Court reversed, overruling *Davis (David)*, 199 Mich App at 516, and "any [other] Michigan decisions [to the extent that they] impose a per se prohibition against granting a new trial in light of newly discovered impeachment evidence[.]" *Grissom*, 492 Mich at 320. Noting that "newly discovered impeachment evidence ordinarily will not justify the grant of a new trial[,]" the Court held that such evidence could, in a "rare case[,]" warrant the grant of a new trial. *Id.* at 317-318. The Court explained:

> "Newly discovered impeachment evidence concerning immaterial or collateral matters cannot satisfy *Cress*[, 468 Mich 678]. But if it has an exculpatory connection to testimony concerning a material matter and a different result is probable, a new trial is warranted. It is not necessary that the evidence contradict specific testimony at trial." *Grissom*, 492 Mich at 321.

Accordingly, the Court remanded the case to the trial court, directing it to "evaluate the new evidence and determine whether there exists an exculpatory connection between it and the heart of the complainant's testimony[,]" considering "only [those] facts . . . in the newly discovered evidence and those in the record." *Grissom*, 492 Mich at 321.

Although "[n]ewly discovered impeachment evidence may be grounds for a new trial if[] . . . there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence[,]" counsel must still be reasonably diligent in securing the evidence before trial. *People v Armstrong (Parys)*, 305 Mich App 230, 241-243 (2014) (the trial court properly denied the defendant's motion for a new trial where "counsel waited until the evening before trial to search for . . . newly discovered impeachment witnesses[;]" if "counsel [had] more actively attempted to secure [the] witnesses, he could have discovered the witnesses in time for . . . trial[]") (citation omitted).

5. Brady Violations[9]

A defendant may be entitled to a new trial on the basis of a violation of *Brady v Maryland*, 373 US 83 (1963). See *People v Dimambro*, ___ Mich App ___, ___ (2016). In order to establish a *Brady* violation, a defendant must establish that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *People v Chenault*, 495 Mich 142, 155 (2014), citing *Strickler v Greene*, 527 US 263, 281-282 (1999). In *Chenault*, the Michigan Supreme Court explained the materiality requirement as follows:

> "To establish materiality, a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' This standard 'does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal[.]' The question is whether, in the absence of the suppressed evidence, the defendant 'received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' In assessing the materiality of the evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal."

Chenault, 495 Mich at 150-151 (citations omitted); see also *Dimambro*, ___ Mich App at ___ (expert testimony regarding undisclosed medical examiner photographs "demonstrate[d] that there [was] a reasonable probability that the outcome of the

[9] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook: Vol. 1*, Chapter 8, for additional discussion of *Brady* violations.

trial [might] have been different had the photographs been disclosed to the defense[]" where the photographs may have revealed that the child-victim's injuries were not intentionally inflicted; accordingly, "the trial court properly concluded that [the] defendant [was] entitled to a new trial").

6. Insufficient Evidence

"The trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done." *People v Abraham (Nathaniel)*, 256 Mich App 265, 269 (2003).

There is a distinction between the standard for granting a new trial and that required to grant a directed verdict of acquittal. *Lemmon*, 456 Mich at 633, 645 n 25. "If the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered." *Id.* at 634. In contrast, "[a] trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 627.

"The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400 (2000). "The scope of review is the same whether the evidence is direct or circumstantial." *Id.* at 400. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428 (2002). "'[An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.'" *People v Wolfe*, 440 Mich 508, 514-515 (1992), amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376 (1974).

"[W]hen a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element," a challenge to the sufficiency of the evidence "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction."

Musacchio, 577 US at ___. "If a jury instruction requires the jury to find guilt on the elements of the charged crime, a defendant will have had a 'meaningful opportunity to defend' against the charge[, a]nd if the jury instruction requires the jury to find those elements 'beyond a reasonable doubt,' the defendant has been accorded the procedure that [is] required to protect the presumption of innocence." *Id*. at ___ (citations omitted).

7. Polygraph Examinations

Polygraph results may be admissible in support of a defendant's motion for a new trial. *People v Barbara*, 400 Mich 352, 412 (1977).

"Polygraph test results may be considered in deciding a motion for [a] new trial where . . . (1) they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications and the quality of the polygraph equipment meets with the approval of the court, (4) either the prosecutor or the court is able to obtain an independent examination of the subject or of the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject." *Mechura*, 205 Mich App at 484.

C. Standard of Review

A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *People v Lonsby*, 268 Mich App 375, 382 (2005).

A court's decision to dismiss a juror during deliberations based on misconduct, illness, or other valid reason is reviewed for an abuse of discretion. *People v Mason*, 96 Mich App 47, 49-50 (1980).

A trial court's decision whether to grant a mistrial based on juror misconduct during deliberations is reviewed for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175 (1997).

The trial court's grant or denial of a motion for a new trial on the basis of juror misconduct is reviewed for an abuse of discretion. *People v Johnson (Benny)*, 245 Mich App 243, 250 (2001).

1.4 Ineffective Assistance of Counsel

A. General Standard

The Michigan and United States Constitutions guarantee criminal defendants the right to the effective assistance of counsel. US Const,

Am VI; Const 1963, art 1, § 20; *People v LeBlanc*, 465 Mich 575, 578 (2002).[10]

Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v McGhee (Larry A)*, 268 Mich App 600, 625 (2005).

1. The *Strickland* Standard

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687 (1984); *People v Pickens*, 446 Mich 298, 302-303 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. *People v Taylor (Geracer)*, 275 Mich App 177, 186 (2007). In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Taylor (Geracer),* 275 Mich App at 186. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, 466 US at 694; *People v Stanaway*, 446 Mich 643, 687-688 (1994). The court must determine whether "'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *People v Mitchell*, 454 Mich 145, 156 (1997), quoting *Strickland*, 466 US at 687.

An attorney has a duty to conduct a reasonable investigation, and failure to do so can amount to ineffective assistance of counsel. *People v Grant (William)*, 470 Mich 477, 485-486 (2004). The investigation must be reasonably conducted to permit a strategic choice on what evidence to present. *Wiggins v Smith (Sewall)*, 539 US 510, 522-523 (2003). "'[I]t is particularly

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[10] The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., created the Michigan Indigent Defense Commission (MIDC) within the judicial branch and established a new system for the appointment of defense counsel for indigent defendants. Under the MIDCA, the MIDC is required to "[d]evelop[] and oversee[] the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and [the MIDCA]." MCL 780.989(1)(a). However, MCL 780.1003(1) provides:

> "Nothing in [the MIDCA] shall be construed to overrule, expand, or extend, either directly or by analogy, any decisions reached by the United States supreme court or the supreme court of this state regarding the effective assistance of counsel."

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook: Vol. 1*, Chapter 3, for discussion of the MIDCA.

unreasonable to fail to track down readily available and likely useful evidence that a client himself [or herself] asks his [or her] counsel to obtain.'" *Peoples v Lafler*, 734 F3d 503, 514 (CA 6, 2013) (citation omitted) (granting habeas corpus relief to the petitioner on the ground that "[t]rial counsel's failure to use readily available evidence to impeach the credibility of the only witnesses tying [the petitioner] to the crime" constituted ineffective assistance of counsel).

However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Davis (Marcus) (On Rehearing)*, 250 Mich App 357, 368 (2002). The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Dixon (Darrell)*, 263 Mich App 393, 312 (2004). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly (Robert)*, 186 Mich App 524, 526 (1990). A defendant can establish the factual predicate for his or her claim of ineffective assistance of counsel for failure to call alibi witnesses "by providing affidavits to substantiate that the witnesses would have testified as he [or she] purports." *People v Vaughn (Joseph) (Vaughn I)*, 291 Mich App 183, 194 (2010). Without proof of substantial prejudice, a defense attorney's choice to pursue one of two weak defense strategies is not ineffective assistance. *People v LaVearn*, 448 Mich 207, 216 (1995).

Counsel's failure to interview witnesses, alone, is not enough to show ineffective assistance; the defendant must show that the failure prevented counsel from discovering valuable information that would have "substantially benefited" the defendant, or that the attorney's unpreparedness prejudiced the defense. *People v Caballero*, 184 Mich App 636, 640-642 (1990).

In *Avery v Prelesnik*, 548 F3d 434, 435 (CA 6, 2008), the defendant was deprived of his right to the effective assistance of counsel when his attorney never personally attempted to contact or interview any potential alibi witnesses, instead relying on information provided to him by an investigator. *Id.* at 437-438. Where "potential alibi witnesses [were] coupled with an otherwise weak case[,] the failure to investigate the testimony [was] sufficient to 'undermine confidence' in the outcome of the jury verdict." *Id*. at 438-439. The Court of Appeals for the Sixth Circuit noted that the relevant inquiry was not "whether [the defendant] was ultimately innocent, but, rather, whether he was deprived a reasonable shot of acquittal." *Id*. at 439.

In *Brown (Michael) v Smith (David)*, 551 F3d 424, 426 (CA 6, 2008), the defendant was deprived of his right to the effective

assistance of counsel when his attorneys failed to investigate and obtain records from the victim's counseling sessions, which would have undermined the victim's credibility. The defendant established that defense counsels' failure to investigate constituted deficient performance, where "[t]he prosecution's entire case hinged on the credibility of [the victim], and defense counsel were aware that [the victim's counselor] (who disbelieved [the victim]) had treated her near the time of the alleged assault . . . ." *Id.* at 431. Where "the verdict turned entirely on [the victim's] credibility as a witness, [the defendant's] attorneys should have taken all reasonable steps to investigate evidence relevant to [the victim's] credibility; [and] their failure to do so left important facts undiscovered." *Id*. at 435. "[W]here there was no other evidence of [the defendant's] guilt," the absence of the missing evidence was an error that sufficiently undermined confidence in the outcome of the defendant's trial. *Id*.

"Competent counsel can be expected to undertake a 'thorough investigation of law and facts relevant to plausible options' for the defense." *Couch v Booker*, 632 F3d 241, 246 (CA 6, 2011), quoting *Strickland*, 466 US at 690. "[W]hile this does not require counsel to investigate every conceivable defense, any limitation on counsel's investigation must be supported by a 'reasonable professional judgment[].'" *Couch*, 632 F3d at 246, quoting *Strickland*, 466 US at 691. "[A] lawyer cannot make a protected strategic decision without investigating the potential bases for it[,]" and "[i]t is particularly unreasonable to fail to track down readily available and likely useful evidence that a client himself [or herself] asks his [or her] counsel to obtain." *Couch*, 632 F3d at 246. In *Couch*, 632 F3d at 242, 246, defense counsel was ineffective for failing to investigate a causation defense where he was aware of "several facts that made a causation defense a 'plausible' option" and the defendant "not only told [him] to pursue the defense but also told him [] to do so . . . by obtaining . . . a [readily available] report about the incident."

In the defendant's trial for second-degree criminal sexual conduct (CSC-II), MCL 750.520c, involving his eight-year-old daughter, "defense counsel's performance was constitutionally deficient because she failed to exercise reasonable professional judgment when she decided to forgo any investigation of the case before settling on a defense strategy[, and t]hat deficiency prejudiced [the] defendant by undermining the reliability of the outcome of his trial, which rested solely on the credibility of the complainant and [the] defendant." *People v Trakhtenberg*, 493 Mich 38, 43-44 (2012). In *Trakhtenberg*, 493 Mich at 43, "the

complainant testified that [the] defendant touched her three or four times . . . and would lower her hand to his genitals[;]" the defendant, "[a]s the only defense witness, . . . testified that he never forced the complainant to touch his genitals and that he touched the complainant's genitals six times to apply medication at [the insistence of the complainant's mother and the defendant's ex-wife] after a heated argument over whether it was appropriate for him to apply the ointment."

The *Trakhtenberg* Court held that defense counsel's decision to forego discovery, on the ground that it was "irrelevant to the defense theories[]" that the complainant could be impeached with a prior inconsistent statement regarding the number of times the defendant made her touch him and that the defendant lacked the requisite intent of sexual gratification, was constitutionally deficient in light of the defendant's ex-wife's testimony at the *Ginther*[11] hearing that she had made negative comments about the defendant to the complainant and had brought the complainant to a youth pastor before bringing her to CARE House for a forensic interview. *Trakhtenberg*, 493 Mich at 45-47, 52-55. Counsel erred in failing to interview the CARE House worker who performed the interview, failing to procure an expert witness regarding the propriety of the interview, failing to identify the factual predicate of each of the five charged counts of CSC-II, and failing to cross-examine the defendant's ex-wife; further, the *Trakhtenberg* Court noted, "defense counsel may not use trial strategy to insulate trial decisions if counsel cannot provide a reasonable basis for the chosen strategy, particularly where . . . the strategy is chosen before conducting any reasonable investigation." *Id.* at 52, 53, 53 n 8, 54-55.

In a "case involving the unexplained and unwitnessed death of a child, [in which] expert testimony was critical to explain whether the cause of death was intentional or accidental[,]" the defendant was entitled to a new trial because of defense counsel's constitutionally ineffective "failure to attempt to engage a single expert witness to rebut the [testimony of the prosecution's five expert witnesses that the child died as a result of shaken baby syndrome and/or blunt force trauma], or to attempt to consult an expert with the scientific training to support the defendant's theory of the case[that the child's injuries resulted from an accidental fall.]" *People v Ackley*, 497 Mich 381, 383-387, 390-391, 393 (2015) (concluding that there was "no objectively reasonable explanation for counsel's decision to confine his pursuit of expert assistance to . . . a self-proclaimed *opponent* of the very defense

[11] *People v Ginther*, 390 Mich 436, 443-444 (1973).

theory counsel was to employ at trial, despite [the expert's] referral to at least one other expert who could provide qualified and suitable assistance to the defendant[,]" or for counsel's "fail[ure] to . . . educate himself or conduct any independent investigation of the medical issues at the center of the case[]").

In the defendant's trial for third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 but less than 16 years old), defense counsel's failure to pursue the introduction of cell phone records to discredit the complainant's testimony that she had not communicated with the defendant after he raped her "not only fell below an objective standard of reasonableness, but also prejudiced [the] defendant." *People v Armstrong (Richard)*, 490 Mich 281, 283, 286-288, 294 (2011). "Although the issue of consent is . . . irrelevant under MCL 750.520d(1)(a), . . . defense counsel did not seek to admit the records to establish that the alleged intercourse was consensual[; r]ather, defense counsel sought to establish that the complainant's allegations that intercourse—forcible or otherwise—occurred at all lacked credibility because she falsely testified that she had not called or communicated with [the] defendant after the alleged rapes." *Armstrong (Richard)*, 490 Mich at 292. Counsel admitted that his failure to pursue admission of the records was a mistake rather than a matter of trial strategy, and the prosecution did not appeal the trial court's finding that counsel's error fell below an objective standard of reasonableness. *Id*. at 290, 293. Furthermore, "the Court of Appeals clearly erred by affirming the trial court's finding of no prejudice[,]" because "even assuming that the evidence would have worked slightly against [the] defendant, it does not follow that the evidence would not also have worked so significantly against the complainant as to destroy her credibility and result in [the] defendant's acquittal." *Id*. at 291, 293.

In a case in which the defendant was charged with first-degree criminal sexual conduct (CSC-I), defense counsel was ineffective for failing to present evidence that "the complainant had engaged in consensual vaginal and anal sex[]" with her live-in boyfriend; "[t]he fact that the complainant was sexually active and living with her boyfriend at age 19, well before" she was examined by a pediatrician who testified that he found extensive hymenal changes and a chronic anal fissure and that these findings were consistent with those of either a sexually active adult woman or an abused child, was "highly relevant." *People v Shaw (Barry)*, ___ Mich App ___, ___ (2016). "[E]vidence of an alternative explanation for the hymenal changes and source for the chronic anal fissure would have been admissible under the exception to the rape shield statute[, MCL 750.520j(1)(b),] and defense counsel's failure to ask the boyfriend about these issues

fell below an objective standard of reasonableness." *Shaw (Barry)*, ___ Mich App at ___ (citations omitted).

In the defendant's trial for first-degree and second-degree criminal sexual conduct involving his then-three-year-old daughter, "defense counsel's mishandling of inadmissible testimony . . . vouching for [the victim's] credibility[]" constituted ineffective assistance of counsel. *People v Douglas (Jeffery)*, 496 Mich 557, 583, 585 (2014). In *Douglas (Jeffery)*, 496 Mich at 570, a forensic interviewer was improperly permitted to testify, as an expert witness, "that [the victim] had not been coached by [her mother] but rather was being truthful with [the forensic interviewer;]" similarly, a Children's Protective Services worker was improperly permitted to "testif[y] that, based on her investigation, she found that [the victim's] 'allegations had been substantiated' and that[] . . . 'there was no indication that [the victim] was coached or being untruthful[.]'" Additionally, an investigating detective testified that the victim's mother, in response to the defendant's denials when confronted with the allegations, stated that she "'[knew her] daughter don't lie[.]'" *Id*. at 568.

The Michigan Supreme Court held that there was "no sound strategy in counsel's failure to object to the vouching testimony offered by [these three witnesses[;]" rather, the admission of these statements "directly contravened [counsel's] strategy[,]" which "was to demonstrate that [the victim] was not believable, that her testimony had been tainted by [her mother], and that she had told different stories to different people throughout the investigative process." *Douglas (Jeffery)*, 496 Mich at 586. Moreover, "the prosecution's case hinged wholly on the credibility of [the victim's] allegations, making defense counsel's success in undermining that credibility all the more critical[,]" yet counsel "permitted . . . three figures of apparent authority and impartiality, with direct involvement in and knowledge of the investigation[,] . . . to present testimony improperly reaching the key factual issue before the jury: whether [the victim] was telling the truth[;]" it was "reasonably probable that, but for this testimony, the outcome of the defendant's trial may have been different." *Id*. (citation omitted).

"[The] defendant did not receive effective assistance of counsel at trial" where defense counsel "failed to object to [inadmissible] hearsay testimony offered by five different witnesses, each of whom recounted statements made to them by the complainant in which she told them that [the] defendant had sexually abused her years earlier[;]" "[g]iven the frequency, extent, and force of the hearsay testimony, . . . had defense counsel objected to its admission, there [was] a reasonable probability that the outcome

of [the] case would have been different." *Shaw (Barry)*, ___ Mich App at ___. "Given the time that had passed since the alleged abuse stopped, the lack of any witnesses to the charged crimes, and the lack of any significant circumstantial proofs, [the] case turned largely on the complainant's credibility[; b]ecause defense counsel did not object to the hearsay statements, the jury heard the complainant's version of events more than five times[,]" and, "in the case of [the testimony of an examining pediatrician and a detective,] the hearsay was offered with what amounted to an official stamp of approval." *Shaw (Barry)*, ___ Mich App at ___.

"[C]ounsel cannot be charged with ineffective representation when his [or her] failure to locate exculpatory evidence is 'directly attributable to [a defendant's] refusal to cooperate, rather than any insufficiency in the investigation' conducted by counsel." *Hodgson v Warren*, 622 F3d 591, 599 (CA 6, 2010), quoting *Fautenberry v Mitchell*, 515 F3d 614, 625 (CA 6, 2008). See also *People v Buie (On Remand) (Buie IV)*, 298 Mich App 50, 64 (2012) (holding that "[a] defendant cannot allege that defense counsel was ineffective for failing to meet with him [or her] when [the] defendant failed to cooperate with [counsel's] staff during their visit[]"). However, "a defendant's lack of cooperation could not 'exonerate [defense counsel's] consistent pattern of neglecting his [or her] essential function of investigating the claims against his [or her] client.'" *Hodgson*, 622 F3d at 599, quoting *White v McAninch*, 235 F3d 988, 997 (CA 6, 2000).

"[T]he waiver of an opening statement involves 'a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel.'" *People v Payne*, 285 Mich App 181, 190 (2009), quoting *People v Pawelczak*, 125 Mich App 231, 242 (1983) (defense counsel's decision to forego an opening statement was insufficient to prove ineffective assistance of counsel where the defendant failed to establish that his counsel's performance was deficient under an objective standard of reasonableness, or that the outcome of the lower court proceedings was affected).

An attorney is not ineffective for failing to make a futile objection, *People v Fike*, 228 Mich App 178, 182 (1998), nor is an attorney ineffective for failing to file a meritless motion, *People v Traylor*, 245 Mich App 460, 463 (2001), because trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425 (2000). Whether to object to a perceived impropriety is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58 (2004).

Under certain circumstances, defense counsel's failure to request a limiting instruction may constitute ineffective assistance of counsel. *Thompkins v Berghuis*, 547 F3d 572, 590 (CA 6, 2008). In *Thompkins*, 547 F3d at 574, 577, the defendant was charged with murder. At trial, the defendant's accomplice testified that he (the accomplice) had been acquitted of murder charges. *Id*. at 578. Defense counsel failed to request a limiting instruction that the jury could not consider the accomplice's testimony as substantive evidence of the defendant's guilt. *Id*. at 579. On appeal, the reviewing court found that in light of the fact that the defendant's primary trial strategy involved shifting responsibility for the murder onto his accomplice, the fact that the accomplice had been acquitted of murder "likely exerted a powerful influence on the jury to convict [the defendant] of murder. If the jury did not convict [the defendant], the jury knew that no one would be convicted for killing [one victim] and shooting [another]. Most importantly, in the absence of a limiting instruction, the jury could well have believed that it was entirely proper to weigh [the accomplice's] acquittal as significant evidence that [the defendant] must have been the shooter. In fact, the trial court's jury instructions included the statement that '[y]ou may convict the defendant *based only on the accomplice's testimony*, if you believe the testimony and it proves the [d]efendant's guilt[] beyond a reasonable doubt.'" *Id*. at 591. "The jury thus heard that it could convict [the defendant] based solely on [the accomplice's] testimony, which included not only his account of the shooting but also his statement that he had been acquitted of murder." *Id*. The defendant proved that his counsel was ineffective by demonstrating that his attorney's performance was deficient, and that there was a reasonable probability that, but for his attorney's error, the result of the proceeding would have been different. *Id*. at 590-591. See also *Shaw (Barry)*, ___ Mich App at ___ (holding that "defense counsel's failure to request [a limiting instruction] was below the standard of effective representation[,]" and "[t]he trial court [committed plain error when it] . . . failed to provide a prior bad acts limiting instruction despite the potential for prejudice in [hearsay] testimony that described [the] defendant grabbing the complainant's mother by the neck and threatening to kill her[; t]his testimony did not provide evidence of 'motive, opportunity, intent, preparation, scheme, plan or system' as to the charged crime, nor any other basis for admission under MRE 404(b)[]").

The complete concession of defendant's guilt renders counsel ineffective. *People v Krysztopaniec*, 170 Mich App 588, 596 (1988). However, "[w]here the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a

defense or admit to guilt on some charges but maintain innocence on others." *People v Walker (Thomas)*, 167 Mich App 377, 382 (1988), overruled in part on other grounds by *People v Mitchell (Shane)*, 456 Mich 693, 698 (1998).

A defendant was not denied his Sixth Amendment right to counsel where his attorney fell asleep for an undetermined period during the defendant's cross-examination by the prosecution. *Muniz v Smith*, 647 F3d 619, 623-625 (CA 6, 2011) (because "[t]he trial evidence against [the defendant] was overwhelming[,]" he could not establish prejudice sufficient to satisfy *Strickland*, 466 US at 687, where the record showed that a juror saw defense counsel sleeping through a single portion of the defendant's "fairly short" cross-examination).

"[Defense] counsel's failure to object to the courtroom's closure during voir dire [did not] entitle[the defendant] to a new trial on the basis of ineffective assistance of counsel[;]" the Court of Appeals properly "reasoned that [the] '[d]efendant's trial counsel might have reasonably concluded that proceeding with a jury voir dire that was closed to the public benefitted [the] defendant' because '[r]easonable trial counsel might conclude that the potential jurors will be more forthcoming in their responses when the courtroom is closed, that the proceedings will be less likely to be tainted by outside influences, or might simply find the procedure preferable because it will expedite the proceedings.'" *People v Vaughn (Joseph) (Vaughn II)*, 491 Mich 642, 669-671 (2012), quoting *Vaughn I*, 291 Mich App at 197.

Where the Michigan Court of Appeals "fail[ed] to apply *Strickland*[, 466 US 668,] to assess [an] ineffective-assistance-of-counsel claim . . . , the [Court's] adjudication was contrary to clearly established federal law[,]" and the respondent was entitled to pursue habeas corpus review. *Lafler v Cooper*, 566 US ___, ___ (2012),[12] citing *Panetti v Quarterman*, 551 US 930, 948 (2007).

"Although a defendant's proclamation of innocence does not relieve counsel of his [or her] normal responsibilities under *Strickland*[, 466 US 668], it may affect the advice counsel gives." *Burt v Titlow*, 571 US ___, ___, ___ (2013) (holding that the Sixth Circuit Court of Appeals erred in overturning the Michigan Court of Appeals' decision that defense counsel's advice to the respondent to withdraw his guilty plea satisfied *Strickland*, "given that [the] respondent was claiming innocence and only

[12] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . [*Cooper*[, 566 US , did not] create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

days away from offering self-incriminating testimony in open court pursuant to a plea agreement involving an above-guidelines sentence[]").

2. Presumption of Prejudice

"[T]here is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *United States v Cronic*, 466 US 648, 659 n 26 (1984), citing *Strickland*, 466 US at 693-696. However, in *Cronic*, 466 US at 658-660, the United States Supreme Court identified three rare situations involving "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified[]" and in which prejudice is therefore presumed: (1) the complete denial of counsel, such as where the accused is denied counsel at a critical stage of the proceedings; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is called upon to render assistance under circumstances where even competent counsel very likely could not (as in the case of *Powell v Alabama*, 287 US 45, 56-59 (1932), where defense counsel was appointed to represent defendants in a capital case on the day the trial was scheduled to start); see also *People v Frazier (Corey)*, 478 Mich 231, 243 (2007).[13]

"[A] structural error [does not] automatically satisf[y] the second *Strickland* prong[; rather,] . . . *Strickland*[, 466 US at 692,] and . . . *Cronic*[, 466 US at 659 n 25,] articulated only a narrow class of situations in which prejudice is presumed for ineffective assistance purposes: 'when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding' or 'when counsel is burdened by an actual conflict of interest.'" *Vaughn II*, 491 Mich at 671-674 (holding that "an ineffective assistance of counsel claim premised on either counsel's waiver of or failure to object to the Sixth Amendment right to a public trial requires a showing of actual prejudice before the defendant is entitled to relief[]").

"[A] presumption of prejudice exists when a defendant's former defense counsel joins the prosecutor's office that is pursuing the case against the defendant." *People v Hemingway*, 495 Mich 860,

[13] See also *People v Gioglio (Gioglio II)*, 490 Mich 868 (2011), holding that "[f]or the reasons stated in the Court of Appeals dissenting opinion [in *People v Gioglio (Gioglio I)*, 292 Mich App 173, 209-237 (2011) (K.F. Kelly, J., dissenting)], [*Cronic*, 466 US 658] does not apply to defense counsel's performance in this case[,]" and remanding for "consideration of whether defense counsel's performance was ineffective under *Strickland*[, 466 US 668][.]"

> 860 (2013), citing MRPC 1.9(b); MRPC 1.10(b); *People v Davenport*, 483 Mich 906 (2009). "Such a presumption may be overcome, however, if the prosecutor shows that the attorney who had a conflict of interest was properly 'screened from any participation in the matter[.]'" *Hemingway*, 495 Mich at 860 (quoting MRPC 1.10(b)(1) and remanding the matter to the circuit court to "determine when the defendant's former counsel's employment with the . . . [p]rosecutor's office began and whether the prosecution rebutted the presumption of prejudice by showing that the former defense counsel was properly screened from any participation in the matter[]").

B. Evidentiary (*Ginther*) Hearing

A defendant is entitled to have his or her attorney "prepare, investigate, and present all substantial defenses." *Kelly (Robert)*, 186 Mich App at 526. If a defendant wishes to advance a claim of ineffective assistance of counsel based on matters not of record, an evidentiary (*Ginther*) hearing is required in the trial court. *People v Ginther*, 390 Mich 436, 443-444 (1973).

In *Kelly (Robert)*, 186 Mich App at 526, at a posttrial evidentiary hearing, the defendant claimed that his trial attorney's failure to file a timely notice of alibi defense deprived him of the effective assistance of counsel. The Court of Appeals determined that a substantial alibi defense would have been one in which the defendant's proposed alibi witness verified his version. *Id.* at 527. According to the Court:

> "[D]efendant failed to show that he was deprived of a substantial defense. There is nothing in the record showing what the proposed alibi witnesses' testimony would have been had they been permitted to testify on the matter and, thus, whether they would have, in fact, provided an alibi for defendant." *Kelly (Robert)*, 186 Mich App at 527.

The court has discretion whether to hold an evidentiary hearing. *People v Mischley*, 164 Mich App 478, 481-482 (1987). An evidentiary hearing may be granted if the record has not been sufficiently developed and the defendant can show evidence of a factual dispute which might, if further developed, possibly be resolved in his or her favor. *People v McMillan*, 213 Mich App 134, 141-142 (1995).

The burden of proof for a new trial traditionally lies with the moving party. *People v Elston*, 462 Mich 751, 762 (2000). Mere assertions of ineffective assistance of counsel by the defendant, without more, do not satisfy that evidentiary requirement. *Id.* at 762.

A defendant was not entitled, under MRE 702, to "present an attorney as an expert witness at [his] *Ginther*[14] hearing to testify regarding whether defense counsel's performance adhered to community standards and norms." *People v Marshall (Dustin)*, 298 Mich App 607, 619 (2012), vacated in part on other grounds 493 Mich 1020 (2013) (holding that "[b]ecause the court was familiar with the facts of the case and the legal standards for evaluating an attorney's performance relative to a claim of ineffective assistance of counsel, its decision to exclude [the] defendant's proposed expert testimony was . . . not an abuse of discretion[]").

"The trial court failed to complete its duties under [the Court of Appeals' order remanding for a *Ginther*[15] hearing], because it did not determine whether the evidence that it considered in finding ineffective assistance by trial counsel was admissible[; w]here a claim of ineffective assistance of counsel is based on the failure of counsel to produce evidence at trial, there is no reasonable likelihood of a different outcome unless the evidence is admissible." *People v Kranz*, 495 Mich 989, 989 (2014).

C. Waiver of Attorney-Client Privilege

"It is well established that a defendant in a criminal case who asserts ineffective assistance of counsel waives by doing so the attorney-client privilege." *Virgil & Barbara Howe v Detroit Free Press*, 440 Mich 203, 236 (1992) (Levin, J., separate opinion). A client's allegation that an attorney breached his or her duty to the client waives the attorney-client privilege with regard to all communications relevant to the alleged breach. *People v Houston (John)*, 448 Mich 312, 332 (1995). "The fact that the defendant's allegation [i]s not brought in a formal complaint against his [or her] attorney is of no consequence." *Id.* at 332.

D. Pleas[16]

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US 356, 373 (2010)[17]; see also *Missouri v Frye*, 566 US ___, ___ (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense

[14] *Ginther*, 390 Mich 436.

[15] *Ginther*, 390 Mich 436.

[16] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapters 5 and 6, for additional discussion of ineffective assistance of counsel in the context of pleas and plea negotiations.

[17] *Padilla*, 559 US 356, has prospective application only under both federal and state rules of retroactivity. See *Chaidez v United States*, 568 US ___, ___ (2013); *People v Gomez*, 295 Mich App 411, 413 (2012).

counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]").

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*[, 466 US at 687]." *Frye*, 566 US at ___, citing *Hill v Lockhart*, 474 US 52, 57 (1985). First, "[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 US at 56 (citation omitted). "The second, or 'prejudice,' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him [or her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, 566 US at ___.[18] "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer[;] . . . a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law[;] . . . [and] . . . a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at ___.

E. Effective Assistance on Appeal

"[T]he defendant was deprived of his appeal of right as a result of constitutionally ineffective assistance of counsel[]" where "the failure to perfect an appeal of right was solely the fault of the defendant's trial counsel, who did not fulfill his promise in open court to file the necessary paperwork to begin the appellate process." *People v Tull*, 495

[18] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US , did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *Liddell*, 722 F3d at 738-739, quoting 28 USC 2255(h)(2).

Mich 945, 945 (2014), citing *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States*, 526 US 23, 28 (1999). See also *People v Varnado*, 499 Mich 923, 923 (2016) (citing *Roe*, 528 US at 477, and *Peguero*, 526 US at 28, and holding that "the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel[]" where "[t]he defendant's former appellate attorney failed to timely file in the trial court a motion to withdraw as counsel, and failed to file in the Court of Appeals, on direct review, a delayed application for leave to appeal within the deadlines set forth in MCR 7.205(G)(3)[]").

An appellate attorney may be ineffective for failing to raise the issue of the defendant's trial counsel's effectiveness. *People v Reed*, 198 Mich App 639, 646 (1993).[19] The standard set out in *Strickland*, 466 US 668, also applies when analyzing a claim of ineffective assistance of appellate counsel. *Reed*, 198 Mich App at 646. According to the *Reed* Court:

> "An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. However, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. The fact that counsel failed to recognize or failed to raise a claim despite recognizing it does not per se constitute cause for relief from judgment. Thus, to permit proper review in cases where appellate counsel has pursued an appeal as of right and raised nonfrivolous claims, the defendant must make a testimonial record in the trial court in connection with a claim of ineffective assistance of appellate counsel." *Reed*, 198 Mich App at 646-647 (internal citations omitted).

An appellate attorney's failure "to timely file in the trial court a motion to withdraw the defendant's plea, and . . . to file in the Court of Appeals, on direct review, a delayed application for leave to appeal within the deadlines set forth in MCR 7.205(F)[, resulting in] . . . the defendant [being] deprived of his direct appeal[,] . . . [constituted]

[19] See also *People v Brown (Stanley)*, 491 Mich 914, 914-915 (2012), peremptorily granting the defendant a new trial under MCR 6.508(D) on the ground that the defendant's trial counsel was ineffective in failing to present certain corroboratory evidence and in failing to "effectively cross-examine the sole complainant" about inconsistencies in her testimony; "[b]ecause the defendant's former appellate counsel was ineffective for failing to raise these issues on the defendant's direct appeal, and the defendant was prejudiced thereby, he has met the burden of establishing entitlement to relief under MCR 6.508(D)."

constitutionally ineffective assistance of appellate counsel." *People v West (Anthony)*, 495 Mich 879, 879 (2013), citing *Flores-Ortega*, 528 US at 477; *Peguero*, 526 US at 28; see also *People v Irwin*, 497 Mich 851, 851 (2014) (noting that defense counsel "acknowledged . . . sole responsibility for missing the deadline[to file a delayed application for leave to appeal under MCR 7.205(F)]"); *People v Leonard (Maurice)*, 497 Mich 852, 852 (2014) (holding that "the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel[]" where "[t]he defendant's attorney acknowledged . . . that the delay in filing the defendant's application for leave to appeal was due to the attorney's failure to locate the correctional facility in which the defendant was incarcerated[]").

A defendant who files a motion for new trial during his or her appeal of right is "entitled to counsel during the proceeding and entitled to raise a claim of ineffective assistance of [appellate] counsel[.]" *People v Campbell (Raphael)*, ___ Mich ___, ___ (2016), citing *Douglas v California*, 372 US 353 (1963).

F. Collateral Estoppel

"['Cross-over'] collateral estoppel may [not] be applied to preclude review of a criminal defendant's claim of ineffective assistance of counsel when a prior civil judgment held that defense counsel's performance did not amount to malpractice." *Trakhtenberg*, 493 Mich at 42, 51 (holding that "because [the] defendant ha[d] a different and most likely stronger incentive to litigate counsel's errors in the criminal proceeding," he "did not have a full and fair opportunity to litigate his [ineffective assistance of counsel] claim in the [prior] malpractice proceeding[]").

G. Standard of Review

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *Grant (William)*, 470 Mich at 484-485. A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.* at 484-485. If the defendant failed to move for a new trial or evidentiary hearing, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38 (2002).

1.5 Correcting Mistakes

A. Clerical Mistakes

- Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission

may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it. MCR 6.435(A). *People v Holder*, 483 Mich 168, 176 n 25 (2009); *People v Lanzo Constr Co*, 272 Mich App 470, 484 (2006).

- "A prison sentence entered on a judgment that is erroneous because the judge misspoke or the clerk made a typing error is correctable under [MCR 6.435(A)]." 1989 Staff Comment to MCR 6.435.[20]

- A trial court's failure to specify, in a judgment of sentence, whether a defendant's sentences are concurrent with or consecutive to a parole sentence constitutes an omission within the meaning of MCR 6.435. *People v Howell (Marlon)*, 300 Mich App 638, 645-648 (2013). Further, neither MCR 6.435 nor due process requires a trial court to give a defendant a hearing before correcting such a clerical error. *Howell*, 300 Mich App at 649-651. Specifically, "when [a] trial court corrects a mistaken sentence and it does not have discretion to sentence a defendant any differently, the defendant is not entitled to a hearing." *Id*. at 650.

- "While the [Department of Corrections] . . . has an obligation to ensure that any sentence executed is free from errors, the department is not a party to the underlying criminal proceedings under . . . MCR 6.435. [Therefore], *any* notices sent from the DOC to the courts and parties regarding sentencing errors are merely informational, and any requests contained therein merely advisory. Any judge receiving such a notice must ascertain the nature of the claimed error, determine whether the error implicates a defendant's sentence, and consider the curative action recommended by the DOC. It is imperative, however, that any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules." *Holder*, 483 Mich at 176.

B. Substantive Mistakes

- "A substantive mistake is a conclusion or decision that is erroneous, because it is based on a mistaken belief in the facts or the applicable law." *People v Jones (Carlos)*, 203 Mich App 74, 80 (1993).

[20] A staff comment to the Michigan Court Rules is not binding authority. *People v Williams (Carletus)*, 483 Mich 226, 238 n 15 (2009).

- "A prison sentence entered on a judgment that is erroneous because the judge relied on mistaken facts (for example, confused codefendants) or made a mistake of law (for example, unintentionally imposed a sentence in violation of the *Tanner* rule)[21] is a substantive mistake and is correctable by the judge under [MCR 6.435(B)] until the judge signs the judgment, but not afterwards." 1989 Staff Comment to MCR 6.435.[22] In the latter event, however, the defendant may obtain relief by filing a postconviction motion. See MCR 6.429.

- After giving the parties an opportunity to be heard, ***and*** if it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. MCR 6.435(B).

- If the Department of Corrections claims that a substantive sentencing error was made, the court may modify the sentence only after adhering to the requirements in MCR 6.435(B), i.e., giving the parties an opportunity to be heard, ***and*** if it has not yet entered judgment in the case. *Holder*, 483 Mich at 176-177.

- "[T]he court's ability to correct substantive mistakes pursuant to [MCR 6.435(B)] ends with the entry of the judgment. See [MCR] 6.427 ['[w]ithin 7 days after sentencing, the court must date and sign a written judgment of sentence . . . .']. This limitation does not, however, prohibit a party aggrieved by a substantive mistake from obtaining relief by using available postconviction procedures." 1989 Staff Comment to MCR 6.435.[23]

C. Correction of Record

- If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected. MCR 6.435(C).

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[21] "The [*People v*] *Tanner*[, 387 Mich 683 (1972)] rule states that the greatest minimum sentence a defendant can receive is two-thirds of the statutory maximum period." *People v Wilson (Jacqueline)*, 111 Mich App 770, 774 (1981). See also MCL 769.34(2)(b).

[22] A staff comment to the Michigan Court Rules is not binding authority. *People v Williams (Carletus)*, 483 Mich 226, 238 n 15 (2009).

[23] A staff comment to the Michigan Court Rules is not binding authority. *People v Williams (Carletus)*, 483 Mich 226, 238 n 15 (2009).

D. Correction During Appeal

- If a claim of appeal has been filed or leave to appeal has been granted in the case, corrections under MCR 6.435 are subject to MCR 7.208(A) (trial court may not set aside or amend a judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, after a decision on the merits in an action in which a preliminary injunction was granted, or as otherwise provided by law), and MCR 7.208(B) (concerning postjudgment motions in criminal cases). MCR 6.435(D).

Chapter 2: District Court Sentencing

This chapter has intentionally been left blank. A new chapter will be created that discusses district court sentencing. In the meantime, for information on this topic, see http://mjieducation.mi.gov/documents/benchbooks/7-distctsent.

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Part A—Introduction

3.1 Scope of This Chapter

The primary objective of this chapter is to present a comprehensive picture of the dynamic landscape of sentencing in Michigan since the legislative sentencing guidelines were adopted in 1998. To that end, the chapter will address various procedural and statutory components of felony sentencing proceedings, including the respective rights and responsibilities of the court and the defendant. The chapter will further discuss several fundamental characteristics of felony sentences in Michigan, aspects which were established long before the advent of the statutory sentencing guidelines. Also addressed in the chapter are the different types of sentences available and any limitations on a sentencing court's authority to impose certain types of sentences in specific situations.

A comprehensive discussion of the topics contained here as they may (or may not) apply to juveniles is beyond the scope of this chapter. At times, the chapter makes general references to the subject matter being discussed and its applicability to juveniles, but it does not contain an exhaustive treatment of any topic as it relates to juveniles. For a detailed discussion of proceedings involving juveniles, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

All references in this chapter to "the guidelines" are to the legislative or statutory sentencing guidelines enacted by 1998 PA 317. Whenever the author intends reference to the judicial sentencing guidelines, the reference will be clearly specified.

Finally, this chapter is not intended to replace the *Sentencing Guidelines Manual*, a booklet published in various formats by MJI and West Publishing.

3.2 Overview of Felony Sentencing[1]

The trial court's objective in sentencing a defendant is to tailor a penalty that is appropriate to the seriousness of the offense and the criminal history of the offender. *People v Rice (On Remand)*, 235 Mich App 429, 445 (1999). The "framework" of an appropriate sentence consists of four basic considerations:

[1] This section provides an overview of the various aspects of felony sentencing. A footnote will appear directing the reader to a different section where a more complete discussion appears on any particular topic.

- the likelihood or potential that the offender could be reformed;
- the need to protect society;
- the penalty or consequence appropriate to the offender's conduct; and
- the goal of deterring others from similar conduct.

Rice, 235 Mich App at 446, citing *People v Snow*, 386 Mich 586, 592 (1972).

"[A] sentencing judge does not have unfettered discretion. Numerous checks shield the defendant from an arbitrary sentence and help to insure that the objective of personalized disposition is achieved. In addition to the compilation of a presentence report and scoring under the sentencing guidelines, other decisions of th[e Michigan Supreme] Court limit consideration of factors deemed inappropriate in sentencing, helping to insure that the judge enjoys a broad, yet fair, knowledge of the defendant and the circumstances of the crime of which he [or she] is convicted." *People v Adams (Steven)*, 430 Mich 679, 687 (1988).

Fashioning an appropriate sentence under the statutory guidelines requires the court's attention to the offender's prior record variable (PRV) and offense variable (OV) scores and the specific cell in which those scores place the offender in the appropriate sentencing grid.[2] "Proposed scoring of the [sentencing] guidelines shall accompany the presentence report." MCR 6.425(D).

Generally, a defendant should be sentenced by the judge who presided at his or her trial, or accepted his or her plea, if the judge is reasonably available.[3] *People v Pierce*, 158 Mich App 113, 115 (1987). However, resentencing is not required if the defendant does not object. *People v Robinson*, 203 Mich App 196, 197-198 (1993).

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[2] In 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US ___ (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, 399 (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)[,]" 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). See Section 3.4 for discussion of *Lockridge*.

[3] However, if a felony plea is accepted by a district judge, a circuit judge must conduct the sentencing. MCL 766.4(3). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, for discussion of pleas.

The rules of evidence do not apply to sentencing proceedings. See MRE 1101(b)(3); *People v Matzke*, 303 Mich App 281, 284 (2013); *People v Potrafka*, 140 Mich App 749, 751-752 (1985). Even when evidence is not admissible at the defendant's trial, a sentencing court may properly consider it in determining an appropriate sentence. *People v Watkins*, 209 Mich App 1, 5-6 (1995).

A. Court-Appointed Foreign Language Interpreter[4]

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1).[5] A person financially able to pay for the interpretation costs may be ordered to reimburse the court for those costs. MCR 1.111(F)(5). See also MCR 1.111(A)(4).

- "'Case or Court Proceeding' means 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).

- "'Party' means 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).

B. Indeterminate Sentences[6]

A first-time offender convicted of a felony punishable by imprisonment in a state prison may not be sentenced to a definite term of imprisonment; rather, the court must sentence the

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[4] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

[5] 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).

[6] As the term is used in Michigan, an *indeterminate sentence* is a sentence of unspecified duration. In *People v Lockridge*, 498 Mich 358, 380 n 18 (2015), the Michigan Supreme Court explained:

"In [*People v Drohan*, 475 Mich 140, 153 n 10 (2006), the Court] cited the definition of 'indeterminate sentence' from *Black's Law Dictionary* (8th ed): a sentence 'of an unspecified duration, such as one for a term of 10 to 20 years.' . . . *Drohan* was correct to say that Michigan has an indeterminate sentencing scheme under that definition of the term."

The *Lockridge* Court further noted, however, that "Michigan's sentencing scheme is *not* 'indeterminate' as the United States Supreme Court has ever applied that term." *Lockridge*, 498 Mich at 380, citations omitted; emphasis added. Rather, "the relevant distinction between constitutionally permissible 'indeterminate' sentencing schemes and impermissible 'determinate' sentencing schemes, as the United States Supreme Court has used those terms, . . . turns on whether judge-found facts are used to curtail judicial sentencing discretion by *compelling* an increase in the defendant's punishment[; i]f so, the system violates the Sixth Amendment[, and] Michigan's sentencing guidelines do just that." *Id*. at 383.

defendant to a minimum term and must state the maximum term of imprisonment for the record. MCL 769.8(1). The maximum term of imprisonment is the maximum penalty authorized by law for conviction of the sentencing offense, unless otherwise provided by Chapter 9 of the Code of Criminal Procedure (MCL 769.1–MCL 769.36). MCL 769.8(1).

Indeterminate sentencing does not apply to offenses for which the only punishment prescribed by law is life in prison. MCL 769.9(1).

Where the punishment prescribed by law is life or any number of years, the court may sentence the defendant to life or to a term of years. MCL 769.9(2). If the court sentences the defendant to a term of years, the court must fix a minimum term and maximum term of years or fractions of years. *Id*. The court may not—in the same sentence—set the maximum sentence at life imprisonment and set the minimum sentence at a term of years. *Id*. For example, a sentence of "30 years to life" is invalid.

1. The *Tanner* Rule

The common-law "*Tanner* rule" developed in response to sentencing courts that were imposing "indeterminate" sentences in which the minimum and maximum terms were separated by only insignificant periods of time. *People v Tanner*, 387 Mich 683, 689 (1972). In response, the Michigan Supreme Court ruled that where an indeterminate sentence is imposed, the minimum sentence must not exceed two-thirds of the maximum sentence.[7] *Id.* at 690. In other words, any minimum term of imprisonment that exceeds two-thirds of the maximum term imposed does not constitute an indeterminate sentence. *Id*.

The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and *Tanner*, 387 Mich at 690, is a reduction in the minimum sentence. *People v Thomas (Gerry)*, 447 Mich 390, 392-394 (1994).

The *Tanner* rule does not apply to convictions for which the penalty is mandatory life in prison or for which a statute provides for the imposition of a mandatory minimum sentence. *Tanner*, 387 Mich at 690.

[7] The *Tanner* rule was ultimately codified in MCL 769.34(2)(b). *People v Garza*, 469 Mich 431, 435 (2003).

2. The *Tanner* Rule Extended to Habitual Offenders

Although the indeterminate sentence statute on which the two-thirds rule is based expressly applies to *first-time* offenders, the Michigan Supreme Court approved extension of the *Tanner* rule to the interval between minimum and maximum sentences in cases involving habitual offenders. MCL 769.8(1); *People v Wright (Kenneth)*, 432 Mich 84, 93-94 (1989). In *Wright (Kenneth)*, 432 Mich at 87-88, the trial court sentenced the defendant to a term of 28 to 30 years, and the Michigan Court of Appeals modified the sentence to conform to the two-thirds rule of *Tanner*, resulting in a 20- to 30-year term of imprisonment. The Michigan Supreme Court affirmed the sentence modification and concluded "that the Legislature intended to provide a meaningful interval between minimum and maximum sentences imposed pursuant to [the habitual offender sentencing provisions]." *Wright (Kenneth)*, 432 Mich at 89. According to the *Wright (Kenneth)* Court:

> "In *People v Tanner*, [387 Mich 683, 688 (1972),] the defendant, who had pleaded guilty to manslaughter, was sentenced to serve fourteen years, eleven months to fifteen years in prison. The Court addressed itself to the purely legal question whether the defendant's sentence was in fact 'indeterminate,' as contemplated by the provisions of the indeterminate sentence act. The [*Tanner*] Court stated:
>
> * * *
>
> > "'Convinced as we are, that a sentence with too short an interval between minimum and maximum is not indeterminate, we hold that any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act.'" *Wright (Kenneth)*, 432 Mich at 89-90, quoting *Tanner*, 387 Mich at 689-690.

3. The *Tanner* Rule Codified

MCL 769.34(2)(b) codified the common-law *Tanner* rule. MCL 769.34(2)(b) provides that "[t]he court shall not impose a minimum sentence, including a departure,[8] that exceeds 2/3 of the statutory maximum sentence."

However, "MCL 769.34(2)(b) does not apply when a defendant is convicted of a crime punishable with imprisonment for life or any term of years because the minimum will never exceed two-thirds of the statutory maximum of life." *People v Lewis (Curtis)*, 489 Mich 939 (2011), citing *People v Washington (Sylvester)*, 489 Mich 871 (2011); *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n 14 (2006), abrogated in part on other grounds as recognized by *People v Lockridge*, 498 Mich 358, 364, 378-379 (2015); *People v Harper*, 479 Mich 599, 617 n 31 (2007), abrogated in part on other grounds by *Lockridge*, 498 Mich at 364.

C. Presentence Investigation Report[9]

A presentence investigation report (PSIR) is required for felony cases, MCL 771.14(1), and cannot be waived. *People v Hemphill*, 439 Mich 576, 581 (1992); *People v Brown (Lewis)*, 393 Mich 174, 179 (1974).

"Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court." MCR 6.425(A). See also MCL 777.14.

Proposed guidelines scoring must accompany the PSIR. MCR 6.425(D).

A trial court must provide the prosecutor and the defendant's attorney, or the defendant, if he or she is not represented by an attorney, with copies of the PSIR at a reasonable time, but not less than two business days, before the day of sentencing. MCR 6.425(B).

"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). Regarding the resolution of challenges to the PSIR, see MCR 6.425(E)(2). The trial court is

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[8] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. In light of the emphasized limiting language, it is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. See Section 3.4 for discussion of *Lockridge*.

[9] For a full discussion on PSIR requirements, see Section 3.29.

required to respond to a challenge. *People v Spanke*, 254 Mich App 642, 648 (2003).

D. Sentencing Guidelines

1. Applicability to Felony Offenses

The legislative sentencing guidelines apply to felony offenses listed in MCL 777.11 to 777.19 that were committed on or after January 1, 1999. MCL 769.34(2).[10] The legislative sentencing guidelines do not apply if a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment. MCL 769.34(5). The legislative sentencing guidelines that were in effect on the date the crime was committed govern the calculation of an offender's minimum sentence. MCL 769.34(2).

2. Scoring Offense Variables (OVs) and Prior Record Variables (PRVs)[11]

The minimum sentence range for an offense to which the sentencing guidelines apply is determined by scoring the appropriate offense variables (OVs) and prior record variables (PRVs) for a specific conviction. MCL 777.21.

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 ___ (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, 399 (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

[10] The judicial sentencing guidelines apply to offenses committed before January 1, 1999. The judicial sentencing guidelines are discussed as relevant throughout this chapter; however, all references in this chapter to "the guidelines" are to the *legislative* or statutory sentencing guidelines enacted by 1998 PA 317. Whenever the author intends reference to the judicial sentencing guidelines, the reference will be clearly specified.

[11] For a full discussion of each PRV, see Section 3.8. For a full discussion of each OV, see Section 3.9.

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)[,]"[12] 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).[13] See Section 3.4 for discussion of *Lockridge*.

"Under the sentencing guidelines, the circuit court's factual determinations . . . must be supported by a preponderance of the evidence." *People v Hardy (Donald)*, 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016, citing *People v Osantowski*, 481 Mich 103, 111 (2008); see also *People v Jones (Byron)*, 494 Mich 880, 880-881 (2013) (noting that "'[a] trial court determines the sentencing variables by reference to the record, *using the standard of preponderance of the evidence*[,]'" and vacating the portion of *People v Jones (Byron)*, 299 Mich App 284, 286 (2013), stating that "'[a] scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision[]'") (citations omitted); *People v Steanhouse*, 313 Mich App 1, 39-41 (2015), lv gtd 499 Mich 934 (2016). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy (Donald)*, 494 Mich at 438; see also *Steanhouse*, 313 Mich App at 38; *People v Gullett*, 277 Mich App 214, 217 (2007).[14]

"The fact that a trial court engaged in judicial fact-finding is not relevant to the inquiry with respect to an evidentiary challenge[]" to the scoring of the OVs. *People v Biddles*, ___

[12] 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.

[13] MCR 6.425(D), which provides, in part, that the sentencing court "must use the sentencing guidelines, as provided by law[,]" and MCR 6.425(E)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure," have not yet been amended to conform to *Lockridge*, 498 Mich 358.

[14] In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the guidelines "are advisory only." The Court of Appeals has since concluded that, "given the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*." *Steanhouse*, 313 Mich App at 38, citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438; *Gullett*, 277 Mich App at 217.

Mich App ___, ___ (2016) (citing *Lockridge*, 498 Mich at 389, and disagreeing "with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant's OV score under the guidelines[,]" which "is in direct contradiction of the *Lockridge* Court's rejection of the defendant's argument that juries should be required to find the facts used to score the OVs[]"). Under *Lockridge*, 498 Mich at 392 n 28, "judicial fact-finding is proper, as long as the guidelines are advisory only." *Biddles*, ___ Mich App at ___, ___ n 5 (additionally disagreeing with the suggestion in *People v Blevins*, ___ Mich App ___, ___ n 7 (2016), that "judicial fact-finding 'constitutes a departure[]'").

3. Departing From the Guidelines[15]

MCL 769.34(3) provides that "[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." However, in 2015, the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[,]" 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 365, 399, citing *Booker*, 543 US at 233, 264 (emphasis supplied).[16]

Rather than adhering to MCL 769.34(3) and articulating a substantial and compelling reason for a departure, "[w]hen a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant[17] or found beyond a reasonable doubt by the jury, the sentencing court may exercise

[15] For a full discussion on departing from the sentencing guidelines, see Part E.

[16] MCR 6.425(D), which provides, in part, that the sentencing court "must use the sentencing guidelines, as provided by law[,]" and MCR 6.425(E)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure," have not yet been amended to conform to *Lockridge*, 498 Mich 358.

[17] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *Lockridge*, 498 Mich at 399, the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea or in testimony or by stipulation or by some similar or analogous route." *People v Garnes*, ___ Mich App ___, ___ (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*. at ___ (citing *Apprendi*, 530 US at 469-471, and remanding "for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admissions" with respect to several contested offense variable scores) (additional citations omitted).

its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so." *Lockridge*, 498 Mich at 391-392. "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable." *Id*. at 392, citing *Booker*, 543 US at 261. "[A departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny, constitutes a reasonable sentence under *Lockridge*." *People v Steanhouse*, 313 Mich App 1, 47-48 (2015), lv gtd 499 Mich 934 (2016) (citations omitted).

The trial court must score the now-advisory guidelines before imposing a departure sentence. *People v Geddert*, ___ Mich ___, ___ (2016).

E. Allocution[18]

At sentencing, the court is required to give the *defendant*, defense counsel, the prosecutor, and the crime victim(s) an opportunity to advise the court of any circumstances they believe the court should take into consideration in imposing sentence. MCR 6.425(E)(1)(c). The *victim* also has a constitutional and statutory right to make a statement to the court at sentencing. Const 1963, art 1, § 24(1); MCL 780.765; *People v Williams (Anterio)*, 244 Mich App 249, 253-254 (2001). Finally, the court has discretion to allow a *nonparty* to address the court at sentencing. *People v Albert*, 207 Mich App 73, 75 (1994) (trial court did not abuse its discretion in allowing a victim's attorney in a civil case against the defendant to address the court, over the defendant's objection).

F. Imposition of Sentence[19]

The trial court is required to state on the record "the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled." MCR 6.425(E)(1)(d).

[18] For more information on allocution, see Section 3.30

[19] See SCAO Form CC 219b, *Judgment of Sentence/ Commitment to Department of Corrections*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/criminaldisposition/cc219b.pdf. For more information on the sentencing hearing, including requirements and rights of the defendant, see Part E.

1. Minimum and Maximum Prison Sentences

Unless a mandatory sentence is required, the court must state both the minimum and maximum sentence. MCL 769.8; MCL 769.9. The maximum sentence is the statutory maximum. *People v Maxson*, 163 Mich App 467, 471 (1987). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *People v Lockridge*, 498 Mich 358, 392 (2015), citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[20]

The minimum sentence cannot be more than two-thirds of the maximum sentence. *People v Tanner*, 387 Mich 683, 690 (1972). The *Tanner* rule is now statutory. MCL 769.34(2)(b). The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and *Tanner*, 387 Mich at 690, is a reduction in the minimum sentence. *People v Thomas (Gerry)*, 447 Mich 390, 392-394 (1994). However, "MCL 769.34(2)(b) does not apply when a defendant is convicted of a crime punishable with imprisonment for life or any term of years because the minimum will never exceed two-thirds of the statutory maximum of life." *People v Lewis (Curtis)*, 489 Mich 939, 939-940 (2011), citing *People v Washington (Sylvester)*, 489 Mich 871 (2011); *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n 14 (2006), abrogated in part on other grounds as recognized by *Lockridge*, 498 Mich at 378-379; *People v Harper*, 479 Mich 599, 617 n 31 (2007), abrogated in part on other grounds by *Lockridge*, 498 Mich at 364-365.

2. Consecutive and Concurrent Sentences[21]

Absent statutory authority for imposing a consecutive sentence, a concurrent sentence is required. *People v Sawyer (Ralph)*, 410 Mich 531, 534 (1981). A PSIR must include a statement prepared by the prosecuting attorney regarding whether consecutive sentencing is required or authorized by law. MCL 771.14(2)(d); MCR 6.425(A)(1)(i). The trial court must specify in the judgment of sentence whether the sentence is concurrent or consecutive. MCL 769.1h(1).

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[20] See Section 3.4 for discussion of *Lockridge*.

[21] See Section 3.33 for more information.

Under MCL 771.14(2)(e), where the defendant's "sentences for . . . lower-crime-class offenses [are] to be served concurrently with [his or her] highest class-felony sentence, the [lesser-class] guidelines [do] not need to be scored[.]" *People v Lopez (Jorge)*, 305 Mich App 686, 692 (2014), citing *People v Mack*, 265 Mich App 122, 126-130 (2005). However, "when imposing concurrent sentences, . . . [courts should] ensure that each individual sentence, irrespective of any guidelines calculations used, does not exceed its statutory maximum." *Lopez (Jorge)*, 305 Mich App at 692.

3. Habitual Offenders[22]

MCL 769.10, MCL 769.11 and MCL 769.12 govern sentencing for habitual offenders. These provisions increase the statutory maximum for offenses depending on the number of the defendant's prior felony convictions.[23]

Before accepting a guilty plea, the trial court is required, under MCR 6.302(B)(2), to apprise the defendant "of the maximum possible prison sentence with habitual-offender enhancement[.]" *People v Brown (Shawn)*, 492 Mich 684, 693-694 (2012) (holding that MCR 6.310(C) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea).

4. Special Alternative Incarceration (SAI)—"Boot Camp"[24]

Certain defendants are eligible to be placed in "boot camp" as a condition of probation, MCL 771.3b(1). The Special Alternative Incarceration (SAI) units provide a program of physically strenuous work and exercise, modeled after military basic training. MCL 798.14(1).

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[22] See Part B for more information on habitual offenders.

[23] Additionally, MCL 769.12, governing fourth habitual offender status, provides for a *mandatory minimum* sentence of 25 years' imprisonment for an offender who has been convicted of three or more prior felonies or felony attempts, including at least one "[l]isted prior felony" as defined in MCL 769.12(6)(a), and who commits or conspires to commit a subsequent "[s]erious crime" as defined in MCL 769.12(6)(c). MCL 769.12(1)(a).

[24] See Section 3.53 for more information on boot camp.

5. Jail Sentence[25]

Determinate jail sentences, with or without probation, are proper penalties under the sentencing guidelines as intermediate sanctions. *People v Martin (George H)*, 257 Mich App 457, 460-462 (2003); MCL 750.506; MCL 769.8(1).

MCL 801.251(1)(a)-(e) provides that, subject to MCL 801.251a,[26] a person sentenced to a county jail (except for a person serving all or any part of a sentence of imprisonment for any of the following crimes or attempted crimes: MCL 750.145c, 750.520b, 750.520c, 750.520d, 750.520g, and murder in connection with sexual misconduct) may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:

- Job seeking
- Working at his or her job
- Conducting his or her own self-employed business or occupation (including housekeeping and caring for the needs of his or her family)
- Attending school
- Obtaining medical treatment, substance abuse treatment, mental health counseling, or psychological counseling

An individual may petition the court for the privilege of leaving jail as provided in MCL 801.251(1) when he or she is sentenced, and the court has the discretion to renew the individual's petition. MCL 801.251(2). The court may withdraw the privilege at any time by entering an order to that effect, and notice is not required. *Id*.

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[25] See SCAO Form MC 219, *Judgment of Sentence/Commitment to Jail*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/criminaldisposition/mc219.pdf.

[26] MCL 801.251a(1) provides that "an individual convicted of a felony" may not be released from jail under MCL 801.251 to attend work or school "unless the county sheriff or the [Department of Corrections] has determined that the individual is currently employed or currently enrolled in school," and establishes requirements for ordering and providing this verification. MCL 801.251a(2)(b) defines "'[s]chool[,]'" for purposes of MCL 801.251a, as "[a] school of secondary education[,] . . . [a] community college, college, or university[,] . . . [a] state-licensed technical or vocational school or program[,] . . . [or a] program that prepares the person for the general education development (GED) test."

6. Probation[27]

A court may place a defendant on probation under the charge and supervision of a probation officer, if the court determines that a defendant convicted of any crime other than murder, treason, CSC-I, CSC-III, armed robbery, or major controlled substance offenses, is unlikely to engage in an offensive or criminal course of conduct again, and that the public good does not require that the defendant suffer the penalty imposed by law. MCL 771.1(1).

> **Note:** Although not included in MCL 771.1(1), the court may not place a defendant on probation when he or she was convicted of any of the offenses for which mandatory prison sentences are prescribed by statute.

7. Fines and Costs[28]

MCL 769.1k[29] provides a general statutory basis for a court's authority to impose fines and costs. If a defendant pleads guilty or nolo contendere, or the defendant is found guilty following a trial, the court must impose the minimum state costs as set out in MCL 769.1j. MCL 769.1k(1)(a). Under MCL 769.1k(1)(b) and MCL 769.1k(2), the court may also impose:

- any fine authorized by the statute under which the defendant entered a plea or was found guilty
- any cost authorized by the statute under which the defendant entered a plea or was found guilty

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[27] See Section 3.46 for a full discussion of probation.

[28] See Section 3.40 on ordering the payment of fines. See Section 3.41 on ordering the payment of costs. See Section 3.42 for more information on minimum state costs.

[29] Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k in response to the Michigan Supreme Court's holding in *People v Cunningham (Cunningham II)*, 496 Mich 145 (2014), rev'g 301 Mich App 218 (2013) and overruling *People v Sanders (Robert) (After Remand)*, 298 Mich App 105 (2012), and *People v Sanders (Robert)*, 296 Mich App 710 (2012). In *Cunningham II*, the Court held that MCL 769.1k(1)(b)(*ii*)—which, at the time, provided for the imposition of "[a]ny cost in addition to the minimum state cost"—did "not provide courts with the independent authority to impose 'any cost[;]'" rather, it "provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 147, 158 (concluding that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs[]"). 2014 PA 352 added MCL 769.1k(1)(b)(*iii*) to provide for the imposition of "any cost reasonably related to the actual costs incurred by the trial court[.]"

The amendments effectuated by 2014 PA 352 "appl[y] to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." 2014 PA 352, enacting section 1 (emphasis supplied).

- any cost "reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case[]"[30]
- the expenses of providing legal assistance to the defendant[31]
- any assessment authorized by law
- reimbursement under MCL 769.1f
- any additional costs incurred in compelling the defendant's appearance

"Beginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1).] . . . However, the information is not required to include the calculation of the costs involved in a particular case." MCL 769.1k(7). "A defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." MCL 769.1k(10).

See Section 3.40 for information on ordering the payment of fines, Section 3.41 for information on ordering the payment of costs, and Section 3.42 for information on minimum state costs. Additionally, the Appendix in this Benchbook contains three tables setting out statutory authority for imposing costs. See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Table of Felony Costs and Table of Misdemeanor Costs.

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[30] Court costs may be awarded under MCL 769.1k(1)(b)(*iii*), as amended by 2014 PA 352, effective October 17, 2014. *People v Konopka*, 309 Mich App 345, 357 (2015). This provision is applicable "[u]ntil 36 months after [October 17, 2014.]" MCL 769.1k(1)(b)(*iii*). See also 2014 PA 352, enacting section 1 ("[t]his amendatory act applies to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." See Section 3.41(B) for additional discussion of 2014 PA 352 and the imposition of "court costs."

[31] "[W]hen authorized, costs of prosecution 'must bear some reasonable relation to the expenses actually incurred in the prosecution.'" *People v Dilworth*, 291 Mich App 399, 401 (2011), quoting *People v Wallace*, 245 Mich App 310, 314 (1929). "Furthermore, those costs may *not* include 'expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law.'" *Dilworth*, 291 Mich App at 401, quoting *People v Teasdale*, 335 Mich 1, 5 (1952).

8. Restitution[32]

Victims have a constitutional right to restitution. Const 1963, art 1, § 24. Additionally, restitution is mandatory under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. See *People v Garrison*, 495 Mich 362, 365, 373 (2014). "At sentencing, the court must, on the record[,] order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(E)(1)(f); see also MCL 769.1a(2); MCL 780.766(2) (felony article); MCL 780.794(2) (juvenile article); MCL 780.826(2) (misdemeanor article).[33] "[B]oth [the CVRA[34] and MCL 769.1a(2)] impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete." *Garrison*, 495 Mich at 368 (noting that "the plain meaning of the word 'full' is 'complete; entire; maximum[]'") (citation omitted).

Because restitution is mandatory, defendants are on notice that it will be part of their sentences. *People v Ronowski*, 222 Mich App 58, 61 (1997). Restitution is not open to negotiation during the plea-bargaining or sentence-bargaining process. *Id.* at 61.

G. Judgment/Reissuance of Judgment

Under MCR 6.427, the court must date and sign a written judgment of sentence within seven days after sentencing that includes the following:

- The title and file number of the case;
- The defendant's name;
- The crime for which the defendant was convicted;
- The defendant's plea;

[32] For detailed information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8. For more information on restitution as it relates to felony sentencing, see Section 3.44.

[33] The felony, juvenile, and misdemeanor articles of the CVRA contain substantially similar language.

[34] Although the *Garrison* Court specifically applied MCL 780.766(2) (the restitution provision that is contained in the felony article of the CVRA), the Court's holding defining the term *full restitution* as "restitution that is maximal and complete[]" would presumably extend to the restitution provisions contained in the CVRA's juvenile article (MCL 780.794(2)) and misdemeanor article (MCL 780.826(2)) as well. See *Garrison*, 495 Mich at 367 n 11 (noting that "MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)[]").

- The name of the defendant's attorney if one appeared;
- The jury's verdict or the finding of guilt by the court;
- The term of the sentence;
- The place of detention;
- The conditions incident to the sentence; and
- Whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant's Michigan driver's license number.

If the defendant was found not guilty or is entitled to be discharged for any other reason, the court must enter judgment accordingly. MCR 6.427.

The date a judgment is signed is its entry date. MCR 6.427.

Under MCR 6.428, the trial court must issue an order restarting the time in which to file an appeal of right "[i]f the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right[.]"

H. Two-Way Interactive Video Technology

A defendant may not be sentenced for a felony by videoconference. *People v Heller*, ___ Mich App ___, ___ (2016). "Sentencing [for a felony] by videoconference plainly contravenes MCR 6.006, which identifies the criminal proceedings in which two-way interactive video technology may be used[]" and does not include felony sentencing. *Heller*, ___ Mich App at ___. Furthermore, "sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present, and virtual appearance is not a suitable substitute for physical presence." *Id*. at ___ (holding that where "[t]he trial court sentenced [the defendant] by videoconference, with [the defendant] located in the county jail[,]" the defendant's "[physical] absence from the sentencing nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair[]") (citations omitted).

Part B—Scoring the Statutory Sentencing Guidelines

3.3 Applicability of Statutory Sentencing Guidelines

The statutory sentencing guidelines apply to felony offenses listed in MCL 777.11 to MCL 777.19 that were committed on or after January 1, 1999. MCL 769.34(2). The brief descriptions accompanying the statutory sections listing the felony offenses in MCL 777.11 to MCL 777.19 "are for assistance only." MCL 777.6. The language contained in the statute defining the felony offense itself governs application of the sentencing guidelines. MCL 777.6. The statutory sentencing guidelines are *not* applicable to offenses for which the applicable statute establishes a mandatory determinate penalty or a mandatory penalty of life imprisonment for conviction of the offense. MCL 769.34(5). Application of the guidelines with regard to habitual offenders, repeat drug offenders, controlled substance convictions before March 1, 2003, and probation violations are discussed in detail in later sections of this chapter.

Application of the statutory sentencing guidelines is determined by "the date the crime was committed"; application of the guidelines is not affected by the date of conviction or the date of sentencing. See *People v Martin (George H)*, 257 Mich App 457, 459 (2003); *People v Gonzalez (Israel)*, 256 Mich App 212, 227 (2003); *People v Reynolds (Jeffrey)*, 240 Mich App 250, 253-254 (2000). MCL 769.34(2) states, in part:

> "Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3),[35] the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 [may[36]] be within the appropriate sentence range under the

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[35] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)."

[36] MCL 769.34(2) uses the word *shall* rather than *may*. However, in 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US ___ (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, 399 (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)[,]" 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). See Section 3.4 for discussion of *Lockridge*.

> version of those sentencing guidelines in effect on the date the crime was committed."

MCL 769.34(2) clearly anticipates the dynamic quality of the statutory sentencing guidelines by requiring that a court sentence an offender to the minimum sentence range recommended "under the version of th[e] sentencing guidelines in effect on the date the crime was committed."

Fashioning an appropriate sentence under the statutory guidelines requires the court's attention to the offender's prior record variable (PRV) and offense variable (OV) scores and the specific cell in which those scores place the offender in the appropriate sentencing grid. "Proposed scoring of the [sentencing] guidelines shall accompany the presentence report." MCR 6.425(D).

In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[37]

3.4 Judicial Factfinding and the *Apprendi*/*Alleyne* Rule

In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015). The following discussion aims to provide a historical backdrop for this conclusion.

A. *Apprendi*, *Alleyne*, and Michigan's "Indeterminate" Sentencing Scheme

Under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490 (2000); see also *Blakely v Washington*, 542 US 296, 303-304 (2004). In *Alleyne v United States*, 570 US ___, ___ (2013), the United States Supreme Court extended the *Apprendi*/*Blakely* rule to

[37] See Section 3.4 for discussion of *Lockridge*.

"mandatory minimum" sentences, overruling *Harris v United States*, 536 US 545 (2002), and holding that "a fact increasing *either end* of [a sentencing] range produces a new penalty and constitutes an ingredient of the offense[]" (emphasis added). Additionally, in *United States v Booker*, 543 US 220, 226, 245, 259 (2005), the United States Supreme Court held that the mandatory federal sentencing guidelines violated the Sixth Amendment under *Apprendi* and *Blakely*; as a remedy, two provisions of the federal guidelines were invalidated,[38] and the guidelines were rendered *advisory* rather than mandatory.

In caselaw that preceded *Alleyne*, 570 US ___, the Michigan Supreme Court concluded that the *Apprendi*/*Blakely* rule was inapplicable to Michigan's "indeterminate" sentencing scheme. See *People v Drohan*, 475 Mich 140, 163-164 (2006), abrogated in part as recognized by *Lockridge*, 498 Mich at 378-379.[39] Noting that "*Blakely*[, 542 US 296,] applies only to bar the use of judicially ascertained facts to impose a sentence beyond that permitted by the jury's verdict[]" and that "a Michigan trial court may not impose a sentence greater than the statutory maximum[,]" the *Drohan* Court concluded that "the trial court's power to impose a sentence is always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict[;]" accordingly, "[a]s long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Drohan*, 475 Mich at 160-161, 164, citations omitted. See also *People v Harper*, 479 Mich 599, 644 (2007) ("reaffirm[ing] . . . that Michigan has a true indeterminate sentencing system in which the statutory maximum is prescribed by law and in which the sentencing guidelines are used only to determine a defendant's minimum sentence[]"); *People v McCuller*, 479 Mich 672, 677, 698 (2007) (holding that under Michigan's "true indeterminate sentencing scheme[,]" whereby a "sentencing court scores the [offense variables (OVs)] only to calculate the recommended range for the *minimum* portion of the defendant's sentence, not to arrive at the defendant's maximum sentence, which is set by statute[,]" a sentencing court "[does] not violate *Blakely*[, 542 US 296,] when it engage[s] in judicial fact-finding to score the OVs and then

[38] Specifically, the *Booker* Court severed "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see [18 USC 3553(b)(1) (2000 ed, Supp IV)], and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see [18 USC 3742(e) (2000 ed and Supp IV).]" *Booker*, 543 US at 259.

[39] See also *People v McCuller*, 479 Mich 672 (2007); *People v Harper*, 479 Mich 599 (2007); and *People v Claypool*, 470 Mich 715, 730 n 14 (2004), each abrogated in part by *Lockridge*, 498 Mich at 364-365.

determine[s the] defendant's minimum sentence on the basis of those scores[]") (citations omitted).

In *People v Herron*, 303 Mich App 392, 403-404 (2013), rev'd in part 498 Mich 901 (2015) and overruled by *Lockridge*, 498 Mich at 399, the Court of Appeals rejected the defendant's challenge to the scoring of the sentencing guidelines on the basis of *Alleyne*, 570 US ___, ___ in which the United States Supreme Court extended the *Apprendi/ Blakely* rule to "mandatory minimum" sentences and held that "[f]acts that increase [a] mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt." The *Herron* Court concluded that "[w]hile judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sentence, the maximum of which is set by law, *Drohan*, [475 Mich at 164], it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment right to a jury trial." *Herron*, 303 Mich App at 403-404, citing *Alleyne*, 570 US at ___, ___ n 6. The Court explained:

> "[J]udicial fact-finding to score Michigan's sentencing guidelines falls within the '"wide discretion"' accorded a sentencing court '"in the sources and types of evidence used to assist [the court] in determining the kind and extent of punishment to be imposed within limits fixed by law[.]"' . . . Michigan's sentencing guidelines are within the 'broad sentencing discretion, informed by judicial factfinding, [that] does not violate the Sixth Amendment.'" *Herron*, 303 Mich App at 405, quoting *Alleyne*, 570 US at ___, ___ n 6 (internal citation omitted).

B. *Lockridge* and Remedy for *Alleyne* Violation

In *People v Lockridge*, 304 Mich App 278, 284 (2014), rev'd in part 498 Mich 358 (2015), the Court of Appeals applied *Herron*, 303 Mich App 392, and rejected the defendant's *Alleyne* challenge to the scoring of the guidelines. However, two judges on the *Lockridge* panel filed concurring opinions indicating that they disagreed with the analysis in *Herron*, 303 Mich App 392. Judge Beckering opined that *Alleyne*, 570 US ___, "renders Michigan's indeterminate sentencing scheme unconstitutional[,]" and that the appropriate remedy "would [be to] make the sentencing guidelines in Michigan advisory as the United States Supreme Court did with the federal sentencing guidelines in [*Booker*, 543 US 220]." *Lockridge*, 304 Mich App at 285-286 (Beckering, P.J., concurring). Judge Shapiro agreed with Judge Beckering that *Herron*, 303 Mich App 392, "[did] not comport with the

constitutional mandate of *Alleyne*[, 570 US ___,]" but only to the extent "that fact-finding is used to set a sentencing 'floor,' i.e., a mandatory minimum[;]" therefore, Judge Shapiro would have made "only the *lower* end of a range . . . advisory only." *Lockridge*, 304 Mich App at 311, 315-316 (Shapiro, J., concurring) (emphasis added).

The Michigan Supreme Court reversed, in part, the judgment of the Court of Appeals, 304 Mich App 278, and overruled *Herron*, 303 Mich App 392, holding that "Michigan's sentencing guidelines scheme[, which] allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives, . . . violates the Sixth Amendment to the United States Constitution under *Alleyne*[, 570 US ___]." *Lockridge*, 498 Mich at 383, 399 (additionally noting that "[b]ecause Michigan's sentencing scheme is not 'indeterminate' as that term has been used by the United States Supreme Court, [it] cannot be exempt from the [rule of *Apprendi*, 530 US 466, and *Alleyne*, 570 US ___,] on that basis[]").[40]

"To remedy the constitutional flaw in the guidelines," the *Lockridge* Court "sever[ed] MCL 769.34(2)[41] 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)."[42] *Lockridge*, 498 Mich at 391, 399. The Court further held, in accordance with *Booker*, 543 US at 233, 264, that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the guidelines "are advisory only." *Lockridge*, 498 Mich at 365, 399.[43]

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[40] As the term is used in Michigan, an *indeterminate sentence* is a sentence of unspecified duration. In *Lockridge*, 498 Mich at 380 n 18, the Michigan Supreme Court explained:

> "In [*Drohan*, 475 Mich at 153 n 10, the Court] cited the definition of 'indeterminate sentence' from *Black's Law Dictionary* (8th ed): a sentence 'of an unspecified duration, such as one for a term of 10 to 20 years.' . . . *Drohan* was correct to say that Michigan has an indeterminate sentencing scheme under that definition of the term."

The *Lockridge* Court further noted, however, that "Michigan's sentencing scheme is *not* 'indeterminate' as the United States Supreme Court has ever applied that term." *Lockridge*, 498 Mich at 380, citations omitted; emphasis added. Rather, "the relevant distinction between constitutionally permissible 'indeterminate' sentencing schemes and impermissible 'determinate' sentencing schemes, as the United States Supreme Court has used those terms, . . . turns on whether judge-found facts are used to curtail judicial sentencing discretion by *compelling* an increase in the defendant's punishment[; i]f so, the system violates the Sixth Amendment[, and] Michigan's sentencing guidelines do just that." *Id*. at 383.

[41] MCL 769.34(2) provides, in part:

> "Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under [MCL 769.34](3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed."

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.[44]

C. Imposing Sentence Under the Post-*Lockridge* Advisory Guidelines

"[S]entencing courts [are no longer] *bound* by the applicable sentencing guidelines range[.]" *Lockridge*, 498 Mich at 392. "Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Id.*, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). The *Lockridge* Court specifically noted that its holding "[did] nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not." *Lockridge*, 498 Mich at 392 n 28, citing MCL 777.21(1)(a); MCL 777.31(1); MCL 777.32(1). See also *People v Biddles*, ___ Mich App ___, ___ (2016) (noting that, under *Lockridge*, 498 Mich at 392 n 28, "judicial fact-finding is proper, as long as the guidelines are advisory only[,]" and disagreeing "with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant's OV score under the guidelines[,]" which "is in direct contradiction of the *Lockridge* Court's rejection of the defendant's argument that juries should be required to find the facts used to score the OVs[]").

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[42] MCL 769.34(3) provides, in part:

> "A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."

[43] The *Lockridge* Court rejected two additional proposed remedies. First, the Court rejected, as an undue "burden[to the] judicial system[,]" the defendant's contention that juries should be "require[d] . . . to find the facts used to score all the OVs that are not admitted or stipulated by the defendant or necessarily found by the jury's verdict." *Lockridge*, 498 Mich at 389, citation omitted. Second, the Court "decline[d] to adopt" Judge Shapiro's suggested remedy, which would render advisory only the *floor* of the applicable guidelines range, "because it would require [the Court] to significantly rewrite MCL 769.34(2)[] . . . [and] would be inconsistent with the Legislature's expressed preference" that both the top and bottom ends of the guidelines range "be mandatory in all cases (other than those in which a departure was appropriate)[.]" *Lockridge*, 498 Mich at 389-390, citation omitted.

[44] It is unclear whether or to what extent other statutory references to departures (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. See, e.g., MCL 769.34(4), governing intermediate sanctions, which refers to *departures*. See Section 3.7 for discussion of intermediate sanctions.

"When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant[45] or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so."[46] *Lockridge*, 498 Mich at 391-392. "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable." *Id*. at 392, citing *Booker*, 543 US at 261. "[A departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny, constitutes a reasonable sentence under *Lockridge*." *People v Steanhouse*, 313 Mich App 1, 47-48 (2015), lv gtd 499 Mich 934 (2016) (citations omitted).

The trial court must score the now-advisory guidelines before imposing a departure sentence. *People v Geddert*, ___ Mich ___, ___ (2016).

See Section 3.54(C) for discussion of appellate review of sentence departures. See also Section 3.54(E) for discussion of appellate review of sentences in cases that have been held in abeyance for *Lockridge*, 498 Mich 358.

3.5 Offense Categories and Crime Classes

A. Offense Category (Crime Group)

All felony offenses to which the sentencing guidelines apply fall into one of six offense categories. The offense category, or "crime group," to which an offense belongs determines which offense variables must be scored. The six offense categories are defined in MCL 777.5(a)-(f) as:

- crimes against a person ("person"),

[45] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *Lockridge*, 498 Mich at 399, the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea or in testimony or by stipulation or by some similar or analogous route." *People v Garnes*, ___ Mich App ___, ___ (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*. at ___ (citing *Apprendi*, 530 US at 469-471, and remanding "for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admissions" with respect to several contested offense variable scores) (additional citations omitted).

[46] MCR 6.425(E)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure," has not yet been amended to conform to *Lockridge*, 498 Mich 358.

- crimes against property ("property"),
- crimes involving a controlled substance ("CS"),
- crimes against public order ("pub ord"),
- crimes against public trust ("pub trst"), and
- crimes against public safety ("pub saf").

B. Crime Class

Within each "crime group," all offenses to which the guidelines apply are further categorized by the seriousness of the offense. This gradation of offense seriousness is indicated by the offense's "crime class."[47] An offense's crime class is designated by the letters "A" through "H" and "M2." "M2" (second-degree murder) and "A" represent the most serious felony offenses, while the letters "B" through "H" represent the remaining felony offenses in decreasing order of their seriousness.

An offense's crime class roughly corresponds to the maximum term of imprisonment for offenses in the same class:[48]

ClassSentence

- ALife
- B20 years of imprisonment
- C15 years of imprisonment
- D10 years of imprisonment
- E5 years of imprisonment
- F4 years of imprisonment
- G2 years of imprisonment
- HJail or other intermediate sanction

Generally, the actual statutory maximum term of imprisonment for a specific offense is consistent with the "crime class/maximum sentence" chart printed above. However, there are offenses that

[47] An offense's crime class determines which sentence grid applies to the sentencing offense. MCL 777.21(1)(c). Sentence grids are available by clicking here.

[48] House Legislative Analysis, HB 5419, HB 5398, and SB 826 (Revised Second Analysis), September 23, 1998, 3.

stray from this standard. Apparently, the statutory maximum term of imprisonment was used to divide the felonies into discrete crime classes so that most felony offenses included in a particular crime class share the same statutory maximum term of imprisonment. There is no legislative authority for the division of felonies into crime classes; therefore, there is no prohibition against assigning a felony to a crime class that is inconsistent with the statutory maximum for that felony offense. Rather, the statutory maximum, as it is stated in the actual language of the statute, governs the upper limit of punishment possible for conviction of a particular offense. See MCL 777.6.

For example, MCL 409.122(3) and MCL 750.145c(3) are both "crimes against a person," and both are designated as class D felonies.[49] MCL 777.14b; MCL 777.16g. According to the "crime class/ maximum sentence" chart above, which corresponds to language found in legislative documents discussing the statutory guidelines,[50] class D felonies are crimes for which a maximum sentence of ten years of imprisonment may be appropriate. However, the maximum term of imprisonment authorized by MCL 750.145c(3) is only seven years (falling in between the maximum terms indicated for class D and class E felonies), while the maximum term authorized by MCL 409.122(3) is 20 years. In neither of the two statutes is the statutory maximum ten years as the designation "class D" suggests. While the crime class designation in most cases will correspond to the maximum sentences listed in the chart above, the two offenses discussed here exemplify the directive of MCL 777.6: the express language of the statute defining the offense itself governs application of the sentencing guidelines.

C. Attempts

The sentencing guidelines apply to attempted crimes if the crime attempted is a felony offense. MCL 777.19(1). The guidelines do not apply to an attempt to commit a class H offense. *Id*.

An attempt to commit an offense falls within the same offense category or crime group as the offense itself. MCL 777.19(2). The crime class for an attempt is determined by the class of the offense attempted:

- if the attempted offense is in class A, B, C, or D, the attempt is a class E offense. MCL 777.19(3)(a).

[49] In general, MCL 409.122(3) prohibits employing children in a child sexually abusive activity, and MCL 750.145c(3) prohibits distributing, promoting, or financing child sexually abusive activity or materials.

[50] See House Legislative Analysis, HB 5419, HB 5398, and SB 826 (Revised Second Analysis), September 23, 1998, 3.

- if the attempted offense is in class E, F, or G, the attempt is a class H offense. MCL 777.19(3)(b).

3.6 Sentencing Grids[51]

Sentencing grids for all felony offenses to which the guidelines apply are located in MCL 777.61 to MCL 777.69. There are nine different grids, one each for crimes in classes A, B, C, D, E, F, G, and H, and one for second-degree murder (M2). Each sentencing grid is divided into "cells" corresponding to the number of offense variable (OV) and prior record variable (PRV) levels applicable to the crime class represented by the grid. A defendant's recommended minimum sentence range is indicated by a numerical range in the cell located at the intersection of the defendant's "OV level" (vertical axis) and "PRV level" (horizontal axis) on the sentencing grid appropriate to the offense of which the defendant was convicted. MCL 777.21(1)(c). The recommended minimum sentence in each cell is expressed by a range of numbers (in months) or life imprisonment ("L"). *Id*.

The nine grids in MCL 777.61 to MCL 777.69 contain only the sentence ranges for offenders *not* being sentenced as habitual offenders; no separate grids for habitual offenders are provided. However, the recommended minimum sentence range for habitual offenders is determined by reference to the ranges reflected in the nine "basic" grids. MCL 777.21(3)(a)–MCL 777.21(3)(c). In previously published sentencing manuals, the sentencing grids for first-time offenders and for habitual offenders were designed separately so that reference to one grid was limited to either first-time offender ranges or habitual offender ranges. The sentencing grids printed in the *Michigan Sentencing Guidelines Manual* (available by clicking here), and as shown in the examples below, are comprehensive sentencing grids that combine the minimum sentences recommended under the guidelines for *all* offenders—both first-time *and* habitual.

Specific cells in some sentencing grids are differentiated from other cells by their classification as *prison cells*, *straddle cells*, and *intermediate sanction cells*.[52]

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[51] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

[52] These terms are not expressly used in statutes governing application of the sentencing guidelines. See MCL 769.34(4); *People v Stauffer*, 465 Mich 633, 636 n 8 (2002).

A. Prison Cells

Prison cells are those cells for which the minimum sentence recommended exceeds one year of incarceration. In the sentencing grids that appear in the State of Michigan *Sentencing Guidelines Manual* and in this chapter, *prison cells* are those cells that are unmarked, i.e., not shaded (as are *straddle cells*), and not asterisked (as are "intermediate sanction cells").[53]

B. Straddle Cells

Straddle cells[54] are those cells in which the lower limit of the recommended range is one year or less and the upper limit of the recommended range is more than 18 months. MCL 769.34(4)(c); *Stauffer*, 465 Mich at 636 n 8. *Straddle cells* appear shaded in the sentencing grids published in the State of Michigan *Sentencing Guidelines Manual* and in the grids used in this chapter, as shown in the example below.

Sentencing Grid for Class F Offenses—MCL 777.67 Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c))													
OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4

[53] An example of a sentencing grid for class F offenses appears before Section 3.6(C).

[54] See Section 3.7 for a comprehensive discussion.

II 10-34 Points	0	6*	0	9*	0	17*	5	23	10	23	12	24	
		7*		11*		21		28		28		30	HO2
		9*		13*		25		34		34		36	HO3
		12*		18*		34		46		46		48	HO4
III 35-74 Points	0	9*	0	17*	2	17*	10	23	12	24	14	29	
		11*		21		21		28		30		36	HO2
		13*		25		25		34		36		43	HO3
		18*		34		34		46		48		58	HO4
IV 75+ Points	0	17*	2	17*	5	23	12	24	14	29	17	30	
		21		21		28		30		36		37	HO2
		25		25		34		36		43		45	HO3
		34		34		46		48		58		60	HO4
Intermediate sanction cells are marked with asterisks, straddle cells are shaded, and prison cells are unmarked.													

C. Intermediate Sanction Cells

Intermediate sanction cells[55] are those cells in which the upper limit recommended by the guidelines is 18 months or less. MCL 769.34(4)(a). These cells are marked with an asterisk in published the State of Michigan *Sentencing Guidelines Manual* and in this chapter, as shown in the example above.

D. Habitual Offenders

This Part (Part B) discusses the standard method of determining the recommended minimum sentence ranges using the statutory

[55] See Section 3.7 for a comprehensive discussion.

sentencing guidelines and grids for offenders *not* being sentenced as habitual offenders. Discussion of the guidelines and grids as they apply to habitual offenders begins in Section 3.16.

3.7 Intermediate Sanctions

A. Introduction

Two types of differentiated sentencing grid cells, *intermediate sanction cells* (governed by MCL 769.34(4)(a)-(b)) and *straddle cells* (governed by MCL 769.34(4)(c)),[56] generally (in the absence of a departure) provide for the imposition of certain types of sentences.[57]

MCL 769.34(4) provides:

> "Intermediate sanctions shall be imposed under this chapter as follows:
>
> > (a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines . . . is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason[58] to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.
> >
> > (b) If an attempt to commit a felony designated in offense class H . . . is punishable by imprisonment for more than 1 year, the court shall impose an intermediate sanction upon conviction of that offense absent a departure.
> >
> > (c) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:

[56] The terms *intermediate sanction cell* and *straddle cell* are not expressly used in statutes governing application of the sentencing guidelines. See MCL 769.34(4)(a); *People v Stauffer*, 465 Mich 633, 636 n 8 (2002).

(*i*) To imprisonment with a minimum term within that range.

(*ii*) To an intermediate sanction that may include a term of imprisonment of not more than 12 months."

Sanctions that are considered intermediate sanctions include, but are not limited to, any one or more of the following:

- inpatient or outpatient drug treatment or participation in a drug treatment court (MCL 600.1060 to MCL 600.1084);
- probation[59] with conditions required or authorized by law;
- residential probation;

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[57] In 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US ___ (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, 399 (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)[,]" 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). See Section 3.4 for discussion of *Lockridge*.

The *Lockridge* Court did not specifically address intermediate sanctions. However, MCL 769.34(4), governing intermediate sanctions, refers to *departures*, and the *Lockridge* Court 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, emphasis supplied.

Under MCL 769.34(4)(a), a trial court generally must impose an intermediate sanction when the offender's PRV and OV scores place him or her in an intermediate sanction cell; if the court instead imposes a prison sentence, it must articulate a *substantial and compelling reason* to do so. Similarly, under MCL 769.34(4)(b), a defendant convicted of an attempt to commit a Class H felony that is punishable by imprisonment for more than one year must be sentenced to an intermediate sanction, absent a *departure*. Finally, under MCL 769.34(4)(c), absent a *departure*, a trial court must either impose a prison sentence or an intermediate sanction when the offender's PRV and OV scores place him or her in a straddle cell.

As noted above, *Lockridge*, 498 Mich at 365 n 1, requires that statutory references to "departures from the guidelines[]" be severed or struck down only "as necessary." The Court of Appeals has held that, "[p]ursuant to the broad language of *Lockridge*, [498 Mich at 365 n 1, 391,] under [MCL 769.34(4)(a)], a trial court *may*, but is no longer *required to*, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding, "[c]onsistent with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word 'may[,]'" and "strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction[]") (emphasis added). Moreover, "because an intermediate sanction is no longer mandated pursuant to *Lockridge*," a trial court does not violate *Alleyne v United States*, 570 US ___, ___ (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, ___ Mich App at ___. Presumably, the same reasoning would apply to MCL 769.34(4)(b) (providing for the imposition of intermediate sanctions for certain attempted Class H offenses) and MCL 769.34(4)(c) (governing straddle cells). See Section 3.4 for discussion of *Lockridge* and *Alleyne*.

- probation with jail;
- probation with special alternative incarceration (SAI);[60]
- mental health treatment;
- mental health or substance abuse counseling;
- jail, with or without work or school release;
- jail, with or without day parole authorized under MCL 801.251 to MCL 801.258;
- participation in a community corrections program;
- community service;
- payment of a fine;[61]
- house arrest; and
- electronic monitoring. MCL 769.31(b)(*i*)-(*xv*).

An offender may be incarcerated in a county jail as part of an intermediate sanction as long as the term does not exceed the upper limit indicated in an intermediate sanction cell[62] or 12 months, whichever is less. MCL 769.34(4)(a).

B. Intermediate Sanction Cells

Intermediate sanction cells are those cells in which the upper limit of the minimum range recommended under the guidelines is 18 months or less. MCL 769.34(4)(a). Intermediate sanction cells are marked with an asterisk in the example below, and in the sentencing

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[58] The intermediate sanction provisions of MCL 769.34(4)(a)-(c) provide that, absent a *departure*, the court is *required* to impose sentence as set out in those provisions. However, "[p]ursuant to the broad language of [*People v Lockridge*, 498 Mich 358, 365 n 1, 391 (2015)], under [MCL 769.34(4)(a)], a trial court *may*, but is no longer *required to*, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding, "[c]onsistent with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word 'may[,]'" and "strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction[]") (emphasis added). Moreover, "because an intermediate sanction is no longer mandated pursuant to *Lockridge*," a trial court does not violate *Alleyne v United States*, 570 US ___, ___ (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, ___ Mich App at ___. See Section 3.4 for discussion of *Lockridge* and *Alleyne*.

[59] See Section 3.46 for a detailed discussion of probation.

[60] See Section 3.53.

[61] See Section 3.40.

[62] Unless otherwise specified in the applicable statutory provisions. See MCL 769.34(2)(a).

grids published in this chapter and in the State of Michigan *Sentencing Guidelines Manual*. An intermediate sanction is any sanction other than imprisonment in a state prison or state reformatory that may be lawfully imposed on an offender. MCL 769.31(b).

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4

An intermediate sanction is any sanction other than imprisonment in a state prison or state reformatory that may be lawfully imposed on an offender. MCL 769.31(b). Under MCL 769.34(4)(a), if the offender's PRV and OV scores place him or her in an intermediate sanction cell, the trial court must either impose an intermediate sanction or articulate for the record a substantial and compelling reason for a departure.[63] However, "[p]ursuant to the broad language" of *People v Lockridge*, 498 Mich 358, 365 n 1, 391 (2015),[64] "under [MCL 769.34(4)(a)], a trial court *may*, but is no longer *required to*, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding, "[c]onsistent with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word

[63] See *People v Stauffer*, 465 Mich 633, 635-636 (2002); see also *People v Rathman*, 497 Mich 1008, 1008 (2015) (noting that "[a]n intermediate sanction does not include a prison term even if the minimum prison sentence is within the guidelines range[,]" and remanding for resentencing because "the trial court did not articulate a substantial and compelling reason for imposing a prison term" when "[t]he defendant's minimum sentencing guidelines called for an intermediate sanction of 0 to 17 months[]") (citation omitted).

[64] In *Lockridge*, 498 Mich at 391, the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. See Section 3.4 for discussion of *Lockridge*.

'may[,]'" and "strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction[]") (emphasis added).[65] Moreover, "because an intermediate sanction is no longer mandated pursuant to *Lockridge*," a trial court does not violate *Alleyne v United States*, 570 US ___, ___ (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, ___ Mich App at ___.[66]

> **NOTE:** Although imposition of an intermediate sanction under MCL 769.34(4)(a) is no longer mandatory under *Schrauben*, ___ Mich App at ___, the following discussion of caselaw predating *Schrauben* and *Lockridge*, 498 Mich 358, *may* be of continued relevance in determining whether to impose an intermediate sanction under the guidelines.

An offender may be incarcerated in a county jail as part of an intermediate sanction as long as the term does not exceed the upper limit indicated in the intermediate sanction cell[67] or 12 months, whichever is less. MCL 769.34(4)(a). In *Stauffer*, 465 Mich at 634, the defendant's PRV and OV levels placed him in a cell with a maximum minimum term of 17 months, and the trial court sentenced the defendant to a prison term of 17 to 24 months.[68] Ordinarily, the defendant's sentence would have been unremarkable because on its face, the sentence was within the guidelines. *Id.* at 634-635. However, under the plain language of MCL 769.34(4)(a), the trial court was required to impose an intermediate sanction because the upper limit of the range in the defendant's cell was less than 18 months. *Stauffer*, 465 Mich at 635. Because a prison term cannot be an intermediate sanction, the trial court's sentence represented a departure from the directive contained in MCL 769.34(4)(a), even though the actual length of the term imposed fell within the face values indicated by the cell. *Stauffer*, 465 Mich at 636.

See also *People v Muttscheler*, 481 Mich 372, 373 (2008), in which the Michigan Supreme Court held that absent a substantial and compelling reason to depart from the guidelines, a defendant whose

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[65] See the *Alleyne/Lockridge* footnote in Section 3.7(A) for more information. See Section 3.4 for additional discussion of *Lockridge*, 498 Mich 358.

[66] The *Schrauben* Court additionally held that if the trial court declines to impose an intermediate sanction under MCL 769.34(4)(a) and instead imposes a prison sentence that is within the recommended minimum sentencing range, the prison sentence "is within the range authorized by law." *Schrauben*, ___ Mich App at ___, citing *Alleyne*, 570 US at ___. Under such circumstances, MCL 769.34(10) requires that "the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Schrauben*, ___ Mich App at ___.

[67] Unless otherwise specified in the applicable statutory provisions. See MCL 769.34(2)(a).

[68] The minimum term was reduced to 16 months to comply with the two-thirds rule. *Stauffer*, 465 Mich at 634 n 3.

recommended minimum sentence range required the imposition of an intermediate sanction could not be sentenced to serve time in prison because an intermediate sanction did not include a prison sentence. The Court noted that *Stauffer*, 465 Mich at 636, "implies that when the guidelines require an intermediate sanction, even if the *length* of the sentence does not exceed the statute's 12-month maximum, the sentence is an upward departure if the defendant is required to serve it in prison, rather than in jail." *Muttscheler*, 481 Mich at 375. See, e.g., *People v Lucey*, 287 Mich App 267, 269-270 (2010), in which the guidelines recommended a minimum term of five to 17 months, and the trial court was required to impose an intermediate sanction unless it provided a substantial and compelling reason to sentence the defendant to prison. Without a substantial and compelling reason, the defendant's sentence of 17 to 30 months in prison—a "location departure"—to run consecutively to the sentence for which he was on parole at the time he committed the offenses in the case at issue, constituted an unsubstantiated guidelines departure. *Id.* at 269, 274. According to the Court, "[t]he fact that a defendant might have to serve county jail time following additional prison incarceration for a parole violation cannot be a substantial and compelling reason to depart from the sentencing guidelines." *Id*. at 273.

See also *People v Martinez-Vasconcel*, 497 Mich 1018, 1018 (2015) (holding that where a defendant's "plea agreement provided for a sentence within a sentencing guidelines range of 0 to 18 months[,] . . . the trial court was required to impose an intermediate sanction as defined by MCL 769.31(b)," and remanding for resentencing because "the trial court sentenced the defendant to a term of imprisonment without any acknowledgment on the record that this was a departure from the plea and sentence agreement[]") (citing MCL 769.34(4)(a); *Muttscheler*, 481 Mich 372; MCR 6.302(C)(3); MCR 6.310(B)(2)).

For a defendant sentenced for violating a section of the Michigan Vehicle Code, a trial court's sentence of one year of probation to be served in the county jail was not a departure under MCL 769.34(2)(a) where the maximum minimum term recommended by the guidelines was 11 months. *People v Hendrix*, 263 Mich App 18, 22 (2004), modified in part 471 Mich 926 (2004). *Hendrix*, 263 Mich App at 20, involved MCL 257.625(9)(c),[69] a statute expressly noted in MCL 769.34(2)(a). Violations of MCL 257.625(9)(c) are subject to alternate mandatory minimum sentences under MCL 769.34(2), and the trial court may sentence a defendant to either alternative. *Hendrix*, 263 Mich App at 21-22. In *Hendrix*, 263 Mich App at 21, one sentencing alternative under MCL 257.625(9)(c) authorized the

[69] MCL 257.625(8)(c) at the time *Hendrix* was decided.

court to sentence a defendant to prison for not less than one year, and this one-year mandatory minimum applied *only if* the defendant was sentenced to prison.

The *Hendrix* case illustrates the operation of MCL 769.34(2)(a):

> "If the Michigan vehicle code . . . mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections [(*if a defendant is sentenced under the option in MCL 257.625(9)(c)(i), a mandatory minimum of one year applies*)] and the Michigan vehicle code . . . authorizes the sentencing judge to impose a sentence that is less than that minimum sentence [(*MCL 257.625(9)(c)(ii) authorizes a court to sentence a defendant to probation and community service with a maximum of one year in a county jail, a lesser sentence than the one-year minimum in prison*)], imposing a sentence that exceeds the recommended sentence range [(*in Hendrix, the range was 0 to 11 months*)] but is less than the mandatory minimum sentence [(*one year in prison if the defendant is sentenced to prison*)] is not a departure under this section." *Hendrix*, 263 Mich App at 19.

C. Attempted Class H Felony Offenses Punishable by More Than One Year of Imprisonment

Under MCL 769.34(4)(b), when an offender is convicted of attempting to commit a class H felony for which a term of more than one year of imprisonment is authorized, the trial court must impose an intermediate sanction, unless the court expresses a substantial and compelling reason for a departure.[70]

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[70] However, in *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[,]" and additionally 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, 391, emphasis supplied. "Pursuant to the broad language of *Lockridge*, [498 Mich at 365 n 1, 391], under [MCL 769.34(4)(a) (governing intermediate sanction cells)], a trial court *may*, but is no longer *required to*, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding, "[c]onsistent with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word 'may[,]'" and "strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction[]") (emphasis added). Moreover, "because an intermediate sanction is no longer mandated pursuant to *Lockridge*," a trial court does not violate *Alleyne v United States*, 570 US ___, ___ (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, ___ Mich App at ___. Presumably, the same reasoning would apply to MCL 769.34(4)(b) (providing for the imposition of intermediate sanctions for certain attempted Class H offenses) and MCL 769.34(4)(c) (governing straddle cells). See the *Alleyne/Lockridge* footnote in Section 3.7(A) for more information. See Section 3.4 for discussion of *Lockridge* and *Alleyne*.

For example, furnishing a prisoner with contraband is a class H felony punishable by a maximum of five years of imprisonment. MCL 800.281(1); MCL 800.285(1); MCL 777.17g. Therefore, an offender convicted of attempting to furnish a prisoner with contraband would be convicted of attempting to commit a class H felony punishable by more than one year in prison. According to MCL 769.34(4)(b), the offender must be sentenced to an intermediate sanction—which may include up to one year in county jail—unless a departure is appropriate.

D. Straddle Cells

Generally, *straddle cells* are those cells that "straddle" the division between prison and jail. *Straddle cells* are those cells in which the lower limit of the recommended range is one year or less and the upper limit of the recommended range is more than 18 months. MCL 769.34(4)(c); *Stauffer*, 465 Mich at 636 n 8. *Straddle cells* appear shaded in the sentencing grids published in the State of Michigan's *Sentencing Guidelines Manual* and in the grids used in this chapter, as shown in the example in Section 3.7(B).

When an offender's prior record variable (PRV) and offense variable (OV) levels result in his or her placement in a *straddle cell*, the sentencing court—absent a departure—must sentence the offender in one of two ways described in MCL 769.34(4)(c)[71]:

- The court must impose a sentence in which the minimum term of imprisonment is within the range indicated in the *straddle cell*; that is, if the court sentences the offender to prison rather than jail, the minimum term must be within the range of months recommended in that cell, MCL 769.34(4)(c)(*i*); or

[71] However, in *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[,]" and additionally 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, 391, emphasis supplied. "Pursuant to the broad language of *Lockridge*, [498 Mich at 365 n 1, 391], under [MCL 769.34(4)(a) (governing intermediate sanction cells)], a trial court *may*, but is no longer *required to*, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding, "[c]onsistent with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word 'may[,]'" and "strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction[]") (emphasis added). Moreover, "because an intermediate sanction is no longer mandated pursuant to *Lockridge*," a trial court does not violate *Alleyne v United States*, 570 US ___, ___ (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, ___ Mich App at ___. Presumably, the same reasoning would apply to MCL 769.34(4)(b) (providing for the imposition of intermediate sanctions for certain attempted Class H offenses) and MCL 769.34(4)(c) (governing straddle cells). See the *Alleyne/Lockridge* footnote in Section 3.7(A) for more information. See Section 3.4 for discussion of *Lockridge* and *Alleyne*.

- The court must sentence the offender to an intermediate sanction, which may include a term of imprisonment up to 12 months; that is, any term of imprisonment imposed under this option will be served by the offender in the county jail, MCL 769.34(4)(c)(*ii*).

People v Martin (George H), 257 Mich App 457 (2003), provides an example of a case involving a straddle cell, i.e., a cell in which the upper limit of the recommended sentence is more than 18 months and the lower limit is 12 months or less. MCL 769.34(4)(c). According to the guidelines, the defendant's recommended minimum sentence was 5 to 28 months in prison for the offense of larceny from a person, MCL 750.357. *Martin (George H)*, 257 Mich App at 459-460. Pursuant to a *Cobbs*[72] agreement, the defendant pleaded guilty based on the trial court's preliminary sentence evaluation that the court would sentence him to a term in county jail rather than a term of imprisonment in state prison. *Martin (George H)*, 257 Mich App at 458. The defendant was sentenced as a second offense habitual offender, MCL 769.10, to ten months in the county jail, and the prosecution appealed on the grounds that the trial court erred as a matter of law by imposing a determinate sentence on defendant. *Martin (George H)*, 257 Mich App at 458.

Although MCL 769.8 prohibits determinate sentencing[73] where the penalty for a felony offense may be imprisonment in a state prison, the Michigan Court of Appeals concluded that the Legislature intended an exception to MCL 769.8 with the creation of "intermediate sanctions" for offenses "with a relative lack of severity." *Martin (George H)*, 257 Mich App at 461. The Court explained that this legislative intent would be frustrated by application of MCL 769.8 to the situation in *Martin (George H)*: "[O]ur Legislature enacted a statutory sentencing scheme that provides greater uniformity for sentences involving the most serious offenses and offenders, [and] it also provided trial courts with greater discretion regarding sentences for offenses and offenders on the other end of the continuum." *Martin (George H)*, 257 Mich App at 461. The Court noted that MCL 769.31(b)(*viii*) expressly indicates that jail is an appropriate intermediate sanction, and held that the sentence imposed "merely recognized that [the] Legislature created an exception in less serious cases." *Martin (George H)*, 257 Mich App at 462.

[72] *People v Cobbs*, 443 Mich 276 (1993); see Section 3.37 for more information.

[73] Determinate and indeterminate sentencing are discussed in Section 3.1(B).

3.8 Scoring an Offender's Prior Record Variables (PRVs)[74]

> Note: Published appellate opinions discussing issues under the legislative sentencing guidelines remain limited with regard to specific prior record variables. In an effort to provide guidance to users of this chapter, unpublished opinions addressing issues not addressed by published opinions have been included in the discussion of a particular area. Unpublished opinions appear only to provide a court with information regarding how an appellate court has dealt with an issue not clearly addressed in published case law. Unpublished opinions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), and the first unpublished opinion appearing in a series of unpublished opinions will be footnoted with a reminder of this fact. In addition, published opinions discussing the prior judicial guidelines are included where relevant.

MCL 777.21 provides in detail the method by which an offender's recommended minimum sentence range is determined using the offender's prior record variable (PRV) and offense variable (OV) scores. Each *offense variable* to be scored is determined by the crime group to which the sentencing offense belongs. MCL 777.21(1)(a). But *all prior record variables* are scored for felony offenses to which the guidelines apply, without regard to the sentencing offense's crime group. MCL 777.21(1)(b); *People v Peltola*, 489 Mich 174, 187, 190-191 (2011). The total number of points assessed for the PRVs constitutes the offender's "PRV level," which is represented by the horizontal axis on each sentencing grid.[75]

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[74] In 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US ___ (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, 399 (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)[,]" 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). See Section 3.4 for discussion of *Lockridge*.

The rule of *Apprendi*, 530 US at 490 ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[]"), does not apply to prior convictions and therefore presumably does not implicate the scoring of *prior record* variables under Michigan's sentencing guidelines. See *Alleyne*, 570 US at ___ n 1 (noting that "[i]n *Almendarez–Torres v United States*, [523 US 224 (1998)], [the United States Supreme Court] recognized a narrow exception to [the] general rule [of *Apprendi*] for the fact of a prior conviction[;]" the *Alleyne* Court declined to revisit *Almendarez-Torres* "[b]ecause the parties [did] not contest that decision's vitality[]"); see also, generally, *Lockridge*, 498 Mich at 370 n 12.

Each PRV statute contains several statements to which a specific number of points is assigned. The statements appearing in each of the PRV statutes quantify the specific sentencing characteristic addressed by each individual PRV. For example, PRV 1 targets an offender's previous high severity felony convictions and assigns a point value to these prior convictions. The point value increases according to the number of previous qualifying convictions.

"'[A] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.'" *People v Jones (Byron)*, 494 Mich 880, 880-881 (2013), quoting *People v Osantowski*, 481 Mich 103, 111 (2008) (emphasis omitted); see also *People v Hardy (Donald)*, 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016; *People v Steanhouse*, 313 Mich App 1, 38 (2015), lv gtd 499 Mich 934 (2016). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy (Donald)*, 494 Mich at 438; see also *Steanhouse*, 313 Mich App at 38; *People v Gullett*, 277 Mich App 214, 217 (2007).[76]

For purposes of scoring an offender's PRVs, a "conviction" includes an assignment to youthful trainee status under MCL 762.11 *et seq*. and a conviction set aside under MCL 780.621 to MCL 780.624. MCL 777.50(4)(a).[77] Similarly, a "juvenile adjudication" for purposes of an offender's PRV score includes an adjudication set aside under MCL 712A.18e or expunged. MCL 777.50(4)(c). See *People v Smith (Ricky)*, 437 Mich 293, 302-304 (1991), where the Court explained the propriety of considering an adult defendant's expunged juvenile record at the adult defendant's sentencing hearing. The Court noted that the purpose of automatic expungement was not to protect the adult offender from any criminal consequences of his or her juvenile record, but to eliminate the social or civil stigma of delinquency and the economic disabilities that could accompany a record of juvenile delinquency. *Id.* at 302-303. "The law contemplates a differentiation in sentencing between first-time offenders and recidivists, juvenile or adult." *Id*. at 303.

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[75] Sentencing grids are found in MCL 777.61 to MCL 777.69. Each grid is also available by clicking here.

[76] In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the guidelines "are advisory only." Because nothing in *Lockridge* specifically calls into question the standards currently governing appellate review of judicial fact-finding in scoring the (now advisory) guidelines, it is unclear to what extent these standards remain good law. The Court of Appeals has since concluded that, "given the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*." *Steanhouse*, 313 Mich App at 38, citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438; *Gullett*, 277 Mich App at 217.

[77] Specific offender statuses are discussed in Section 3.8(H).

The general rule of MCL 777.21(1)(b), which requires that all PRVs be scored for all offenses enumerated in MCL 777.11–MCL 777.19, applies to offenders falling within the purview of MCL 777.21(4) for violations listed in MCL 777.18 (guidelines offenses based on the commission of an underlying offense), notwithstanding the absence of any reference to PRVs in MCL 777.21(4). *Peltola*, 489 Mich at 188-189.[78]

A. Ten-Year Gap Requirement for Prior Convictions and Adjudications

MCL 777.50 proscribes using a conviction or a juvenile adjudication when scoring PRVs 1 through 5 if discharge from the conviction or adjudication occurred more than ten years before commission of the sentencing offense. Specifically, MCL 777.50(1) states:

> "In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of [ten] or more years between the discharge[79] date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication."

To apply MCL 777.50(1), determine the length of time between the *discharge date* of the conviction or juvenile adjudication immediately preceding the *commission date* of the sentencing offense. If the time span is ten years or more, that conviction or juvenile adjudication—and any convictions or adjudications that occurred earlier—must not be counted when scoring the offender's PRVs. MCL 777.50(2). If the time span between the commission date of the offender's sentencing offense and the discharge date of the offender's most recent conviction or juvenile adjudication is less than ten years, that prior conviction or adjudication must be counted in scoring the offender's PRVs.

If the offender's most recent conviction or adjudication must be counted in scoring his or her PRVs, and if the offender has additional prior convictions or juvenile adjudications, determine the length of time between the *commission date* of the prior conviction or adjudication first scored and the *discharge date* of the next earlier conviction or adjudication. If the time span equals or exceeds ten years, that conviction or adjudication may not be counted. If the time span is less than ten years, that conviction or adjudication may be counted in scoring the offender's PRVs. Use the process described above until a time span equal to or greater than ten years

[78] See Section 3.11.

[79] Discharge from the jurisdiction of the court or the Department of Corrections. MCL 777.50(4)(b).

separates the discharge date of an earlier conviction or adjudication from the commission date of the next conviction or adjudication or until no previous convictions or adjudications remain. MCL 777.50(2).

It is important to document both the *commission* date and the *discharge* date of each prior conviction or juvenile adjudication. When working backward from the commission date of the sentencing offense, the discharge date of the most recent conviction or adjudication is required. If the most recent conviction or adjudication qualifies as a previous conviction under MCL 777.50, working backward from that conviction or adjudication requires the scorer to begin with that conviction's *commission* date—not the *discharge* date by which its relationship to the sentencing offense was first measured.

If a discharge date is not available, determine the date by adding the amount of time the defendant was placed on probation or the length of the minimum term of incarceration to the date the defendant was *convicted*—not the date the defendant was *sentenced*—and use that date as the discharge date. MCL 777.50(3).

> **Note:** Frequent challenges to the constitutionality of an offender's prior convictions or adjudications arise at sentencing when a defendant claims that one or more of the prior convictions or adjudications counted in scoring the PRVs was obtained without the defendant having had the benefit of counsel. The constitutional validity of a defendant's prior convictions or adjudications as they relate to the defendant's PRV level is discussed in Section H.

"[A] prior conviction that is not otherwise scorable under the prior record variables of the sentencing guidelines may, nevertheless, be considered in applying the so-called '10-year gap' rule of MCL 777.50." *People v Butler (Rodney)*, ___ Mich App ___, ___ (2016) (rejecting the defendant's argument that "only offenses scorable under MCL 777.55 [(PRV 5)] may be considered in applying the 10-year gap rule under MCL 777.50 in determining which offenses may be scored under PRV 5[]"). While MCL 777.50 and MCL 777.55 "serve a common purpose of limiting what prior convictions may be considered, the limitations are different and the underlying purpose of the respective limitations are obviously different as well." *Butler (Rodney)*, ___ Mich App at ___. "[T]he provisions of MCL 777.55, along with MCL 777.51 through MCL 777.54, consider the nature of the defendant's prior crimes, whether they are worthy of being scored under the sentencing guidelines, and the points to be assessed based upon the number and severity of those offenses[,]" while "MCL 777.50, on the other hand, addresses the question

whether a defendant's prior criminal history should no longer be considered at all because of a period of time spent as a law-abiding citizen." *Butler (Rodney)*, ___ Mich App at ___. "[I]t is not unreasonable for the Legislature to have insisted that the 10-year conviction-free period be . . . free of *any* convictions, even ones that would not themselves be scorable under the prior record variables." *Id*. at ___.

PRVs 1 through 5 indicate that the convictions and adjudications contemplated for use in scoring these variables must be convictions and adjudications *entered* before the commission date of the sentencing offense. MCL 777.51 to MCL 777.55. Where the commission date of the sentencing offense fell after the commission date of a previous offense but before the date on which the defendant entered a guilty plea to the previous offense, the conviction (plea) entered *after* the commission date of the sentencing offense is not a "prior conviction" for purposes of scoring PRV 5. *People v Hammond*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2003 (Docket No. 231540).[80]

Despite the range of possible offense dates (March 7, 2001 to June 7, 2001) listed in the complaint against the defendant, the evidence at trial established that the earliest date on which the defendant committed the sentencing offense was March 31, 2001, which was more than ten years after the defendant's discharge from probation for an earlier offense (March 18, 1991). Thus, the earlier offense could not be counted as a prior conviction for purposes of scoring the defendant's PRVs. *People v Ray (John)*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2003 (Docket No. 240843).

B. Assignment to Youthful Trainee Status Under the PRVs

Under the express language of the statutory sentencing guidelines, a defendant's previous assignment to youthful trainee status[81] is a prior conviction for purposes of scoring a defendant's PRVs. MCL 777.50(4)(a)(*i*); *People v Williams (Zachary)*, 298 Mich App 121, 125, 127 (2012).[82] However, the statutory sentencing guidelines do not diminish the *civil* protection provided by MCL 762.14(2) or the

[80] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[81] Youthful trainee status is discussed further in Section 3.49.

[82] A defendant's assignment to youthful trainee status could not be counted as a prior conviction under the judicial sentencing guidelines, see *People v Garner (Demetrick)*, 215 Mich App 218, 220 (1996); "[h]owever, *Garner* was decided two years before the Legislature enacted MCL 777.50, . . . which defines 'conviction' to include assignment to youthful trainee status for purposes of scoring PRV 1[,]" *Williams (Zachary)*, 298 Mich App at 125-126.

conditional protection provided in MCL 762.14(4), regarding public disclosure of records involving the prior criminal charge.

C. PRV 1—Prior High Severity Felony Convictions

1. Definitions/Scoring

To score PRV 1, first determine if the defendant has any previous convictions that qualify as "prior high severity felony convictions." A prior high severity felony conviction is:

- a conviction entered before the commission date of the sentencing offense,[83]
- for a crime listed in class M2, A, B, C, or D, or
- for a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D, or
- for a felony that is not listed in *any* crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more, or
- for a felony under federal law or the law of another state that does not correspond to a crime listed in *any* class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more. MCL 777.51(2).

If the defendant has previous convictions that qualify under PRV 1, next determine which one or more of the statements addressed by the variable apply to the offender's previous high severity felony convictions and assign the point value indicated by the applicable statement with the highest number of points. MCL 777.51(1).

Points	PRV 1—Number of prior high severity convictions
75	The offender has 3 or more prior high severity convictions. MCL 777.51(1)(a).
50	The offender has 2 prior high severity convictions. MCL 777.51(1)(b).

[83] A qualifying prior high severity felony conviction must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.8(A).

25	The offender has 1 prior high severity conviction. MCL 777.51(1)(c).
0	The offender has no prior high severity convictions. MCL 777.51(1)(d).

2. Case Law Under the Statutory Guidelines

"[B]y distinguishing high- and low-severity felony convictions [in MCL 777.51(2) and MCL 777.52(2)] the Legislature intended to provide sentencing courts with a mechanism for matching criminal conduct prohibited by other states with similar conduct prohibited by Michigan statutes, with the focus on the type of conduct and harm that each respective statute seeks to prevent and punish." *People v Crews*, 299 Mich App 381, 389-390 (2013).

Because "MCL 777.51(2)(b) clearly requires that [an out-of-state] offense correspond 'to *a* crime listed in offense class M2, A, B, C, or D' in order to be scored as a prior high-severity felony conviction under PRV 1[,] . . . the fact that [an out-of-state] statute seeks to protect against the same type of harm as [a] Michigan[] . . . statute is not sufficient to score [a] defendant's prior [out-of-state] conviction[] under PRV 1[; rather, the] . . . conviction must correspond to a specific Michigan crime in the appropriate class."[84] *Crews*, 299 Mich App at 392.

"[I]n the context of MCL 777.51(2)(b), [a] 'corresponding' [felony is] appropriately construed as being 'similar or analogous.'" *Crews*, 299 Mich App at 391, quoting *Random House Webster's College Dictionary* (1992). "In order to be scored under PRV 1, an out-of-state felony must only 'correspond' to a crime in a listed offense class[, and t]he plain meaning of 'correspond' does not require statutes to mirror each other under all circumstances; rather, it requires only that statutes be analogous or similar, meaning that they have 'qualities in common.'" *Crews*, 299 Mich App at 388, 396 (quoting *Random House Webster's College Dictionary* (1992) and holding that the defendant's two prior convictions of second-degree burglary under an Ohio statute corresponded to second-degree home invasion under MCL 750.110a(3), notwithstanding that "one element of [the Ohio statute] . . . [did] not exactly match MCL 750.110a(3)[,]" and that the trial court therefore properly scored 50 points for PRV 1).

[84] Note that MCL 777.51(2)(b) also applies to prior convictions under federal law.

For purposes of scoring an offender's prior record variables, "another state," as contemplated by MCL 777.51(2), does not include foreign states. *People v Price (Tore)*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). According to the *Price (Tore)* Court:

> "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not a conviction for 'a felony under a law of the United States or another state[.]'" *Id.* at 4-5.

Where a defendant argued that he should not have been assessed 25 points for PRV 1 when it was unclear whether the defendant's previous conviction in California for second-degree robbery was a "high severity felony" under Michigan law, the Court observed:

> "[O]ur review of the California and Michigan definitions of robbery suggest, without more facts, that [the] defendant's California second-degree robbery conviction is akin to an unarmed robbery[85] conviction in Michigan. Accordingly, in the absence of evidence to the contrary, it appears that the trial court correctly scored PRV 1." *People v Stewart (Cedric)*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2003 (Docket No. 240376).[86]

Under MCL 777.50(4)(a)(*i*), "assignment of youthful trainee status [under the Holmes Youthful Trainee Act, MCL 762.11 *et seq*.,] constitutes a conviction for purposes of scoring PRV 1." *People v Williams (Zachary)*, 298 Mich App 121, 125, 127 (2012).

A prior conviction entered against an individual who was tried as an adult in a designated proceeding under MCL 712A.2d[87]

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[85] Unarmed robbery under Michigan law, MCL 750.88, is a class C felony, and class C felonies are among the list of offenses under Michigan law, federal law, or *the law of another state* to be counted as a prior high severity felony conviction for purposes of scoring PRV 1. MCL 777.51(2)(b).

[86] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[87] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for information about designated proceedings.

constitutes a conviction, rather than a juvenile adjudication, for purposes of scoring the PRVs, irrespective of whether the individual was sentenced as an adult or received a juvenile disposition in the designated proceeding. *People v Armstrong (Parys)*, 305 Mich App 230, 243-244 (2014) (noting that, under MCL 712A.2d(7), "a juvenile tried as an adult who is found guilty or who pleads guilty or no contest receives a judgment of conviction, which has 'the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction[]'"). Accordingly, if the prior conviction constitutes a high-severity felony, "the trial court must score the previous conviction under PRV 1, regardless of how the previous trial court sentenced the juvenile." *Armstrong (Parys)*, 305 Mich App at 244.

3. Relevant Case Law Under the Judicial Guidelines

More than one prior high severity conviction arising from the same judicial proceeding may be counted when scoring PRV 1. *People v Whitney (Albert)*, 205 Mich App 435, 436 (1994). Under the judicial sentencing guidelines, the Court of Appeals affirmed the defendant's score of 50 points for PRV 1 where both qualifying previous convictions resulted from a single judicial proceeding. *Id.* at 436. In *Whitney (Albert)*, 205 Mich App at 436, the Court emphasized that the purpose of PRV 1 is to accurately reflect an offender's previous criminal history. According to the Court:

> "We can think of no sensible reason why a person who is convicted of multiple crimes at one judicial proceeding, whether those crimes were committed during a single criminal episode or not, should receive the same score under PRV[]1 as a person who committed only one crime during a single criminal act." *Whitney (Albert)*, 205 Mich App at 436-437.

D. PRV 2—Prior Low Severity Felony Convictions

1. Definitions/Scoring

To score PRV 2, determine whether the offender has any convictions that qualify as "prior low severity felony convictions" under this variable. A prior low severity felony conviction is:

- a conviction entered before the commission date of the sentencing offense,[88]

- for a crime listed in class E, F, G, or H, or
- for a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H, or
- for a felony that is not listed in *any* crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of less than ten years, or
- for a felony under federal law or the law of another state that does not correspond to a crime listed in *any* class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of less than ten years. MCL 777.52(2).

If the defendant has previous convictions to which PRV 2 applies, determine which of the statements listed in the variable apply to those prior low severity felony convictions and assign the point value corresponding to the applicable statement having the highest number of points. MCL 777.52(1).

Points	PRV 2—Number of prior low severity convictions
30	The offender has 4 or more prior low severity convictions. MCL 777.52(1)(a).
20	The offender has 3 prior low severity convictions. MCL 777.52(1)(b).
10	The offender has 2 prior low severity convictions. MCL 777.52(1)(c).
5	The offender has 1 prior low severity conviction. MCL 777.52(1)(d).
0	The offender has no prior low severity convictions. MCL 777.52(1)(e).

2. Case Law Under the Statutory Guidelines

"[B]y distinguishing high- and low-severity felony convictions [in MCL 777.51(2) and MCL 777.52(2)] the Legislature intended to provide sentencing courts with a mechanism for matching criminal conduct prohibited by other states with similar conduct prohibited by Michigan statutes, with the focus on the type of conduct and harm that each respective statute seeks to prevent and punish." *People v Crews*, 299 Mich App 381, 389-390 (2013).

[88] A qualifying prior low severity felony conviction must satisfy the ten-year gap requirements of MCL 777.50, as discussed inSection 3.8(A).

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *Price (Tore)*, 477 Mich at 5 (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 2 is the same as the language used in PRV 1—the variable at issue in *Price (Tore)*. MCL 777.52(2) defines a prior low severity felony conviction as a conviction for "[a] crime listed in offense class E, F, G, or H [*or for a*] *felony under a law of the United States or another state* that corresponds to a crime listed in offense class E, F, G, or H." (Emphasis added.) According to the *Price (Tore)* Court:

> "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not a conviction for 'a felony under a law of the United States or another state[.]'" *Price (Tore)*, 477 Mich at 4-5.

An Indiana felony conviction arising from the defendant's purchase of a stolen firearm constituted a prior low severity felony conviction under the law of another state for purposes of scoring PRV 2, even though the defendant served only one year in jail for the Indiana felony. *People v Meeks*, 293 Mich App 115, 116-119 (2011). The Court, noting that Indiana law did not provide for a misdemeanor-level violation for the defendant's conduct, concluded that "a felony remains a felony even if a jurisdiction's peculiarities of sentencing cause the sentence to mimic one for a misdemeanor." *Id.* at 118. The Court further noted that even though the defendant's conduct of purchasing a stolen firearm for $175 constituted a violation of MCL 750.535(5) under Michigan law (misdemeanor receiving and concealing), the defendant's conduct more specifically fell under MCL 750.535b, receiving a stolen firearm, which is a class E felony under Michigan law. *Meeks*, 293 Mich App at 118-119.

A felony-firearm conviction constitutes a prior low severity felony conviction that may be assessed points for purposes of PRV 2. *People v Dent*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2010 (Docket No. 290832)[89] (MCL 777.52(2)(c) "specifically incorporates felonies

[89] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

that are not listed in the offense classes" with maximum terms of imprisonment that are less than ten years; felony-firearm is not listed in the offense classes, and first and second felony-firearm convictions have sentences of two and five years, respectively). See also *People v Williams (Timothy)*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2010 (Docket No. 288704) (trial court properly assessed five points for PRV 2 for the defendant's felony-firearm conviction, because "felony-firearm fits the plain wording of [MCL 777.52(2)(c)]"—a felony not listed in any offense class that is punishable by a maximum term of imprisonment of less than ten years).

A defendant's previous *misdemeanor* conviction for "joyriding" under MCL 750.414 qualifies as a prior low severity felony conviction for purposes of scoring PRV 2. *People v Wallace (Terrance)*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (Docket No. 238355), slip op pp 1-2. In *Wallace (Terrance)*, the defendant argued that his previous conviction could not be properly counted under PRV 2 because the statute defined the prohibited conduct as a misdemeanor. *Wallace (Terrance)*, slip op at 2. The Court acknowledged that the statutory language of MCL 750.414 indicated that conduct in violation of the statute was a misdemeanor punishable by no more than two years of imprisonment, but notwithstanding that language, the Court noted that "MCL 777.52 expressly defines 'low severity felony conviction' to include a conviction for a crime listed in offense class 'H.' MCL 777.16u expressly lists a violation of MCL 750.414, i.e., joyriding, in offense class 'H." *Wallace (Terrance)*, slip op at 2. Thus, even though joyriding is identified as a misdemeanor in MCL 750.414, it falls within the plain and unambiguous definition of 'low severity felony conviction' provided by MCL 777.52, which governs the scoring of PRV 2." *Wallace (Terrance)*, slip op at 2.

3. Relevant Case Law Under the Judicial Guidelines

It is permissible to use the same previous conviction for purposes of scoring PRV 2 and PRV 6.[90] *People v Vonins (After Remand)*, 203 Mich App 173, 176 (1993). In *Vonins*, the defendant argued that the trial court's assessment of points under PRV 2 for the defendant's previous controlled substance offense conviction precluded the court from using that same conviction to assess him points under PRV 6. *Id.* at 176. The Court of Appeals explained that PRV 6 was a separate category

[90] PRV 6 deals with an offender's relationship to the criminal justice system at the time the sentencing offense was committed. See Section 3.8(H).

that addressed a situation different from the situation addressed in PRV 2:

> "PRV 2 provides for the assessment of points for every prior low[]severity felony conviction, with an increase in the number of points in correlation to the number of such convictions. PRV 6 provides for the assessment of points if, at the time of the instant offense, the defendant had a relationship with the criminal justice system . . . . Additional points are to be assessed under PRV 6 when there is a 'post-conviction relationship,' such as being on probation or parole when the instant offense was committed . . . ." *Vonins*, 203 Mich App at 176-177.

E. PRV 3—Prior High Severity Juvenile Adjudications

1. Definitions/Scoring

A "prior high severity juvenile adjudication" is a juvenile adjudication:

- for conduct that would be a crime listed in class M2, A, B, C, or D if committed by an adult, or
- for conduct that would be a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D if committed by an adult, or
- for conduct that, if committed by an adult, would be a felony that is not listed in *any* crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more, or
- for conduct that, if committed by an adult, would be a felony under federal law or the law of another state that does not correspond to a crime listed in *any* class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more, and
- for which the order of disposition was entered before the commission date of the sentencing offense.[91] MCL 777.53(2).

[91] A qualifying prior high severity juvenile adjudication must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.8(A).

If the offender has previous adjudications to which PRV 3 applies, determine which one or more of the statements addressed by PRV 3 apply to the offender and assign the point value indicated for the applicable statement with the highest number of points. MCL 777.53(1).

Points	PRV 3—Number of prior high severity juvenile adjudications
50	The offender has 3 or more prior high severity juvenile adjudications. MCL 777.53(1)(a).
25	The offender has 2 prior high severity juvenile adjudications. MCL 777.53(1)(b).
10	The offender has 1 prior high severity juvenile adjudication. MCL 777.53(1)(c).
0	The offender has no prior high severity juvenile adjudications. MCL 777.53(1)(d).

2. Case Law Under the Statutory Guidelines

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *Price (Tore)*, 477 Mich at 5 (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 3 is the same as the language used in PRV 1—the variable at issue in *Price (Tore)*. MCL 777.53(2) defines a prior high severity juvenile adjudication as "a juvenile adjudication for conduct that would be . . . if committed by an adult . . . [*a*] *felony under a law of the United States or another state* corresponding to a crime listed in offense class M2, A, B, C, or D." (Emphasis added.) According to the *Price (Tore)* Court:

> "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not a conviction for 'a felony under a law of the United States or another state[.]'" *Price (Tore)*, 477 Mich at 4-5.

F. PRV 4—Prior Low Severity Juvenile Adjudications

1. Definitions/Scoring

A "prior low severity juvenile adjudication" is an adjudication:

- for conduct that would be a crime listed in class E, F, G, or H if committed by an adult, or
- for conduct that would be a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H if committed by an adult, or
- for conduct that, if committed by an adult, would be a felony that is not listed in *any* crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of less than ten years, or
- for conduct that, if committed by an adult, would be a felony under federal law or the law of another state that does not correspond to a crime listed in *any* class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of less than ten years, and
- for which the order of disposition was entered before the commission date of the sentencing offense.[92] MCL 777.54(2).

If the offender has previous adjudications to which PRV 4 applies, determine which one or more of the statements addressed by PRV 4 apply to the offender and assign the point value indicated for the applicable statement with the highest number of points. MCL 777.54(1).

Points	PRV 4—Number of prior low severity juvenile adjudications
20	The offender has 6 or more prior low severity juvenile adjudications. MCL 777.54(1)(a).
15	The offender has 5 prior low severity juvenile adjudications. MCL 777.54(1)(b).
10	The offender has 3 or 4 prior low severity juvenile adjudications. MCL 777.54(1)(c).
5	The offender has 2 prior low severity juvenile adjudications. MCL 777.54(1)(d).
2	The offender has 1 prior low severity juvenile adjudication. MCL 777.54(1)(e).
0	The offender has no prior low severity juvenile adjudications. MCL 777.54(1)(f).

[92] A qualifying prior low severity juvenile adjudication must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.8(A).

2. Case Law Under the Statutory Guidelines

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *Price (Tore)*, 477 Mich at 5 (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 4 is the same as the language used in PRV 1—the variable at issue in *Price (Tore)*. MCL 777.54(2) defines a prior low severity juvenile adjudication as "a juvenile adjudication for conduct that would be . . . if committed by an adult . . . [*a*] *felony under a law of the United States or another state* corresponding to a crime listed in offense class E, F, G, or H." (Emphasis added.) According to the *Price (Tore)* Court:

> "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not a conviction for 'a felony under a law of the United States or another state[.]'" *Price (Tore)*, 477 Mich at 4-5.

G. PRV 5—Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications

1. Definitions/Scoring

A "prior misdemeanor conviction" is a conviction:

- for a misdemeanor offense under Michigan law or the law of a political subdivision of Michigan, or under the law of another state or a political subdivision of another state, or under federal law,
- if the conviction was entered before the commission date of the sentencing offense.[93] MCL 777.55(3)(a).

A "prior misdemeanor juvenile adjudication" is a juvenile adjudication:

- for conduct that, if committed by an adult, would be a misdemeanor under Michigan law or the law of a

[93] A qualifying prior misdemeanor conviction must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.8(A).

political subdivision of Michigan, or under the law of another state or a political subdivision of another state, or under federal law,

- if the order of disposition for the juvenile adjudication was entered before the commission date of the sentencing offense.[94] MCL 777.55(3)(b).

Score PRV 5 by determining which one or more of the statements addressed by the variable apply to the offender and assigning the point value indicated for the applicable statement with the highest number of points. MCL 777.55(1).

Points	PRV 5—Number of prior misdemeanor convictions or prior misdemeanor juvenile adjudications
20	The offender has 7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1)(a).
15	The offender has 5 or 6 prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1)(b).
10	The offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1)(c).
5	The offender has 2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1)(d).
2	The offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication. MCL 777.55(1)(e).
0	The offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1)(f).

Additional requirements of PRV 5 may eliminate the use of prior convictions or adjudications that would otherwise qualify under this variable:

- A prior conviction used to enhance the sentencing offense to a felony may not be counted under PRV 5. MCL 777.55(2)(a)-(b).

- Only prior convictions and adjudications for offenses expressly listed in PRV 5 may be counted as prior misdemeanor convictions or prior misdemeanor juvenile adjudications for purposes of scoring PRV 5. These convictions and adjudications are as follows:

[94] A qualifying prior misdemeanor juvenile adjudication must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.8(A).

- prior misdemeanor convictions or prior misdemeanor juvenile adjudications that are offenses against a person or property, weapons offenses, or controlled substances offenses, and

- prior misdemeanor convictions and prior misdemeanor juvenile adjudications for the operation or attempted operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender is under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. MCL 777.55(2)(a)-(b).

2. Case Law Under the Statutory Guidelines

Under MCL 777.55(3)(b), "[an] order of disposition [for a juvenile adjudication must be] entered before the sentencing offense was committed . . . [in order to] constitute a prior misdemeanor juvenile adjudication for purposes of assessing points under PRV 5." *People v Gibbs (Phillip)*, 299 Mich App 473, 485 (2013) (the trial court erred in assessing two points under PRV 5 where the order of disposition for the defendant's juvenile adjudication was not entered until after the commission of the sentencing offense, even though the juvenile offense was committed before the sentencing offense).

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *Price (Tore)*, 477 Mich at 5 (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 5 is the same as the language used in PRV 1—the variable at issue in *Price (Tore)*. MCL 777.55(3)(a) defines prior misdemeanor conviction as "a conviction for a misdemeanor under a law of this state, a political subdivision of this state, *another state*, a political subdivision of another state, or the United States[.]" (Emphasis added.) MCL 777.55(3)(b) defines prior misdemeanor juvenile adjudication as "a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, *another state*, a political subdivision of another state, or the United States[.]" (Emphasis added.) According to the *Price (Tore)* Court:

> "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of

> 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not a conviction for 'a felony [or misdemeanor] under a law of the United States or another state[.]'" *Price (Tore)*, 477 Mich at 4-5.

A defendant's conviction for being a minor operating a vehicle with any bodily alcohol content—the "zero-tolerance provision," MCL 257.625(6)—constitutes a misdemeanor for operating a vehicle while under the influence of alcohol or impaired by alcohol for purposes of scoring PRV 5. *People v Bulger*, 291 Mich App 1, 6-7 (2010). Although the "prior conviction under the zero-tolerance provision did not require proof that [the defendant] was actually under the influence of alcohol or was impaired by alcohol[,]" "the sentencing [guidelines] statute [should be read] broadly to refer to the drunk-driving statute as a whole, rather than to the specific crimes that require proof of operating a vehicle 'under the influence of or impaired by' alcohol." *Id.* at 6, 7.

Previous non-OUIL alcohol-related convictions are not convictions involving a controlled substance for purposes of scoring PRV 5. *People v Endres*, 269 Mich App 414, 416-417 (2006), overruled in part on other grounds in *People v Hardy (Donald)*, 494 Mich 430, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016.

Misdemeanor convictions for possession of drug paraphernalia "may be counted as controlled substance offenses for purposes of PRV 5." *People v Stevens (Roland)*, 306 Mich App 620, 627 (2014) (noting that "offenses involving drug paraphernalia have been specifically categorized by the Legislature as offenses within the controlled substances article of the Public Health Code[]").

A discharge and dismissal following a defendant's successful completion of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring PRV 5. *People v James (Derrick)*, 267 Mich App 675, 679-680 (2005). "MCL 333.7411(1) specifically states that the discharge and dismissal procedure that it authorizes is 'without adjudication of guilt' and 'is not a conviction for purposes of . . . disabilities imposed by law upon conviction of a crime . . . .'" *James (Derrick)*, 267 Mich App at 679-680.

Misdemeanor offenses are not categorized as are felony offenses under the sentencing guidelines. *People v Maben*, ___ Mich App ___, ___ (2015), citing MCL 777.5; *People v Bonilla-Machado*, 489 Mich 412, 422 (2011). Consequently, a trial court must often determine the nature of a misdemeanor crime for purposes of scoring PRV 5. *People v Cadwell*, unpublished memorandum opinion of the Court of Appeals, issued December 20, 2002 (Docket No. 236381), slip op p 2.[95] In *Cadwell*, slip op at 2, the appellate panel concluded:

> "Unlike felonies, the Legislature did not place misdemeanors into categories. In the absence of more specific legislative guidance, it was for the trial court to determine whether [the] defendant's misdemeanor conviction for disorderly jostling, MCL 750.167(1)(k), was a crime against a person. The court noted that the jostling offense involved unconsented touching of other persons. The trial court did not err in finding that this was an offense against a person that should be scored under MCL 777.55." *Cadwell*, slip op at 2.

In *Maben*, ___ Mich App at ___, the Court of Appeals held that because the statute governing the misdemeanor offense of malicious use of a telecommunications device, MCL 750.540e(1), "specifically addresses communications directed at 'another person[,]'" it "constitute[s] [an] offense[] against a person as required by MCL 777.55(2)(a)[,]" and therefore may be used to score PRV 5. The Court further noted that even if "analogous felony offenses have been categorized as offenses against public order or public safety, . . . those offenses . . . do not proscribe activity directed at a particular individual[,]" in contrast to the misdemeanor offense of malicious use of a telecommunications device. *Maben*, ___ Mich App at ___ (citations omitted).

An out-of-state conviction for an attempted crime may qualify for scoring under PRV 5 if the attempted offense is tied to the crime attempted, the attempted offense is a misdemeanor, and the crime attempted "'is an offense against a person or property, a controlled substance offense, or a weapon offense.'" *People v Crews*, 299 Mich App 381, 397-399 (2013) (quoting MCL 777.55(2)(a) and holding that the defendant's prior Ohio conviction of "'attempt to commit an offense' . . . stemm[ing] from a charge of possession or use of drugs[]" was properly considered in scoring ten points under PRV 5,

[95] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

because "Ohio's attempt statute specifically tie[d] an attempt conviction to the crime attempted[]" and "[the d]efendant's PSIR clearly indicate[d] that the original charge leading to his attempt plea was a controlled substance offense[]").

H. PRV 6—Relationship to the Criminal Justice System

1. Definitions/Scoring

PRV 6 assesses points based on an offender's relationship to the criminal justice system. MCL 777.56. PRV 6 is scored by determining which of the statements addressed by the variable apply to the offender and assigning the point value indicated by the applicable statement with the highest number of points. MCL 777.56(1). PRV 6 should be assessed against an offender who is involved with the criminal justice system of Michigan, another state, or the federal criminal justice system. MCL 777.56(1)-(2).

Points	PRV 6—Offender's relationship to the criminal justice system
20	The offender is a prisoner of the department of corrections or serving a sentence in jail. MCL 777.56(1)(a). This includes an offender who is an escapee. MCL 777.56(3)(b).
15	The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation. MCL 777.56(1)(b).
10	The offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony. MCL 777.56(1)(c).
5	The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor. MCL 777.56(1)(d).
0	The offender has no relationship to the criminal justice system. MCL 777.56(1)(e).

"Delayed sentence status" includes, but is not limited to, an offender assigned or deferred under:

- MCL 333.7411 (deferral for certain controlled substance offenses),
- MCL 600.1076(4) (deferral involving drug treatment courts),
- MCL 750.350a (deferral under limited circumstances for parental kidnapping),
- MCL 750.430 (deferral for impaired healthcare professionals),

- MCL 762.11 to MCL 762.15 (assignment to youthful trainee status), and
- MCL 769.4a (deferral under limited circumstances for domestic assault). MCL 777.56(3)(a).[96]

2. Case Law Under the Statutory Guidelines

A defendant has a prior "relationship with the criminal justice system" for purposes of scoring PRV 6 when disposition of a misdemeanor crime committed by the defendant is pending at the time the defendant committed the sentencing offense. *People v Endres*, 269 Mich App 414, 422-423 (2006), overruled in part on other grounds in *People v Hardy (Donald)*, 494 Mich 430, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016.

Where a defendant commits the sentencing offense after having been charged with a misdemeanor for which bond was granted but later forfeited, five points are properly assessed under PRV 6 even if the defendant was not technically "on bond" when he committed the sentencing offense. *People v Johnson (Angelo)*, 293 Mich App 79, 84-90 (2011). The Court stated:

> "Admittedly, where an offender commits an offense after his [or her] bond has been forfeited or revoked, he [or she] is not 'on bond,' as PRV 6 states. However, where an offender's bond is revoked, he [or she] is also not free and clear of the criminal justice system. A condition of any pretrial release (bond) is that the defendant will appear in court as required. We note that even if a defendant's bond is forfeited, the condition that the defendant appear in court is still in place and is an inherent condition of any pretrial release. Forfeiting the monetary part of a bond does not relieve the defendant of the obligation to comply with the condition that he [or she] appear as required by the court." *Johnson (Angelo)*, 293 Mich App at 88-89.

Thus, a five-point score for PRV 6 was not improper where the defendant committed a misdemeanor for which bond was granted and subsequently revoked because "the ramifications for that charge remain." *Johnson (Angelo)*, 293 Mich App at 89-

[96] Specific statutes under which an offender's sentence may be delayed are discussed in detail in Sections 3.47, 3.48, and 3.49.

90. Because the defendant's misdemeanor charge was still pending, the Court could not "classify [him] as having 'no relationship' with the criminal justice system." *Id.* at 90.

Because PRV 6 accounts for an offender's conduct *before* commission of the sentencing offense, an offender's PRV 6 score may not be adjusted to account for an offender's subsequent conduct related to a probation violation. *People v Hendrick*, 261 Mich App 673, 682 (2004), aff'd and rev'd on other grounds 472 Mich 555 (2005). PRV 6 does not apply to conduct arising after the commission of the sentencing offenses. *Hendrick*, 261 Mich App at 682.

A score of ten points is appropriate for PRV 6 where the defendant absconded from probation 20 years before committing the sentencing offense, because "'a defendant's period of probation is tolled when he [or she] absconds from probationary supervision'" and "'[a]n absconding defendant should not be allowed to benefit from his [or her] wrongful noncompliance with the terms of his [or her] probation order.'" *People v Dendel (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2008 (Docket No. 247391), vacated in part on other grounds 485 Mich 903, quoting *People v Ritter*, 186 Mich App 701, 711 (1991).[97]

Ten points were properly scored for PRV 6 where the defendant committed the sentencing offense while on probation for a juvenile offense. *People v Anderson (Michael)*, 298 Mich App 178, 180-183 (2012) ("[j]uveniles on probation are involved with the corrections aspect of the criminal justice system[;]" therefore, "[the] defendant's prior juvenile adjudications supported the trial court's scoring of [PRV 6][]"). See also *People v Gibbs (Phillip)*, 299 Mich App 473, 486-487 (2013) (where the defendant had entered a plea on a juvenile offense and was "awaiting adjudication or sentencing at the time he committed the sentencing offense," five points were properly assessed under PRV 6, "even if [the defendant] was not on bond at the time he committed the sentencing offense[]"); *People v Kelly (DeJuan)*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2010 (Docket

[97] *People v Dendel* has a lengthy history. The Michigan Supreme Court reversed the first Court of Appeals unpublished opinion, issued July 18, 2006, and remanded the case to the Court of Appeals for consideration of remaining appellate issues. *People v Dendel*, 481 Mich 114 (2008). On both parties' motions for rehearing, the Michigan Supreme Court reiterated its reversal of the Court of Appeals opinion and its remand of the case to the Court of Appeals for consideration of appellate issues raised but not yet considered. The case discussed above is the resulting Court of Appeals decision from the remand. Both parties appealed the decision in that case and the outcome of those subsequent appeals and opinions involve issues not related to the Court of Appeals decision regarding the scoring of PRV 6.

No. 289689) (because "[n]othing in PRV 6 indicates that it was not meant to apply to an escapee from juvenile confinement[,]" the trial court properly assessed 20 points for PRV 6 where the defendant committed the sentencing offense after he escaped from his court-ordered community placement following a juvenile adjudication).

3. Relevant Case Law Under the Judicial Guidelines

Under the judicial sentencing guidelines, the Court of Appeals determined that the trial court properly assessed a defendant five points under PRV 6 where the defendant's bail was revoked when he failed to appear for a hearing following his arrest for an offense committed before the sentencing offense. *People v Lyons (Kenyatta) (After Remand)*, 222 Mich App 319, 322-323 (1997). Applying the rules of statutory interpretation to the judicial sentencing guidelines then in effect, the Court noted that "the guidelines do not state that five points can be assessed *only* in the enumerated circumstances." *Id.* at 322. The Court explained that "[i]t would be absurd to suggest that the drafters of the guidelines intended that a defendant would receive more lenient treatment by being, in the words of the trial court, a 'runaway' from the criminal justice system." *Id.*

Five points is appropriately scored under PRV 6 when a defendant is on bond for a previous offense at the time he or she committed the sentencing offense, even when the defendant is ultimately acquitted of the first offense. *People v Jarvi*, 216 Mich App 161, 164-165 (1996). "The obvious intent of awarding five points to an individual who commits a crime while on bond or bail has no nexus to issues of guilt or innocence of the underlying charge. Rather, PRV 6 simply recognizes the more egregious nature of an offense committed while a prior relationship to the criminal justice system exists." *Id.* at 165.

I. PRV 7—Subsequent or Concurrent Felony Convictions

1. Definitions/Scoring

PRV 7 assesses points against an offender who is convicted of multiple felonies or is convicted of a felony offense after his or her commission of the sentencing offense. MCL 777.57. The statute defining PRV 7 specifically prohibits the use of certain felony convictions for purposes of scoring PRV 7:

- A conviction for felony-firearm may not be counted under PRV 7. MCL 777.57(2)(b).

- A concurrent felony conviction that will result in a mandatory consecutive sentence may not be counted under PRV 7. MCL 777.57(2)(c).

- A concurrent felony conviction that will result in a consecutive sentence under MCL 333.7401(3) may not be counted under PRV 7.[98] MCL 777.57(2)(c).[99]

Score PRV 7 by determining which of the statements apply to the offender and assigning the point value corresponding to the applicable statement with the highest number of points. MCL 777.57(1).

> **Note:** Only subsequent or concurrent *felony* convictions may be counted under PRV 7. Misdemeanor convictions are not included.

Points	PRV 7—Number of subsequent or concurrent felony convictions
20	The offender has 2 or more subsequent or concurrent felony convictions. MCL 777.57(1)(a).
10	The offender has 1 subsequent or concurrent felony conviction. MCL 777.57(1)(b).
0	The offender has no subsequent or concurrent felony convictions. MCL 777.57(1)(c).

2. Case Law Under the Statutory Guidelines

PRV 7 is an exception to the general rule that prior record variables account only for an offender's prior conduct, because PRV 7 assigns a point value for convictions that occur concurrent to the sentencing offense and convictions that occur *after* the sentencing offense. *Peltola*, 489 Mich at 187 n 29.

See also *People v Rapley*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2003 (Docket No. 238704) (any "inherent inconsistency" in counting an offender's *concurrent* conviction for purposes of a *prior* record variable does not trump the clear language of MCL 777.57, which states that an offender is to be assessed points under PRV 7 for felony convictions obtained at the same time as the conviction for the

[98] MCL 333.7401(3) permits a court to order that a sentence imposed for a violation of MCL 333.7401(2)(a) run consecutively to a term of imprisonment imposed for another felony conviction.

[99] The prohibition against counting an offense under MCL 333.7401(2)(a) for which a consecutive sentence may be imposed under MCL 333.7401(3) was added by 2002 PA 666, effective March 1, 2003.

sentencing offense and felony convictions obtained after the commission date of the sentencing offense).[100]

For purposes of scoring PRV 7, where a defendant is convicted of multiple offenses, the number of concurrent convictions does not include the sentencing offense. *People v Pickett*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2004 (Docket No. 246138).

PRV 7's instruction not to count a concurrent conviction if the conviction will result in the imposition of a mandatory consecutive sentence does not apply to consecutive sentences resulting from an offender's parole violation. *People v Clark (Dale)*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003 (Docket No. 240139), slip op pp 3-4. The convictions prohibited from inclusion under PRV 7 are those where an offender will be sentenced for at least one concurrent or subsequent conviction at the time of the sentencing offense, and the concurrent or subsequent conviction will result in a mandatory consecutive sentence. *Id.* at slip op p 4. PRV 7 does not apply to consecutive sentences that may result from a *separate* parole violation hearing, because a separate parole violation hearing is not a concurrent felony conviction for purposes of MCL 777.57(2)(c). *Clark (Dale)*, slip op at 4.

3.9 Scoring an Offender's Offense Variables (OVs)

Note: Published appellate opinions discussing issues under the legislative sentencing guidelines remain limited with regard to specific offense variables. In an effort to provide guidance to users of this chapter, unpublished opinions addressing issues not addressed by published opinions have been included in the discussion of a particular area. Unpublished opinions appear only to provide a court with information regarding how an appellate court has dealt with an issue not clearly addressed in published case law. Unpublished opinions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), and the first unpublished opinion appearing in a series of unpublished opinions will be footnoted with a reminder of this fact. In addition, published opinions discussing the prior judicial guidelines are included where relevant.

[100] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

The elements of a crime and, as determined by the Legislature, the aggravating or mitigating factors relevant to the commission of an offense constitute the crime's "offense characteristics." MCL 769.31(d). Offense characteristics are measured by scoring the appropriate offense variables (OVs). There are 20 offense variables, some of which have been amended since the guidelines first went into effect.

Each OV consists of several statements to which a specific number of points is assigned. These statements quantify the specific offense characteristic addressed by each individual OV. For example, OV 2 targets the lethal potential of any weapon possessed by the offender when the sentencing offense was committed. MCL 777.32. Under OV 2, a point value is assigned based on the specific type of weapon possessed, and the point value increases according to the deadly potential of the weapon. Where more than one statement under a specific OV applies to the circumstances of an offense, the applicable statement with the highest number of points is used to assess the points attributable to the offender for that OV.

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 ___ (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, 399 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)[,]"[101] 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).[102]

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[101] 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.

[102] MCR 6.425(D), which provides, in part, that the sentencing court "must use the sentencing guidelines, as provided by law[,]" and MCR 6.425(E)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure," have not yet been amended to conform to *Lockridge*, 498 Mich 358.

However, the *Lockridge* Court specifically noted that its holding "[did] nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not." *Lockridge*, 498 Mich at 392 n 28, citing MCL 777.21(1)(a); MCL 777.31(1); MCL 777.32(1). "The fact that a trial court engaged in judicial fact-finding is not relevant to the inquiry with respect to an evidentiary challenge[]" to the scoring of the OVs. *People v Biddles*, ___ Mich App ___, ___ (2016) (citing *Lockridge*, 498 Mich at 389, and disagreeing "with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant's OV score under the guidelines[,]" which "is in direct contradiction of the *Lockridge* Court's rejection of the defendant's argument that juries should be required to find the facts used to score the OVs[]"). Under *Lockridge*, 498 Mich at 392 n 28, "judicial fact-finding is proper, as long as the guidelines are advisory only." *Biddles*, ___ Mich App at ___, ___ n 5 (additionally disagreeing with the suggestion in *People v Blevins*, ___ Mich App ___, ___ n 7 (2016), that "judicial fact-finding 'constitutes a departure[]'").

See Section 3.4 for discussion of *Lockridge*.

A. OVs According to Crime Group

MCL 777.21 details the method by which an offender's recommended minimum sentence range is determined using the offender's prior record variable (PRV) and OV scores. The offense category or "crime group" to which the sentencing offense belongs "[is] used to determine which of the OVs to score for [the] crime *and* how those OVs should be scored." *People v Bonilla-Machado*, 489 Mich 412, 422 (2011); see also MCL 777.21(1)(a). The total number of points assessed for all OVs scored for an offense constitutes the offender's "OV level," which is represented by the vertical axis on each sentencing grid.[103] MCL 777.21(1)(a).

"[T]he six named offense category designations used in MCL 777.5 and [MCL] 777.11 through [MCL] 777.19 apply to the scoring of offense variables[;]" therefore, an offense that is statutorily designated as a "crime against public safety" may not also be considered a "crime against a person" for purposes of scoring an offense variable. *Bonilla-Machado*, 489 Mich at 416 (the Court of Appeals wrongly decided that assault of a prison guard, a crime against public safety according to its statutory designation in MCL 777.16j, "is *also* a crime against a person because, obviously, a prison guard is a person"). In *Bonilla-Machado*, 489 Mich at 426, the Michigan Supreme Court, noting that "MCL 777.21(1)(a) explicitly instructs a court to first '[f]ind the *offense category* for the offense

[103] Sentencing grids are found in MCL 777.61 to MCL 777.69. Each grid is also available by clicking here.

from' MCL 777.11 through [MCL] 777.19 and then 'determine the offense variables to be scored for that *offense category*[,]'" concluded that "[t]he use of the named offense categories throughout the sentencing guidelines chapter indicates legislative intent to have the offense categories applied in a uniform manner, including when they are applied in the offense variable statutes." Accordingly, "a felony statutorily designated as a 'crime against public safety' may not be used to establish a 'pattern of felonious criminal activity involving three or more crimes against a person' for purposes of scoring OV 13." *Bonilla-Machado*, 489 Mich at 430-431. See also *People v Pearson (Jermaine)*, 490 Mich 984 (2012) (because "conspiracy is classified as a 'crime against public safety[]'" under MCL 777.18, conspiracy to commit armed robbery may not be considered when scoring OV 13, even though armed robbery is classified under MCL 777.16y as a "'crime[] against a person'"; MCL 777.21(4) "does not allow the offense category underlying the conspiracy to dictate the offense category of the conspiracy itself for purposes of scoring OV 13[]"); *People v Reynolds (Regan)*, 495 Mich 921, 921 (2014) (citing *Pearson (Jermaine)*, 490 Mich 984, and *Bonilla-Machado*, 489 Mich 412, and holding that because "[a] conspiracy conviction cannot be scored as a crime against a person[,]" the trial court erred in "consider[ing] the defendant's conspiracy conviction to be a crime against a person[]" for purposes of scoring OV 12 and OV 13).

1. Crimes Against a Person (Person)

"Person" is the designation used to identify crimes against a person in the statutory lists of felonies to which the guidelines apply. MCL 777.5(a).

For all crimes against a person, OVs 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20 are to be scored. MCL 777.22(1).

Score OVs 5 and 6 if the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1).

Score OV 16 if the sentencing offense is a violation or attempted violation of MCL 750.110a (home invasion). MCL 777.22(1).

Score OVs 17 and 18 if the offense or attempted offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1).

2. Crimes Against Property (Property)

"Property" is the term used to identify crimes against property in the statutory lists of felonies to which the guidelines apply. MCL 777.5(b).

For all crimes against property, OVs 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20 must be scored. MCL 777.22(2).

3. Crimes Involving a Controlled Substance (CS)

"CS" is the designation used to identify crimes involving a controlled substance in the statutory lists of felonies to which the guidelines apply. MCL 777.5(c).

For all crimes involving a controlled substance, OVs 1, 2, 3, 12, 13, 14, 15, 19, and 20 must be scored. MCL 777.22(3).

4. Crimes Against Public Order (Pub Ord) and Crimes Against Public Trust (Pub Trst)

"Pub ord" and "Pub trst" are the abbreviations used to identify crimes against public order and crimes against public trust in the statutory lists of felonies to which the guidelines apply. MCL 777.5(d); MCL 777.5(e).

For all crimes against public order and all crimes against public trust, score OVs 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20. MCL 777.22(4).

5. Crimes Against Public Safety (Pub Saf)

"Pub saf" is the designation used to identify crimes against public safety in the statutory lists of felonies to which the guidelines apply. MCL 777.5(f).

Score OVs 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20 for all crimes against public safety.

Score OV 18 if the offense or attempted offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(5).

B. OV Scoring In General[104]

Evidentiary standard. "'[A] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.'" *People v Jones (Byron)*, 494 Mich 880, 880-881 (2013), quoting *People v Osantowski*, 481 Mich 103, 111

(2008) (emphasis omitted); see also *People v Hardy (Donald)*, 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016; *People v Steanhouse*, 313 Mich App 1, 38 (2015), lv gtd 499 Mich 934 (2016). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy (Donald)*, 494 Mich at 438; see also *Steanhouse*, 313 Mich App at 38; *People v Gullett*, 277 Mich App 214, 217 (2007).[105]

Conduct beyond the sentencing offense. "Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). "*McGraw*[, 484 Mich at 122, 130-134,] . . . requires a court to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was charged and later dismissed or dropped, regardless of the sequence in which the conduct transpired." *People v Gray (Orlando)*, 297 Mich App 22, 33-34 (2012). "However, . . . a trial court may properly consider all of [the] 'defendant's conduct during' that offense." *People v Chelmicki*, 305 Mich App 58, 72 (2014) (quoting *McGraw*, 484 Mich at 134, and holding that the trial court properly scored OV 1 based on "[the] defendant's act of holding a BB gun to the victim's head . . . 'during' the ongoing offense of unlawful imprisonment[]"). See also *People v Nawwas*, ___ Mich ___, ___ (2016) (citing *McGraw*, 484 Mich at 135, and holding that where the defendant was convicted of discharge of a firearm in an occupied facility, MCL 750.234b(2), possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a pistol in a motor vehicle, MCL 750.227,[106] but "the trial court only scored the sentencing guidelines for the defendant's violation of MCL

[104] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

[105] In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the guidelines "are advisory only." Because nothing in *Lockridge* specifically calls into question the standards currently governing appellate review of judicial fact-finding in scoring the (now advisory) guidelines, it is unclear to what extent these standards remain good law. The Court of Appeals has since concluded that, "given the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*." *Steanhouse*, 313 Mich App at 38, citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438; *Gullett*, 277 Mich App at 217.

750.227[,] . . . [t]he trial court erred in scoring [OV 9] based on a finding that two to nine victims were placed in danger of physical injury or death in relation to the defendant's violation of MCL 750.227[]").

Conduct inherent in a crime. "[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables." *Hardy (Donald)*, 494 Mich at 441-442 (holding that "[t]he Court of Appeals . . . erred in [*People v Glenn (Devon)*, 295 Mich App 529, 535 (2012),] to the extent it concluded that 'circumstances inherently present in the crime must be discounted for purposes of scoring an OV[]'"). "The sentencing guidelines explicitly direct courts to disregard certain conduct inherent in a crime when scoring OVs 1, 3, 8, 11, and 13[[107]; however, i]n all other cases, 'the Sentencing Guidelines allow a factor that is an element of the crime charged to also be considered when computing an offense variable score.'" *Hardy (Donald)*, 494 Mich at 442, quoting *People v Gibson (Terrance)*, 219 Mich App 530, 534 (1996) (holding that the defendant was properly assessed points for OV 2 under the judicial sentencing guidelines—the equivalent of OV 3 under the statutory guidelines—for causing personal injury to the victim even though personal injury was an element of the CSC-I charge against the defendant).

See also *People v Nantelle*, 215 Mich App 77, 84-85 (1996) (the age of the victim and the defendant's position of authority were elements of CSC-II *and* were factors properly considered in scoring OV 7 under the judicial guidelines—OV 10 under the statutory guidelines); *People v Cotton*, 209 Mich App 82, 84 (1995) (it was proper to prosecute the defendant for CSC-I because the victim was younger than 13 years of age *and* to assess points for OV 7—OV 10 under the statutory guidelines—against the defendant for exploiting a victim's vulnerability because the victim was younger than 13 years of age).

Co-offenders' conduct. "[T]he court may not assess [a] defendant points solely on the basis of his or her co-offender's conduct unless the OV at issue explicitly directs the court to do so." *People v Gloster*, ___ Mich ___, ___ (2016) (holding that "a sentencing court may not assess a defendant 15 points for predatory conduct under OV 10 solely on the basis of the predatory conduct of the defendant's co-offenders[]" because "MCL 777.40 contains no language directing a

[106] See *People v Nawwas*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2015 (Docket No. 319039), slip op at 1.

[107] See e.g., OV 3, where the guidelines preclude scoring five points for injury if bodily injury is an element of the sentencing offense, and OV 8, where the guidelines preclude scoring points for asportation when the sentencing offense is kidnapping. MCL 777.33(2)(d); MCL 777.38(2)(b).

court to assess a defendant the same number of points as his [or her] co-offenders in multiple-offender situations[]"). "[T]he Legislature has explicitly provided that all offenders in a multiple-offender situation should receive the same score for OVs 1, 2, and 3, but excluded that language from other OVs[.]" *Gloster*, ___ Mich at ___.

C. OV 1—Aggravated Use of a Weapon

1. Definitions/Scoring

OV 1 is scored for all offenses to which the sentencing guidelines apply, i.e., for offenses in every crime group designation. MCL 777.22(1)-(5). Determine which statements addressed by OV 1 apply to the offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.31(1).

Points	OV 1—Aggravated use of a weapon
25	A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon. MCL 777.31(1)(a).
20	The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.31(1)(b). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER APRIL 22, 2002. SEE 2002 PA 137.
15	A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon. MCL 777.31(1)(c).
10	The victim was touched by any other type of weapon. MCL 777.31(1)(d).
5	A weapon was displayed or implied. MCL 777.31(1)(e).
0	No aggravated use of a weapon occurred. MCL 777.31(1)(f).

- Each person in danger of injury or loss of life is counted as a victim for purposes of scoring OV 1. MCL 777.31(2)(a).

- In cases involving multiple offenders, when one offender is assigned points for the use or the presence of a weapon, all offenders must be assigned the same number of points. MCL 777.31(2)(b).

- Score five points if an offender used an object to suggest that he or she had a weapon. MCL 777.31(2)(c).

- Score five points if an offender used a chemical irritant, a chemical irritant or smoke device, or an imitation harmful substance or device. MCL 777.31(2)(d).[108]

- Do not score five points if the sentencing offense is a conviction of MCL 750.82 (felonious assault) or MCL 750.529 (armed robbery). MCL 777.31(2)(e).

- "Chemical irritant," "chemical irritant device," "harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," "harmful radioactive device," and "imitation harmful substance or device" are defined in MCL 750.200h. MCL 777.31(3)(a).

- "'Incendiary device'" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device." MCL 777.31(3)(b).

2. Case Law Under the Statutory Guidelines

a. Offense-Specific Nature of OV 1

"OV 1 is an 'offense-specific' variable; therefore, in scoring OV 1, the trial court [is] limited to 'considering the sentencing offense alone.'" *People v Chelmicki*, 305 Mich App 58, 72 (2014), quoting *People v McGraw*, 484 Mich 120, 127 (2009). "However, in doing so, a trial court may properly consider all of [the] 'defendant's conduct during' that offense." *Chelmicki*, 305 Mich App at 71-72 (quoting *McGraw*, 484 Mich at 134, and rejecting the defendant's contention that because "the [sentencing] offense of unlawful imprisonment was 'complete' the moment he [asported the victim], . . . evidence of his putting [a] BB gun to the victim's head occurred after that crime and, therefore, [could not] be used in scoring OV 1[;]" rather, ten points were properly scored for OV 1 because "[the] defendant's act of holding a BB gun to the victim's head was conduct that occurred 'during' the ongoing offense of unlawful imprisonment[]").

[108] Effective October 23, 2001. 2001 PA 136.

Where "there was no evidence that [the] defendant's possession of [a] gun, which was used to support [his] felon-in-possession conviction, entailed [the] defendant discharging the weapon, let alone discharging it at or toward a human being[, t]he trial court . . . clearly erred in assessing 25 points for OV 1[.]" *People v Biddles*, ___ Mich App ___, ___ (2016), citing *Chelmicki*, 305 Mich App at 72; *McGraw*, 484 Mich at 127.

b. Multiple Offender Provision

The instructions for scoring OV 1 include specific directions in cases involving multiple offenders.[109] For OV 1, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same number of points. MCL 777.31(2)(b). However, the multiple offender provision applies only when the offenders are being scored for the same offense. *People v Johnston*, 478 Mich 903, 904 (2007). The multiple offender provision does not require that an offender be assessed the same number of points as other offenders involved in the same criminal episode if the offender was the only person convicted of the specific crime being scored. *Id.* at 904.[110] In other words, when more than one offender is involved in the same criminal conduct but only one offender is convicted of a specific crime arising from the conduct, that particular crime does not involve multiple offenders for purposes of scoring OV 1.

"[I]n the absence of any clear argument that the scores assessed [against the first offender] were incorrect," the multiple offender provision in OV 1 and OV 3 requires that other offenders convicted of the same offense must be assessed the same number of points. *People v Morson*, 471 Mich 248, 261-262 (2004) (the defendant and the codefendant robbed a woman at gunpoint and a third party was injured when the codefendant shot him). At issue in *Morson*, 471 Mich at 258-259, was the fact that the defendant, who was sentenced after the codefendant was sentenced, received higher scores for OV 1 and OV 3 than

[109] OVs 2 and 3 also have multiple offender provisions.

[110] *Johnston*, 478 Mich at 904, overruled *People v Villegas*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2005 (Docket Nos. 253447, 253512, and 254284). In those consolidated cases involving the multiple offenders at issue in the scoring of OV 1, defendant Johnston's codefendants were convicted of felonious assault (assault with a dangerous weapon), but defendant Johnston's convictions did not involve the use of a weapon.

did the codefendant. The prosecution argued that the statute clearly required that the highest number of points be assessed for each variable, but it did not dispute the codefendant's scores at her sentencing and did not contend on the defendant's appeal that the codefendant's scores were inaccurate or erroneous. *Id*. at 259. Under these circumstances, the *Morson* Court explained:

> "Unless the prosecution can demonstrate that the number of points assessed to the prior offender was erroneous or inaccurate, the sentencing court is required to follow the plain language of the statute, which requires the court to assess the same number of points on OV 1 and OV 3 to multiple offenders." *Morson*, 471 Mich at 262.

The multiple-offender provisions in OV 1 and OV 3 were "not implicated" where "[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim], and . . . [his] codefendant . . . was convicted by plea on the crimes for which [the] defendant was acquitted[.]" *Biddles*, ___ Mich App at ___ (citing *Johnston*, 478 Mich at 904, and *Morson*, 471 Mich at 260 n 13, and concluding that, because the defendant and his codefendant were not convicted of the same specific offense, the case "was not a multiple-offender case[]").

c. Inoperable Weapons

The definition of a firearm "does not prescribe a requirement that the weapon be 'operable' or 'reasonably or readily repairable.' . . . [T]he design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a 'firearm.'" *People v Peals*, 476 Mich 636, 638 (2006) (construing the definition of "firearm" for purposes of determining whether the defendant was a felon in possession of a firearm, MCL 750.224f[1]). See also *People v Humphrey*, 312 Mich App 309, 318, 319 n 4 (2015) (holding that "under *Peals*, [476 Mich at 638, 642,] the operability of a firearm is not relevant to firearms offenses under Chapter XXXVII of the Michigan Penal Code, and the inoperability of a pistol is [not] a valid affirmative defense to a [carrying a concealed weapon (CCW)] charge[,]" and further noting that "the reasoning employed in *Peals* is . . . viable" under the definition of *firearm* in both former MCL 750.222(d) and

MCL 750.222(e) as amended by 2015 PA 28, effective August 10, 2015)[111]; *People v Rueda (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2011 (Docket No. 291914), slip op p 3 (citing *Peals*, 476 Mich at 652 n 7, 655-656, and holding that the trial court properly assessed 15 points for OV 1 where the gun used in the scoring offense had missing internal parts, rendering it temporarily inoperable).[112]

d. Threatening Victim Versus Merely Displaying or Implying a Weapon

Fifteen points are to be scored for OV 1 when "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon[,]" MCL 777.31(1)(c), while only five points are to be scored when "[a] weapon was displayed or implied[,]" MCL 777.31(1)(e).

"MCL 777.31(1) explicitly distinguishes 'threaten[ing]' [under MCL 777.31(1)(c)] from 'display[ing][]' [under MCL 777.31(1)(e),]" and "the minimum distinction between the two circumstances is whether the defendant in any way suggests, by act or circumstance, that the weapon might actually be used against the victim." *People v Brooks (Randall)*, 304 Mich App 318, 321 (2014). When determining whether a knife or other cutting or stabbing weapon was used to *threaten* the victim or was merely *displayed or implied*,

> "the fact that some kind of weapon is apparently present, by sight or by implication, in the abstract warrants [an] assessment of 5 points under MCL 777.31(1)(e). To warrant [an] assessment of 15 points under MCL 777.31(1)(c), there must be some reason, however slight, for the victim to reasonably perceive that the weapon will actually be used, and moreover, will actually be used against the victim. A threat exists when a knife is used for the purpose of suggesting to the victim a 'menace or source

[111] MCL 750.222(e), as amended by 2015 PA 28, effective August 10, 2015, defines *firearm* as "any weapon which will, *is designed to*, or may readily be converted to expel a projectile by action of an explosive." (Emphasis added.)

[112] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

> of danger[.]'" *Brooks (Randall)*, 304 Mich App at 322, quoting *Random House Webster's College Dictionary* (1997).

In *Brooks (Randall)*, 304 Mich App at 319, 322-323, although the factual record was unclear regarding "whether [the] defendant ever . . . removed [a] knife from his sock, let alone actually pointed it at or gestured with it toward anyone[,]" the Court of Appeals rejected the defendant's contention that he "merely displayed or implied the knife[]" and that five points, rather than 15, should have been scored under OV 1 for his conviction of unarmed robbery:

> "The evidence overwhelmingly indicate[d] that [the] defendant had a readily apparent knife and engaged in some kind of intentional, overt conduct involving that knife. The most reasonable interpretation of that action is that [the] defendant had a present intention of removing the knife for use. In the context of a robbery, an assailant attempting to pull a knife out of his [or her] sock, or even merely reaching for the knife, would be interpreted by any reasonable person as an indication that the knife would actually be used to inflict harm upon them. In other words, [the] defendant went beyond merely displaying a weapon by acting in a manner that suggested its imminent use. . . . [These] actions were sufficient to constitute a threat under MCL 777.31(1)(c)." *Brooks (Randall)*, 304 Mich App at 323.

Furthermore, it is not necessary that a knife or other cutting or stabbing weapon have been *pointed* at the victim in order "to constitute a threat[]" under MCL 777.31(1)(c); although "[t]he language of MCL 777.31(1)(c) relating to firearms indicates that 15 points should be assessed for OV 1 if the firearm is 'pointed at or toward a victim,' . . . that instructive language applies only to firearms, not other weapons." *Brooks (Randall)*, 304 Mich App at 323 n 1.

e. Harmful Substances

- **"Exposure"**

OV 1 was properly scored at 20 points, MCL 777.31(1)(b), where the defendant "exposed" the victim-baby to harmful substances, first by mixing milk with bleach in the baby's bottle, and then by mixing milk with Comet in the baby's bottle. *People v Jones (Shatara)*, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2010 (Docket No. 289612), slip op p 2. The defendant argued that a 20-point score was inappropriate because there was no record evidence that the baby was "ever placed in proximity to the poisonous substances, or that [the] defendant tried to bring the hazardous substances to the baby." *Id*. However, the presentence investigation report (PSIR) indicated that the defendant's mother poured out the bleach/milk mixture and confronted the defendant, who then took the bottle and filled it with the Comet/milk mixture. *Id*. Thereafter, the defendant attempted to leave with the baby, and had to be forcibly prevented from doing so. *Id*. Further, the defendant admitted that she had intended to harm herself and the baby. *Id*. The Court adopted the trial court's reasoning that "'the proximity of the child to the substance, i.e., real close to having the child ingest the substance, is close enough to consider that the child was exposed to the harmful . . . substance.'" *Id*.

- **"Harmful biological substance"**

"Harmful biological substance" for purposes of scoring OV 1 includes HIV-infected blood because blood containing HIV is "a substance produced by a human organism that contains a virus that can spread or cause disease in humans" as required by the definition of "harmful biological substance" in MCL 750.200h(g). *People v Odom*, 276 Mich App 407, 413 (2007) (twenty points were properly scored for OV 1 where the defendant, who was HIV positive and whose mouth was bleeding, spit on a corrections officer).

"Harmful biological substance" for purposes of scoring OV 1 includes fecal matter because "human fecal matter contains harmful bacteria that could cause disease in another human being[.]" *People v Huddleston*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 2009 (Docket No. 285961) (twenty points were properly scored for OV 1 where the defendant threw feces into the face and mouth of a jail deputy, and the Court took judicial notice of human fecal matter's potential to cause disease in another human being because of the harmful bacteria contained in it).

- **"Harmful chemical substance"**

"Harmful chemical substance" for purposes of scoring OV 1 does *not* include heated cooking oil because, under MCL 750.200h(i), cooking oil is not a substance that "possess[es] an inherent or intrinsic ability or capacity to cause death, illness, injury or disease" as required by the term "harmful." *People v Blunt*, 282 Mich App 81, 86, 89 (2009) (points were improperly scored for OV 1 where the defendant threw hot oil at the victim's face). Any substance that is innocuous in its unaltered state is not a harmful substance under MCL 777.31(1)(b). *Blunt*, 282 Mich App at 88.

"[W]hile heroin could, under the appropriate fact situation, constitute the aggravated use of a weapon, that it is not the case in an ordinary drug transaction[;] . . . [rather,] to be scorable under OV 1, [heroin] must be used as a weapon." *People v Ball (Amanda)*, 297 Mich App 121, 122, 124-126 (2012) (although heroin "is capable of causing death[and is t]herefore . . . a harmful chemical substance[]" under MCL 777.31(1)(b), 20 points were improperly assessed under OV 1 where, after the defendant delivered heroin to the victim in exchange for a video game, the victim "voluntarily ingested the heroin" and died of an overdose; because "[t]here [was] no evidence that [the] defendant forced the victim to ingest the heroin against his will[]" or otherwise used it as a weapon, OV 1 should have been scored at zero points).

Similarly, "zero points should have been scored for" OV 1 and OV 2 where the methamphetamine involved in the case "was not used or possessed as a weapon." *People v Lutz*, 495 Mich 857, 857 (2013), citing *Ball (Amanda)*, 297 Mich App 121. Moreover, "[i]nvolvement in, or exposure to, a methamphetamine lab or its constituent parts, even if an explosion occurs, without more, does not constitute the use of a weapon under OV 1[or OV 2]." *People v Gary*, 305 Mich App 10, 11-14 (2014) (holding that where the defendant purchased supplies, including lithium batteries and fuel, for the production of methamphetamine by someone else, the trial court improperly scored points under OV 1 and OV 2; although "lithium batteries and . . . fuel could constitute 'harmful chemical substances' and their employment in a methamphetamine lab could constitute part of an 'explosive device[]' [under MCL 777.31(1)(b),] as demonstrated by the fact that [the] lab exploded, causing . . . serious injury[,]" the defendant did not "use[]

the . . . batteries[,] . . . fuel[,] . . . [or] methamphetamine lab as a weapon[]").

f. Unconventional Weapons

A brass statue and a shotgun are not "other cutting or stabbing weapon[s]" for purposes of scoring OV 1, even if the items were used in some method that resulted in the victim's bleeding. *People v Wilson (John)*, 252 Mich App 390, 394-395 (2002).[113] According to the Court, "To the extent that either object was used in a manner to cause the primary victim to bleed, it was not because she was cut or stabbed, but because she was hit with a relatively heavy object." *Id.* at 395.

A glass mug may be a "weapon" for purposes of scoring OV 1. Ten points were properly scored against the defendant who caused his wife's injuries and eventual death by striking her with a glass mug. *People v Lange*, 251 Mich App 247, 252-255 (2002). The Court reasoned that the Legislature's use of the word "weapon" was not predicated on an object's ability to reflect an offender's "plan" or "preparation." *Id.* at 255. The fact that the defendant did not plan to use the mug as a weapon did not preclude the mug's characterization as a weapon. *Id*. In defining what the Legislature intended by the word "weapon" in OV 1, the Court referred to a previous Michigan Supreme Court decision that defined the term "dangerous weapon":

> "'Some weapons carry their dangerous character because so designed and are, when employed, *per se*, deadly, while other instrumentalities are not dangerous weapons unless turned to such purpose. *The test as to the latter is whether the instrumentality was used as a weapon and, when so employed in an assault, dangerous.* The character of a dangerous weapon attaches by adoption when the instrumentality is applied to use against another in furtherance of an assault. *When the purpose is evidenced by act, and the instrumentality is adapted to accomplishment of*

[113] The defendant's scoring error claims were unpreserved and unreviewable; however, the Court, in the context of the defendant's claim that he was denied the effective assistance of counsel, reviewed the defendant's claim that OV 1 was improperly scored. Because of this, the Court characterized its analysis of the scoring issues as dicta with regard to a properly preserved challenge to the same scoring issues that may occur in subsequent cases. *Wilson (John)*, 252 Mich App at 392-393, 395 n 1.

> *the assault and capable of inflicting serious injury, then it is, when so employed, a dangerous weapon*.'" *Lange*, 251 Mich App at 256, quoting *People v Vaines*, 310 Mich 500, 505-506 (1945).

See also *People v Bosca*, 310 Mich App 1, 50 (2015) (citing *Lange*, 251 Mich App at 256-257, and holding that, under MCL 777.31(c), "[b]ased on the manner of use . . . of [a] circular saw to instill fear, coupled with the 'cutting' nature of the saw, the trial court did not err in scoring 15 points" for OV 1) (additional citation omitted).

Where the defendant admitted throwing a stick that struck the victim's leg and knocked the victim down, the evidence established that the "victim was touched [with] any other type of weapon" for the purposes of scoring OV 1. *People v Jones (Kenneth)*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 238557), vacated on other grounds and remanded for reconsideration 469 Mich 984 (2003).[114]

g. Use of Bare Hands as a Weapon

A *weapon* is "an article distinct from the particular offender[,]" and "an offender's bare hands do not qualify as a weapon under MCL 777.31[]" or MCL 777.32. *People v Hutcheson*, 308 Mich App 10, 15-17 (2014) (holding that points may not be assessed under OV 1 or OV 2 where "[the] defendant used only his [or her] bare hands, and no distinct weapon, to assault [a] victim[])" (citations omitted).

h. Implied Use or Possession of Weapon

Scoring instructions for OV 1 expressly prohibit scoring five points for possession and display of a weapon when the sentencing offense is armed robbery, MCL 750.529. MCL 777.31(2)(e).

Where the complainant testified that he was under the impression that the defendant was carrying a gun because the defendant kept his hand inside his shirt during the robbery, OV 1 was correctly scored for the defendant's implied use of a weapon. *People v Gholston*, unpublished

[114] The Michigan Supreme Court remanded the case for the Court of Appeals to reconsider the trial court's sentence in light of *People v Babcock*, 469 Mich 247 (2003). In its opinion on remand, the Court of Appeals "adopt[ed] and reaffirm[ed its] prior opinion regarding all non-departure issues." *People v Jones (Kenneth)*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2004 (Docket No. 238557).

opinion per curiam of the Court of Appeals, issued September 11, 2003 (Docket No. 240810).

i. Sufficient Evidence to Support OV 1 Score

Although the evidence did not suggest that the defendant intended to *hit* the victim when shooting his gun over the victim's bed and head, it also did not suggest that he intentionally shot *away from* the victim; thus, OV 1 was properly scored at 25 points because the trial court had "a sound evidentiary basis" for determining that the shooter discharged his gun "in the victim's general direction," i.e. *toward* the victim. *People v Greyerbiehl*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2002 (Docket No. 233472).

"[N]othing in the plain language of [MCL 777.31(1)(a)] requires that [a] defendant affirmatively attack the victim with [a] knife or purposefully cut the victim to merit a score of 25 points under OV 1[; r]ather, . . . all that is required . . . to establish the aggravated use of a weapon is that 'a victim was cut . . . with a knife' during the offense." *People v Laube*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2015 (Docket No. 319268) (holding that 25 points were properly scored for OV 1 where the victim "cut his hand while trying to wrestle [a] knife from [the] defendant during [a] robbery as opposed to [the] defendant proactively stabbing [the victim]") (citations omitted).

j. OV Score Inconsistent with Jury Verdict

OV 1 was properly scored at 15 points under MCL 777.31(1)(c) ("the victim had a reasonable apprehension of an immediate battery when threatened with a knife . . . .") where, even though a jury acquitted the defendant of armed robbery and instead found him guilty of unarmed robbery, the victim testified that the defendant had a knife in his hand during the robbery. *People v Agelink*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2010 (Docket No. 292198).

k. Statutory Interpretation and Intent of OV 1

"[T]he central focus of OV 1 is not the *type* of weapon involved, but rather the *manner* in which the weapon was used." *People v Rutley*, unpublished opinion per curiam of the Court of Appeals, issued November 30, 2010 (Docket

No. 291682), slip op p 4. Even though "firearm" is not specifically listed in MCL 777.31(1)(d), as it is in MCL 777.31(1)(a) (firearm was discharged at or toward a human being) and MCL 777.31(1)(c) (firearm was pointed at or toward a victim), the phrase used in MCL 777.31(1)(d) (victim was touched by any other type of weapon) must be read to include a firearm. *Rutley*, slip op at 4. In *Rutley*, slip op at 4, points were properly assessed under MCL 777.31(1)(d) because the victim was clearly "touched by any other type of weapon" when the defendant struck the victim several times with a pistol.

3. Relevant Case Law Under the Judicial Guidelines

The Court of Appeals affirmed the trial court's score of five points for OV 1 against a defendant who appeared to be grasping the handle of a firearm in his pants as he handed a note to a cashier indicating that he had a gun. *People v Elliott*, 215 Mich App 259, 261 (1996). According to the Court, "[T]he guidelines clearly contemplate the implied use of a firearm." *Id.* at 261.

D. OV 2—Lethal Potential of the Weapon Possessed or Used

1. Definitions/Scoring

OV 2 is scored for crimes against a person, crimes against property, and crimes involving a controlled substance. MCL 777.22(1)-(3). Score OV 2 by determining which statements apply to the circumstances of the offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.32(1).

Points	OV 2—Lethal potential of the weapon possessed or used
15	The offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device. MCL 777.32(1)(a). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER OCTOBER 23, 2001. SEE 2001 PA 136.
15	The offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon. MCL 777.32(1)(b).
10	The offender possessed or used a short-barreled rifle or a short-barreled shotgun. MCL 777.32(1)(c).

5	The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon. MCL 777.32(1)(d).
1	The offender possessed or used any other potentially lethal weapon. MCL 777.32(1)(e).
0	The offender possessed or used no weapon. MCL 777.32(1)(f).

- In cases involving multiple offenders, if one offender is assessed points for possessing a weapon, all offenders must be assessed the same number of points. MCL 777.32(2).

- "Harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," and "harmful radioactive device" are defined in MCL 750.200h. MCL 777.32(3)(a).

- A "fully automatic weapon" is a firearm that ejects an empty cartridge from a shot and loads a live cartridge from the magazine for the next shot without requiring renewed pressure on the trigger for each successive shot. MCL 777.32(3)(b).

- A "pistol," "rifle," or "shotgun" includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm made in or after 1898 that fires fixed ammunition. A "pistol," "rifle," or "shotgun" does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle. MCL 777.32(3)(c).

- An "'[i]ncendiary device' includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device." MCL 777.32(3)(d).

2. Case Law Under the Statutory Guidelines

a. Multiple Offender Provision

The instructions for scoring OV 2 include specific directions in cases involving multiple offenders.[115] For OV 2, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same number of points.

[115] OVs 1 and 3 also have multiple offender provisions.

MCL 777.32(2). However, the multiple offender provision applies only when the offenders are being scored for the same offense. *Johnston*, 478 Mich at 904. The multiple offender provision does not require that an offender be assessed the same number of points as other offenders involved in the same criminal episode if the offender was the only person convicted of the specific crime being scored. *Id.* at 904.[116] In other words, when more than one offender is involved in the same criminal conduct but only one offender is convicted of a specific crime arising from the conduct, that particular crime does not involve multiple offenders for purposes of scoring OV 2.

b. Inoperable Weapons

The definition of a firearm "does not prescribe a requirement that the weapon be 'operable' or 'reasonably or readily repairable.'. . . [T]he design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a 'firearm.'" *Peals*, 476 Mich at 638. See also *People v Rueda (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2011 (Docket No. 291914), slip op pp 3-4, citing *Peals,* 476 Mich 650 (trial court properly assessed five points for OV 2 where the gun used in the scoring offense had missing internal parts rendering it temporarily inoperable).[117]

c. Harmful Substances

"Harmful chemical substance" for purposes of scoring OV 2 does not include heated cooking oil because, under MCL 750.200h(i), cooking oil is not a substance that "possess[es] an inherent or intrinsic ability or capacity to cause death, illness, injury or disease" as required by the term "harmful." *Blunt*, 282 Mich App at 86, 89 (points were improperly scored for OV 2 where the defendant threw hot oil at the victim's face). Any substance that is innocuous in its unaltered state is not a harmful substance under MCL 777.32(1)(a). *Blunt*, 282 Mich App at 88.

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[116] *Johnston*, 478 Mich at 904, overruled *People v Villegas*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2005 (Docket Nos. 253447, 253512, and 254284). In those consolidated cases involving the multiple offenders at issue in the scoring of OV 1, defendant Johnston's codefendants were convicted of felonious assault (assault with a dangerous weapon), but defendant Johnston's convictions did not involve the use of a weapon.

[117] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

d. Controlled Substances

"[Z]ero points should have been scored for" OV 1 and OV 2 where the methamphetamine involved in the case "was not used or possessed as a weapon." *People v Lutz*, 495 Mich 857, 857 (2013), citing *People v Ball (Amanda)*, 297 Mich App 121 (2012).[118] Moreover, "[i]nvolvement in, or exposure to, a methamphetamine lab or its constituent parts, even if an explosion occurs, without more, does not constitute the use of a weapon under OV 1[or OV 2]." *People v Gary*, 305 Mich App 10, 11-14 (2014) (holding that where the defendant purchased supplies, including lithium batteries and fuel, for the production of methamphetamine by someone else, the trial court improperly scored points under OV 1 and OV 2; although "lithium batteries and . . . fuel could constitute 'harmful chemical substances' and their employment in a methamphetamine lab could constitute part of an 'explosive device[]' [under MCL 777.31(1)(b),] as demonstrated by the fact that [the] lab exploded, causing . . . serious injury[,]" the defendant did not "use[] the . . . batteries[,] . . . fuel[,] . . . [or] methamphetamine lab as a weapon[]").

"OV 2, MCL 777.32, must be scored at 0 points where [an] incendiary device was part of the process of manufacturing methamphetamine and was not possessed or used as a weapon." *People v Jackson (Kelly)*, 497 Mich 857, 857-858 (2014), citing *Ball (Amanda)*, 297 Mich App 121 (additional citation omitted).

e. Unconventional Weapons

"A metal pipe or bat used to strike a person in the head is unquestionably a potentially lethal weapon." *People v McCuller*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2005 (Docket No. 250000).[119]

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[118] In *Ball (Amanda)*, 297 Mich App at 122, the Court held that "for points to be assessed under OV 1[based on the delivery of heroin in a drug transaction], the heroin itself must have been used as a weapon."

[119] This conclusion was reviewed by the Michigan Supreme Court in *People v McCuller*, 479 Mich 672, 696 (2007). The Court (after remand from the United States Supreme Court on other grounds) stated that "the uncontroverted and overwhelming evidence showed beyond a reasonable doubt that the victim was touched by a weapon[, and i]n regard to OV2, the uncontested and overwhelming evidence regarding the magnitude of the victim's injuries demonstrated that the weapon used to injure him was potentially lethal."

f. Use of Bare Hands as a Weapon

A *weapon* is "an article distinct from the particular offender[,]" and "an offender's bare hands do not qualify as a weapon under MCL 777.31[]" or MCL 777.32. *People v Hutcheson*, 308 Mich App 10, 15-17 (2014) (holding that points may not be assessed under OV 1 or OV 2 where "[the] defendant used only his [or her] bare hands, and no distinct weapon, to assault [a] victim[])" (citations omitted).

g. Sufficient Evidence to Support OV 2 Score

Fifteen points were appropriately scored under OV 2 where, even though the defendant was acquitted of armed robbery, trial testimony and the defendant's PSIR indicated that the defendant brandished a gun during the robbery and pointed it at a victim's face. *People v Halverson*, 291 Mich App 171, 182-183 (2010).

A witness's testimony that the weapon used by the defendant "was shorter than a normal size shotgun" is sufficient to support a score of ten points under OV 2. *People v Brewer (Michael)*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2004 (Docket No. 242764).

Where "the only weapon found at the scene was an 'Airsoft' pellet gun[,]" and where the trial court found that "there was 'no credible evidence to indicate that the defendant had in his possession or was assisting someone else in the possession of a firearm[,]'" five points should not have been assessed under OV 2. *People v Hood (Lavise)*, unpublished opinion per curiam of the Court of Appeals, issued November 7, 2013 (Docket Nos. 307575, 308316, 311136, 315294)[120] (holding that "[b]ecause there was no testimony or other evidence presented about the lethality of the Airsoft gun, [OV 2] should be scored at zero[]").

E. OV 3—Physical Injury to a Victim

1. Definitions/Scoring

OV 3 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22(1)-(5). To score OV 3, determine which statements addressed by the variable apply to the

[120] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

offense and assign the point value indicated by the applicable statement with the highest number of points. MCL 777.33(1).

Points	OV 3—Degree of physical injury sustained by a victim
100	A victim was killed. MCL 777.33(1)(a).
50	A victim was killed. MCL 777.33(1)(b). (35 points for offenses committed before September 30, 2003. 2003 PA 134.)
25	Life threatening or permanent incapacitating injury occurred to a victim. MCL 777.33(1)(c).
10	Bodily injury requiring medical treatment occurred to a victim. MCL 777.33(1)(d).
5	Bodily injury not requiring medical treatment occurred to a victim. MCL 777.33(1)(e).
0	No physical injury occurred to a victim. MCL 777.33(1)(f).

- In cases involving multiple offenders, if one offender is assessed points for death or physical injury, all offenders must be assessed the same number of points. MCL 777.33(2)(a).

- Score 100 points if death results from the commission of the offense and homicide is not the sentencing offense. MCL 777.33(2)(b). Any crime in which the death of a person is an element of the crime is a "homicide." MCL 777.1(c).

- Score 50 points if death results from an offense or attempted offense that involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive[121] and any of the following apply:

  - the offender was under the influence of or visibly impaired by the use of alcohol, a controlled substance, or a combination of alcohol and a controlled substance, MCL 777.33(2)(c)(*i*);

  - the offender had an alcohol content of 0.08 grams[122] or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, MCL 777.33(2)(c)(*ii*); or

[121] See MCL 777.1 for definitions of "aircraft," "ORV," "snowmobile," "vehicle," and "vessel."

[122] Effective October 1, 2018, the alcohol content level increases to 0.10 grams or more.

- the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212 or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(*iv*), MCL 777.33(2)(c)(*iii*).

- Do not score five points if "bodily injury" is an element of the sentencing offense. MCL 777.33(2)(d).

- "Requiring medical treatment" refers to an injury's need for treatment, not whether a victim was successful in obtaining treatment. MCL 777.33(3).

2. Case Law Under the Statutory Guidelines

a. Sufficient Evidence

If "a preponderance of the evidence [independently] supports the trial court's . . . score[,]" the trial court is not required to "independently verify[]" disputed information contained in the presentence investigation report (PSIR) or conduct an evidentiary hearing. *People v Maben*, ___ Mich App ___, ___ (2015) (where the defendant disputed that the victim "actually went to the hospital," contrary to the victim's impact statement in the PSIR, "the trial court [did not err] in scoring 10 points for OV 3 without independently verifying the report[;]" the defendant's "description of the manner in which he strangled [the victim]," together with additional "undisputed information" about the victim's injuries and his statement to officers "that he intended to seek treatment, provided independent support for the trial court's finding[]").

Points are appropriately scored for OV 3 only where there is record evidence of a victim's injury; a prosecutor's file notes do not constitute record evidence. *People v Endres*, 269 Mich App 414, 417-418 (2006), overruled in part on other grounds in *People v Hardy (Donald)*, 494 Mich 430, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016.

Where the jury convicted the defendant of first-degree child abuse and second-degree murder for the death of her newborn infant, 25 points should have been scored for OV 3, irrespective of the existence of "conflicting evidence surrounding the baby's manner of death[.]" *People v Portellos*, 298 Mich App 431, 434, 446-448 (2012) (holding that, in determining the number of points to

assess under OV 3 when the sentencing offense is a homicide, a court must consider "whether, but for the defendant's conduct, the victim's death would have occurred[]").

b. Victim

For purposes of scoring OV 3, a "victim" includes any person harmed as a result of the offender's conduct. *People v Albers*, 258 Mich App 578, 593 (2003). In *Albers*, the defendant was convicted of involuntary manslaughter for the death of a child killed in an apartment complex fire caused by the defendant's son. *Id.* at 580. The defendant argued that OV 3 was improperly scored for injury to an individual other than the child who died as a result of the fire and for whose death the defendant was convicted. *Id*. at 591.

The Court of Appeals first noted that MCL 777.33 does not contain any language defining the term "victim" for purposes of scoring OV 3. *Albers*, 258 Mich App at 592-593. The defendant asserted that the statute's use of the term "victim" in its singular form indicated a legislative "intent that OV 3 apply only to the victim of the charged offense." *Id.* at 592-593. However, rules of statutory construction clearly provide that every reference to the singular may include reference to the plural. MCL 8.3b; *Albers*, 258 Mich App at 593. Finding no authority indicating otherwise, the Court of Appeals concluded that for purposes of scoring OV 3, "the term 'victim' includes any person harmed by the criminal actions of the charged party." *Id.* at 593.

"[A] coperpetrator is properly considered a 'victim' for purposes of OV 3 when he or she is harmed by the criminal actions of the charged party[;]" accordingly, where the defendant's coperpetrator was fatally shot by the homeowner during the home invasion for which the defendant was convicted, "[t]he trial court properly assessed 100 points for OV 3 because the coperpetrator was harmed by the criminal actions of [the] defendant." *People v Laidler*, 491 Mich 339, 341-342 (2012). Noting that "[b]ecause OV 3 is defined as 'physical injury to a victim,' it is manifest that a 'victim' is required in all cases in which OV 3 is scored[,]" but that "MCL 777.33 does not define 'victim,'" the *Laidler* Court concluded that "a 'victim' is any person who is harmed by the defendant's criminal actions[,]" including a coperpetrator whose injury is factually caused by the defendant's criminal

actions. *Laidler*, 491 Mich at 343, 345-349. "But for [the] defendant's commission of the [home invasion], [his coperpetrator] would not have been killed[;] . . . [b]ecause [the coperpetrator] was killed as a result of the home invasion perpetrated jointly with [the] defendant, he was clearly 'harmed by the criminal actions' of [the] defendant . . . [and, t]herefore, he was a 'victim' for purposes of OV 3." *Id*. at 350. See also *People v Howe (Bryan)*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2014 (Docket No. 313143), slip op pp 1-2, 10-11 (concluding that, under *Laidler*, 491 Mich at 352-353, "[a] defendant can be considered a 'victim' for purposes of scoring OV 3[,]" and holding that OV 3 was properly scored based on injuries the defendant sustained when a methamphetamine laboratory exploded).[123]

"[F]irst responders can be 'victims' for purposes of OV 3." *People v Fawaz*, 299 Mich App 55, 61-62 (2012) (holding that two firefighters who "suffered injuries requiring medical attention while combating [a fire] set by [the] defendant[]" qualified as "victims[,]" and that the trial court therefore erred in assigning zero points for OV 3).

c. Injury Must Result From Sentencing Offense

Under *McGraw*, 484 Mich at 133,[124] "the '[o]ffense variables must be scored giving consideration to the sentencing offense alone[.]'" *People v Mushatt (Mushatt II)*, 486 Mich 934 (2010), reversing in part *People v Mushatt (Mushatt I)*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2009 (Docket No. 283954). In *Mushatt II*, 486 Mich at 934, the trial court improperly assessed five points for OV 3, MCL 777.33(1)(e), where although an individual was bruised after being hit by the defendant's car, the defendant was acquitted of the related felonious assault charge. Accordingly, the individual did not constitute a victim for purposes of scoring OV 3 because "the injured woman was not injured by the criminal actions that were the subject of [the defendant's] convictions (fleeing and eluding and larceny)[.]" *Mushatt II*, 486 Mich at 934. See also *People v Dolittle*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2011 (Docket No.

[123] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[124] "[T]he retroactive effect of [*People v*] *McGraw*[, 484 Mich 120 (2009),] is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved." *People v Mushatt (Mushatt II)*, 486 Mich 934 (2010).

298235)[125] (trial court erred in scoring 100 points under OV 3 where there was no evidence that a victim was killed during the course of the defendants' arson offense; although the defendants set fire to a dumpster containing a dead body, no factual causation existed to support the score because the decedent had been killed by someone other than the defendants prior to the arson).

Where "[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim], and . . . [his] codefendant . . . was convicted by plea on the crimes for which [the] defendant was acquitted," the trial court erred in scoring 100 points for OV 3; "looking solely at [the] defendant's conduct," it could not be concluded that the victim's death "resulted from or was factually caused by [the] defendant's commission of the offense of felon-in-possession[.]" *Biddles*, ___ Mich App at ___, citing *Mushatt II*, 486 Mich 934; *McGraw*, 484 Mich at 129 (additional citations omitted).

d. Multiple Offender Provision

The instructions for scoring OV 3 include specific directions in cases involving multiple offenders.[126] For OV 3, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same number of points. MCL 777.33(2)(b). However, the multiple offender provision applies only when the offenders are being scored for the same offense. *Johnston*, 478 Mich at 904. The multiple offender provision does not require that an offender be assessed the same number of points as other offenders involved in the same criminal episode if the offender was the only person convicted of the specific crime being scored. *Id.* at 904.[127] In other words, when more than one offender is involved in the same criminal conduct but only one offender is convicted of a specific

[125] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[126] OVs 1 and 2 also have multiple offender provisions.

[127] *Johnston*, 478 Mich at 904, overruled *People v Villegas*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2005 (Docket Nos. 253447, 253512, and 254284). In those consolidated cases involving the multiple offenders at issue in the scoring of OV 1, defendant Johnston's codefendants were convicted of felonious assault (assault with a dangerous weapon), but defendant Johnston's convictions did not involve the use of a weapon.

crime arising from the conduct, that particular crime does not involve multiple offenders for purposes of scoring OV 3.

"[I]n the absence of any clear argument that the scores assessed [against the first offender] were incorrect," the multiple offender provision in OV 1 and OV 3 requires that other offenders convicted of the same offense must be assessed the same number of points. *Morson*, 471 Mich at 261-262 (the defendant and the codefendant robbed a woman at gunpoint and a third party was injured when the codefendant shot him). At issue in *Morson*, 471 Mich at 258-259, was the fact that the defendant, who was sentenced after the codefendant was sentenced, received higher scores for OV 1 and OV 3 than did the codefendant. The prosecution argued that the statute clearly required that the highest number of points be assessed for each variable, but it did not dispute the codefendant's scores at her sentencing and did not contend on the defendant's appeal that the codefendant's scores were inaccurate or erroneous. *Id*. at 259. Under these circumstances, the *Morson* Court explained:

> "Unless the prosecution can demonstrate that the number of points assessed to the prior offender was erroneous or inaccurate, the sentencing court is required to follow the plain language of the statute, which requires the court to assess the same number of points on OV 1 and OV 3 to multiple offenders." *Morson*, 471 Mich at 262.

The multiple-offender provisions in OV 1 and OV 3 were "not implicated" where "[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim], and . . . [his] codefendant . . . was convicted by plea on the crimes for which [the] defendant was acquitted[.]" *Biddles*, ___ Mich App at ___ (citing *Johnston*, 478 Mich at 904, and *Morson*, 471 Mich at 260 n 13, and concluding that, because the defendant and his codefendant were not convicted of the same specific offense, the case "was not a multiple-offender case[]").

e. Bodily Injury

Even where the sentencing offense is homicide, 25 points are properly scored for OV 3 when a defendant causes a

physical injury to a victim in the process of killing the victim. *People v Houston (Duane)*, 473 Mich 399, 402 (2005). The Court noted that the guidelines instructed the sentencing court to score the highest number of points applicable, and because 100 points was not an option, the number of points attributable to the next applicable variable statement should be scored. *Id.* at 405-407. According to the Court, the *Houston* defendant's argument that zero points should be scored wrongly assumed "that only the 'ultimate result' of a defendant's criminal act—here, the death rather than the injury that preceded the death—may be considered in scoring OV 3." *Id*. at 405. The Court explained that while the defendant's gunshot to the victim's head ultimately killed the victim, the defendant's conduct also caused the victim to first suffer a "[l]ife-threatening or permanent incapacitating injury" for which 25 points were appropriately scored. *Id*. at 402. See also *Portellos*, 298 Mich App at 447 (citing *Houston (Duane)*, 473 Mich at 407, and noting that "[i]f the victim is killed, the trial court must assign 25 points unless a higher score applies[]").

"The defendant's conduct need not be the *sole* cause of the victim's death[]" for a score under OV 3; rather, in determining the number of points to assess when the sentencing offense is a homicide, a court must consider "whether, but for the defendant's conduct, the victim's death would have occurred." *Portellos*, 298 Mich App at 448. Therefore, where the jury convicted the defendant of first-degree child abuse and second-degree murder for the death of her newborn infant, 25 points should have been scored for OV 3, irrespective of the existence of "conflicting evidence surrounding the baby's manner of death[.]" *Id.* at 434, 447-448.

Pregnancy resulting from sexual assault is "bodily injury" for purposes of scoring OV 3. *People v Cathey*, 261 Mich App 506, 513-514 (2004). The *Cathey* Court approved the resolution of this issue in a case decided under the judicial guidelines—*People v Woods (Joseph)*, 204 Mich App 472, 474-475 (1994) (under the judicial guidelines then in effect, bodily injury was addressed by OV 2). *Cathey,* 261 Mich App at 511-512. The *Woods (Joseph)* Court quoted with approval a California appellate court's decision involving a similar issue:

> "'A pregnancy resulting from a rape (and, in this case, a resulting abortion) are not injuries necessarily incidental to an act of rape. The

> bodily injury involved in a pregnancy (and, in this case, a resulting abortion) are significant and substantial. Pregnancy cannot be termed a trivial, insignificant matter. It amounts to significant and substantial bodily injury or damage. . . . Major physical changes begin to take place at the time of pregnancy. It involves a significant bodily impairment primarily affecting a woman's health and well being. It is all the more devastating when imposed on a woman by forcible rape.'" *Woods (Joseph)*, 204 Mich App at 474-475, quoting *People v Sargent*, 86 Cal App 3d 148, 151-152; 150 Cal Rptr 113 (1978).

Ten points were properly assessed where a rape victim "suffered an infection as a consequence of the rape[, because . . . t]his is sufficient to constitute 'bodily injury requiring medical treatment' within the meaning of OV 3." *People v McDonald (Deandre)*, 293 Mich App 292, 298 (2011). The *McDonald (Deandre)* Court defined "bodily injury" in the context of OV 3 as "encompass[ing] anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *Id.* at 298.

Five points may be assessed against a defendant for bodily injury not requiring medical treatment where "the victim received a homemade tattoo and sustained a small bruise to her right buttock and irritation and redness to her vaginal opening." *People v Apgar*, 264 Mich App 321, 329 (2004).

"Whether an injury required medical treatment [for purposes of scoring 10 points under MCL 777.33(1)(d)] depends on whether the treatment was necessary, not on whether the victim successfully obtained treatment[;]" however, OV 3 must not be construed "in a way that would allow courts to assume that all bodily injuries require medical treatment, when there is no evidence that treatment was necessary, [as this construction] would render [MCL 777.33(1)(e)]—which concerns injuries that do *not* require medical treatment—surplusage." *People v Armstrong (Parys)*, 305 Mich App 230, 246 (2014) (holding that even if the criminal sexual conduct victim "suffered from a reddened and tender hymen, the evidence did not support assessing 10 points under OV 3 because there [was] no evidence that medical treatment was necessary for [this] injury[]") (citations omitted).

Where the defendant disputed that the victim "actually went to the hospital," contrary to the victim's impact statement in the presentence investigation report (PSIR), "the trial court [did not err] in scoring 10 points for OV 3 without independently verifying the report[]" or conducting an evidentiary hearing; the defendant's "description of the manner in which he strangled [the victim]," together with additional "undisputed information" about the victim's injuries and his statement to officers "that he intended to seek treatment, provided independent support for the trial court's finding." *Maben*, ___ Mich App at ___ (additionally noting that, under MCL 777.33(3), the phrase *requiring medical treatment* for purposes of OV 3 "'refers to the necessity for treatment and not the victim's success in obtaining treatment[]'").

Absent any evidence that the victim was actually infected with HIV, life-threatening injury does not occur when a defendant with HIV has unprotected sex with an uninformed person. *People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328), slip op p 4. According to the Court, "Although it is clear that [the] defendant engaged in life threatening behavior, . . . there is no evidence that the victim was actually infected with HIV as a result[, and] . . . we decline to speculate regarding whether such an injury will occur in the future." *Id*.[128]

Merely because a life-threatening injury may respond to medical treatment and ultimately heal does not remove it from the level of injury meriting 25 points under OV 3. *People v Williams (Harold)*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2003 (Docket No. 230566).

Where nothing in the record indicated that the victim's breathing troubles and repeated loss of consciousness following a sexual assault were related to a physical, rather than a psychological, injury resulting from the assault, and where ten points were also scored for OV 4 (psychological injury to a victim), the trial court erred in scoring ten points for OV 3. *People v Taylor (Keondo)*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011 (Docket No. 296915).

[128] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

f. Sentencing Departure[129]

The severity of a victim's injuries and pain was properly considered as a substantial and compelling reason to support a sentencing departure, notwithstanding the scoring of OV 3. *People v Anderson (Michael)*, 298 Mich App 178, 187-188 (2012) ("[t]he fact that the victims [of an arson] suffered extreme burns over much of their bodies is objective and verifiable[,]" and OV 3 did not adequately account for "the severity of those injuries").

g. Claim of *Lockridge* Error

The trial court's assessment of 50 points for OV 3 and 100 points for OV 9 did not violate the defendant's Sixth Amendment right to a jury trial where the "jury . . . found [the] defendant guilty of OUIL causing death, which required the jury to find that [the] defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof[,]" and "two counts each of second-degree murder[,] . . . reflect[ing] that the jury found beyond a reasonable doubt that multiple deaths occurred[;]" under these circumstances, "each of the facts necessary to support [the OV scores] was necessarily found by the jury beyond a reasonable doubt." *People v Bergman*, 312 Mich App 471, 498, 499 (2015) (noting that where "facts found by the jury [are] sufficient to assess the minimum number of OV points necessary for [the] defendant's placement in the . . . cell of the sentencing grid under which [he or] she [is] sentenced, there [is] no plain error and [the] defendant is not entitled to resentencing or other relief [on an unpreserved claim] under [*People v Lockridge*, 498 Mich 358 (2015)][]").

F. OV 4—Psychological Injury to a Victim

1. Definitions/Scoring

OV 4 is scored for all offenses to which the guidelines apply except crimes involving a controlled substance. MCL 777.22(1),

[129] In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

(2), (4), and (5). Score OV 4 by determining which statement applies to the offense and assigning the point value indicated by the applicable statement. MCL 777.34(1).

Points	OV 4—Degree of psychological injury sustained by a victim
10	Serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a).
0	No serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(b).

Ten points should be scored if the victim's serious psychological injury may require professional treatment. Whether the victim has sought treatment for the injury is not conclusive. MCL 777.34(2).

2. Case Law Under the Statutory Guidelines

a. Evidence of Psychological Harm

Points may be assessed under OV 4 only where there exists some evidence that a victim suffered serious psychological harm that required professional treatment. *People v Hicks (Rodney)*, 259 Mich App 518, 535 (2003). Ten points are improper when "the record does not reflect any evidence of serious psychological harm to the victim or give any indication that [the victim] needed psychological treatment." *Id.* at 535.

"Because OV 4 does not specifically provide otherwise," the sentencing court is "limited to solely considering the sentencing offense" when scoring OV 4. *Biddles*, ___ Mich App at ___, citing *McGraw*, 484 Mich at 129. Accordingly, where "[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim]," the trial court erred in scoring 10 points for OV 4; "[t]he record contain[ed] no evidence that serious psychological injury occurred to a victim as a result of [the] defendant being a felon and being seen carrying a gun after the shooting[.]" *Biddles*, ___ Mich App at ___.

"The trial court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury '*occurred* to a victim.'" *People v*

Lockett, 295 Mich App 165, 182-183 (2012) (because "[t]here was no testimony indicating that [the victim] suffered a psychological injury, the presentence report contain[ed] no information that would indicate any victims suffered psychological harm, and the record [did] not include a victim-impact statement[,]" the trial court erred in assessing 10 points for OV 4 on the ground that the defendant's conduct "'would cause any normal person of [the victim's] age serious psychological injury[]'"). See also *People v McChester*, 310 Mich App 354, 358-359 (2015) (holding that the trial court erred by assessing 10 points for OV 4 where "the only information or evidence in the record regarding the victim's psychological state was the [presentence investigation report's] reference to her being 'visibly shaken[]'" and there was no "indication from the victim herself regarding her psychological state[;]" while the victim "may very well have suffered a serious psychological injury requiring professional treatment or that may have required professional treatment, . . . [t]here simply was not a preponderance of evidence establishing that the victim suffered a *serious* psychology injury[]").

Evidence supported the trial court's score of ten points under OV 4 where the victim's impact statement indicated that her

> "'life has been terrible since the incidents. She states that she has a lot of nightmares, problems in her marriage, problems at work, and in just about every other facet of her life. She states that this whole situation has been a nightmare . . . She indicates that she has not sought treatment as of this writing date, however, she plans to do so in the future.'" *People v Drohan*, 264 Mich App 77, 90 (2004), aff'd on other grounds 475 Mich 140 (2006).[130]

The Court of Appeals affirmed the trial court's scoring of ten points for OV 4 based primarily on the Court's conclusion that videotaped evidence showed the victims behaving in a manner that indicated both victims had suffered serious psychological injury as a result of the defendant's conduct. *People v Wilkens*, 267 Mich App 728, 740-741 (2005).

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[130] The Michigan Supreme Court's decision in *People v Drohan*, 475 Mich 140 (2006), was abrogated in part on other grounds as recognized by *People v Lockridge*, 498 Mich 358, 378-379 (2015). See Section 3.4 for discussion of *Lockridge*.

The *Wilkens* Court stated:

> "With regard to the male victim, the videotape reveals that his attitude took a disturbing turn during the course of the 41-minute incident. Toward the end, he resorted to making violent threats against the female victim to coerce her into continuing the sex acts. This, in light of the fact that the male victim's demeanor on the stand was rather casual, indicates that the male victim suffered serious psychological injury as a result of this incident such that he was rendered unable to comprehend the gravity of his actions. This supports the trial court's scoring of OV 4.
>
> "With regard to the female victim, the trial court relied on statements that she made 'on the videotape and everything else.' Though the female victim did not testify, the videotape shows that the female victim repeatedly indicated that she did not want to continue the sex acts and that the 'motion lotion' was hurting her, yet [the] defendant asserted that the videotape was not worth the money he spent on the female victim's clothes and urged the female victim to continue. Ultimately, the female victim sat up in bed and remained silent while [the] defendant attempted to coax her into continuing. This evidence indicates that [the] defendant's actions caused the female victim anxiety, altered her demeanor, and caused her to withdraw; it supports a finding of serious psychological injury occurring to the female victim." *Wilkens*, 267 Mich App at 740-741.

The Court of Appeals has approved the scoring of ten points for OV 4 based primarily on the sentencing court's inference from the victim's testimony that psychological harm requiring professional treatment occurred. See e.g., *Apgar*, 264 Mich App at 329, where the Court of Appeals found sufficient evidence to support the trial court's OV 4 score "[b]ecause the victim testified that she was fearful during the encounter with [the] defendant[;]" see also *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding that OV 4 was properly scored at 10 points for the defendant's uttering and publishing convictions where the victim "indicated in a letter to the trial court that 'the

past three years [had] been a struggle for him psychologically[]'" and "[t]he trial court had the opportunity to observe [the victim's] demeanor during trial and noted how . . . when [the] defendant committed the crimes, everything changed for [the victim][]") (citations omitted); *People v Gibbs (Phillip)*, 299 Mich App 473, 493 (2013) (where one victim of an armed robbery "testified that the experience was traumatic and he had bad dreams about it[,]" another victim "stated[at sentencing], 'Not to mention what you took from us psychologically[,]'" and a third victim "indicated [in his impact statement] that he did not feel safe in his store[,]" ten points were properly scored for OV 4); *People v Williams (Zachary)*, 298 Mich App 121, 124 (2012) ("[t]he victim's statements about feeling angry, hurt, violated, and frightened" following a home invasion supported an assessment of ten points under OV 4); *People v Armstrong (Parys)*, 305 Mich App 230, 247-248 (2014) (citing *Gibbs (Phillip)*, 299 Mich App at 493, and noting that a "trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated[;]" therefore, even though the victim "testified that she did not want counseling because she did not want to continue to talk about her experience," points were properly assessed under OV 4 because the victim's "statements about the way the sexual assault affected her life showed that she suffered a psychological injury[that] . . . may require treatment in the future[]").

Evidence substantiating a victim's psychological harm and receipt of professional treatment may be introduced by means other than the victim's testimony. See *People v Brown (Tony)*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 243961), where OV 4 was properly scored when "the prosecutor informed the court [during sentencing] that the victim's family had informed him of the therapy the victim [wa]s undergoing and w[ould] continue to undergo, including psychological counseling[,]" and "the victim's father gave a victim impact statement during sentencing that [the] defendant's actions had caused the victim a tremendous amount of emotional pain and suffering."

b. Sentencing Departure[131]

An upward departure could be justified if OV 4 did not adequately account for the additional psychological harm resulting when the defendant and the victim are family members. *People v Anderson (Michael)*, 298 Mich App 178, 188-189 (2012) (noting that "OV 4 . . . does not adequately consider the ways in which an offense affects familial relationships, . . . nor does it always account for the unique psychological injuries suffered by individual victims," and holding that the trial court properly departed from the guidelines range where the defendant set his parents' house on fire, trapping them inside).

G. OV 5—Psychological Injury to a Member of a Victim's Family

1. Definitions/Scoring

OV 5 is scored only under very specific circumstances involving a crime against a person: when the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1). Score OV 5 by assigning the point value indicated by the statement that applies to the sentencing offense. MCL 777.35(1).

Points	OV 5—Psychological injury sustained by a member of a victim's family
15	Serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(a).
0	No serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(b).

- Score 15 points if the victim's family member's serious psychological injury may require professional treatment. The fact that treatment has not been sought is not determinative. MCL 777.35(2).

- Any crime in which the death of a person is an element of the crime is a "homicide." MCL 777.1(c).

[131] In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

2. Case Law Under the Statutory Guidelines

"[T]he trial court properly assessed 15 points for OV 5[]" where "[t]he trial testimony[] . . . indicated that [the victim's] parents were present in their home when the crime occurred, and that they found their son with his throat slashed by someone whom they believed to be their son's close friend[.]" *People v Steanhouse*, 313 Mich App 1, 39 (2015), lv gtd 499 Mich 934 (2016) (citations omitted). "[T]he facts as found by the trial court were not clearly erroneous and were supported by a preponderance of record evidence, and . . . the evidence sufficiently demonstrate[d] that [the victim's] parents sustained serious psychological injury that may require professional treatment[.]" *Id*. at 39 (additionally noting that "[t]he trial court's opportunity to observe the demeanor of [the victim's] parents during their testimony also supported the trial court's finding that [they] sustained psychological injury[,]" and that the victim "testified at the sentencing hearing that his parents were 'deeply affected' by the incident and [were] in the process of seeking psychological help[]") (citations omitted).

The trial court did not clearly err in determining that the infant homicide victim's father and grandmother "did not necessarily require professional treatment[]" and in scoring zero points for OV 5; although the grandmother "expressed her emotional response to the [infant's] death," neither she nor the infant's father "state[d] that [they] intended to receive treatment." *People v Portellos*, 298 Mich App 431, 449 (2012).

"[N]othing in the language of [MCL 777.35] limits the term 'family' to people . . . having a blood connection *and* a legally recognized relationship[.]" *People v Davis (Stafano)*, 300 Mich App 502, 511-512 (2013) (holding that "the victim's biological mother [was] a 'member of [a] victim's family'" within the meaning of MCL 777.35(1) even though she had given the victim up for adoption, and that the trial court properly scored 15 points under OV 5 based on indications in the biological mother's victim impact statement "that [the] defendant's acts had caused [her] to have suffered depression and a nervous breakdown that resulted in her receiving more medication than before the crime[]").

Where the victim's mother reported "that both her and her husband are receiving counseling and continue to feel depressed about the death of their daughter, stating that 'there are no words that can describe it,[]'" the trial court properly scored OV 5 at 15 points. *People v Rice (Ronald)*, unpublished

opinion per curiam of the Court of Appeals, issued September 7, 2010 (Docket No. 291711).[132]

There was sufficient evidence to support the trial court's 15-point score for OV 5 where "the victim's brother indicated that the victim's death 'turned his whole family upside down' . . . [and] the victim's mother 'described the incident as tearing her family apart[,]' [and b]oth relatives had sought counseling to deal with their loss." *People v Posey*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2010 (Docket No. 291075).

Points may be appropriate under OV 5 even when family members have a typical reaction to the death of a family member (trouble sleeping, anxiety affecting physical health, fear, and devastation), and the effect on the family members' lives is not debilitating. *People v Chancy*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 249893).

The mother of a victim killed in a fire that burned over 45 percent of the victim's body "could have suffered the type of psychological injury that may require professional treatment." *People v Strouse*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 2003 (Docket No. 234034), slip op p 4. In such a case, 15 points were appropriately scored when the victim's mother also expressed her intent to seek counseling for the psychological harm caused by her son's murder. *Id*.

OV 5 was properly scored where the victim was survived by a young child who would grow up without a mother and where the child's "caregivers would have to 'explain to the . . . child why he does not have a mother like all the other children,' and that the child's loss 'imposes . . . incomprehensible . . . additional concerns for the family[,]'" as indicated by statements made by the victim's grandmother, grandfather, and uncle. *People v Laury*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2003 (Docket No. 238490).

[132] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

H. OV 6—Intent to Kill or Injure Another Individual

1. Definitions/Scoring

OV 6 is scored only under very specific circumstances involving a crime against a person: when the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1). Score OV 6 by determining which statements apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.36(1).

Points	OV 6—Intent to kill or injure another individual
50	The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, first-degree criminal sexual conduct third-degree criminal sexual conduct, first-degree child abuse, a major controlled substance offense, robbery, breaking and entering of a dwelling, first-degree home invasion, second-degree home invasion, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer. MCL 777.36(1)(a).
25	The offender had unpremeditated intent to kill, had the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result. MCL 777.36(1)(b).
10	The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life. MCL 777.36(1)(c).
0	The offender had no intent to kill or injure. MCL 777.36(1)(d).

- Unless the sentencing court has information that was not presented to the jury, an offender's OV 6 score must be consistent with the jury's verdict. MCL 777.36(2)(a).

- Ten points must be scored if a killing is intentional within the definition of second-degree murder or voluntary manslaughter, but the death took place in a combative situation or in response to the decedent's victimization of the offender. MCL 777.36(2)(b).

- Any crime in which a person's death is an element of the crime is a "homicide." MCL 777.1(c).

2. Case Law Under the Statutory Guidelines

In *People v Steanhouse*, 313 Mich App 1, 40, 41 (2015), lv gtd 499 Mich 934 (2016), the Court of Appeals rejected the defendant's contention that there was insufficient evidence of premeditation to support a 50-point score for OV 6. The Court explained:

> "'Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing.' 'To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. . . . [P]remeditation and deliberation characterize a thought process undisturbed by hot blood.' Nonexclusive 'factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted.' Additionally, '[p]remeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation.'
>
> The trial court's finding that [the] defendant had a premeditated intent to kill was not clearly erroneous and was supported by a preponderance of evidence in the record. [The victim] testified that he went upstairs to retrieve his marijuana and, when he returned to the basement, he was struck in the head, apparently without warning, and slit in the throat. When [he] woke up and realized that his throat had been slit, he saw [the] defendant staring at him, '[j]ust wait[ing] for [him] to die.' [The d]efendant made no effort to assist [him]. There was no evidence of an altercation or argument between [the] defendant and [the victim] immediately before the assault which could indicate that the attack was provoked or instigated by hot blood. From these circumstances, one could reasonably infer that [the] defendant planned the attack before it occurred and was lying in wait to attack [the victim] when he returned to the

> basement, which justifies an assessment of 50 points under OV 6[.]" *Steanhouse*, 313 Mich App at 40, 41, citing *People v Hardy (Donald)*, 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016 (quotation marks and additional citations omitted).

Fifty points are properly scored under OV 6 when "a killing was committed in the course of an enumerated felony[or] . . . when 'the killing was the murder of a peace officer[,]'" irrespective of whether the offender had the premeditated intent to kill. *People v Bowling*, 299 Mich App 552, 561-562 (2013) (noting that "[a]ccording to the plain language of [MCL 777.36(1)(a)], the scoring of 50 points is appropriate when the offender has the premeditated intent to kill *or* the killing was committed in the course of the commission of one of the enumerated offenses[] . . . [or] when 'the killing was the murder of a peace officer[,]'" and holding that because the record supported the conclusion that a police officer was killed during a home invasion in which the defendant participated, 50 points were appropriately scored).

A defendant's uncorroborated self-serving hearsay is not an effective challenge to the defendant's OV 6 score when the record evidence more than adequately supported the trial court's scoring decision, and the score was consistent with the jury's verdict. *People v Jones (Kenneth)*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 238557), slip op pp 3-4, vacated on other grounds and remanded for reconsideration 469 Mich 984 (2003).[133] In *Jones (Kenneth)*, slip op at 3, the defendant claimed OV 6 should have been scored at ten points rather than 25 because the victim's death occurred "in a combative situation"—according to the defendant, the victim and the defendant fought after the victim attempted to rob the defendant. However, the evidence showed that the victim was fleeing from the defendant when he was first struck and then beaten to death. *Id*. at 4.

Where a defendant is convicted by jury of OUIL causing death ("a crime in which gross negligence is presumed"), a maximum of ten points may be scored against the defendant under the statutory requirements governing OV 6.[134] *People v*

[133] The Michigan Supreme Court remanded the case for the Court of Appeals to reconsider the trial court's sentence in light of *People v Babcock*, 469 Mich 247 (2003). In its opinion on remand, the Court of Appeals "adopt[ed] and reaffirm[ed its] prior opinion regarding all non-departure issues." *People v Jones (Kenneth)*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2004 (Docket No. 238557). **Note:** Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Stanko, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2004 (Docket No. 242876), slip op pp 2-3. A maximum of ten points was proper in *Stanko* because OV 6 must be scored consistently with the jury's verdict unless the sentencing court has information that was not available to the jury. MCL 777.36(2)(a). Based on the record before the Court on appeal, and without evidence of malice rising to the level of intent required to prove second-degree murder, no more than ten points could be assessed against the defendant for OV 6. *Stanko*, slip op at 3.

Where the defendant initiated the confrontation that resulted in the shooting death of the decedent, the assessment of 25 points for OV 6 "was consistent with the jury's verdict of second-degree murder, which required proof that the defendant acted with the intent to kill, or the intent to inflict great bodily harm, or with the willful and wanton disregard for whether death would result[;]" to score ten points under MCL 777.36(2)(b) for a death occurring "in a combative situation or in response to victimization of the offender by the decedent" would not have been appropriate because "[t]he confrontation was [the defendant's] own creation." *People v Al-Jamailawi*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 292774).

The trial court properly scored 50 points under OV 6 for the defendant's conviction of conspiracy to commit assault with intent to murder (AWIM), notwithstanding that conspiracy is a "public safety" offense under MCL 777.18 and that OV 6 is not included under MCL 777.22(5) as an offense variable that must be scored for crimes against public safety. *People v Tarver*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2012 (Docket No. 300775) (because "MCL 777.22(1) directs a trial court to score OV 6 for . . . '*conspiracy . . . to commit a homicide*,'" and "because[] when [the] defendant conspired to commit AWIM, he necessarily conspired to commit a homicide[,]" the trial court was required to score OV 6).

[134] Conduct scored under OV 6 precludes scoring ten points against an offender under OV 17 (degree of negligence exhibited). MCL 777.47(2).

I. OV 7—Aggravated Physical Abuse

1. Definitions/Scoring

OV 7 is scored for crimes against a person only. MCL 777.22(1). Determine which statement applies to the offense and assign the number of points indicated by the applicable statement. MCL 777.37(1).

Points	OV 7—Aggravated Physical Abuse
50	A victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(a).
0	No victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(b).

- Each person placed in danger of injury or loss of life is a victim for purposes of scoring OV 7. MCL 777.37(2).

- "Sadism" is "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).[135]

2. Case Law Under the Statutory Guidelines

a. Categories of Conduct

The former version of MCL 777.37(1)(a), which was in effect from April 2002[136] until January 2016, required a 50-point score if "[a] victim was treated with sadism, torture, *or* excessive brutality *or* conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." (Emphasis added.) Effective January 5, 2016, 2015 PA 137 amended MCL 777.37(1)(a) to require a 50-point score if "[a] victim was treated with sadism, torture, excessive brutality, or *similarly egregious* conduct designed to substantially increase the fear and

[135] Effective April 22, 2002, 2002 PA 137 deleted "terrorism" from OV 7's list of behaviors meriting points. Although terrorism was eliminated from consideration under OV 7, the conduct previously defined as terrorism remains in OV 7's statutory language as "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "Terrorism" is now addressed by OV 20, MCL 777.49a. See Section 3.9(U).

[136] See 2002 PA 137, effective April 22, 2002.

anxiety a victim suffered during the offense[]" (emphasis added).

The 2016 amendment was apparently prompted by *People v Hardy (Donald)*, 494 Mich 430, 439-444 (2013), in which the Michigan Supreme Court construed the former version of MCL 777.37(1)(a) as establishing four separate categories of scorable conduct—"sadism, torture, or excessive brutality[,] . . . [or] 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[]'"—and further concluded that conduct under the "fourth category[]" did "not have to be 'similarly egregious' to 'sadism, torture, or excessive brutality[.]'" The *Hardy (Donald)* Court explained:

> "In [*People v Glenn (Devon)*, 295 Mich App 529, 533-537 (2012),] the Court of Appeals erred by ignoring the Legislature's second use of the word 'or' in the provision at issue. MCL 777.37(1)(a)[] reads: '[a] victim was treated with sadism, torture, *or* excessive brutality *or* conduct designed to substantially increase the fear and anxiety a victim suffered[.]' 'Or' is a word 'used to indicate a disunion, a separation, an alternative.' While the first 'or' may be interpreted as linking the first three categories in a common series, the second 'or' separates the last OV 7 category from the series that precedes it. Thus, the use of 'or' before the phrase 'conduct designed' shows that this phrase is an independent clause that has an independent meaning. The Court of Appeals in *Glenn* therefore erred by interpreting the statute in a manner inconsistent with its plain meaning." *Hardy (Donald)*, 494 Mich at 441 (emphasis added by the Court; citation omitted).

The *Hardy (Donald)* Court further held that, although the fourth category of conduct need not be "'similarly egregious' to 'sadism, torture, or excessive brutality[,]'" the conduct must go "beyond the minimum required to commit the offense[]" and be "intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy (Donald)*, 494 Mich at 443-444.

Justice Cavanagh dissented on this point and would have held that "the amendatory history of OV 7 evidence[d] a legislative intent that the 'conduct designed' category

include only conduct that is of the same class as the other three categories of conduct listed in OV 7." *Hardy (Donald)*, 494 Mich at 458 (Cavanagh, J., concurring in part and dissenting in part). Justice Cavanagh noted that the original version of MCL 777.37(1)(a), as enacted in 1998, required a 50-point score if "'[a] victim was treated with *terrorism*, sadism, torture, or excessive brutality[,]'" and that *terrorism* was defined in former MCL 777.37(2)(a) as "'*conduct designed to substantially increase the fear and anxiety a victim suffers during the offense*.'" *Hardy (Donald)*, 494 Mich at 450-451 (Cavanagh, J., concurring in part and dissenting in part) (emphasis added by Justice Cavanagh). In 2002, MCL 777.37 was amended, in light of the simultaneous addition of OV 20 (terrorism), to remove the reference to terrorism; yet the definition of *terrorism* from former MCL 777.37(2)(a) was retained as an addition to the list of categories of conduct warranting a score of 50 points, indicating that "the 'conduct designed' category should be given related meaning to the other three categories[.]" *Hardy (Donald)*, 494 Mich at 450-456 (Cavanagh, J., concurring in part and dissenting in part).

Justice McCormack concurred in the majority opinion, but "[wrote] separately to encourage the Legislature to amend [OV 7][] to define, or more clearly articulate its intent in including, the language 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.'" *Hardy (Donald)*, 494 Mich at 448 (McCormack, J., concurring), quoting former MCL 777.37(1).

As noted, MCL 777.37(1)(a), as amended by 2015 PA 137, effective January 5, 2016, now requires a 50-point score if "[a] victim was treated with sadism, torture, excessive brutality, or *similarly egregious* conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[]" (emphasis supplied), effectively superseding—at least in part—the majority's construction of OV 7 in *Hardy (Donald)*, 494 Mich 430.

"[T]he 'right result—wrong reason' doctrine . . . [cannot] be employed to allow impermissible appellate fact-finding[]" in reviewing the propriety of an OV score; accordingly, where "the trial court assessed 50 points for OV 7 solely on the basis of sadistic behavior, . . . [i]t would not be appropriate for [the Court of Appeals] to consider whether" the score would nevertheless have been appropriate on the alternative basis that "[the] defendant's conduct was designed to substantially

increase the victim's fear and anxiety." *People v Thompson (Jackie)*, ___ Mich App ___, ___ n 5 (2016) (citing *Anspaugh v Imlay Twp*, 480 Mich 964 (2007), and noting that "'[a] *trial court* determines the sentencing variables by reference to the record[,]' not [the Court of Appeals][]") (emphasis added by the Court of Appeals; additional citations omitted).

b. Conduct Outside the Sentencing Offense May Not Be Considered

Because OV 7 "does not specifically provide that a sentencing court can look outside the sentencing offense to past criminal conduct in scoring OV 7[,]" the sentencing court is permitted to consider only "conduct occurring during the [sentencing] offense . . . for purposes of scoring OV 7." *Thompson (Jackie)*, ___ Mich App at ___, citing *People v McGraw*, 484 Mich 120 (2009)[137]; *People v Sargent*, 481 Mich 346 (2008). Accordingly, the trial court improperly assessed 50 points for OV 7 "upon contemplation of conduct engaged in by [the] defendant throughout the two-year course of the sexual abuse[against the victim], instead of confining its examination to conduct occurring during the sexual assault [forming the basis of the defendant's no-contest plea], which was the only criminal offense" of which the defendant was convicted under his plea bargain. *Thompson (Jackie)*, ___ Mich App at ___.

c. Scoring Limited to Actual Participants

"For OV 7, only the defendant's actual participation should be scored." *People v Hunt (Christopher)*, 290 Mich App 317, 326 (2010). In *Hunt (Christopher)*, 290 Mich App at 325-326, the trial court erred in assessing 50 points for OV 7 where, although "[the] defendant was present and armed during the commission of the crimes . . . , he did not himself commit, take part in, or encourage others to commit acts constituting 'sadism, torture, or excessive brutality[.]'"

[137] "[T]he retroactive effect of *McGraw*[, 484 Mich 120,] is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved." *People v Mushatt (Mushatt II)*, 486 Mich 934 (2010).

d. Actual Physical Abuse Not Necessary

Actual physical abuse is not necessary to score a defendant's conduct under OV 7. *People v Mattoon*, 271 Mich App 275, 276, 278 (2006). In *Mattoon*, the defendant was convicted of various crimes related to an episode in which he held his girlfriend at gunpoint for nine hours. No actual physical abuse was involved in the incident. *Id.* at 276. Because the trial court concluded that actual physical abuse was required to score a defendant's conduct under OV 7, the court scored the offense variable at zero points. *Id*.

The *Mattoon* Court examined the plain language of MCL 777.37 and concluded that the Legislature did not intend that actual physical abuse be required to support an OV 7 score. *Mattoon*, 271 Mich App at 277-279. According to the Court:

> "While the label of OV 7 is 'aggravated physical abuse,' when the section is read as a whole, it is clear that the Legislature does not require actual physical abuse in order for points to be assessed under this variable. Specifically, subsection 3 defines 'sadism' to mean 'conduct' that, among other things, subjects the victim to extreme or prolonged humiliation. While humiliation may have a physical component, there does not have to be physical abuse in order to produce humiliation. Emotional or psychological abuse can certainly have that effect as well. If the Legislature intended to limit the applicability of OV 7 to cases where there is physical abuse, then instead of defining 'sadism' to be 'conduct' that produces pain or humiliation, it would have said 'physical abuse' that subjects the victim to pain or humiliation." *Mattoon*, 271 Mich App at 277-278.

e. Consciousness of Victim Not Required

The assessment of points under OV 7 does not depend on whether the victim is alive or conscious of the treatment scored by this variable. *People v Kegler*, 268 Mich App 187, 191-192 (2005). Points are properly scored under OV 7 when a victim is treated with excessive brutality no matter how (or if) the victim subjectively experiences that

treatment. *Id.* at 191. Although OV 7 does account for a victim's treatment when the victim is conscious, its application is not limited to those criminal episodes where a victim's consciousness is implicitly required (when points are assessed for conduct intended to increase a victim's fear and anxiety, for example). *Id*. at 192 n 14.

f. Sadism

"'[S]adism' denotes conduct that exceeds that which is inherent in the commission of the offense." *People v McReynolds*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2009 (Docket No. 282582).

Fifty points should be scored for "sadism" when a defendant's conduct subjects the victim to extreme or prolonged pain or humiliation and the *conduct* is inflicted for the defendant's gratification. *People v Taylor (Michael)*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 240344), slip op p 3. The statutory language does not require that the defendant be gratified by the victim's pain or humiliation, only that the defendant's conduct itself be intended to gratify the defendant. *Id.*; see also MCL 777.37(1)(a) and MCL 777.37(3). "Because [the] defendant performed the sexual acts for his gratification, and the acts caused the victim severe and prolonged humiliation," OV 7 was properly scored at 50 points. *Taylor (Michael),* slip op at 3.

"[T]he trial court erroneously concluded that [the] defendant's conduct was sadistic[]" where, before the defendant sexually assaulted a minor on several occasions, "[the] defendant and the minor would play a [video game] in which [the] defendant's character would kiss and want to have sex with the minor's character." *People v O'Dell*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2014 (Docket No. 315609), slip op pp 1-2 (noting that "there [was] no evidence to support the trial court's finding that the victim was subjected to extreme or prolonged pain or humiliation as a result of playing the [video game; a]t most, the evidence showed that [the] defendant's actions made the victim nervous, which does not rise to the level of sadism[]").[138]

[138] An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).

g. Excessive Brutality

Fifty points were properly scored against a defendant for the excessive brutality exhibited by the defendant during the assault of his wife. *People v Wilson (Willie)*, 265 Mich App 386, 398 (2005). "The victim's testimony detailed a brutal attack, which took place over several hours, involving being attacked by weapons and being kicked, punched, slapped, and choked numerous times, ending in injuries requiring treatment in a hospital." *Id.* at 398.

For purposes of OV 7, the defendant's use of "excessive brutality" was established by evidence that he had hidden a baseball bat in his coat, confronted and struck the victim without warning so that the victim had no opportunity to protect himself, and once the victim was down, the defendant continued to kick and strike the victim with the baseball bat four or five more times. *People v Brown (Tony)*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 243961).

Fifty points were properly scored for OV 7 where, "during the two to five minutes that the pregnant [victim] was being strangled, she suffered a fractured pharynx and hemorrhaging in her deep neck muscles . . . Such evidence demonstrated excessive brutality in commission of the assault and murder of a six-and-a-half month pregnant woman, which also caused the death of her unborn child." *People v Lario-Munoz*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2011 (Docket No. 295811).

h. Similarly Egregious Conduct Designed to Increase Victim's Fear and Anxiety

The former version of MCL 777.37(1)(a), which was in effect from April 2002[139] until January 2016, required a 50-point score if "[a] victim was treated with sadism, torture, *or* excessive brutality *or c*onduct designed to substantially increase the fear and anxiety a victim suffered during the offense[]" (emphasis added). Effective January 5, 2016, 2015 PA 137 amended MCL 777.37(1)(a) to require a 50-point score if "[a] victim was treated with sadism, torture, excessive brutality, or *similarly egregious* conduct designed to substantially

[139] See 2002 PA 137, effective April 22, 2002.

increase the fear and anxiety a victim suffered during the offense[]" (emphasis added).

The 2016 amendment was apparently prompted by *Hardy (Donald)*, 494 Mich at 439-444. Construing the version of OV 7 that was in effect prior to the January 2016 amendments, the Michigan Supreme Court held that the last phrase of former MCL 777.37(1)(a) "[was] an independent clause that [had] an independent meaning[;]" therefore, "a defendant's conduct [did] not have to be 'similarly egregious' to 'sadism, torture, or excessive brutality' for OV 7 to be scored at 50 points[.]" *Hardy (Donald)*, 494 Mich at 441, 443. This portion of *Hardy (Donald)*, 494 Mich 430, has been superseded, at least in part, by 2015 PA 137, which explicitly requires that conduct be *similarly egregious* to sadism, torture, or excessive brutality in order to warrant a 50-point score.[140]

It is unclear, however, whether the remainder of the OV 7 analysis in *Hardy (Donald)* remains good law following the enactment of 2015 PA 137. The *Hardy (Donald)* Court, in construing the "'fourth category[]'" of scorable conduct under former MCL 777.37(1)(a), held that "it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy (Donald)*, 494 Mich at 440-441. "[T]he focus is on the intended effect of the conduct,[141] not its actual effect on the victim." *Id*. at 441 n 29, citing *Kegler*, 268 Mich App at 191. "The relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 443-444.

"Since the 'conduct designed' category only applies when a defendant's conduct was designed to substantially *increase* fear, to assess points for OV 7 under this category, a court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue." *Hardy (Donald)*, 494 Mich at 442-443 (citation omitted). The *Hardy (Donald)* Court explained:

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[140] See Section 3.9(I)(2)(a) for additional discussion of 2015 PA 137.

[141] "[A] defendant does not have to verbalize his [or her] intentions for a judge to find that the defendant's conduct was designed to elevate a victim's fear or anxiety[; r]ather, a court can infer intent indirectly by examining the circumstantial evidence in the record that was proven by a preponderance of the evidence." *Hardy (Donald)*, 494 Mich at 440 n 26.

> "To make this determination, a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied. Then the court should determine, to the extent practicable, the fear or anxiety associated with the minimum conduct necessary to commit the offense. Finally, the court should closely examine the pertinent record evidence, including how the crime was actually committed by the defendant. . . . [E]vidence which satisfies an element of an offense need not be disregarded solely for that reason. Instead, all relevant evidence should be closely examined to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount." *Id*. at 443.

Where the defendant "took the extra step of racking [a] shotgun," which "went beyond the minimum conduct necessary to commit a carjacking[,]" and because a preponderance of the evidence showed that "he did so to make his victim fear that a violent death was imminent, not just possible, the circuit court properly assessed 50 points for OV 7." *Hardy (Donald)*, 494 Mich at 444-445, 447 (concluding that defendant Hardy's[142] "conduct of racking a shotgun while pointing it at the victim constituted 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[]'") (citation omitted).

Similarly, 50 points were properly scored for OV 7 where "a preponderance of the evidence established that [defendant] Glenn struck two victims [of an armed robbery] with the butt of what appeared to be a sawed-off shotgun, knocked one victim to the ground, and forced both victims behind a store counter to make them fear imminent, serious injury or death[.]" *Hardy (Donald)*, 494 Mich at 446-448 (reversing *Glenn (Devon)*, 295 Mich App 529, and concluding that "[defendant] Glenn's conduct went beyond that necessary to effectuate an armed robbery[]" and that "he intended for his conduct to

[142] In *Hardy (Donald)*, the Court decided two consolidated cases. *Hardy (Donald)*, 494 Mich at 434.

increase the fear of his victims by a considerable amount[]").[143]

The defendant was properly assessed 50 points under former OV 7 where the evidence established that, in robbing a drugstore, he "did more than simply produce a weapon and demand money." *People v Hornsby*, 251 Mich App 462, 469 (2002).[144] In *Hornsby*, 251 Mich App at 468, the shift supervisor testified that the defendant held her at gunpoint behind the closed door of the manager's office as she transferred money from the store's safe to an envelope. Further testimony established that the defendant threatened to kill her and everybody else in the store, and that at one point, the shift supervisor heard the defendant's gun click as if it was being cocked when someone began turning the doorknob to the room she and the defendant occupied. *Id*. at 469. The defendant's repeated threats against the shift supervisor and store customers and his actions in cocking the gun provided sufficient support[[145]] for the trial court's conclusion that "[the defendant] deliberately engaged in 'conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.'" *Id*.; MCL 777.37(1)(a).

Under former MCL 777.37(1)(a), OV 7 was properly scored at 50 points where the defendant "ordered the [rape] victim to keep her eyes closed[, . . .] indicated that he and what he implied were accomplices knew who she was and had been watching her[, . . . and] made threats that he could find her again in the future, thereby suggesting not only that she was suffering a horrific assault but that there might never be any escape, either." *McDonald (Deandre)*, 293 Mich App at 298-299.[146] "[E]ven though the victim eventually concluded that [the]

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[143] As noted above, it is unclear whether, and to what extent, this portion of the analysis of former MCL 777.37(1)(a) in *Hardy (Donald)*, 494 Mich at 441-448, remains good law following the amendments to OV 7 under 2015 PA 137, effective January 5, 2016. See Section 3.9(I)(2)(a) for additional discussion of 2015 PA 137.

[144] *Hornsby*, 251 Mich App 462, was decided before OV 7 was amended under both 2015 PA 137, effective January 5, 2016, and 2002 PA 137, effective April 22, 2002; accordingly, it is unclear whether, and to what extent, *Hornsby* remains good law.

Additionally, *Hornsby* was decided before OV 20 was enacted, under 2002 PA 137, effective April 22, 2002, to address *terrorism* (a violent act that is dangerous to human life and is intended to intimidate or influence a civilian population or government operation). See Section 3.9(U). Before the enactment of OV 20, the language in OV 7 included *terrorism* in its list of behaviors meriting points under that variable. Notwithstanding the elimination of the term *terrorism* from the language of OV 7, the variable accounts for the conduct to which the term *terrorism* then referred—*"conduct designed to substantially increase the fear and anxiety a victim suffered during the offense*." MCL 777.37(1)(a) (emphasis added).

See Section 3.9(I)(2)(a) for additional discussion of the former versions of MCL 777.37(1)(a).

defendant really did not know her identity there was ample evidence that [the] defendant engaged in 'conduct designed to substantially increase [her] fear and anxiety[.]'" *Id.* at 299.

"[T]he trial court . . . erroneously concluded that [the defendant's conduct] was 'designed to substantially increase the fear and anxiety [the] victim suffered during the offense[]'" under former MCL 777.37(1)(a) where, before the defendant sexually assaulted a minor on several occasions, "[the] defendant and the minor would play a [video game] in which [the] defendant's character would kiss and want to have sex with the minor's character." *People v O'Dell*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2014 (Docket No. 315609), slip op pp 1-2.[147] "[T]here [was] nothing in the record to support a finding that [the] defendant used the [video game] as a means of increasing the victim's fear or anxiety[; t]o the contrary, it [was] equally, if not more[,] probable that [the] defendant used the [video game] to groom the victim for future sexual acts and reduce the victim's fear and anxiety suffered during the sexual assault." *Id*. at 2 ("that the victim may have felt nervous while playing the [video game was] irrelevant to the . . . inquiry[under former MCL 777.37(1)(a)], which only considers [the] defendant's intent[]").

i. Pre-Offense or Post-Offense Sexual Conduct Against the Victim

Because OV 7 "does not specifically provide that a sentencing court can look outside the sentencing offense to past criminal conduct in scoring OV 7[,]" the

[145] The *Hornsby* Court stated that "'[s]coring decisions for which there is any evidence in support will be upheld.'" *Hornsby*, 251 Mich App at 468, quoting *People v Elliott*, 215 Mich App 259, 260 (1996). However, in *Hardy (Donald)*, 494 Mich at 437-438, 438 n 18, the Michigan Supreme Court clarified that, contrary to several Court of Appeals decisions, "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines[;]" rather, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence[]" (citations omitted). "[T]he standards of review traditionally applied to the trial court's scoring of the variables remain viable after [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Steanhouse*, 313 Mich App 1, 38 (2015), lv gtd 499 Mich 934 (2016), citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438 (additional citation omitted).

[146] *McDonald (Deandre)*, 293 Mich App 292, was decided before OV 7 was amended under 2015 PA 137, effective January 5, 2016; accordingly, it is unclear whether, and to what extent, *McDonald (Deandre)* remains good law.

[147] An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1). Additionally, *O'Dell* was decided before OV 7 was amended under 2015 PA 137, effective January 5, 2016.

sentencing court is permitted to consider only "conduct occurring during the [sentencing] offense . . . for purposes of scoring OV 7." *Thompson (Jackie)*, ___ Mich App at ___, citing *McGraw*, 484 Mich 120[148]; *Sargent*, 481 Mich 346. Accordingly, the trial court improperly assessed 50 points for OV 7 "upon contemplation of conduct engaged in by [the] defendant throughout the two-year course of the sexual abuse[against the victim], instead of confining its examination to conduct occurring during the sexual assault [forming the basis of the defendant's no-contest plea], which was the only criminal offense" of which the defendant was convicted under his plea bargain. *Thompson (Jackie)*, ___ Mich App at ___.

J. OV 8—Victim Asportation or Captivity

1. Definitions/Scoring

OV 8 is scored for crimes against a person only. MCL 777.22(1). Score OV 8 by determining which statement applies to the sentencing offense and assigning the point value indicated by the applicable statement. MCL 777.38(1).

Points	OV 8—Victim asportation or captivity
15	A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a).
0	No victim was asported or held captive. MCL 777.38(1)(b).

- Each person in danger of injury or loss of life is a victim for purposes of scoring OV 8. MCL 777.38(2)(a).

- Zero points must be scored if the sentencing offense is kidnapping. MCL 777.38(2)(b).[149]

[148] "[T]he retroactive effect of *McGraw*[, 484 Mich 120,] is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved." *People v Mushatt (Mushatt II)*, 486 Mich 934 (2010).

[149] "[T]he plain language of MCL 777.38 directs the assessment of zero points for OV 8 only when the sentencing offense is 'kidnapping.' . . . [U]nlawful imprisonment[, MCL 750.349b, is] a distinct crime[.]" *People v Kosik*, 303 Mich App 146, 158-159 (2013) (noting that although "the Legislature amended MCL 750.349 [in 2006] and added MCL 750.349b, differentiating unlawful imprisonment from kidnapping[,]" it "fail[ed] to include unlawful imprisonment in MCL 777.38(2)(b)[]").

2. Case Law Under the Statutory Guidelines

a. Asportation Does Not Require Forcible Movement

"Asportation" need not be forcible to merit a score under OV 8. *People v Spanke*, 254 Mich App 642, 647 (2003). In *Spanke*, the Court of Appeals noted that the sentencing guidelines do not define "asportation," but the language of OV 8 clearly intends that points be assessed against an offender if "'[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.'" *Id.* at 646-647, quoting MCL 777.38(1)(a). The Court further discussed "asportation" as the term is used in defining the offense of kidnapping and applied it to scoring OV 8. *Spanke*, 254 Mich App at 647. Under MCL 750.349, asportation is an element of kidnapping, and the Court explained that "[w]hile asportation is an element of forcible kidnapping, there is no requirement that the movement itself be forcible. Rather, the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense." *Spanke*, 254 Mich App at 647.[150] In *Spanke*, no force was employed to move the victims to the defendant's home—in fact, there was evidence that the victims may have voluntarily accompanied the defendant to his home. *Id.* at 648. The *Spanke* Court stated that "the crimes could not have occurred as they did without the movement of [the] defendant and the victims to a location where they were secreted from observation by others"; thus, the movement was more than merely incidental to the commission of the crime. *Id*.

Points were appropriately assessed for OV 8 when, although no force was used, "the victim was transported . . . to an unfamiliar house . . . where she was involved in sexual encounters with three men she barely knew." *Apgar*, 264 Mich App at 330. See also *People v Cox (Jeffery)*, 268 Mich App 440, 454-455 (2005) (although the victim had been to the defendant's house on other occasions, the defendant was the individual who transported the victim to the defendant's house at the time the sexual offenses occurred).

[150] The defendant in *Spanke*, 254 Mich App 642, was not convicted of kidnapping so the prohibition against scoring OV 8 did not apply.

b. Asportation to Places or Situations of Greater Danger

"[P]laces where others [a]re less likely to see [a] defendant commit[] crimes," e.g., a trailer on the defendant's property, a tree stand on the defendant's property, and a dirt bike ridden "far away from the house," constitute places or situations of greater danger under MCL 777.38(1)(a) for which OV 8 is properly scored. *People v Steele (Larry)*, 283 Mich App 472, 490-491 (2009). See also *People v Chelmicki*, 305 Mich App 58, 70-71 (2014) (citing *Steele (Larry)*, 283 Mich App at 491, and holding that "OV 8 could have properly been scored . . . on the basis of 'asportation[]'" where "[t]he victim was . . . [dragged by the defendant] away from the balcony[of their apartment], where she was in the presence or observation of others, to the interior of the apartment, where others were less likely to see [the] defendant committing a crime[]"); *People v Dillard (Shylon)*, 303 Mich App 372, 380 (2013) ("the strong implication [was] that the victim was not free to go anywhere other than into the [defendant's] apartment with [the] defendant, a place that would have been more isolated from the possibility of further assaults being detected[; t]hat no such additional assaults apparently occurred [was] not relevant[]"); *People v Phillips (Keith)*, 251 Mich App 100, 108 (2002) (the defendant drove the victim to "an isolated area near a river" and parked the car so it faced away from the road); *People v Gholston*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2003 (Docket No. 240810)[151] ("confined and private environment inside the back room [of a store] was a place of greater danger than the main shopping area of the store").

c. Victim Held Captive Beyond the Time Necessary to Commit the Offense

"[Fifteen] points may be assessed [under OV 8] . . . if the defendant held the victim 'captive beyond the time necessary to commit the offense.'" *Chelmicki*, 305 Mich App at 70, quoting MCL 777.38(1)(a) and citing *Apgar*, 264 Mich App at 329-330.

"[W]hen [the] defendant continued to hold the victim against her will after dragging her [from the balcony of their apartment] into the apartment, he effectively held

[151] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

her longer than the time necessary to commit the [sentencing] offense of unlawful imprisonment." *Chelmicki*, 305 Mich App at 70 (noting that because "[t]he unlawful-imprisonment statute's definition of 'restrain' provides that '[t]he restraint does not have to exist for any particular length of time[,]' MCL 750.349b(3)(a)[,] . . . the crime can occur when the victim is held for even a moment[,]" and holding that 15 points were therefore properly scored for OV 8 notwithstanding that "all of [the] defendant's conduct during the time he restrained the victim was conduct that occurred 'during' the offense[]").

d. Multiple Offender Cases

Only a defendant's actual participation in the criminal conduct under OV 7 should be scored. *Hunt (Christopher)*, 290 Mich App at 325-326 (the trial court erred in assessing 50 points for OV 7 where, although "[the] defendant was present and armed during the commission of the crimes . . . , he did not himself commit, take part in, or encourage others to commit acts constituting 'sadism, torture, or excessive brutality'").

3. Relevant Case Law Under the Judicial Guidelines

In *People v Hack*, 219 Mich App 299, 313 (1996), the trial court properly assessed points against a defendant under OV 5 (the equivalent of OV 8 under the statutory guidelines) where the evidence established that the defendant moved the child-victims to a different area of the house and away from the mother of one victim. *Id.* at 313. The child's mother testified that she could not see into the bedroom where the defendant had taken the victims and did not know what was happening during the time she was separated from the children. *Id*. The Court agreed with the trial court that the children were in greater danger when they were removed from the room occupied by one victim's mother; therefore, points were properly assessed against the defendant for OV 5. *Id*. See also *People v Dilling*, 222 Mich App 44, 54-55 (1997) (same result regarding OV 5 score for codefendant involved in the same offense for which the defendant in *Hack* was convicted).

K. OV 9—Number of Victims

1. Definitions/Scoring

OV 9 is scored for all felony offenses except crimes involving a controlled substance. MCL 777.22(1), (2), (4), and (5). Determine which statements in OV 9 apply to the offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.39(1).

Points	OV 9—Number of victims
100	Multiple deaths occurred. MCL 777.39(1)(a).
25	10 or more victims were placed in danger of physical injury or death. 20 or more victims were placed in danger of property loss. MCL 777.39(1)(b). POINTS FOR VICTIMS PLACED IN DANGER OF PROPERTY LOSS WERE ADDED BY 2006 PA 548, EFFECTIVE MARCH 30, 2007.
10	2 to 9 victims were placed in danger of physical injury or death. 4 to 19 victims were placed in danger of property loss. MCL 777.39(1)(c). POINTS FOR VICTIMS PLACED IN DANGER OF PROPERTY LOSS WERE ADDED BY 2006 PA 548, EFFECTIVE MARCH 30, 2007.
0	Fewer than 2 victims were placed in danger of physical injury or death. Fewer than 4 victims were placed in danger of property loss. MCL 777.39(1)(d). POINTS FOR VICTIMS PLACED IN DANGER OF PROPERTY LOSS WERE ADDED BY 2006 PA 548, EFFECTIVE MARCH 30, 2007.

- Count each person[152] who was placed in danger of physical injury or loss of life or property[153] as a victim for purposes of scoring OV 9. MCL 777.39(2)(a).[154][155]

- Score 100 points only in homicide cases. MCL 777.39(2)(b). Any crime in which the death of a person is an element of the crime is a "homicide." MCL 777.1(c).

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[152] In *People v Ambrose*, ___ Mich App ___, ___ n 4 (2016), the Court of Appeals noted that "'[p]erson' is defined under the Penal Code as 'an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association[,]' MCL 750.10[,]" and that "[a] similar definition appears in the Code of Criminal Procedure[,] MCL 761.1(a)."

[153] Loss of property was added to the circumstances in OV 9 by 2006 PA 548, effective March 30, 2007.

[154] In *People v Ambrose*, ___ Mich App ___, ___ (2016), the Court of Appeals held that MCL 777.39(2)(a) "only provid[es] guidance . . . about who *must* be counted as a 'victim,' and [does not provide] a complete and limiting definition of the term 'victim[.]'" See Section 3.9(K)(2) for discussion of *Ambrose*, ___ Mich App ___.

[155] ~~Loss of property was added to the circumstances in OV 9 by 2006 PA 548, effective March 30, 2007.~~

2. Case Law Under the Statutory Guidelines

The term *victim* as used in MCL 777.39 is not limited to *persons* who suffered danger of physical injury or loss of life or property; rather, "MCL 777.39 allows a trial court, when scoring OV 9, to count as a 'victim' 'one that is acted on' by [the] defendant's criminal conduct and placed in danger of loss of life, bodily injury, or loss of property." *People v Ambrose*, ___ Mich App ___, ___ (2016), quoting *Merriam-Webster's Collegiate Dictionary* (11th ed), p 1394. The *Ambrose* Court explained:

> "MCL 777.39(1)(c) does not define 'victim.' However, MCL 777.39(2)(a) does instruct courts to score each person who was placed in danger of physical injury or loss of life or property as a victim. Notably, MCL 777.39(2)(a) contains no words limiting the definition of 'victim' to persons who were placed in danger of physical injury or loss of life or property. Rather, it simply states that such persons *must* be counted as victims.[156] Thus, . . . there is no basis to conclude that the word 'victim' as used in MCL 777.39 must be defined only to include persons who suffered danger of physical injury or loss of life.
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> * * *
>
> Further, because we read MCL 777.39(2)(a) as only providing guidance to the trial court about who *must* be counted as a 'victim,' and not as providing a complete and limiting definition of the term 'victim,' we may consult a dictionary for guidance. *Merriam-Webster's Collegiate Dictionary* (11th ed), p 1394, defines 'victim' as 'one that is acted on and [usually] adversely affected by a force or agent.'" *Ambrose*, ___ Mich App at ___ (citation omitted).

Applying this definition of *victim*, the *Ambrose* Court—"without declaring [a] fetus . . . to be a 'person' under the law[]"—held that a fetus was properly counted as a victim under OV 9 where the defendant was convicted of feloniously assaulting his pregnant girlfriend. *Ambrose*, ___ Mich App at ___ (noting that the defendant's conduct "placed the fetus at

[156] The *Ambrose* Court noted that "'[p]erson' is defined under the Penal Code as 'an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association[,]' MCL 750.10[,]" and that "[a] similar definition appears in the Code of Criminal Procedure[,] MCL 761.1(a)." *Ambrose*, ___ Mich App at ___ n 4.

risk of bodily injury or loss of life, not only as an indirect result of the risk of death or harm to the mother but also as a direct result of blows to the mother's abdominal area[]").

When scoring OV 9, only people placed in danger of injury or loss of life or property *during* conduct "relating to the [sentencing] offense" should be considered. *People v Sargent*, 481 Mich 346, 350 (2008). See also *McGraw*, 484 Mich at 122, 133-135 ("[A] defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise.").[157]

In *Sargent*, 481 Mich at 347, the defendant was convicted of sexually abusing a teenager. At trial, evidence was introduced that the defendant also sexually abused the victim's sister on a separate occasion. *Id*. The Supreme Court found that the sentencing court erred in assessing ten points for OV 9 on the basis that there were two victims: the victim and the victim's sister. *Id*. at 347-348, 351. The Court noted that although "the Legislature has explicitly stated that conduct not related to the offense being scored can be considered when scoring some offense variables," OV 9 is not among those variables. *Id*. at 350. Therefore, the *Sargent* Court held that zero points should have been assessed because the defendant was not convicted of sexually abusing the victim's sister, and because the defendant's sexual abuse of the sister did not arise out of the same transaction as the abuse of the victim. *Sargent*, 481 Mich at 351.

See also *People v Nawwas*, ___ Mich ___, ___ (2016) (citing *McGraw*, 484 Mich at 135, and holding that where the defendant was convicted of discharge of a firearm in an occupied facility, MCL 750.234b(2), possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a pistol in a motor vehicle, MCL 750.227,[158] but "the trial court only scored the sentencing guidelines for the defendant's violation of MCL 750.227[,] . . . [t]he trial court erred in scoring [OV 9] based on a finding that two to nine victims were placed in danger of physical injury or death in relation to the defendant's violation of MCL 750.227[]"); *Biddles*, ___ Mich App at ___ (citing *McGraw*, 484 Mich at 133-

[157] "[T]he retroactive effect of [*People v*] *McGraw*[, 484 Mich 120 (2009),] is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved." *People v Mushatt*, 486 Mich 934 (2010).

[158] See *People v Nawwas*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2015 (Docket No. 319039), slip op at 1.

134, and holding that where "[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim], and . . . [his codefendant] was convicted by plea on the crimes for which [the] defendant was acquitted," the trial court erred in scoring 10 points for OV 9; "[the] defendant's commission of the offense of felon-in-possession, in and of itself, simply did not place anyone in danger of physical injury or death[]") (additional citations omitted); *People v Phelps*, 288 Mich App 123, 139 (2010), overruled in part on other grounds in *People v Hardy (Donald)*, 494 Mich 430, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016 (ten points were improperly scored against the defendant when although two of the complainant's friends were in the room at the time of the sexual assault(s), "[the defendant] did not threaten anyone, and he did not make physical contact with either of the complainant's friends[]").

"A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim." *People v Gratsch*, 299 Mich App 604, 623-624 (2013), vacated in part on other grounds 495 Mich 876 (2013) (evidence that the defendant told a fellow jail inmate that the defendant "'should stab . . . [a corrections officer] in the neck[]'" with a needle he had constructed, and that he threatened to hurt the inmate if the inmate told anyone about the needle, supported the trial court's score of ten points for OV 9; "at least two victims were placed in danger of physical injury because of [the] defendant's possession of the needle, . . . [and it was] irrelevant that neither the inmate nor the correction[s] officer was actually harmed[]").

OV 9 was properly scored at ten points where the defendant was charged with several sex-related crimes against three separate victims on three separate occasions because more than one potential victim was in the room sleeping while the defendant assaulted another victim. *People v Waclawski*, 286 Mich App 634, 684 (2009). Although the charges against the defendant stemmed from behavior that occurred on three different dates and only one victim was harmed on each of those dates, the evidence presented "support[ed] the conclusion that [the] defendant would choose a victim while the other boys were present." *Id.* at 684. Thus, a score of ten points was proper "because the record support[ed] the inference that at least two other victims were placed in danger

of physical injury when the sentencing offenses were committed." *Id.*

OV 9 was improperly scored at ten points because, even though the defendant was charged with gross indecency involving the victim, and on a different occasion, two other minors, the instance of CSC-I for which the defendant was being sentenced only involved one of the girls. *People v Gullett*, 277 Mich App 214, 217-218 (2007). According to the *Gullett* Court, where the record revealed that the defendant was convicted and sentenced on only one charge of CSC-I involving a single victim, the sentencing court erred in assessing points for OV 9 based on the number of victims involved in a separate incident. *Id.* at 218.

OV 9 was properly scored at ten points where the defendant committed an armed robbery in a store, then stopped a woman driving a car and forced her to drive him to another location. *People v Mann (Brian)*, 287 Mich App 283, 284-285, 288 (2010). The defendant argued that OV 9 should be scored at zero points, because "his armed robbery was completed with there being only one victim . . . before he began the separate crime stemming from his commandeering a car and driver for his getaway." *Id.* at 286. However, the Court found that the applicable statutes provide that "the course of an armed robbery includes the robber's conduct in fleeing the scene of the crime."[159] *Id*. at 287. In this case, the "defendant's commandeering of a car immediately after taking money from the first victim and forcing the driver of the car to drive him to another community, created a second victim of the armed robbery. In other words, the carjacking incident constituted not only the commission of separate offenses, but was also a continuation of the armed robbery." *Id*.

OV 9 must not be construed so broadly that individuals are counted by the mere possibility that they could appear within the scope of the dangerous circumstances created by a defendant's conduct; "[t]he plain language of MCL 777.39(1) requires that a specific number of persons be placed in danger to warrant the scoring of points for OV 9." *People v Rogers (Jimmie)*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2010 (Docket No. 293926), slip op p 7.[160] In *Rogers (Jimmie)*, slip op at 6, the defendant had a

[159] The defendant in *Mann*, 287 Mich App 283, was convicted of armed robbery under MCL 750.530, which incorporates MCL 750.529 by reference. MCL 750.529 expressly defines "in the course of committing a larceny" as including "acts that occur in an attempt to commit the larceny, or during commission of the larceny, *or in flight or attempted flight after the commission of the larceny*, or in an attempt to retain possession of the property." MCL 750.530(2) (Emphasis added.).

blood alcohol level of 0.27 percent and was driving his truck "all over the roadway." Although "any person in or near [the] defendant's path was likely placed in danger, considering his level of intoxication, erratic swerving in the roadway, and speed[,]" the trial court erred in assessing 25 points for OV 9 ("10 or more victims . . . were placed in danger of physical injury or death") because "there [was] no record evidence indicating [that 10 or more victims] were in or near [the] defendant's path at the time of his drunk driving." *Rogers (Jimmie)*, slip op at 7.

OV 9 was properly scored at ten points where the defendant shot a bystander who attempted to aid the armed robbery victim because the bystander was also "'placed in danger of injury or loss of life[,]'" MCL 777.39(1)(c). *Morson*, 471 Mich at 261-262. See also *People v Fawaz*, 299 Mich App 55, 58, 63-64 (2012) (the defendant's elderly neighbor qualified as a "victim[]" under OV 9 because she "had to be escorted from her home by a police officer for her personal safety[]" when her home filled with smoke due to the defendant's arson of his nearby home); *People v Kimble (Richard)*, 252 Mich App 269, 274 (2002), aff'd on other grounds 470 Mich 305 (2004) (decedent, her fiance, and her child were with her in the car and were all "in danger of injury or loss of life" when the defendant fatally shot the decedent through the car's windshield); *People v Williams (Harold)*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2003 (Docket No. 230566) (the number of victims properly included the victim's wife and children who, although they occupied a different room of the house than did the defendant and the victim, were "placed in danger of injury or loss of life" when the defendant fired multiple shots in the victim's home); *People v Arney*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2003 (Docket No. 236875) (at least two individuals other than the cashier from whom the defendant took money saw the defendant and his gun at the cash register in front of the restaurant; thus they were placed in danger of injury because of their physical proximity to the robbery and the defendant's weapon).

Ten points were appropriate under OV 9 where videotaped evidence showed a female victim and a male victim *actually* being harmed, or being placed in danger of injury, as a result of the defendant's conduct. *Wilkens*, 267 Mich App at 741-742.

[160] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

The trial court erred in scoring 25 points for OV 9 on the ground that the defendant's vandalism of two schools "'was a crime against a community[;]'" because "[t]here [was] no evidence on the record to establish that 20 or more persons were affected by [the] defendant's vandalism, either directly or indirectly[,] . . . OV 9 should have been scored at zero points." *People v Carrigan*, 297 Mich App 513, 515-516 (2012), overruled in part on other grounds in *Hardy (Donald)*, 494 Mich at 438 n 18.

First responders may constitute "victims" under OV 9 if they were "'placed in danger of physical injury or loss of life[.]'" *Fawaz*, 299 Mich App at 62-63 (quoting MCL 777.39(2)(a) and holding that two firefighters who "suffered injuries requiring medical attention while combating [a fire] set by [the] defendant[]" qualified as "'victims' under the unambiguous language of OV 9[]").

Where "at least one [neighborhood] resident [was] present in the area[]" when the defendant's accomplice fired multiple gunshots and killed a police officer during a home invasion, ten points were properly scored under OV 9. *People v Bowling*, 299 Mich App 552, 562-563 (2013).

The trial court's assessment of 50 points for OV 3 and 100 points for OV 9 did not violate the defendant's Sixth Amendment right to a jury trial where the "jury . . . found [the] defendant guilty of OUIL causing death, which required the jury to find that [the] defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof[,]" and "two counts each of second-degree murder[,] . . . reflect[ing] that the jury found beyond a reasonable doubt that multiple deaths occurred[;]" under these circumstances, "each of the facts necessary to support [the OV scores] was necessarily found by the jury beyond a reasonable doubt." *People v Bergman*, 312 Mich App 471, 498, 499 (2015) (noting that where "facts found by the jury were sufficient to assess the minimum number of OV points necessary for [the] defendant's placement in the . . . cell of the sentencing grid under which [he or] she was sentenced, there [is] no plain error and [the] defendant is not entitled to resentencing or other relief [on an unpreserved claim] under [*People v Lockridge*, 498 Mich 358 (2015)][]").

L. OV 10—Exploitation of a Vulnerable Victim

1. Definitions/Scoring

OV 10 is scored for all felony offenses except crimes involving a controlled substance. MCL 777.22(1), MCL 777.22(2), MCL 777.22(4), and MCL 777.22(5). Score OV 10 by determining which statements apply to the circumstances of the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.40(1).

Points	OV 10—Exploitation of a victim's vulnerability
15	Predatory conduct was involved. MCL 777.40(1)(a).
10	The offender exploited a victim's physical disability, mental disability, or youth or agedness, or a domestic relationship, or the offender abused his or her authority status. MCL 777.40(1)(b).
5	The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. MCL 777.40(1)(c).
0	The offender did not exploit a victim's vulnerability. MCL 777.40(1)(d).

- Do not automatically score points for victim vulnerability just because one or more of the factors addressed by OV 10 are present in the circumstances surrounding the sentencing offense. MCL 777.40(2) expressly states that "[t]he mere existence of 1 or more factors described in [MCL 777.40](1) does not automatically equate with victim vulnerability."

- "Predatory conduct" is "preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim,[161] for the primary purpose of victimization." MCL 777.40(3)(a).

- To "exploit" a victim is to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

- A victim's "vulnerability" is the victim's "readily apparent susceptibility to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

[161] The phrase "[o]r a law enforcement officer posing as a potential victim[]" was added to MCL 777.40(3)(a) by 2014 PA 350, effective October 17, 2014.

- "'Abuse of authority status' means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d).

2. Case Law Under the Statutory Guidelines

a. Overview of OV 10's Purpose

OV 10 is intended to cover a broad range of an offender's conduct and to differentiate between the potential dangers arising from that conduct when an offender directs his or her conduct at a victim under circumstances external to a victim, or when an offender directs his or her conduct at a victim because of the victim's inherent condition or circumstances. The Michigan Supreme Court, in *People v Huston*, 489 Mich 451, 460-461 (2011), summarized the intended application of OV 10's graduated scoring in light of an offender's conduct as it is directed toward a victim with or without inherent vulnerability:

> "The hierarchical range of points that may be assessed under OV 10 extends from zero to 15 points. Zero points are to be assessed when '[t]he offender did not exploit a victim's vulnerability.' MCL 777.40(1)(d). Five points are to be assessed when '[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious'—things that are largely within the victim's own control. MCL 777.40(1)(c). Ten points are to be assessed when '[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status'—things that are largely outside of the victim's control. MCL 777.40(1)(b). Finally, 15 points are to be assessed when '[p]redatory conduct was involved'—something that is *always* outside of the victim's control and something that may impact the community as a whole and not only persons with already-existing vulnerabilities. . . . [W]e can only interpret the Legislature's hierarchical approach in OV 10 as indicating its own view

> that 'predatory conduct' deserves to be treated as the *most serious* of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were *already* vulnerable for one reason or another. By its essential nature, predatory conduct may render *all* persons uniquely susceptible to criminal exploitation and transform all persons into potentially 'vulnerable' victims. Only in this way can MCL 777.40(1)(a) be understood as connected with MCL 777.40(1)(b) through [MCL 777.40(1)](d)."

b. Victim Vulnerability in General

"[P]oints should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon (Trumon)*, 481 Mich 152, 158 (2008), overruled in part on other grounds in *Huston*, 489 Mich at 458 n 4.[162] Factors that evidence a victim's vulnerability include:

- physical disability,
- mental disability,
- youth or agedness,
- existence of a domestic relationship between the victim and the offender,
- the offender's abuse of authority status,
- difference in the victim's and the offender's size, strength, or both,
- victim's intoxication or drug use, or
- victim's level of consciousness. *Cannon (Trumon)*, 481 Mich at 158-159.

[162] *Huston*, 489 Mich at 458 n 4, noted that the *Cannon (Trumon)* Court's statement that a defendant's preoffense conduct must be directed at a *specific* victim was dictum. The *Huston* Court clarified that preoffense conduct *need not be directed at a specific victim in order to merit points under OV 10*. *Huston*, 489 Mich at 454.

The Court noted that "[t]he mere existence of one of these factors does not automatically render [a] victim vulnerable." *Cannon (Trumon)*, 481 Mich at 159.

Exploitation of a vulnerable victim is a prerequisite to assessing points under OV 10. *Cannon (Trumon)*, 481 Mich at 162. However, "nothing in *Cannon* [*(Trumon)*, 481 Mich 152,] requires the offender to have first-hand contact to exploit a victim[; r]ather, *Cannon* [*(Trumon)*] provides that every subdivision of MCL 777.40(1) requires that the offender have somehow exploited a vulnerable victim[.]" *People v Needham*, 299 Mich App 251, 252, 258 (2013) ("[w]hen a person possesses child sexually abusive material, he or she personally engages in the systematic exploitation of the vulnerable victim depicted in that material[, and e]vidence of possession therefore can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim's vulnerability due to the victim's youth[]").

c. Defendant's Conduct Need Not Be Directed at a Specific Victim

Fifteen points may be assessed against a defendant for predatory conduct without regard to whether the defendant directed his or her preoffense conduct at a specific victim—all that is required under OV 10 is that the defendant's preoffense conduct was directed at 'a victim.' *Huston*, 489 Mich at 454. Furthermore, "the victim does not have to be inherently vulnerable. Instead, a defendant's 'predatory conduct,' by that conduct alone (*eo ipso*), can create or enhance a victim's 'vulnerability.'" *Id*.

d. Abuse of Authority Status

Where the defendant argued that OV 10 was improperly scored because no evidence was presented "to indicate any manipulation by [the] defendant or any exploitation of his status," ten points were correctly assessed against the 67-year-old defendant, who was in the process of adopting the 14-year-old victim, and who lived at the defendant's home, at the time he sexually assaulted her. *Phillips (Keith)*, 251 Mich App at 109.

OV 10 was properly scored against a defendant who used his status as an authority figure to sexually assault his niece; he constituted an authority figure because he was "playing the uncle role" to his sister's children and was "invested with the authority to enforce [the children's

mother's] directives regarding the disciplining of her children." *People v Loney*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2004 (Docket No. 243416).[163]

e. Exploitation Must Occur to Victim of Crime Scored

Ten points are proper only where the defendant has exploited a *victim's* vulnerability; that is, when the defendant "exploit[s] a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.40(1)(b). "A 'victim' is 'a "person harmed by a crime, tort, or other wrong" . . . or . . . a person who "is acted on and usually adversely affected by a force or agent[.]"'" *Needham*, 299 Mich App at 255, quoting *People v Althoff*, 280 Mich App 524, 536-537 (2008) (additional citations omitted).

Ten points were properly scored under OV 10 based on the defendant's possession of child sexually abusive material. *Needham*, 299 Mich App at 255, 260 ("[t]he victim of crimes involving child sexually abusive activity, including the possession of child sexually abusive material[,] is the child victim portrayed in the material[, and] . . . [the defendant] *exploit[ed] and manipulate[d]* the young, vulnerable victims depicted in the materials he possessed[]").

Ten points were not proper when the score was based on the fact that the defendant's two children were passengers in the defendant's car when she drove through a flashing red light and killed the driver of another vehicle. *People v Hindman*, 472 Mich 875, 876 (2005), reversing the unpublished opinion per curiam of the Court of Appeals, issued January 22, 2004 (Docket No. 244904). It was error for the trial court to assess points under OV 10, "not on the basis of having exploited the second-degree murder victim, but on the basis of having exploited her own children who were merely passengers in her car and not the victims of the criminal offense being scored." *Hindman*, 472 Mich at 876.

[163] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

f. Domestic Relationship

Ten points were properly scored for OV 10 where "[t]he victim was clearly 'vulnerable' in light of [the] defendant's greater strength, [the victim's] intoxication, and the domestic relationship between the two, including the fact that [the victim] and [the] defendant had a child together." *People v Dillard (Shylon)*, 303 Mich App 372, 380-381 (2013) (holding that "[the d]efendant unambiguously exploited his greater strength and his relationship with the victim; both facts ensured that [the victim] had no meaningful way to escape from him until outside intervention by the police occurred[]").

"[T]o qualify as a 'domestic relationship' [for purposes of scoring OV 10, MCL 777.40,] there must be a familial or cohabitating relationship." *People v Jamison*, 292 Mich App 440, 447 (2011). In *Jamison*, 292 Mich App at 444, 448, the trial court erred in assessing ten points for OV 10 where the defendant and the victim dated in the past, but did not share a domicile and were not related. Specifically, the Court of Appeals stated that "[it did] not believe that simply *any* type of dating relationship, past or present, meets the requirements of OV 10" and held that the "relationship [in *Jamison*] did not display the characteristics needed to elevate [the] ordinary relationship [between the victim and the defendant] to 'domestic relationship' status." *Id.* at 447-448.

"[T]he trial court erroneously assessed 10 points for OV 10[]" where, although the defendant and the victim "remained friends," they "had stopped dating at least two months prior to the assault[,] . . . were dating other people, . . . did not continue to have sex, and . . . did not live together." *People v Brantley*, 296 Mich App 546, 554-555 (2012). See also *People v Counts*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2004 (Docket No. 246717), slip op pp 2-3, which held that for purposes of OV 10, a "domestic relationship" is not established by proof that the defendant and the victim shared "any type" of relationship. In the context of scoring OV 10, the defendant and the victim must have a "familial or cohabitating relationship." If *any* relationship could qualify under OV 10, the Legislature need not have specified "domestic." *Counts*, slip op at 3. Further, OV 10 requires not only the existence of the domestic relationship—points are appropriate only when the defendant exploits that relationship. *Id*. "If the

relationship [between the defendant and the victim] is over, . . . that relationship can no longer be exploited." *Id*.

g. Vulnerability—Age of the Victim

In the context of the defendant's claim of ineffective assistance of counsel, the Court of Appeals refused to adopt the defendant's argument that OV 10 was improperly scored because "despite the girls' young ages in this case, there was no evidence that they were vulnerable or that he exploited them." *People v Harmon (Douglas)*, 248 Mich App 522, 531 (2001). The defendant relied on the statutory language contained in MCL 777.40(2), which states that "[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." *Harmon (Douglas)*, 248 Mich App at 531. Contrary to the defendant's argument that the young girls participated in his photography sessions without coercive or exploitive conduct on his part, the evidence established that the defendant manipulated the victims based on their age, their financial need, and their aspiration to become models. *Id*. at 531-532. "By using these two incentives, fame and fortune, [the] defendant manipulated the minors into posing for lewd and lascivious photographs." *Id*. at 532. See also *Wilkens*, 267 Mich App at 742 (The "defendant 'exploited' the victim's youth by manipulating her with clothes and alcohol in exchange for [her participation in] making [a] sexually abusive videotape.").

A five-year age difference between a defendant and a complainant may justify a score of ten points for OV 10. *People v Johnson (William)*, 474 Mich 96, 103 (2006). In *Johnson (William)*, the Michigan Supreme Court stated: "We also agree that the trial court did not err in scoring OV 10 at ten points. . . . As the Court of Appeals explained, '[w]here [the] complainant was fifteen years old and [the] defendant was twenty, the court could determine that [the] defendant exploited the victim's youth in committing the sexual assault.'" *Id.* at 103.

The trial court properly scored ten points for OV 10 where the evidence showed that the 24-year-old defendant exploited the 16-year-old victim's youth and vulnerability within the meaning of MCL 777.40. *People v Phelps*, 288 Mich App 123, 136 (2010), overruled in part on other grounds in *People v Hardy (Donald)*, 494 Mich 430, 438 n 18 (2013), effectively superseded in part on other grounds by

2015 PA 137, effective January 5, 2016. Although the victim's age alone did not support scoring OV 10, "the record supported that [the victim's] age and immaturity made her a vulnerable victim." *Phelps*, 288 Mich App at 136. The Court of Appeals noted that "evidence on the record supported that [the defendant] exploited the [victim] for selfish purposes by manipulating her into engaging in sexual acts with him and allowing him to be in a position in which he could engage in nonconsensual sexual intercourse." *Id*. at 136-137. Further, "the evidence showed that the [victim] was vulnerable because it was readily apparent that she was susceptible to physical restraint, persuasion, or temptation." *Id*. at 137.

Where the defendant "picked up [the 12-year-old victim of dissemination of sexually explicit matter to a minor] in the middle of the night in his van[,] . . . drove to a liquor store to purchase alcohol[,] . . . [and] then drove the van to a city park and parked it[,]" the trial court's assessment of 15 points for OV 10 was supported by the evidence; "[b]ecause of [the victim's] young age, she was susceptible to injury, physical restraint, or temptation[,]" and "it [was] a reasonable inference that victimization was [the defendant's] primary purpose for engaging in the preoffense conduct." *People v Lockett*, 295 Mich App 165, 184 (2012).

Ten points were properly scored under OV 10 based on the defendant's possession of child sexually abusive material. *Needham*, 299 Mich App at 252, 260 ("evidence of possession [of child sexually abusive material] . . . can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim's vulnerability due to the victim's youth[]").

h. Vulnerability Arising Out of a Victim's Relationships or Circumstances

A score of 15 points under OV 10 does not require that a victim be "inherently" vulnerable. *Huston*, 489 Mich at 454. MCL 777.40(3)(c) "contemplat[es] vulnerabilities that may arise not only out of a victim's characteristics, but also out of a victim's relationships or circumstances." *Huston*, 489 Mich at 464. Furthermore, "[MCL 777.40(3)(c)] does not mandate that [the victim's] 'susceptibility' be *inherent* in the victim. Rather, the statutory language allows for susceptibility arising from external circumstances as well." *Huston*, 489 Mich at 466.

"[A] defendant's 'predatory conduct,' by that conduct alone (*eo ipso*), can create or enhance a victim's 'vulnerability[;]'" accordingly, where "[the] defendant and his cohort[,] [before robbing] the victim, . . . were lying in wait, armed with two BB guns and a knife, and hidden from the victim, who was by herself at night in an otherwise empty parking lot[,]" the victim was properly considered "vulnerable" under MCL 777.40(3)(c) because the victim "would have a 'readily apparent susceptibility . . . to injury [or] physical restraint . . . ." *Huston*, 489 Mich at 454-455, 467. See also *People v Kosik*, 303 Mich App 146, 160-161 (2013) (the trial court's conclusion "that the circumstances of the offense rendered the victim vulnerable[] . . . [was] sufficient; the trial court did not need to find that the victim possessed some inherent vulnerability[]").

i. Predatory Conduct

"MCL 777.40(3)(a) does not define 'predatory conduct' to mean preoffense conduct directed at *the* victim; instead, MCL 777.40(3)(a) defines 'predatory conduct' to mean 'preoffense conduct directed at *a* victim . . . .'" *Huston*, 489 Mich at 458.[164] Thus, MCL 777.40(3)(a) must not be construed "as requiring that the defendant's preoffense predatory conduct have been directed at one particular or specific victim, but instead as requiring only that the defendant's preoffense predatory conduct have been directed at *a* victim." *Huston*, 489 Mich at 459. Accordingly, 15 points were properly scored under OV 10 for "[a] defendant who directed his preoffense conduct at the community-at-large by lying in wait, armed, in a parking lot at night, waiting for the first random person to come along so that he or she could be criminally victimized." *Id*. at 459-460.

"'[P]redatory conduct' . . . is behavior that is predatory in nature, 'precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action . . . .'" *Huston*, 489 Mich at 463, quoting *Cannon (Trumon)*, 481 Mich at 161, overruled in part on other grounds in *Huston*, 489 Mich at 458 n 4.[165] Additionally, "['predatory conduct'] does not encompass *any* 'preoffense conduct,' but rather only those forms of

[164] After *Huston*, 489 Mich 451, was decided, 2014 PA 350, effective October 17, 2014, amended MCL 777.40(3)(a) to include, in the definition of "'[p]redatory conduct[,]'" preoffense conduct that is directed at "a law enforcement officer posing as a potential victim[.]"

'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.'" *Huston*, 489 Mich at 462, quoting *Cannon (Trumon)*, 481 Mich at 162. In *Huston*, 489 Mich at 463-464, the defendant's preoffense conduct of "[lying] in wait while armed and hidden from view for the primary purpose of eventually causing a person to suffer from an injurious action, i.e., an armed robbery . . . constituted 'predatory conduct' both under the statutory definition of this phrase and according to common understanding under which lying in wait constitutes quintessential 'predatory conduct.'"

The trial court properly scored 15 points against the defendant for predatory conduct under OV 10 where the evidence established that the defendant and his accomplices drove around looking for a car from which they could steal a set of expensive wheel rims, spotted the victim's car and its valuable wheel rims, followed the victim's car to the victim's home, watched the victim pull her car into the driveway, shot the victim, and stole her car. *Kimble*, 252 Mich App at 274-275, aff'd on other grounds 470 Mich 305 (2004).

Fifteen points were proper where the trial court found the victim's vulnerability "readily apparent" from observing the victim's demeanor and where the defendant engaged in predatory conduct. *People v Drohan*, 264 Mich App 77, 90-91 (2004), aff'd on other grounds 475 Mich 140 (2006).[166] Evidence showed that the victim confided in the defendant, and the defendant took advantage of her vulnerability by approaching her on numerous occasions and waiting for her in a parking structure before sexually assaulting her. *Id.* at 90-91.

The timing and location of an offense is evidence that the defendant watched and waited for an opportunity to commit the criminal act, and watching and waiting for an opportunity to commit a crime is "predatory conduct" for

[165] After *Huston*, 489 Mich 451, was decided, 2014 PA 350, effective October 17, 2014, amended MCL 777.40(3)(a) to include, in the definition of "'[p]redatory conduct[,]'" preoffense conduct that is directed at "a law enforcement officer posing as a potential victim[.]"

[166] The Michigan Supreme Court's decision in *People v Drohan*, 475 Mich 140 (2006), was abrogated in part on other grounds as recognized by *People v Lockridge*, 498 Mich 358, 378-379 (2015). See Section 3.4 for discussion of *Lockridge*.

which the defendant was appropriately assessed 15 points under OV 10. *People v Witherspoon,* 257 Mich App 329, 336 (2003). In *Witherspoon,* 257 Mich App at 336, the nine-year-old victim testified that the defendant assaulted her when she was alone in the basement folding clothes. Relying on *Kimble*, 252 Mich App at 274-275, the Court noted that the defendant's timing (when the victim was alone) and his choice of location (an isolated room of the house, the basement) was sufficient to establish predatory conduct similar to the defendant's conduct in *Kimble*. *Witherspoon*, 257 Mich App at 336. See also *People v Kosik*, 303 Mich App 146, 160 (2013) (citing *Witherspoon*, 257 Mich App at 336, and holding that 15 points were properly scored for OV 10 where "[the] defendant engaged in predatory conduct by investigating the store [in which the victim worked] and waiting until the victim was alone to strike[;] . . . [t]he timing of an offense, including watching the victim and waiting until the victim is alone before victimizing him or her, may be evidence of predatory conduct[]"); *People v Ackah-Essien*, 311 Mich App 13, 38 (2015) (holding that 15 points were properly scored for OV 10 where the "evidence supported the trial court's finding that [the defendant and his accomplices engaged in] . . . 'pre-offense conduct designed to lure the victim[, a pizza deliveryman,] to . . . [an] abandoned home where they then, on the pretext of paying him, lured him in to a dark and abandoned home where he was jumped and robbed[]'").

See also *Cox (Jeffery)*, 268 Mich App at 455, where points were properly scored for predatory or preoffense conduct when the defendant engaged in sexual conduct with "a seventeen-year-old mentally incapable victim." In addition to the questions concerning the victim's mental status, evidence established that, before the charged sexual conduct, the defendant visited the victim at his foster home, the victim had been to the defendant's home on several occasions and had viewed pornographic material there, and the "defendant admitted to harboring the victim as a runaway from a foster home." *Id.* at 446-447, 455.

Fifteen points were properly scored under OV 10 based on evidence that, prior to engaging in intercourse with the child victim, the defendant gave her gifts, including a cell phone so that she could communicate with him, and picked her up in his vehicle and took her to his home. *People v Johnson* (*Todd*), 298 Mich App 128, 133-134 (2012)

("the trial court did not err by finding that [the] defendant's gifts to [the victim] and picking [her] up in his vehicle were predatory conduct used to exploit . . . a vulnerable victim[]").

j. Co-offenders' Conduct

"[A] sentencing court may not assess a defendant 15 points for predatory conduct under OV 10 solely on the basis of the predatory conduct of the defendant's co-offenders." *People v Gloster*, ___ Mich ___, ___ (2016). "In direct contrast to [OVs 1, 2, and 3], MCL 777.40 contains no language directing a court to assess a defendant the same number of points as his [or her] co-offenders in multiple-offender situations." *Gloster*, ___ Mich at ___. Accordingly, "the trial court erred by assessing [the] defendant 15 points for OV 10 because the record indicate[d] that the court based its assessment of points entirely on the conduct of [the] defendant's co-offenders." *Id*. at ___ (additionally holding that the Court of Appeals "erred by concluding that the trial court's scoring of OV 10 was supported by [the] defendant's *own* conduct[; b]ecause the trial court did not *itself* find that [the] defendant's own conduct was predatory in nature, the Court of Appeals failed to review the trial court's findings for clear error as required by *People v Hardy*[*(Donald)*, 494 Mich 430, 438 (2013)]") (emphasis added).

3. Relevant Case Law Under the Judicial Guidelines

OV 7 (OV 10 under the statutory guidelines) differentiates between an offender's exploitation of a victim due to a difference in size or strength and exploitation of a victim based on agedness. *People v Piotrowski*, 211 Mich App 527, 531 (1995). In *Piotrowski*, the defendant argued that her treatment of the victim was not the result of age-based exploitation; instead, according to the defendant, she would have subjected the victim to the same treatment regardless of the victim's age. *Id.* at 531. The Court disagreed, emphasizing the different point values corresponding to an offender's exploitation due to strength or size and an offender's exploitation due to age:[167]

> "We would first note that OV 7 distinguishes between exploitation through a difference in size or strength, which is scored at 5, and exploitation

[167] The same point values are assigned to OV 10 under the statutory guidelines.

> of agedness, which is scored at 15. We take this [point differential] to be an explicit recognition of the distinction between the decline in physical strength characteristic of advanced age, and the less easily articulated decline in aggressiveness in confrontational situations that also often accompanies advancing years. To fail to recognize this distinction would render nugatory OV 7 in the context of elderly victims, since virtually all exploitation of agedness would be ascribed to exploitation of physical infirmity, meaning that those who prey on the aged would receive more lenient sentences than recommended by the guidelines. The guidelines recognize and address exploitation of our senior citizens.
>
> In the present case, [the] defendant did not shout, 'I am exploiting you because you are a senior citizen.' In our opinion, there was no need for [the] defendant to so state her motivation; her actions clearly manifested such a motivation. Had the victim been twenty-eight rather than seventy-eight, regardless of her physical strength, we find it unlikely that she would have been all but forgotten in a bathroom, fearing for her life the entire fifteen minutes, while her knife-wielding assailant leisurely inventoried her possessions. In other words, had [the] defendant not immediately dismissed the possibility that the elderly victim would offer any resistance, which dismissal can only be attributed to her age, we believe that the victim would have been terrorized for a far shorter period of time." *Piotrowski*, 211 Mich App at 531-532.

M. OV 11—Criminal Sexual Penetration

1. Definitions/Scoring

OV 11 is scored only for crimes against a person. MCL 777.22(1). Determine which statements addressed by OV 11 apply to the offense and assign the point value indicated by the

applicable statement having the highest number of points. MCL 777.41(1).

Points	OV 11—Criminal sexual penetration
50	Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a).
25	One criminal sexual penetration occurred. MCL 777.41(1)(b).
0	No criminal sexual penetration occurred. MCL 777.41(1)(c).

- All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11. MCL 777.41(2)(a).

- Multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OVs 12 or 13.[168] MCL 777.41(2)(b). However, if any conduct is scored under OV 11, that conduct must not be scored under OV 12 and may be scored under OV 13 only if the conduct is gang-related or related to the offender's membership in an organized criminal group. MCL 777.42(2)(c); MCL 777.43(2)(c).

- The one penetration on which a first- or third-degree criminal sexual conduct offense is based must not be counted for purposes of scoring OV 11. MCL 777.41(2)(c).

2. Case Law Under the Statutory Guidelines

When scoring 50 points under OV 11, there must be sufficient "record evidence to support a finding that any charged or uncharged criminal sexual penetration arose out of the sentencing offense." *People v Goodman*, 480 Mich 1052 (2008); *People v Thompson (Bernard)*, 474 Mich 861 (2005).

The sexual penetration that is the basis of the sentencing offense may not be scored under OV 11, but a sexual penetration arising from the sentencing offense and on which a conviction separate from the sentencing offense is based is not precluded from consideration under OV 11. *People v McLaughlin*, 258 Mich App 635, 676 (2003). In *McLaughlin*, the defendant argued he was improperly scored 50 points for two

[168] OV 12 addresses criminal acts that occur within 24 hours of the sentencing offense and will not result in a separate conviction. OV 13 accounts for an offender's pattern of criminal conduct over a period of five years regardless of outcome.

penetrations when those penetrations resulted in separate CSC-I convictions, because the instructions for OV 11 prohibited scoring points for any penetration that formed the basis of a CSC-I or CSC-III conviction. *Id.* at 671-672. Because the defendant was convicted of three counts of CSC-I, the defendant argued that each penetration was the basis of its own conviction and could not be used in scoring the other convictions. *Id*.

Notwithstanding the ambiguity of the language used in MCL 777.41(2)(c), the Court concluded:

> "[T]he proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is first-degree or third-degree CSC. Under this interpretation, trial courts may assign points under [MCL 777.]41(2)(a) for 'all sexual penetrations of the victim by the offender arising out of the sentencing offense,' while complying with the mandate of [MCL 777.]41(2)(c), by not scoring points for *the one penetration* that forms the basis of a first- or third-degree CSC offense. Accordingly, trial courts are prohibited from assigning points for the one penetration that forms the basis of a first- or third-degree CSC offense that constitutes the sentencing offense, but are directed to score points for penetrations that did not form the basis of the sentencing offense." *McLaughlin*, 258 Mich App at 676.

See also *Cox (Jeffery)*, 268 Mich App at 455-456 (OV 11 was properly scored at 25 points where the defendant was convicted of two counts of CSC-I for penetrations arising from the same incident—the trial court properly scored the one penetration that did not form the basis of the sentencing offense, even though the defendant was separately convicted for both penetrations); *People v Matuszak*, 263 Mich App 42 (2004) (fifty points were appropriate under OV 11 where there was evidence of five penetrations).

In *People v Johnson (William)*, 474 Mich 96, 99-103 (2006), the Michigan Supreme Court further defined OV 11 as applied to cases in which a defendant is convicted of more than one count of CSC-III. In *Johnson (William)*, 474 Mich at 99-100, the trial court scored OV 11 at 25 points because the defendant had twice penetrated the victim. Like the defendant in *Cox (Jeffery)*, 268 Mich App 440, the defendant in *Johnson (William)* was charged with and convicted of CSC for each penetration.

Johnson (William), 474 Mich at 98. In *Johnson (William)*, however, the penetrations occurred on different dates, and therefore, neither of the penetrations arose from the same sentencing offense. *Id.* at 101-102. In the absence of any evidence that the defendant's conduct on one date arose from his conduct on the other date, the two penetrations did not arise from either of the two CSC-III offenses for which the defendant was sentenced. *Id*. Consequently, because the two penetrations in *Johnson (William)* did not arise from the sentencing offense, the trial court erred in scoring OV 11 at 25 points instead of zero points. *Id*.

OV 11 was properly scored at 25 points in Count 1 (penetration during the commission of a felony) "because [the] defendant was charged with only one penetration, yet he penetrated the female victim more than once during the making of the videotape" (evidence showed that the defendant penetrated the victim with his mouth and with a sex toy). *Wilkens*, 267 Mich App at 742-743. OV 11 was also properly scored at 25 points in Count 2 (aiding and abetting in the production of child sexually abusive material) where the evidence established that the defendant aided and abetted the male victim's penetration of the female victim and that the defendant also penetrated the female victim at least one other time. *Id.* at 743. See also *People v Johnson* (*Todd*), 298 Mich App 128, 130-132 (2012) (the trial court properly scored 50 points for OV 11 based on evidence that the defendant and the victim engaged in sexual activity involving penetrations on several occasions over a three-year period beginning when the victim was 13 years old; although "[the victim] did not recall how many times she had sex with [the] defendant[,]" her testimony that they engaged in intercourse, fellatio, and cunnilingus "almost every time they were together" constituted "record evidence establish[ing] that two sexual penetrations arose out of the penetrations forming the basis of the sentencing offenses[]").

Because "fellatio," for purposes of first-degree criminal sexual conduct, "'requires entry of a penis into another person's mouth[,]'" the trial court erred in scoring 25 points for OV 11 where there was evidence that the five-year-old victim licked the defendant's penis, but no evidence that the defendant's penis entered her mouth. *People v McCloud*, unpublished opinion per curiam of the Court of Appeals, issued September 8, 2011 (Docket No. 298504),[169] quoting *People v Reid*, 233 Mich App 457, 479-480 (1999).

[169] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

N. OV 12—Contemporaneous Felonious Criminal Acts

1. Definitions/Scoring

OV 12 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22(1)-(5). Score OV 12 by determining which statements apply to the circumstances of the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.42(1).

Points	OV 12—Number of contemporaneous felonious criminal acts
25	Three or more contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(a).
10	Two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b).
10	Three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(c).
5	One contemporaneous felonious criminal act involving a crime against a person was committed. MCL 777.42(1)(d).
5	Two contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(e).
1	One contemporaneous felonious criminal act involving any other crime was committed. MCL 777.42(1)(f).
0	No contemporaneous felonious criminal acts were committed. MCL 777.42(1)(g).

- A felonious criminal act is contemporaneous if both of the following circumstances exist:
  - the criminal act occurred within 24 hours of the sentencing offense, MCL 777.42(2)(a)(*i*), and
  - the criminal act has not and will not result in a separate conviction, MCL 777.42(2)(a)(*ii*).
- Violations of MCL 750.227b (felony-firearm or possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony) should not be counted when scoring this variable. MCL 777.42(2)(b).
- Conduct scored in OV 11 must not be scored under this variable. MCL 777.42(2)(c).

2. Case Law Under the Statutory Guidelines

The phrase "crime[] against a person" as used in MCL 777.42(1) applies only to offenses falling within that offense category under MCL 777.5 and MCL 777.11–MCL 777.19. See *Bonilla-Machado*, 489 Mich at 422 n 19.[170]

"[W]hen scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Light*, 290 Mich App 717, 723 (2010). In *Light*, 290 Mich App at 720, the defendant pleaded guilty to unarmed robbery, and the trial court assessed five points for OV 12 (two or more contemporaneous felonious criminal acts): (1) carrying a concealed weapon (which was not in dispute), and (2) either larceny from a person or larceny in a building (the lower court record was unclear as to which form of larceny its ultimate scoring decision was based). The Court of Appeals determined that "for OV 12 scoring purposes, [the defendant's] physical act of wrongfully taking [the victim's] money while inside a grocery store is the same single act for all forms of larceny—robbery, larceny from a person, and larceny in a building. Therefore, even though the trial court sentenced [the defendant] for unarmed robbery, [the defendant's] sentencing offense included all acts 'occur[ring] in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.'" *Id*. at 725, quoting MCL 750.530(2). The Court held that "[b]ecause [the defendant's] sentencing offense was unarmed robbery, neither form of larceny could be used as the contemporaneous felonious act needed to increase [the defendant's] OV 12 score." *Light*, 290 Mich App at 726. Stated another way, "the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense." *Id*. "Because both forms of larceny served as the basis of [the defendant's] sentencing offense, the trial court should not have scored five points for [the defendant's] unarmed [] robbery conviction under OV 12." *Id*.

[170] However, see *Bonilla-Machado*, 489 Mich at 428-429, where the Court noted that "[t]he plain language of MCL 777.42 indicates the Legislature's express intent to allow sentencing courts to consider crimes within *all* the offense categories" whenever the statutory language does not expressly limit the sentencing court to considering only "crimes against a person." Specifically, the statutory language in MCL 777.42(1)(c), MCL 777.42(1)(e), and MCL 777.42(1)(f) directs the sentencing court to score points under OV 12 for "contemporaneous felonious criminal acts involving *other* crimes" committed by the defendant.

"[A]ll conduct that can be scored under OV 12 must be scored under that OV before proceeding to score OV 13." *People v Bemer*, 286 Mich App 26, 28 (2009). Conduct that is properly scored under OV 12 may not be omitted from OV 12 simply because scoring the conduct under OV 13 would yield a higher OV total. *Id.* at 28.

In scoring OV 12, a trial court "[is not] free to look at the substance of the crime rather than the offense category designations under the guidelines themselves[.]" *People v Wiggins (Dale)*, 289 Mich App 126, 130 (2010). In *Wiggins (Dale)*, 289 Mich App at 127-128, the defendant was charged with two counts of attempting to arrange for child sexually abusive activity, MCL 750.145c(2) (designated as crimes against a person under MCL 777.16g), and two counts of disseminating sexually explicit matter to a minor, MCL 722.675 (designated as crimes against public order under MCL 777.15g). After the defendant pleaded no contest to one count of attempting to arrange for child sexually abusive activity, the trial court assessed 25 points for OV 12 (three or more contemporaneous felonious criminal acts involving crimes against a person were committed). *Wiggins (Dale)*, 289 Mich App at 127-128; MCL 777.42(1)(a). The Court of Appeals held that OV 12 should have been scored at ten points (three or more contemporaneous felonious criminal acts involving other crimes were committed), because only one of the other three charges was designated as a crime against a person, and the other charges were designated as crimes against public order. *Wiggins (Dale)*, 289 Mich App at 130-131; MCL 777.42(1)(c). The trial court erred in justifying a score of 25 points for OV 12 based on its conclusion that "all three of the additional charges were crimes involving other persons, namely the minor children involved." *Wiggins (Dale)*, 289 Mich App at 127-128, 130-131. The Court of Appeals clarified that "only crimes with the offense category designated as 'person' under MCL 777.11 to MCL 777.18 can be considered 'crimes against a person' for purposes of scoring OV 12[.]" *Wiggins (Dale)*, 289 Mich App at 131.

Where the defendant was in possession of "numerous sexually explicit pictures" of the three child victims "at the time and place where he committed CSC–I against [one of the victims[,]" and where "he was never charged as a result of the possession[,]" the trial court properly scored 25 points for OV 12. *People v Waclawski*, 286 Mich App 634, 686-687 (2009). See also *People v Mull*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2013 (Docket No. 309452)[171]

[171] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

(citing *Waclawski*, 286 Mich App at 686-687, and holding that where the defendant sent an e-mail containing ten sexually explicit images of minor boys, but "the trial court . . . relied on only one photo in finding a factual basis for the [defendant's] plea" of no contest to one count of distributing or promoting child sexually abusive material and one count of using a computer to commit a crime, 25 points were properly scored for OV 12; "because each of the remaining nine images could support a separate charge . . . , the trial court's determination that there were at least three contemporaneous yet uncharged offenses that justified scoring OV 12 was not error[]").

Where the defendant possessed "at least 100 distinct images of child pornography contained in . . . four [computer] disks[]" but was bound over on only one count of possession of child sexually abusive material and one count of using a computer to commit a crime, 25 points were properly scored for OV 12; either "the number of images (over 100) or the number of disks (four) were sufficient to find that [the] defendant possessed three or more different child sexually abusive materials, which in turn is enough to satisfy the numerical threshold for [either] OV 12 [or] OV 13." *People v Loper*, 299 Mich App 451, 454-455, 460-461 (2013) (rejecting the defendant's argument that MCL 750.145c(4), governing the felony offense of possession of child sexually abusive material, "[was] unconstitutionally vague because both a single image . . . and a collection of images . . . are prohibited, resulting in a variance in the number of criminal charges that could be brought by prosecutors in cases in which there is a collection of separate images of child sexually abusive material[and] . . . that because of this ambiguity, the trial court improperly assessed 25 points for OV 12 (and would have improperly scored OV 13 had points been assigned), despite the fact that he was bound over on only one count[]").

Where the defendant possessed "at least 100 distinct images of child pornography contained in . . . four [computer] disks[,]" 25 points were properly scored for OV 12 even though "the majority of the child sexually abusive material was downloaded onto the four disks . . . over a year before the date of the offense[.]" *Loper*, 299 Mich App at 454, 461-463 (because "the facts presented to the trial court form[ed] the basis of a reasonable inference that [the] defendant possessed the disks . . . beginning in 2007 or before, and that he possessed all four disks . . . on October 23, 2008[(which the trial court listed as the offense date),] . . . [i]t was reasonable for the trial court to infer that [the] defendant possessed the images within 24 hours of the offense date[;] . . . [t]hus, there was evidence

supporting the trial court's finding that there were three or more contemporaneous acts of possession of child sexually abusive material under MCL 777.42(2)(a)[]").

Lockridge **Error.** Because OV 12 "specifically states that it cannot be scored for criminal acts for which there was a conviction, . . . any criminal act scored under OV 12 would not be a criminal act found by the jury[;]" accordingly, where there was no indication in the record that the defendant admitted committing the contemporaneous felonious criminal acts supporting the score of 10 points for OV 12, and where removing the 10 points resulted in a change in the applicable guidelines range, he was entitled to a remand for possible resentencing under *People v Lockridge*, 498 Mich 358, 395, 397 (2015), and *United States v Crosby*, 397 F3d 103 (CA 2, 2005), even though the "evidence was [otherwise] sufficient to support" the score. *People v Norfleet*, ___ Mich App ___, ___ (2016).

O. OV 13—Continuing Pattern of Criminal Behavior

1. Definitions/Scoring

OV 13 is scored for all felony offenses subject to the statutory sentencing guidelines. MCL 777.22(1)-(5). Determine which statements addressed by OV 13 apply to the circumstances of the offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.43(1).[172]

Points	OV 13—Continuing pattern of criminal behavior
50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a).
25	The offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang. MCL 777.43(1)(b). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER APRIL 1, 2009. SEE 2008 PA 562.
25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c).

10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(*i*)-(*iii*) or MCL 333.7403(2)(a)(*i*)-(*iii*). MCL 777.43(1)(d). THE UNDERLINED PORTION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER MARCH 1, 2003. SEE 2002 PA 666.
10	The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. Formerly MCL 777.43(1)(d); deleted by 2008 PA 562, effective April 1, 2009. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE APRIL 1, 2009. SEE 2008 PA 562.
10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of MCL 333.7401(2)(a)(*i*)-(*iii*) or MCL 333.7403(2)(a)(*i*)-(*iii*). MCL 777.43(1)(e). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER MARCH 1, 2003. SEE 2002 PA 666.
5	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. MCL 777.43(1)(f).
0	No pattern of felonious criminal activity existed. MCL 777.43(1)(g).

- To score this variable, all crimes within a period of five years, *including the sentencing offense*, must be counted without regard to whether the offense resulted in a conviction. MCL 777.43(2)(a).

- The existence of an organized criminal group may be reasonably inferred from the facts surrounding the sentencing offense, and the group's existence is more important than the presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication demonstrated by the criminal group. MCL 777.43(2)(b).

- Do not consider conduct scored in OVs 11 or 12 unless the offense was related to membership in an organized criminal group, or unless the offense was gang-related. MCL 777.43(2)(c).[173]

- Score 50 points only if the sentencing offense is first-degree criminal sexual conduct. MCL 777.43(2)(d).

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[172] Effective March 1, 2003, 2002 PA 666 amended the instructions for OV 13 to include references to specific controlled substance offenses. Additionally, effective April 1, 2009, 2008 PA 562 amended the instructions for OV 13 to replace the provision allocating ten points for a pattern of activity related to "membership in an organized criminal group" with a provision allocating 25 points for a pattern of activity related to gang membership. Language appearing in the shaded areas of the chart represents the variable as it applies to offenses occurring before or after the effective date(s) of the amendment(s), as indicated within the chart.

[173] "Gang-related" conduct was added by 2008 PA 562, effective April 1, 2009.

- Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring this variable.[174] MCL 777.43(2)(e).

- Only one crime involving the same controlled substance may be counted under this variable.[175] For example, conspiracy and a substantive offense involving the same amount of controlled substances cannot both be counted under OV 13. Similarly, possession and delivery of the same amount of controlled substances may not be counted as two crimes under OV 13. MCL 777.43(2)(f).

2. Case Law Under the Statutory Guidelines

"[A]ll conduct that can be scored under OV 12 must be scored under that OV before proceeding to score OV 13." *Bemer*, 286 Mich App at 28. That is, "when scoring OV 13, the trial court cannot consider any conduct that was or *should have been* scored under [OV 12]." *Bemer*, 286 Mich App at 35.

The five-year period to which OV 13 refers must include the sentencing offense. *People v Francisco*, 474 Mich 82, 86-87 (2006). OV 13 assesses points when a sentencing offense is "part of a pattern of felonious activity." MCL 777.43(1)(a)-(g). According to MCL 777.43(2)(a), a pattern consists of three or more crimes committed in a five-year period "including the sentencing offense without regard to whether a conviction resulted from the offense." In *Francisco*, 474 Mich at 88, the trial court scored OV 13 at 25 points for the defendant's three previous felonies that occurred in 1986, even though the offense for which the defendant was being sentenced occurred in 2003.

Based on the plain language of MCL 777.43, the *Francisco* Court explained:

> "[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.
>
> * * *
>
> "Because MCL 777.43(2)(a) states that the sentencing offense 'shall' be included in the five-

[174] Effective March 1, 2003. 2002 PA 666.

[175] Effective March 1, 2003. 2002 PA 666.

> year period, the sentencing offense *must* be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense." *Francisco*, 474 Mich at 87.

"[A] court may consider [a] charge[] against a defendant [that was] dismissed as a result of a plea agreement in scoring OV 13." *People v Nix*, 301 Mich App 195, 205 (2013). Moreover, a charge dismissed as a result of a plea agreement may be considered in assessing 25 points under MCL 777.43(1)(c), even if the plea agreement resulted in an "ultimate conviction . . . for a crime that is not a crime against a person." *Nix*, 301 Mich App at 203-206 (where the evidence supported the trial court's "determin[ation] that [the] defendant had committed an act of felonious assault [(a crime against a person)] three days before the sentencing offenses[,]" the charged felonious assault was properly considered in assessing 25 points for OV 13, even though the defendant ultimately pleaded guilty of a different offense (a crime against public safety) in connection with the incident).[176]

An offense that is statutorily designated as a "crime against public safety" under MCL 777.5 and MCL 777.11–MCL 777.19 may not also be considered a "crime against a person" to establish a continuing pattern of criminal behavior for purposes of scoring OV 13. *Bonilla-Machado*, 489 Mich at 415-416, 422. In *Bonilla-Machado*, 489 Mich at 424-425, the defendant was convicted of two counts of assaulting a prison employee, an offense that is designated under MCL 777.16j as a crime against public safety. The defendant had two prior convictions for offenses designated as crimes against a person and one prior conviction for an offense designated as a crime against public safety. *Bonilla-Machado*, 489 Mich at 425 n 20. The trial court assessed ten points for OV 13 under MCL 777.43(1)(d) ("[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . ."). *Bonilla-Machado*, 489 Mich at 425. The

[176] The *Nix* Court stated that a score under the sentencing guidelines "must [be upheld] . . . if there is any supporting evidence." *Nix*, 301 Mich App at 204, citing *People v Hornsby*, 251 Mich App 462, 468 (2002). However, in *People v Hardy (Donald)*, 494 Mich 430, 437-438, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016, the Michigan Supreme Court clarified that, contrary to several Court of Appeals decisions, "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines[;]" rather, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence[]" (citations omitted). "[T]he standards of review traditionally applied to the trial court's scoring of the variables remain viable after [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Steanhouse*, 313 Mich App 1, 38 (2015), lv gtd 499 Mich 934 (2016), citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438 (additional citation omitted).

Court of Appeals increased the defendant's OV 13 score to 25 points under MCL 777.43(1)(c) ("[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person"), explaining that "'[a]lthough MCL 777.16j indicates that assault of a prison guard is a crime against public safety, this offense is *also* a crime against a person because, obviously, a prison guard is a person.'" *Bonilla-Machado*, 489 Mich at 425, quoting *People v Bonilla-Machado*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2009 (Docket No. 287605), slip op p 4.

The Michigan Supreme Court, noting that "MCL 777.21(1)(a) explicitly instructs a court to first '[f]ind the *offense category* for the offense from' MCL 777.11 through [MCL] 777.19 and then 'determine the offense variables to be scored for that *offense category*[,]'" concluded that "[t]he use of the named offense categories throughout the sentencing guidelines chapter indicates legislative intent to have the offense categories applied in a uniform manner, including when they are applied in the offense variable statutes." *Bonilla-Machado*, 489 Mich at 426. Accordingly, "a felony designated as a 'crime against public safety' may not be used to establish a 'pattern of felonious criminal activity involving 3 or more crimes against a person,' MCL 777.43(1)(c), for purposes of scoring OV 13." *Bonilla-Machado*, 489 Mich at 416. Because "the combination of designated crimes needed to assess 5 to 50 points for OV 13 [was] not present, . . . the only allowable score under the categories designated in the statute [was] zero points." *Id*. at 427. See also *People v Pearson (Jermaine)*, 490 Mich 984 (2012) (because "conspiracy is classified as a 'crime against public safety[]'" under MCL 777.18, conspiracy to commit armed robbery may not be considered when scoring OV 13, even though armed robbery is classified under MCL 777.16y as a "'crime[] against a person'"; MCL 777.21(4) "does not allow the offense category underlying the conspiracy to dictate the offense category of the conspiracy itself for purposes of scoring OV 13[]").

Juvenile adjudications may be included when scoring OV 13. *People v Harverson*, 291 Mich App 171, 180 (2010). "[T]he plain language of the statute does not require a criminal conviction to score [ten] points, but only requires 'criminal activity.' A juvenile adjudication clearly constitutes criminal activity because 'it amounts to a violation of a criminal statute, even though that violation is not resolved in a "criminal proceeding."'" *Id.* at 180, quoting *People v Luckett*, 485 Mich 1076, 1076-1077 (2010) (Young, J., concurring).

OV 13 was properly scored at 25 points where the defendant was convicted of two felony offenses against a person and had two CSC-I charges pending at the time he was sentenced. *Wilkens*, 267 Mich App at 743-744.

"Before . . . alleged [out-of-state] crimes may be used to score [25 points for] OV 13[under MCL 777.43(1)(c)], the prosecution must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they are properly classified as felony 'crimes against a person,' MCL 777.43(1)(c), and that they occurred 'within a 5-year period' of the sentencing offense, MCL 777.43(2)(a)." *People v Butler*, 498 Mich 859, 859 (2015), citing *People v Hardy (Donald)*, 494 Mich 430 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016.

An offense for which a defendant is acquitted may still be considered for purposes of scoring OV 13 if it is established by a preponderance of the evidence that the defendant committed the offense. *People v Jenkins (Terrell)*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2008 (Docket No. 276763).[177] See also *People v Clark (Dale)*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003 (Docket No. 240139) (OV 13 was properly scored at 25 points where the evidence established that the defendant was in possession of items taken in three home invasions from which the defendant's sentencing offenses stemmed, even though the defendant was not convicted of home invasion).

"[T]he trial court [properly] considered a 2008 charge of bank robbery, which was dismissed, as the third offense to support [a] 10-point score for OV 13[]" in sentencing the defendant for a 2010 robbery at the same bank. *People v Earl (Ronald)*, 297 Mich App 104, 106, 110-111 (2012), aff'd on other grounds 495 Mich 33 (2014) ("[a]lthough the 2008 case was dismissed in the district court, there was no indication at sentencing that 'the 2008 allegation was dismissed for want of probable cause[,]'" and "[i]n light of the unchallenged evidence presented at sentencing regarding the 2008 bank robbery offense, there was enough evidence for the trial court to score 10 points for OV 13[]").

"[M]ultiple concurrent offenses arising from the same incident are properly used in scoring OV 13[.]" *People v Gibbs (Phillip)*, 299 Mich App 473, 487-488 (2013) ("while [the defendant's convictions of two counts of armed robbery and one count of

[177] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

unarmed robbery] arose out of a single criminal episode, [the defendant] committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity[]" for which 25 points were properly scored).

Where the "defendant had pled guilty . . . to two charges of home invasion related to offenses committed [before the sentencing offense] . . . [and d]efense counsel stipulated to these convictions at sentencing[,] . . . the facts underlying the scoring of OV 13 [based on these offenses as part of a pattern of felonious activity] were admitted by [the] defendant, and the points scored for OV 13 [did not need to] be subtracted in considering [the] defendant's total OV score under [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Jackson (Kevin) (On Reconsideration)*, ___ Mich App ___, ___ (2015).

P. OV 14—Offender's Role

1. Definitions/Scoring

OV 14 is scored for all felony offenses to which the guidelines apply. MCL 777.22(1)-(5). Determine which statement applies to the sentencing offense and assign the point value indicated by the applicable statement. MCL 777.44(1).

Points	OV 14—Offender's role
10	The offender was a leader in a multiple offender situation. MCL 777.44(1)(a).
0	The offender was not a leader in a multiple offender situation. MCL 777.44(1)(b).

- Consider the entire criminal transaction in which the sentencing offense occurred when determining the offender's role. MCL 777.44(2)(a).
- In cases involving three or more offenders, more than one offender may be considered a leader. MCL 777.44(2)(b).

2. Case Law Under the Statutory Guidelines

"[T]he plain meaning of 'multiple offender situation' as used in OV 14 is a situation consisting of more than one person violating the law while part of a group[;]" there is no requirement that "'there must be more than one person actively participating in the charged offense(s)[.]'" *People v*

Jones (Byron), 299 Mich App 284, 286-288 (2013), vacated in part on other grounds 494 Mich 880 (2013) (evidence "that at least one other man[] . . . accompanied [the] defendant in the mall to confront [another] group of young men[]" and that the defendant and the other man "escalated the confrontation . . . when they both drew guns and [the] defendant started firing[]" supported the trial court's score of ten points for OV 14, even though "no other [participants in the confrontation] were placed on trial . . . [and the] defendant was the only person charged in connection with the shooting[]").

"[M]erely posing a greater threat to a joint victim is [not] sufficient to establish an individual as a leader within the meaning of OV 14, at least in the absence of any evidence showing that the individual played some role in guiding or initiating the [criminal] transaction itself." *People v Rhodes (Anthony) (On Remand)*, 305 Mich App 85, 90 (2014) (although "[the] defendant's exclusive possession of a gun during the criminal transaction [was] *some* evidence of leadership, . . . it [did] not meet the [applicable] preponderance of the evidence standard" where "the evidence [did] not show that [the] defendant acted first, gave any directions or orders to [his accomplice], displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in [the accomplice's] participation in the criminal transaction, or was otherwise a primary causal or coordinating agent[]").

Ten points were appropriate under OV 14 where, although the defendant did not drive the automobile in which the offenders rode, the defendant was the oldest among the group of offenders involved in the sexual assault, he was the first to make sexual contact with the victim and had the most sexual contact with her, and his was the only DNA that matched the semen in the victim's vaginal area. *Apgar*, 264 Mich App at 330-331.

Ten points were properly scored for OV 14 where there was evidence "that it was [the] defendant who first expressed the idea of committing an armed robbery[;] . . . who selected [a pizza restaurant] and directed a female friend to place [a] false order for him, giving her the address to the abandoned house where the crime was to take place[;] . . . [who] initiated the robbery[;] . . . and . . . who held [a] BB gun to the victim's face during the robbery." *People v Ackah-Essien*, 311 Mich App 13, 39 (2015).

Where the defendant's PSIR indicated that his sister was involved in his effort to take his former girlfriend and their

children out of state, ten points were properly scored for OV 14; it appeared from the PSIR that the sister aided and abetted the defendant in committing unlawful imprisonment and, therefore, that she could be viewed as an "offender" and the defendant as a "leader" within the meaning of MCL 777.44. *People v Hernandez-Perez*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2011 (Docket No. 297917), rev'd in part on other grounds 490 Mich 916 (2011).[178]

OV 14 was improperly scored where evidence showed that the defendant was the sole offender involved in the sentencing offense; the fact that the defendant's wife and children lived at the same residence and frequent visits were made by numerous other people is not evidence that a defendant was the leader in a multiple offender situation. *People v Black (Tempy)*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 2004 (Docket No. 248613).

A police informant acting in concert with law enforcement is not "committing a crime" when the informant's conduct is authorized by the police. *People v Rosenberg*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2005 (Docket No. 251930), slip op p 7 (undercover police informant acting as a buyer in purchasing cocaine from the defendant was not an "offender" for purposes of OV 14). Where the defendant was the only other person involved in the controlled buy, the circumstances do not constitute a "multiple offender situation" as intended by OV 14. *Id*.

OV 14 is properly scored at ten points when the defendant is one of two offenders (in a group of three or more offenders) taking an active role in the commission of the crime and neither one of the two primary participants establishes himself or herself as the leader. *People v Brewer (Michael)*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2004 (Docket No. 242764), slip op p 4. In *Brewer (Michael)*, slip op at 4, ten points were appropriate where the defendant was one of two men with guns who demanded money from the hotel clerk and tied him up in the hotel manager's office, and where testimony indicated that the third participant's purpose in the criminal endeavor was unclear to the victim who suggested that the third person was "maybe a watch out."

The defendant was the leader for purposes of OV 14 in a group's attempt to rob the victim where the defendant "took initiative" in the robbery attempt and "was the first person to

[178] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

throw a punch." *People v Scott (Paris)*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2004 (Docket No. 243418).

Although "there [were] facts that may indicate that [an 18-year-old codefendant] was a leader[]" in disseminating sexually explicit matter to a minor, the trial court did not clearly err in assessing 10 points against the 35-year-old defendant under OV 14; the defendant was "significantly older than [the codefendant]; [the defendant] owned and drove the van in which he picked the girls up and in which the sexual acts occurred; and it [was] reasonable to assume that [the defendant] purchased the alcohol[]" that was procured during the criminal episode. *People v Lockett*, 295 Mich App 165, 184-185 (2012).

Although two of the three victims of an armed robbery did not "believe[] that either [the defendant or his accomplice] was 'the leader,' . . . the trial court did not err by assessing 10 points for OV 14[]" where "[t]here was evidence that [the defendant] was the only perpetrator with a gun, did most of the talking, gave orders to [the accomplice], and checked to make sure [the accomplice] took everything of value[,]" and where the testimony of the accomplice and the third victim supported the finding that the defendant was the leader. *People v Gibbs (Phillip)*, 299 Mich App 473, 493-494 (2013).

Q. OV 15—Aggravated Controlled Substance Offenses[179]

1. Definitions/Scoring

OV 15 is only scored for felony offenses involving a controlled substance. MCL 777.22(3). Score OV 15 by determining which statements apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.45(1).[180]

Pts	OV 15—Aggravated controlled substance offenses
100	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(a).

[179] See the Michigan Judicial Institute's *Controlled Substances Benchbook* for detailed information about controlled substance offenses.

75	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 grams or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(b).
50	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(c).
50	The offense involved traveling from another state or country to this state while in possession of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7212 or MCL 333.7214 with the intent to deliver that mixture in this state. MCL 777.45(1)(d). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER MARCH 19, 2014. 2013 PA 203.
25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender. MCL 777.45(1)(e).
20	The offense involved the sale, delivery, or possession with intent to sell or deliver 225 grams or more of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE MARCH 1, 2003. 2002 PA 666.
15	The offense involved the sale, delivery, or possession with intent to sell or deliver 50 or more grams but less than 225 grams of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE MARCH 1, 2003. 2002 PA 666.
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants. MCL 777.45(1)(f).
10	The offense is a violation of MCL 333.7401(2)(a)(*i*)-(*iii*) pertaining to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) and was committed in a minor's abode, settled home, or domicile, regardless of whether the minor was present. MCL 777.45(1)(g).

[180] The statute governing point allocations for OV 15, MCL 777.45, was amended by 2002 PA 666, effective March 1, 2003, and by 2013 PA 203, effective March 19, 2014. Unshaded areas in the OV 15 chart contain the instructions for scoring OV 15 for offenses occurring on or after March 1, 2003, except as otherwise indicated with respect to the 50-point score under MCL 777.45(1)(d), which applies only to offenses occurring on or after March 19, 2014. Language appearing in the shaded areas of the chart represents the variable as it applies to offenses that occurred before March 1, 2003.

5	The offense involved the delivery or possession with the intent to deliver marijuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking. MCL 777.45(1)(h).
0	The offense was not an offense described in the categories above. MCL 777.45(1)(i).

- "Deliver" is the actual or constructive transfer of a controlled substance from one person to another person without regard to remuneration. MCL 777.45(2)(a).

- A "minor" is an individual 17 years of age or less. MCL 777.45(2)(b).

- "Trafficking" is the sale or delivery of actual or counterfeit controlled substances on a continuing basis to another person or persons for further distribution. MCL 777.45(2)(c).

2. Case Law Under the Statutory Guidelines

"OV 15 must be scored [based solely on] the amount of [controlled substance applicable to] . . . the sentencing offense, and cannot be scored on the basis of other drug offenses committed during a similar period but dismissed as part of [a] plea agreement[;]" accordingly, 50 points were improperly scored under OV 15 based on "amounts of cocaine related to dismissed counts but wholly unrelated to the cocaine possession 'sentencing offense' to which [the] defendant pleaded guilty." *People v Gray (Orlando)*, 297 Mich App 22, 24, 28 (2012). In *Gray (Orlando)*, 297 Mich App at 23-25, the defendant pleaded guilty to certain charges, including a charge of possession with intent to deliver less than 50 grams of cocaine that was based on a small amount of cocaine found in his car, in exchange for dismissal of other charges, including two major controlled substance charges that were based on a large amount of cocaine that was discovered in a motel room. The trial court, noting that the defendant possessed both the smaller and larger amounts of cocaine at the same time, assessed 50 points under OV 15, distinguishing *People v McGraw*, 484 Mich 120 (2009), "on the basis that *McGraw* rejected for scoring consideration events that transpired *after* the sentencing offense was completed[.]" *Gray (Orlando)*, 297 Mich App at 27-28 (emphasis supplied). The Court of Appeals reversed, holding that because OV 15 does not specifically provide otherwise, it must be scored based solely on the sentencing offense. *Id*. at 28, 33-34. Noting that "[*McGraw*, 484

Mich at 122, 130-134,] . . . requires a court to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was charged and later dismissed or dropped, regardless of the sequence in which the conduct transpired[,]" the *Gray (Orlando)* Court concluded that although the greater amount of cocaine could be considered as the basis for a departure from the sentencing guidelines, it could not be considered in scoring OV 15. *Id*. at 32-34.

Dicta appearing in a case remanded for articulation of a substantial and compelling reason for departure under the previously-mandatory guidelines indicates that, for purposes of scoring the guidelines, a person may "deliver" a controlled substance by injecting the substance into another person. *People v Havens*, 268 Mich App 15, 18 (2005). According to the Court:

> "We assume that if injection constitutes delivery for purposes of conviction,[181] the same act constitutes delivery for purposes of scoring offense variable 15 (aggravated controlled substance offenses), MCL 777.45, at 25 points for delivery of a controlled substance other than marijuana to a minor." *Havens*, 268 Mich App at 18.

"A proper reading of MCL 777.45(1)(h) reveals two alternative bases for scoring [OV 15] at five points: (1) when the offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or counterfeit controlled substance; and (2) when the offense involved possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking." *People v Jackson (Kelly)*, 497 Mich 857, 858 (2014) (holding that five points were properly scored for OV 15 "on the ground that there was evidence of delivery of . . . drugs[]").

Five points were properly scored for OV 15 where "[the d]efendant admitted ownership of cocaine and marijuana, and admitted that he sold those substances to others. Packaging materials and a scale of the type used to weigh narcotics were found in [the] defendant's home, and [the] defendant's mother admitted that her son was selling something out of her home." *People v Kennedy (Terrell)*, unpublished opinion per curiam of

[181] The *Havens* Court cited *People v Schultz*, 246 Mich App 695, 701-709 (2001), as support for the conclusion that "delivery of a controlled substance may be accomplished by injecting it into another person."

the Court of Appeals, issued January 29, 2008 (Docket No. 275753).[182]

Five points were proper where the defendant was convicted of possession with intent to deliver less than 50 grams of cocaine. *People v Scott (Willie)*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2004 (Docket No. 248764), slip op p 3. The trial court scored OV 15 at five points because the amount of cocaine and its packaging (pieces of crack cocaine were individually wrapped) indicated that the defendant intended to sell or deliver a controlled substance having value or under circumstances that indicated he was involved in trafficking. *Scott (Willie)*, slip op at 1, 3; MCL 777.45(1)(g).

R. OV 16—Property Obtained, Damaged, Lost, or Destroyed

1. Definitions/Scoring

OV 16 is scored for all felony offenses under the sentencing guidelines except those involving a controlled substance. MCL 777.22(2), MCL 777.22(4), and MCL 777.22(5). When the offense is a crime against a person, OV 16 is scored only for a violation or attempted violation of MCL 750.110a (home invasion). MCL 777.22(1). Score OV 16 by determining which statements addressed by the variable apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.46(1).

Points	OV 16—Degree of property damage
10	Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged. MCL 777.46(1)(a).
10	The property had a value of more than $20,000 or had significant historical, social, or sentimental value. MCL 777.46(1)(b).
5	The property had a value of $1,000 or more but not more than $20,000. MCL 777.46(1)(c).
1	The property had a value of $200 or more but not more than $1,000. MCL 777.46(1)(d).
0	No property was obtained, damaged, lost, or destroyed, or the property had a value of less than $200. MCL 777.46(1)(e).

[182] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1),

- In cases involving multiple offenders or multiple victims, the appropriate point total may be determined by aggregating the value of property involved in the offense, including property involved in uncharged offenses or property involved in charges dismissed under a plea agreement. MCL 777.46(2)(a).

- Use the value of the property to score this variable in cases where the property was unlawfully obtained, lost to the lawful owner, or destroyed. If the property was damaged, use the amount of money necessary to restore the property to its pre-offense condition. MCL 777.46(2)(b).

- Money or property involved in admitted but uncharged offenses or in charges dismissed under a plea agreement may be considered in scoring this variable. MCL 777.46(2)(c).

2. Case Law Under the Statutory Guidelines

"OV 16 [is] to be scored when tangible property that was already possessed by a particular owner was unlawfully obtained, damaged, lost or destroyed[;] . . . [t]herefore, . . . the definition of the term 'loss' or 'lost' [as used in MCL 777.46] does not encompass a person's loss of a right or expectation." *People v Hershey*, 303 Mich App 330, 340-341 (2013) (holding that the defendant's failure "to fulfill [his children's] legal expectation of receiving child support because he was unable to make the [court-ordered] payments[]" did not support a score of five points for OV 16).

Additionally, where "[t]he record [was] void of any evidence[] . . . to refute that [the] defendant was unemployed and unable to pay[,]" his failure to make court-ordered child support payments did not support a score of five points for OV 16 on the basis that property was "obtained unlawfully" within the meaning of MCL 777.46(2)(b). *Hershey*, 303 Mich App at 338 (noting that "[i]f [the] defendant did not have money, he [could not] be said to have retained or obtained money; a legal obligation to pay money [did] not translate to possession of the money owed[]").[183]

Where the sentencing offense was armed robbery, MCL 750.529, OV 16 should not have been scored because armed

[183] The *Hershey* Court "save[d] for another day[] the issue of whether a defendant who actually possesses the money or means needed to pay child support and who simply elects not to do so can be considered to have 'unlawfully obtained' property under MCL 777.46." *Hershey*, 303 Mich App at 338 n 9.

robbery is a crime against a person, and for crimes against a person, OV 16 is scored only when the violation or attempted violation involves MCL 750.110a (home invasion). MCL 777.22(1); *People v Miller (Keothes)*, unpublished opinion per curiam of the Court of Appeals, issued October 28, 2003 (Docket No. 240613).[184]

A family's attachment to the family pet is the sort of intangible value of property contemplated by OV 16's point assignment for damage or destruction to property with "significant sentimental value." *People v Kruithoff*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2003 (Docket No. 242739).

The monetary amounts reflected in the statutory language governing OV 16 do not require submission of exacting or itemized proof of the property's value. See *People v Rosario*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2003 (Docket No. 236965) (where testimony established that a door had been broken off its hinges, a mattress was ruined, and a phone line had been pulled off the wall, the Court of Appeals found that there was sufficient evidence showing that the property damage met the minimum amount of $200 for purposes of scoring OV 16).

The scoring of five points for OV 16 over the defendant's objection was erroneous under *People v Lockridge*, 498 Mich 358 (2015), "because the jury was only required to find that [the] defendant intended or did commit a larceny, not a larceny of a specific value, . . . [and the facts] were not admitted by [the] defendant[;]" however, because "[r]educing [the] defendant's OV score by 5 points . . . would not alter [his] minimum sentencing guidelines range[,] . . . remand [was] not required under *Lockridge*." *People v Jackson (Kevin) (On Reconsideration)*, ___ Mich App ___, ___ (2015) (citations omitted).

S. OV 17—Degree of Negligence Exhibited

1. Definitions/Scoring

OV 17 is scored only under very specific circumstances: when the offense is a crime against a person *and* the crime involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1). Determine which statements apply

[184] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

to the offense and assign the point value indicated by the statement having the highest number of points. MCL 777.47(1).

Points	OV 17—Degree of negligence exhibited
10	The offender showed a wanton or reckless disregard for the life or property of another person. MCL 777.47(1)(a).
5	The offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown. MCL 777.47(1)(b).
0	The offender was not negligent. MCL 777.47(1)(c).

- If points are assessed against the offender for OV 6 (intent to kill or injure another individual), ten points may not be scored under this variable. MCL 777.47(2).[185]

- Definitions for "aircraft," "ORV," "snowmobile," "vehicle," and "vessel" are referenced in MCL 777.1.

2. Case Law Under the Statutory Guidelines

The trial court erred in scoring five points for OV 17, which, under MCL 777.22(1), "can only be scored for larceny from a person[] . . . if the crime involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive[,]" where "the defendant's operation of a vehicle occurred after he completed the crime of larceny from a person. See *People v Smith-Anthony*, 494 Mich 669, 689 n 61 (2013) ('In a larceny case, the crime is completed when the taking occurs.'); see also *People v McGraw*, 484 Mich 120, 122 (2009) ('A defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise.')." *People v Siders*, 497 Mich 985, 986 (2015).

Five points were properly scored for OV 17 where "[t]he evidence revealed that the two vehicles in front of [the] defendant successfully swerved to avoid hitting the victim . . . , while [the] defendant did not." *People v Bartel*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2011 (Docket No. 296795).[186]

[185] The language used in the instructions for OV 17 does not appear to preclude assigning an offender *five* points under this variable when the offender received points under OV 6.

[186] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

OV 17 was properly scored at ten points where "[the] defendant did not give up possession of the vehicle until after he had led multiple officers on a chase. [The d]efendant was observed driving through an intersection on a red light, driving erratically in an attempt to avoid police officers, and driving on a sidewalk near a pedestrian and her children." *People v Morrison (Brian)*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2010 (Docket No. 285662).

T. OV 18—Operator Ability Affected by Alcohol or Drugs

1. Definitions/Scoring

OV 18 is only scored under very specific circumstances: when the offense is a crime against a person *and* the crime involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1). Score OV 18 by determining which of the statements addressed by this variable apply to the offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.48(1).[187]

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Pts	OV 18—Degree to which alcohol or drugs affected the offender
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(a).
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(b).

[187] Effective September 30, 2003, 2003 PA 134 amended the statute governing point allocations for OV 18. Language appearing in the shaded areas of the chart represents the variable as it applies to offenses that occurred before September 30, 2003. Unshaded areas contain the instructions for scoring OV 18 for offenses occurring on or after September 30, 2003, the amendment's effective date.

10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender was under the influence of alcoholic or intoxicating liquor, a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance; or while the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(*iv*); or while the offender had an alcohol content of 0.08 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2018, the offender had an alcohol content of 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(c).
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE SEPTEMBER 30, 2003. 2003 PA 134.
5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while he or she was visibly impaired by the use of alcoholic or intoxicating liquor or a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content. MCL 777.48(1)(d).
5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.07 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was visibly impaired by the use of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE SEPTEMBER 30, 2003. 2003 PA 134.
0	The offender's ability to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive was not affected by an alcoholic or intoxicating liquor or a controlled substance or a combination of alcoholic or intoxicating liquor and a controlled substance. MCL 777.48(1)(e).

- For purposes of scoring OV 18, "any bodily alcohol content" is either of the following:
  - an alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine,[188] MCL 777.48(2)(a),[189] or

[188] Beginning October 1, 2018, an alcohol content of 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

[189] Before September 30, 2003, MCL 777.48(2)(a) stated: "An alcohol content of not less than 0.02 grams or more than 0.07 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine."

- any presence of alcohol within a person's body from the consumption of alcohol except for alcohol consumption as part of a generally recognized religious service or ceremony, MCL 777.48(2)(b).

- Definitions for "aircraft," "ORV," "snowmobile," "vehicle," and "vessel" are referenced in MCL 777.1.

2. Case Law Under the Statutory Guidelines

At the time this chapter was published, there was no published case law concerning the application of OV 18.

"[Where the d]efendant's own testimony at the plea hearing indicated that he 'was on drugs' at the time he took the victim's vehicle[,]" and where "the sentencing report indicate[d] that [the] defendant's description of the offense included an admission that he had smoked crack ten minutes before forcibly taking the victim's car[,]" ten points were appropriately scored for OV 18. *People v Morrison (Brian)*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2010 (Docket No. 285662).[190]

U. OV 19—Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice or the Rendering of Emergency Services

1. Definitions/Scoring

OV 19 is scored for all felony offenses to which the statutory sentencing guidelines apply. MCL 777.22(1)-(5). Determine which statements addressed by OV 19 apply to the sentencing offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.49(1).

Points	OV 19—Threat to security or interference with administration of justice
25	The offender by his or her conduct threatened the security of a penal institution or court. MCL 777.49(a).
15	The offender used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with, or that results in the interference with, the administration of justice or the rendering of emergency services. MCL 777.49(b).

[190] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

10	The offender otherwise interfered with or attempted to interfere with the administration of justice. MCL 777.49(c).
0	The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or the threat of force. MCL 777.49(d).

2. Case Law Under the Statutory Guidelines

"[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343 (2013) (citations omitted). "It 'encompasses more than just the actual judicial process' and can include '[c]onduct that occurs before criminal charges are filed,' acts that constitute obstruction of justice, and acts that do not 'necessarily rise to the level of a chargeable offense[.]'" *Id*. (citation omitted).

a. Conduct That Threatened the Security of a Penal Institution or Court

Where "the defendant was arrested with drugs on his person that were only discovered after he was transported to the county jail[,]" the trial court properly assessed 25 points for OV 19; "MCL 777.49(a)[, which] is not limited 'to those instances in which the sentencing itself occurred within a court or penal institution[,]'" does not contain an intent requirement. *People v Bragg*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2013 (Docket No. 310200), rev'd in part on other grounds 498 Mich 900 (2015) (quoting *People v Smith (David)*, 488 Mich 193, 200 (2010), and rejecting the defendant's argument that 25 points should not have been scored for OV 19 because "he involuntarily brought drugs to the jail after he was placed under arrest and, therefore, had no intent to threaten the security of the penal institution[]").[191]

b. Conduct Before Criminal Charges

A defendant's conduct before criminal charges are filed against him or her may form the basis of interfering or

[191] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

attempting to interfere with the administration of justice as contemplated by OV 19; the conduct constituting interference with the administration of justice under OV 19 includes giving a police officer a false name when asked for identification. *People v Barbee*, 470 Mich 283, 284, 288 (2004) (the defendant gave a false name to a police officer who had pulled over the defendant's car for crossing the fog line).[192]

According to the *Barbee* Court, the phrase 'administration of justice' "encompasses more than just the actual judicial process." *Barbee*, 470 Mich at 287-288. The Court explained:

> "While 'interfered with or attempted to interfere with the administration of justice' is a broad phrase that *can* include acts that constitute 'obstruction of justice,' it is not limited to *only* those acts that constitute 'obstruction of justice.'
>
> * * *
>
> "The investigation of crime is critical to the administration of justice. Providing a false name to the police constitutes interference with the administration of justice, and OV 19 may be scored, when applicable, for this conduct." *Barbee*, 470 Mich at 286, 288.

However, ten points may not be scored under OV 19 based solely on the fact that a defendant lied to medical services personnel. *People v Portellos*, 298 Mich App 431, 449-452 (2012) (holding that "[t]he trial court correctly determined that it should not assign [the defendant ten] points for OV 19 for lying to medical services personnel[]" about the circumstances surrounding the birth and death of her infant, because "MCL 777.49(c) does not contain any reference to [']otherwise interfering with emergency medical services[']").

"Fleeing from the police can easily become 'interference with the administration of justice' particularly where[] . . . there was an effective command for the vehicle to stop, in the form of the police activating their lights and sirens."

[192] The *Barbee* decision vacated the Court of Appeals decision in *People v Deline*, 254 Mich App 595, 597 (2002), to the extent that the *Deline* Court equated the conduct required to merit scoring under OV 19 with conduct that constituted the "obstruction of justice." *Barbee*, 470 Mich at 287.

People v Ratcliff, 299 Mich App 625, 632-633 (2013), vacated in part on other grounds 495 Mich 876 (2013) (ten points were properly scored for OV 19 where police officers approached the stolen vehicle in which the defendant was a passenger and ordered the occupants to "'[f]reeze[,]'" but the defendant, after a vehicle chase, "instead fled on foot after the vehicle came to a stop[]").

c. Conduct After Completion of Offense

"OV 19 may be scored for conduct that occurred after the sentencing offense was completed." *Smith (David)*, 488 Mich at 202. "Because the circumstances described in OV 19 expressly include events occurring after a felony has been completed, the offense variable provides for the 'consideration of conduct after completion of the sentencing offense.'" *Id.* at 202, quoting *McGraw*, 484 Mich at 133-134.

In *Smith (David)*, 488 Mich at 197, the defendant was convicted of manslaughter, reckless driving, and witness intimidation. A few days after the car accident in which the victim was killed, the defendant made threatening statements to one of the passengers in the defendant's vehicle at the time of the accident. *Id.* at 196. At sentencing, defense counsel argued that the "defendant's witness intimidation conviction precluded the scoring of OV 19 for the manslaughter conviction." *Id*. at 197. The Court of Appeals agreed and held that the defendant should have been scored zero points for OV 19, based on the rule set out in *McGraw*, 484 Mich 120, that "offense variables may not be scored for conduct that occurred after the completion of the sentencing offense unless provided for in the particular variable . . . ." *Smith (David)*, 488 Mich at 197-198. The Supreme Court reversed, noting that "[t]he aggravating factors considered in OV 19 contemplate events that almost always occur *after* the charged offense has been completed[,]" and that "[t]he express consideration of these events explicitly indicates that postoffense conduct may be considered when scoring OV 19." *Id*. at 200. The Court held that "[u]nder the exception to the general rule set [out] in *McGraw*, OV 19 may be scored for conduct that occurred after the sentencing offense was completed." *Smith (David)*, 488 Mich at 202.

The mere fact that a defendant "was contemporaneously in violation of his [or her] parole[]" at the time of the commission of the sentencing offense does not justify a

score of 10 points for OV 19. *People v Sours*, ___ Mich App ___, ___ (2016) (citing *McGraw*, 484 Mich at 135, and holding that "the trial court erred by scoring 10 points for OV 19 . . . [for the] defendant's possession of methamphetamine conviction because [the] defendant's failure to report to his parole agent before committing a new felony, the sentencing offense, did not hinder the process of administering judgment *for the sentencing offense*[]") (emphasis added). Where "[the] defendant was arrested immediately after being discovered with methamphetamine[, t]he fact that he was also violating his parole had no effect on the process of investigating, trying, and convicting him for the methamphetamine offense; therefore, OV 19 should have been scored at zero points." *Sours*, ___ Mich App at ___ (citation omitted).

d. Threatening Conduct/Words

Ten points were properly scored for OV 19 where the defendant told the rape victim that he knew who she was and that "his 'boys' had been watching her[,]" and where the "defendant required the victim to promise not to contact the police *as a condition of releasing her*." *McDonald (Deandre)*, 293 Mich App at 299-300. The Court explained:

> "[T]he specific criminal sexual conduct offense for which [the] defendant was charged and convicted was sexual penetration involving the commission of another felony. MCL 750.520b(1)(c). The underlying felony is therefore part of the criminal sexual conduct offense itself. Armed robbery, MCL 750.529, proscribes conduct that includes an assault and a felonious taking of property from the victim's presence or person while the defendant is armed with a weapon, . . . and as such includes flight or attempted flight after the commission of the larceny, or attempts to retain possession of the stolen items, see MCL 750.530(2). Kidnapping is defined as restraining another person, meaning restricting or confining their liberty, and thus necessarily is an ongoing offense until the victim is released. MCL 750.349(2) . . . . In this case, the victim's liberty was not free from restraint until she was not only out of [the] defendant's car, but out of shooting range—after all, the defendant had a gun

> trained on her even after she exited the car. Therefore, even if [the] defendant had not made the threat to the victim until she was already walking away, none of [the] defendant's charged offenses were complete until it was clear that he could no longer change his mind and order her back into the car and OV 19 should be scored." *McDonald (Deandre)*, 293 Mich App at 300-301.

A defendant's conduct is properly scored under OV 19 where the defendant threatens to kill a victim of the crime committed. *People v Endres*, 269 Mich App 414, 420-422 (2006), overruled in part on other grounds in *People v Hardy (Donald)*, 494 Mich 430, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016. Without regard to a defendant's intention when the threat was issued, fifteen points are appropriate because the "threats resulted in the interference with the administration of justice, either by preventing the victim from coming forward sooner or affecting his testimony against [the] defendant." *Endres*, 269 Mich App at 422. See also *Steele (Larry)*, 283 Mich App at 492-493 (ten points were properly scored for OV 19 where the "[d]efendant's admonitions to his victims [that he would go to jail if they disclosed his acts of sexual assault] were a clear and obvious attempt by him to diminish his victims' willingness and ability to obtain justice").

e. Flight From Police

"Fleeing from the police can easily become 'interference with the administration of justice' particularly where[] . . . there was an effective command for the vehicle to stop, in the form of the police activating their lights and sirens." *Ratcliff*, 299 Mich App at 632-633, vacated in part on other grounds 495 Mich 876 (2013) (ten points were properly scored for OV 19 where police officers approached the stolen vehicle in which the defendant was a passenger and ordered the occupants to "'[f]reeze[,]'" but the defendant, after a vehicle chase, "instead fled on foot after the vehicle came to a stop[]"). But see *People v Brown (Charles)*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 2013 (Docket No. 313306) ("[b]ecause flight by itself provides no basis for scoring points under OV 19, and because the record . . . does not show that [the] defendant's flight was even related to the

police or their imminent arrival, the trial court erred in scoring ten points under OV 19[]" where the defendant left the scene merely for the purpose of avoiding further confrontation with the victim and did not "[take] affirmative steps, beyond mere flight, to obstruct justice[]").[193]

f. Resisting Apprehension

OV 19 is properly scored at 15 points where the defendant, in the course of robbing a retail store, "vigorously resisted and threatened" the store's loss prevention officer and other store employees. *People v Passage*, 277 Mich App 175, 181 (2007). According to the Court, interference with store employees in their efforts to prevent the defendant from leaving the premises with unpaid merchandise constituted "interference with the administration of justice" because MCL 764.16(d) authorizes a private citizen to make an arrest if the citizen is an employee of a merchant and has reasonable cause to believe that the person arrested committed a larceny in that store. *Passage*, 277 Mich App at 180-181. Additionally, the language in MCL 777.49(b) refers only to using force or threatening force against another "person"; the statute does not require that the use or threat of force be directed against police officers. *Passage*, 277 Mich App at 181, citing *Endres*, 269 Mich App at 420-422.

g. Perjury

Absent any statutory language indicating otherwise, OV 19 applies to convictions, such as perjury, that necessarily involve interference with the administration of justice. *People v Underwood*, 278 Mich App 334, 339-340 (2008) (the sentencing offense was perjury committed in a court proceeding). The Legislature did not expressly prohibit scoring OV 19 for the crime of perjury, and because perjury is a public trust offense for which OV 19 must be scored, the trial court erred in refusing to do so. *Id.* at 338.

h. General Denial of Guilt

Ordinarily, "a general denial of accusation by a defendant cannot support the scoring of OV 19[.]" *People v Jackson (Victor)*, unpublished opinion per curiam of the Court of

[193] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Appeals, issued October 1, 2009 (Docket No. 285285), slip op p 6.[194] However, OV 19 is properly scored at ten points where the defendant "actively lie[s] to the police, providing a false version of events designed to avoid arrest and to impugn the conduct and reputation of the victim." *Id.* In *Jackson (Victor)*, slip op at 6, the Court found that the defendant's "active lies, attempting to portray the victim as the aggressor and designed to thwart prosecution, interfered with the administration of justice."

i. Lying to Police

OV 19 is properly scored at ten points where an offender "goes beyond merely lying to the police about being guilty, but affirmatively interfer[es] with the administration of justice by inventing a crime where none existed, and falsely reporting that non-existent crime to the police." *People v Morgan (William)*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2003 (Docket No. 242731), slip op pp 3-4.

j. Lying to Medical Personnel

"MCL 777.49(c) does not contain any reference to [']otherwise interfering with emergency medical services[;']" accordingly, "[t]he trial court correctly determined that it should not score [the defendant ten] points for OV 19 for lying to medical services personnel[]" about the circumstances surrounding the birth and death of her infant. *Portellos*, 298 Mich App at 450-451 (noting that although "[i]nterference with emergency services is mentioned several other times throughout MCL 777.49," it was "not included in MCL 777.49(c)[,]" which "is the only part of OV 19 that includes . . . conduct[] such as deceit[]").

k. Concealing or Destroying a Weapon

Evidence of an offender's "attempt to hide or dispose of the weapon [he used to stab the victim] in conjunction with his encouragement of others to lie about where he was at the time of the stabbing was a multifaceted attempt to create a false alibi and mislead the police[]" and supported the trial court's assessment of ten points for OV

[194] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

19. *People v Ericksen*, 288 Mich App 192, 204 (2010); see also *People v Brown (Carlos)*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2011 (Docket No. 299496) (ten points were properly scored for OV 19 based on *Ericksen*, 288 Mich App at 204, because evidence that the defendant, at the time of his arrest, "questioned how he could be charged with armed robbery when the officers had not found a gun . . . gave rise to an inference that [he] had disposed of the gun he used to rob the complainant[]").

l. Fleeing Jurisdiction

OV 19 was properly scored where the defendant absconded and fled the jurisdiction during his trial. *People v Vallance*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2003 (Docket No. 242163). According to the *Vallance* Court, the defendant's conduct was "precisely the type of 'evasive and noncooperative behavior' that OV 19 was designed to address." *Id.*, quoting *Deline*, 254 Mich App at 697-698.

The trial court properly assessed ten points for OV 19 where the defendant fled to a different state and changed his name following the commission of the sentencing offense. *People v Waller*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2011 (Docket No. 297639). The defendant's conduct interfered with the administration of justice by interfering with his capture and arrest. *Id.* "The fact that the investigation could proceed without [the] defendant's presence in Michigan does not mean that the administration of justice was not hampered." *Id*.

m. Change in Offender's Appearance

Absent evidence that the defendant deliberately attempted to prevent his identification by witnesses, a defendant's drastic weight loss and change in head and facial hair styles is not conduct contemplated by OV 19. *People v Arney*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2003 (Docket No. 236875).

n. Failure to Pay Court-Ordered Child Support

"[The] defendant's failure to comply with [his] court-ordered [child support] obligation" did not "constitute

interference with the administration of justice under OV 19." *People v Hershey*, 303 Mich App 330, 342, 345 (2013) (holding that because "[the] defendant's failure to pay child support occurred after the circuit court ordered [him] responsible for child support[,]" the defendant "did not hinder the process or act of administering judgment by judicial process of the cause in . . . the divorce and child-support [case]" in which child support was ordered).

o. Probation Violations

"[The] defendant did not interfere with the administration of justice by violating the terms of his probation[,]" and ten points could not be scored for OV 19 on this basis. *Hershey*, 303 Mich App at 345-346 (noting that "[w]hen [the] defendant violated the terms of his probation, the trial court had already entered the . . . judgment of sentence, and the court's probation order was already effective[; t]hus, although [the] defendant violated the trial court's probation order, he did not hinder the process or act of the trial court administering judgment in [that case][]").

p. Failure to Register Under the Sex Offenders Registration Act (SORA)

"[A] defendant's failure to register as a sex offender [does] not constitute interference with the administration of justice[]" under OV 19. *People v Welch (Jamaal)*, unpublished opinion per curiam of the Court of Appeals, issued August 14, 2014 (Docket Nos. 315782; 316029), slip op p 1. "[O]nce [the] defendant was convicted of a listed offense, . . . 'the process or act of administering judgment by judicial process' was complete upon [the] defendant as related to that offense because he was already found guilty of that offense[;] . . . therefore[,] . . . OV 19 could not be scored at ten points for interfering with the administration of justice as related to the underlying listed offense." *Welch (Jamaal)*, slip op at 2, quoting *Hershey*, 303 Mich App at 344-345. "Moreover, . . . [the] defendant's failure to register as a sex offender [did not] . . . constitute[] an interference with the administration of justice[because] the duties of police under [the SORA] are monitoring functions that do not involve the administering of judgment to an individual by judicial process." *Welch (Jamaal)*, slip op at 2, citing *Hershey*, 303 Mich App at 342-343.[195]

q. Force or Threat of Force Against Property

"[T]he trial court did not err in scoring OV 19 at fifteen points[]" where the defendant fled from police on foot after committing retail fraud and entered a camper parked in a nearby yard for the purpose of hiding from the police. *People v Smith (Chaz)*, ___ Mich App ___, ___ (2016). "Although [the defendant] did not threaten a victim's property or physically destroy the camper that he hid in, he committed the crime of breaking and entering a structure with the intent to commit a felony [(i.e., resisting or obstructing a police officer)] when he entered the camper[,]" and when he "broke into the camper, he exerted force against the property of another [for purposes of OV 19] by opening the door." *Id*. at ___ (noting that "'[u]nder Michigan law, any amount of force used to open a door or window to enter [a] building, no matter how slight, is sufficient to constitute a breaking[]'") (citation omitted).

r. Claim of *Lockridge* Error

Where the defendant, "while pleading guilty, . . . admitted that he ran from the police after stealing property . . . and that he broke into [a] camper in order to hide from the police[,] . . . the facts necessary to support a score of fifteen points [for OV 19] were admitted by [the defendant], and his sentence was not constrained by improper judicial fact-finding in violation of the Sixth Amendment[]" under *People v Lockridge*, 498 Mich 358, 373 (2015). *Smith (Chaz)*, ___ Mich App at ___, citing *People v Garnes*, ___ Mich App ___, ___ (2016).[196]

[195] An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).

[196] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *Lockridge*, 498 Mich at 399, the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea or in testimony or by stipulation or by some similar or analogous route." *Garnes*, ___ Mich App at ___. "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*. at ___ (citing *Apprendi v New Jersey*, 530 US 466, 469-471 (2000), and remanding "for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admissions" with respect to several contested offense variable scores) (additional citations omitted).

V. OV 20—Terrorism

1. Definitions/Scoring

OV 20 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22(1)-(5). Score OV 20 by determining which statements addressed by the variable apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.49a(1).

Points	OV 20—Terrorism
100	The offender committed an act of terrorism by using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(a).
50	The offender committed an act of terrorism without using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(b).
25	The offender supported an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(c).
0	The offender did not commit an act of terrorism or support an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(d).

- For purposes of scoring this variable, the terms "act of terrorism" and "terrorist" are defined in MCL 750.543b. MCL 777.49a(2)(a).[197]

- "Harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," and "harmful radioactive device" are defined in MCL 750.200h. MCL 777.49a(2)(b).

- "'Incendiary device' includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device." MCL 777.49a(2)(c).

[197] An "act of terrorism" is "a willful and deliberate act that . . . would be a violent felony under [Michigan law, no matter where the act was committed, a]n act that the person knows or has reason to know is dangerous to human life[, and a]n act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion." MCL 750.543b(a)(*i*)-(*iii*). A "terrorist" is "any person who engages or is about to engage in an act of terrorism." MCL 750.543b(g).

- For purposes of OV 20, "terrorist organization" is defined in MCL 750.543c. MCL 777.49a(2)(d).

2. Case Law Under the Statutory Guidelines

Scoring 100 points for OV 20 is appropriate only when a defendant's use or threatened use of one of the substances or devices enumerated in MCL 777.49a also constitutes an act of terrorism as defined by MCL 750.543b(a); a score of 100 is inappropriate when a defendant's threats to cause harm using certain substances or devices do not themselves constitute *acts* of terrorism. *People v Osantowski*, 481 Mich 103, 105 (2008). To merit 100 points, the plain language of MCL 777.49a(1)(a) requires "the offender [to] have '*committed an act of terrorism by* using or threatening to use' one of the enumerated substances or devices." *Osantowski*, 481 Mich at 108-109; MCL 777.49a(1)(a)-(b). In other words, "the use or threatened use must constitute the *means* by which the offender committed an *act* of terrorism." *Osantowski*, 481 Mich at 109. "To constitute an act of terrorism, a threat must be a violent felony and *also* must itself be 'a willful and deliberate act' that the offender 'knows or has reason to know is dangerous to human life' and 'that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.'" *Id*., quoting MCL 750.543b(a). Here, the trial court properly concluded that the defendant did not actually intend to intimidate or coerce a civilian population or influence or affect government conduct when he e-mailed to another teenager his threats to engage in violent conduct. *Osantowski*, 481 Mich at 112. However, where "[t]he record demonstrate[d] that [the] defendant used a computer . . . to send intimidating e-mails that threatened physical force against a particular civilian population[,]" the trial court did not err "in concluding that [the] defendant supported an act of terrorism and in assessing 25 points under OV 20." *People v Yaryan*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2011 (Docket No. 300763)[198] (concluding that in *Osantowski*, 481 Mich at 111, the Michigan Supreme Court "specifically noted that a threat of terrorism may qualify as an act in support of terrorism for purposes of OV 20[]").

[198] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Part C—Applying the Guidelines Scores to Determine Recommended Minimum Sentences for Offenders Not Sentenced as Habitual Offenders

Part C discusses the standard method of determining the recommended minimum sentence ranges using the statutory sentencing guidelines and grids[199] for offenders *not* being sentenced as habitual offenders. Discussion of the guidelines and grids as they apply to habitual offenders begins in Section 3.16.

3.10 Felony Offenses Enumerated in §777.11a—§777.17g[200]

The felony offenses enumerated in MCL 777.11a to MCL 777.17g require no special application of the statutory sentencing guidelines. For offenses listed in MCL 777.11a to 777.17g, determine which OVs should be scored by finding the crime group to which the sentencing offense belongs and scoring only the OVs indicated for crimes in that group.[201] MCL 777.21(1)(a). The total number of points scored for all OVs appropriate to the offense is the offender's "OV level." *Id*. Depending on the specific sentencing grid, an offender's OV level will be designated in roman numerals from I to VI. The OV level's numeric designation increases as the offender's OV point total increases so that the severity of the corresponding penalty increases as does the offender's OV level.

All seven PRVs are scored for felony offenses subject to the statutory sentencing guidelines. MCL 777.21(1)(b).[202] The total number of points scored for an offender's seven PRVs is the offender's "PRV level." *Id*. An offender's PRV level is designated by capital letters from A to F according to the offender's PRV point total. PRV level A represents the column with the fewest points and PRV level F represents the column with the most points. As with the OV level values, the severity of penalty increases with an offender's transit from PRV level A up to PRV level F. The point values corresponding with PRV levels A through F are the same for all nine

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[199] See Section 3.6(C) for general discussion of the sentencing grids.

[200] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

[201] Section 3.9 details the statutory instructions used to score each OV.

[202] Section 3.8 discusses in detail the statutory instructions pertaining to each PRV.

sentencing grids so that an offender's criminal history is equally weighted regardless of the severity of the sentencing offense.

A defendant's recommended minimum sentence is indicated by the range contained in the cell located at the intersection of the defendant's OV level (vertical axis) and PRV level (horizontal axis) on the sentencing grid appropriate to the offense of which the defendant was convicted. MCL 777.21(1)(c). The appropriate sentencing grid is determined by the crime class to which the sentencing offense belongs, and the appropriate minimum sentence range is determined by whether the offender will be sentenced as a habitual offender. MCL 777.21(1)(c); MCL 777.21(3). For first-time offenders, or offenders not otherwise being sentenced as habitual offenders, the appropriate upper limit of a recommended minimum range is the number corresponding to the empty "offender status" box on the sentencing grid.[203]

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4

For example, in the sentencing grid above, the recommended minimum ranges for an individual being sentenced as a first-time offender are (in months): for level A-I, 0 to 3; for level B-I, 0 to 6; for level C-I, 0 to 9; for level D-I, 2 to 17; for level E-I, 5 to 23; and for level F-I, 10 to 23.

3.11 Felony Offenses Enumerated in §777.18 (Offenses Predicated on an Underlying Felony)[204]

Special scoring instructions apply to offenses listed in MCL 777.18. Offenses in MCL 777.18 are offenses predicated on an offender's

[203] The "empty box" refers to the top box in each series of boxes down the right side of each grid—or specifically, the box in which HO2, HO3, or HO4 does not appear.

commission of an underlying felony. The offenses listed in MCL 777.18 are those felony offenses for which the statutory maximum penalty is "variable." "Variable" indicates that the term of imprisonment for the violations listed there is not limited to a specific number of years (as are the individual violations listed in MCL 777.11a to MCL 777.17g) because the offenses in MCL 777.18 refer to a variety of underlying felonies to which different statutory maximum penalties apply. In addition, some provisions of the felony offenses listed in MCL 777.18 provide for mandatory minimums or double or triple times the maximum terms of imprisonment authorized in the statutory language governing the underlying felonies themselves.

Scoring instructions for the offenses in MCL 777.18 are found in MCL 777.21(4), which states:

> "If the offender is being sentenced for a violation described in [MCL 777.18], both of the following apply:
>
> (a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in [MCL 777.18].
>
> (b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G."

MCL 777.21(4)(a) requires that all OVs appropriate to the crime group designated in MCL 777.18 must be scored *as well as* any additional OVs appropriate to the crime group of the underlying offense.

The crime class of the underlying offense determines which sentencing grid must be used to determine the offender's recommended minimum sentence range once the offender's PRV and OV levels have been calculated. MCL 777.21(4)(b) assigns a "default" crime class of G to an MCL 777.18 offense when none of the underlying offenses is a felony,

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[204] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

e.g., a violation of MCL 333.7410(4) (possession of certain controlled substances on or within 1,000 feet of school property) based on a violation of MCL 333.7403(2)(d) (misdemeanor possession of marijuana).

The general rule of MCL 777.21(1)(b), requiring the scoring of prior record variables (PRVs) for all offenses enumerated in MCL 777.11–MCL 777.19, applies to "*all* cases . . . unless the language in another subsection of the statute directs otherwise." *People v Peltola*, 489 Mich 174, 182 (2011). Thus, PRVs must be scored against offenders falling within the purview of MCL 777.21(4) for offenses listed in MCL 777.18, notwithstanding the absence of a reference to PRVs in MCL 777.21(4). *Peltola*, 489 Mich at 188. In *Peltola*, 489 Mich at 177, the defendant was convicted of a subsequent controlled substance violation (an MCL 777.18 offense), and his minimum and maximum sentences were doubled as permitted by MCL 333.7413(2). The defendant argued that MCL 777.21(1)(b), which directs the sentencing court to score a defendant's PRVs "[e]xcept as otherwise provided[,]" does not apply to an offender who is being sentenced for a violation described in MCL 777.18 and who is therefore subject to the terms of MCL 777.21(4). *Peltola*, 489 Mich at 184. The Michigan Supreme Court disagreed, holding that "MCL 777.21(1) sets forth the general rule for determining a defendant's minimum sentence range[]" and that, because MCL 777.21(4) *does not direct otherwise* but instead "is merely intended to provide guidance regarding how to determine the OV level and offense class for offenders falling under MCL 777.18[,]" the rule requiring the scoring of PRVs remains applicable to those offenders. *Peltola*, 489 Mich at 176, 191.

There are eight felony offenses included in MCL 777.18 to which the statutory sentencing guidelines apply, and a conviction for any of the eight offenses requires the commission of an offense described in the statutory language of the eight respective felony offenses. Each of the eight offenses is discussed below.

A. Controlled Substance Violations Involving Minors or Near School Property or a Library

MCL 333.7410 addresses several felony violations to which the sentencing guidelines apply.

1. Delivery of Cocaine or a Narcotic Drug Listed in Schedule 1 or 2 to a Minor

MCL 333.7410(1) addresses an offender aged 18 or over who violates MCL 333.7401(2)(a)(*iv*) (less than 50 grams) by delivering or distributing a controlled substance in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine and related substances) to an

individual under the age of 18 who is at least three years younger than the deliverer or distributor. For a conviction of MCL 333.7410(1), the trial court may:

- impose the $25,000 fine authorized under MCL 333.7401(2)(a)(*iv*); or
- sentence the offender to a term of imprisonment of not less than one year and not more than twice the 20-year maximum term authorized under MCL 333.7401(2)(a)(*iv*); or
- both.

2. Delivery of Gamma-Butyrolactone (GBL) or a Controlled Substance Listed in Schedules 1 to 5 to a Minor

MCL 333.7410(1) also provides the penalties for a person aged 18 or over who violates MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b by distributing or delivering any other controlled substance listed in schedules 1 to 5 or GBL to a person under age 18 who is at least three years younger than the distributor or deliverer. An offender convicted of violating this portion of MCL 333.7410(1) is subject to:

- a fine authorized by MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b;[205] or
- a term of imprisonment not to exceed twice the term authorized under MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b;[206] or
- both.

3. Delivery of Cocaine or a Narcotic Drug Listed in Schedule 1 or 2 Within 1,000 Feet of School Property or a Library

MCL 333.7410(2) provides the penalty for a person aged 18 years or older who violates MCL 333.7401(2)(a)(*iv*) (less than 50 grams) by delivering or distributing a controlled substance described in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine and related substances) to another person on or within 1,000 feet of school

[205] The fine amounts vary according to the controlled substance involved.

[206] The maximum terms of imprisonment vary according to the controlled substance involved.

property or a library. Conviction of violating MCL 333.7410(2) subjects an offender to:

- mandatory imprisonment for not less than two years[207] and not more than three times the 20-year maximum term authorized by MCL 333.7401(2)(a)(*iv*); and

- a discretionary fine not to exceed three times the $25,000 fine permitted under MCL 333.7401(2)(a)(*iv*).

4. Possession With Intent to Deliver Cocaine or a Narcotic Drug Listed in Schedule 1 or 2 Within 1,000 Feet of School Property or a Library

MCL 333.7410(3) provides the penalty for a person aged 18 years or older who violates MCL 333.7401(2)(a)(*iv*) (less than 50 grams) "by possessing with intent to deliver to another person on or within 1,000 feet of school property or a library a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in ~~possessing with the intent to deliver a controlled substance described in schedule 1 or 2 that is a narcotic drug or a drug described in~~ [MCL 333.7214(a)(*iv*)]" (cocaine and related substances)~~ on or within 1,000 feet of school property or a library~~. An offender convicted of violating MCL 333.7410(3) is subject to:

- mandatory imprisonment for not less than two years[208] and not more than two times the maximum term of 20 years authorized under MCL 333.7401(2)(a)(*iv*); and

- a discretionary fine not to exceed three times the $25,000 fine permitted under MCL 333.7401(2)(a)(*iv*).

A defendant is subject to an enhanced penalty under MCL 333.7410(3) only if the prosecution presents "proof that the defendant specifically intended to deliver a controlled substance to a 'person on or within 1,000 feet of school property or a library[,]'" rather than that the defendant *possessed* the drugs on or within 1,000 feet of school property or a library. *People v English*, ___ Mich App ___, ___ (2016) (opinion by Wilder, P.J.) (quoting MCL 333.7410(3) and holding that the trial court properly dismissed the charges against the

[207] The trial court may depart from the mandatory minimum term for "substantial and compelling" reasons. MCL 333.7410(5).

[208] The trial court may depart from the mandatory minimum term for "substantial and compelling" reasons. MCL 333.7410(5).

defendants where "although the prosecution presented evidence to establish that [they] were arrested within 1,000 feet of school property while in possession of drugs, the prosecution failed to demonstrate that [they] intended to deliver those drugs to a person on or within 1,000 feet of school property[]"). See also *English*, ___ Mich App at ___ (Murphy, J., concurring in decision to affirm dismissal because "the Legislature intended MCL 333.7410(3) to apply where an offender possesses a controlled substance either inside or outside of a school zone with the intent to deliver the controlled substance within a school zone[]").

5. Possession of GBL or Other Controlled Substance on or Within 1,000 Feet of School Property or a Library

MCL 333.7410(4) provides the penalty for persons aged 18 years or older who violate MCL 333.7401b or 333.7403(2)(a)(*v*), (b), (c), or (d), by possessing GBL or a controlled substance on or within 1,000 feet of school property or a library. An offender convicted of violating MCL 333.7410(4) is subject to:

- mandatory imprisonment, or the imposition of a fine, or both, not to exceed two times the term of imprisonment or twice the amount of fine authorized by MCL 333.7401b or MCL 333.7403(2)(a)(*v*), (b), (c), or (d).[209]

6. Manufacturing Methamphetamine Within 1,000 Feet of School Property or a Library

MCL 333.7410(6) provides the penalty for persons aged 18 years or older who violate MCL 333.7401 by manufacturing methamphetamine on or within 1,000 feet of school property or a library. For a conviction under MCL 333.7410(6), the trial court may:

- impose a fine of up to twice the $25,000 fine authorized under MCL 333.7401(2)(b)(*i*); or
- sentence the offender to a term of imprisonment of not more than twice the 20-year maximum term authorized under MCL 333.7401(2)(b)(*i*); or
- both.

[209] The terms of imprisonment and the amounts of the fines vary with the controlled substance involved in each of these statutes.

B. Subsequent Controlled Substance Violations

MCL 333.7413(2) provides the penalties possible for a person convicted of a second or subsequent offense under article 7 of the Public Health Code, MCL 333.7101 to MCL 333.7545 (controlled substance offenses). MCL 333.7413(2) applies to "general" controlled substance offenses not otherwise addressed by the specific sentencing provisions of MCL 333.7413(1) and (3). Offenders convicted under MCL 333.7413(2) may be sentenced to a term of imprisonment up to twice the term authorized by the statute governing the specific offense, or may be fined up to two times the amount permitted for a violation of the specific offense, or both. MCL 333.7413(2).

"MCL 333.7413(2), by authorizing a trial court to enhance the sentence of a defendant who is a repeat drug offender to a 'term not more than twice the term otherwise authorized,' allows the trial court to double *both* the defendant's minimum and maximum sentences." *People v Lowe*, 484 Mich 718, 719 (2009), overruled in part on other grounds in *People v Peltola*, 489 Mich 174, 189-190 (2011). "[W]hen calculating a defendant's recommended minimum sentence range under the sentencing guidelines when the defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7413(2), a trial court should score the PRVs [prior record variables]." *Peltola*, 489 Mich at 190. In *Peltola*, 489 Mich at 184, the defendant contended that MCL 777.21(1)(b), requiring the sentencing court to score a defendant's PRVs "[e]xcept as otherwise provided[,]" does not apply to offenders falling within the purview of MCL 777.21(4).[210] The Michigan Supreme Court disagreed, holding that "MCL 777.21(1) sets forth the general rule for determining a defendant's minimum sentence range[]" and that, because MCL 777.21(4) does not direct otherwise but instead "is merely intended to provide guidance regarding how to determine the OV level and offense class for offenders falling under MCL 777.18[,]" the rule requiring the scoring of PRVs remains applicable to those offenders. *Peltola*, 489 Mich at 176, 191.[211]

MCL 333.7413(3) provides the penalty for a person convicted of a second or subsequent violation of MCL 333.7410(2) or MCL 333.7410(3).[212] All of the following apply to an offender convicted under MCL 333.7413(3):

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[210] MCL 777.21(4) applies to an offender who "is being sentenced for a violation described in [MCL 777.18]," which includes subsequent controlled substance violations under MCL 333.7413(2).

[211] The *Peltola* Court additionally clarified that because its conclusion was contrary to obiter dicta statements made in *Lowe*, 484 Mich at 729-730, that the Legislature apparently intended that PRVs not be scored under MCL 777.21(4), "the holding in [*Lowe*, 484 Mich 718] is limited to whether MCL 333.7413(2) permits
a trial court to enhance a defendant's minimum and maximum sentence." *Peltola*, 489 Mich at 190.

- The offender must be sentenced to a mandatory minimum term of imprisonment of five years[213] but may not be sentenced to more than two times the term authorized in MCL 333.7410(2) and (3).

- The offender may be fined up to three times the amount authorized by MCL 333.7410(2) and (3).

- The offender is not eligible for probation or suspension of his or her sentence during the term of imprisonment.

MCL 333.7413(5) provides:

> "[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted *under this article or under any statute of the United States or of any state* relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug." (Emphasis added.)

"Another state" for purposes of MCL 777.51(2) (one of the statutory instructions for scoring prior record variable 1 under the sentencing guidelines) does not include foreign states. *People v Price (Tore)*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). The Court's reasoning for its interpretation of "another state" as used in MCL 777.51(2) likely applies to the language used in MCL 333.7413(5) to define second or subsequent offenses. According to the Court, "[t]he common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not a conviction for 'a felony under a law of the United States or another state[.]'" *Price*, 477 Mich at 4-5.

> **Note:** The concurrent (or exclusive) application of the general habitual offender statutes and the penalties prescribed by the Public Health Code for subsequent controlled substance offenses are discussed in Section 3.20.

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[212] Discussed in Section 3.11(A).

[213] The trial court may depart from the mandatory minimum for "substantial and compelling" reasons. MCL 333.7413(4).

C. Recruiting or Inducing a Minor to Commit a Controlled Substance Felony

MCL 333.7416(1)(a) provides the penalty for a person aged 17 years or older[214] who has recruited, induced, solicited, or coerced a minor less than 17 years of age to commit or attempt to commit a controlled substance offense that would be a felony if committed by an adult. Offenders convicted of violating MCL 333.7416(1) may be fined up to the amount authorized for an adult convicted of the underlying offense. In addition to any fine imposed, offenders convicted under MCL 333.7416(1) *must* be sentenced as follows:[215]

- to a mandatory minimum term[216] not less than one-half the maximum term of imprisonment authorized for an adult convicted of the crime;
- to a maximum term of imprisonment that does not exceed the maximum term authorized by statute for an adult convicted of the crime;
- to imprisonment for life if the act committed or attempted is a violation of MCL 333.7401(2)(a)(*i*);
- an offender sentenced under MCL 333.7416(1) is not eligible for probation and the sentence received must not be delayed or suspended. MCL 333.7416(2).

Note: MCL 333.7416(1) does not apply to an act that is a violation of MCL 333.7401(2)(d) that involves the manufacture, delivery, possession, etc., of marijuana. MCL 333.7416(4).

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[214] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (citation omitted).

[215] Note, however, that a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US ___, ___ (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US ___, by effectively eliminating the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and 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.

[216] The court may depart from the minimum term for "substantial and compelling" reasons. MCL 333.7416(3).

D. Conspiracy

MCL 750.157a(a) provides the penalty for a person who conspires with at least one other person to commit an act prohibited by law when commission of the prohibited act is punishable by at least one year of imprisonment. An offender convicted under MCL 750.157a(a) must be sentenced to a term of imprisonment equal to the term authorized for conviction of the offense the offender conspired to commit. In addition to a term of imprisonment, the court may impose a $10,000 fine on an offender convicted of conspiracy.

E. Recruiting or Inducing a Minor to Commit a Felony

MCL 750.157c provides the penalty for a person aged 17 years or older[217] who recruits, induces, solicits, or coerces a minor under the age of 17 years to commit or attempt to commit an act that would be a felony if committed by an adult. Violators of MCL 750.157c are guilty of a felony and must be sentenced to a term not to exceed the maximum term authorized by law for conviction of the act committed or attempted.[218] In addition to the mandatory term of imprisonment, the court may impose a fine on the offender of not more than three times the amount authorized by law for conviction of the act committed or attempted.

F. Voluntarily Allowing a Prisoner to Escape

MCL 750.188 provides the penalty for a jailor or other officer who voluntarily allows a prisoner in his or her custody to escape. Under MCL 750.188, an officer convicted of this offense must be sentenced to the same punishment and penalties to which the escaped prisoner was or would have been subject.

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[217] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (citation omitted).

[218] Note, however, that a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US ___, ___ (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US ___, by effectively eliminating the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and 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.

G. Felony Offenses Committed in Weapon-Free School Zones

MCL 750.237a describes conduct prohibited in weapon-free school zones and provides the penalties for convictions based on that conduct. MCL 750.237a is a separate felony offense based on an offender's violation of one of the thirteen underlying weapons-related statutes when the violation occurs in a weapon-free school zone. An offender may be charged with and convicted of an offense under MCL 750.237a when he or she is a first-time offender of the following statutes:

- MCL 750.224 (manufacture, sale, or possession of machine gun, silencer, bomb, chemical agents, etc.);
- MCL 750.224a (possession or sale of a device emitting an electrical current or impulse—a "stun gun");[219]
- MCL 750.224b (manufacture, sale, or possession of a short-barreled shotgun or rifle);
- MCL 750.224c (manufacture, distribution, sale, or use of armor-piercing ammunition);
- MCL 750.224e (manufacture, sale, distribution, or possession of device to convert semi-automatic weapons to fully-automatic ones);
- MCL 750.226 (going armed with a dangerous weapon with unlawful intent);
- MCL 750.227 (carrying a concealed weapon (CCW));
- MCL 750.227a (unlawful possession of a pistol by a licensee);
- MCL 750.227f (commission or attempted commission of a violent act while wearing body armor);
- MCL 750.234a (intentional discharge of a firearm from a motor vehicle, snowmobile, or ORV);
- MCL 750.234b (intentional discharge of a firearm in or at a dwelling or potentially occupied structure); or

[219] In *People v Yanna*, 297 Mich App 137, 139 n 1, 142-147 (2012), the Michigan Court of Appeals held that the pre-amended version of MCL 750.224a, completely banning the sale or possession of stun guns and similar devices by anyone other than law enforcement officers, was unconstitutional under the Second Amendment; the *Yanna* Court, however, emphasized that its holding was limited to the complete ban under former MCL 750.224a, which was amended, effective August 6, 2012, by 2012 PA 122 to permit the possession and use of electro-muscular disruption devices by licensed individuals under certain circumstances.

- MCL 750.234c (intentional discharge of a firearm at an emergency or law enforcement vehicle).

An offender may be charged with and convicted of an offense under MCL 750.237a for second or subsequent violations of MCL 750.223(2) (knowingly selling a firearm longer than 26 inches to a person under the age of 18), when the violations occurred in a weapon-free school zone.

Violators of MCL 750.237a are guilty of a felony and subject to one or more of the following:

- imprisonment for not more than the maximum term authorized by the specific statutory section violated, MCL 750.237a(1)(a); or

- not more than 150 hours of community service, MCL 750.237a(1)(b); or

- a fine of not more than three times the fine authorized by the specific statutory section violated, MCL 750.237a(1)(c).

H. Larceny of Rationed Goods

MCL 750.367a provides the penalties for stealing "any goods, wares, or merchandise, the manufacture, distribution, sale or use of which is restricted or rationed by the federal government, or any of its agencies or instrumentalities, during a state of war between the United States and any other country or nation . . . ." An offender convicted of an offense under MCL 750.367a may be sentenced to a term of imprisonment not more than two times the term authorized for conviction of the underlying offense. In addition, an offender convicted under this statute may be ordered to pay a fine of not more than twice the amount permitted for conviction of the underlying offense.

3.12 Felony Offenses Enumerated in §777.19 (Attempts)[220]

Attempted offenses are subject to the statutory guidelines only if the offense attempted is a felony offense in class A, B, C, D, E, F, or G. MCL 777.19(1). Attempts to commit class H felonies are not scored under the guidelines.[221] MCL 777.19(1).

To determine the OVs appropriate to an attempted felony subject to the sentencing guidelines, use the crime group of the offense attempted. MCL 777.19(2); MCL 777.21(5). For example, if an offender is convicted of attempted armed robbery, OVs designated for scoring are those for the crime group "person" because armed robbery (the offense attempted) is categorized as a crime against a person. MCL 750.89; MCL 777.16d.

Once the offender's OV and PRV levels have been totaled for an attempted offense, the proper sentencing grid on which to find the recommended minimum sentence range is determined by the attempted offense's original crime class designation:

- Attempts to commit offenses in classes A, B, C, or D are classified as class E offenses. MCL 777.19(3)(a).
- Attempts to commit offenses in classes E, F, or G are classified as class H offenses. MCL 777.19(3)(b).

3.13 Sentencing a Sexually Delinquent Person[222]

A. Definition

A sexually delinquent person is defined in MCL 750.10a as "any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or

[220] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

[221] Intermediate sanctions apply to attempted class H felonies punishable by more than one year of imprisonment. MCL 769.34(4)(b). See Section 3.7(C) for more information.

[222] For additional discussion of sentencing a sexually delinquent person, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 3.

homosexual nature, or by the commission of sexual aggressions against children under the age of 16."

A charge of sexual delinquency may only be brought in conjunction with the following offenses:

- Crime against nature or sodomy, MCL 750.158
- Indecent exposure, MCL 750.335a
- Gross indecency between male persons, MCL 750.338
- Gross indecency between female persons, MCL 750.338a
- Gross indecency between male and female persons, MCL 750.338b

"Conviction of sexual delinquency can be obtained only in conjunction with conviction on the principal charge. Yet, sexual delinquency is a matter of sentencing, unrelated to proof of the original charge." *People v Helzer*, 404 Mich 410, 417 (1978), overruled in part by *People v Breidenbach*, 489 Mich 1 (2011); see also *People v Franklin (John)*, 298 Mich App 539, 547 (2012) (noting that "sexual delinquency is not an actual element of [indecent exposure; r]ather, a finding of sexual delinquency merely allows for an enhancement of the sentence for [an] indecent exposure offense[]"). With the exception of indecent exposure, MCL 750.335a, each of the above-listed offenses contains language stating that if the person was sexually delinquent at the time of the offense, he or she may be punished by imprisonment for an indeterminate term, and that the minimum term must be one day, and the maximum term must be life in prison. See *Helzer*, 404 Mich at 416-417; see also *People v Campbell (Michael)*, ___ Mich App ___, ___ (2016) (noting that 2005 PA 300 changed the language of MCL 750.335a(2)(c) "from '*may* be punishable' to '*is* punishable[,]' indicat[ing] that the Legislature intended the indeterminate sentence of one day to life to be a *mandatory* sentence[]") (emphasis added).

B. Procedure

MCL 767.61a sets out the procedures to be employed concerning a sexually delinquent person:

> "In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall

> charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person.
>
> ***
>
> In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in [MCL 768.35], and before sentencing the accused, shall conduct an examination [in open court] of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony.
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> ***
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> Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense."

"Sexual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme." *People v Kelly (Robert)*, 186 Mich App 524, 528 (1990). See also *People v Winford*, 404 Mich 400, 404 n 5 (1978) ("the indeterminate penalty for a sexual delinquency conviction [i]s an alternate form of sentencing"). "[T]he alternate sentence is an indeterminate term of one day to life imprisonment." *Kelly (Robert)*, 186 Mich App at 528. A defendant may only be sentenced once upon conviction of the principal charge and the sexual delinquency charge, i.e., the court has the discretion to sentence the defendant under the terms of the principal offense, or under the terms of the sexual delinquency offense, but not both. *Winford*, 404 Mich at 404 n 5.

Under MCL 767.61a, if a defendant pleads guilty or nolo contendere to both the principal and delinquency charges, "the trial court [may not] . . . sentenc[e the] defendant as a sexually delinquent person without first holding a hearing to determine if [the] defendant was sexually delinquent." *Franklin (John)*, 298 Mich App at 542, 544 (because "[e]ntering a plea of nolo contendere is 'an admission of all the essential elements of a charged offense[,]'" and because the defendant pleaded nolo contendere to "indecent exposure under circumstances subjecting him to alternative sentencing as a sexually delinquent person[,]" the "plea should be understood as an admission of guilt with regard to the indecent exposure charges *and* the sexually delinquent person charge[]" within the meaning of MCL 767.61a) (emphasis supplied).

The examination required under MCL 767.61a can "take[] place at the plea hearing or later[,]" but it must be conducted at a "'separate hearing[;]'" therefore, "an examination of [the defendant's] criminal history is [not] sufficient to meet the [examination] requirement[.]" *Franklin (John)*, 298 Mich App at 544-545, quoting *People v Breidenbach*, 489 Mich 1, 10 (2011).

The statutory sentencing guidelines apply to a person convicted of sexual delinquency and a corresponding Class A felony offense other than indecent exposure. See MCL 777.16q; *People v Buehler*, 477 Mich 18, 24 (2007), abrogated in part on statutory grounds as recognized by *Campbell (Michael)*, ___ Mich App at ___; see also *Campbell (Michael)*, ___ Mich App at ___. In *Buehler*, 477 Mich at 26, the Michigan Supreme Court, noting that the sexual delinquency crimes listed in MCL 777.16q (MCL 750.335a, MCL 750.338, MCL 750.338a, and MCL 750.338b) are subject to the sentencing guidelines and are Class A felonies for which the minimum possible sentence range is 21 to 35 months, held that a sentence of probation for a conviction of indecent exposure as a sexually delinquent person under former MCL 750.335a constituted a downward departure from the guidelines range, requiring articulation of a substantial and compelling reason to depart.[223] However, although the *Buehler* Court concluded that "the Michigan Sentencing Guidelines control[led] over the version of MCL 750.335a in force when [the] defendant committed his crime[,]" the Court noted that "it [was] unnecessary to determine whether the recent amendment of MCL 750.335a, 2005 PA 300,[224] has altered this conclusion for future offenders." *Buehler*, 477 Mich at 24-25 n 18.

Subsequently, the Michigan Court of Appeals addressed the question left open by *Buehler*, 477 Mich at 24-25 n 18, and held that the trial court erred by applying the sentencing guidelines rather than imposing the mandatory sentence of one day to life in prison as required under MCL 750.335a(2)(c), as amended by 2005 PA 300, for

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[223] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. The *Lockridge* Court did not specifically address intermediate sanctions such as probation. See Section 3.7 for discussion of intermediate sanctions. See also Section 3.4 for discussion of *Lockridge*.

[224] The version of MCL 750.335a(2)(c) in effect prior to the enactment of 2005 PA 300 provided, in part, that a conviction of indecent exposure as a sexually delinquent person "*may be* punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life[.]" (Emphasis added.) MCL 750.335a(2)(c) was amended, effective February 1, 2006, by 2005 PA 300 to provide, in part, that a conviction of indecent exposure as a sexually delinquent person "*is* punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life." (Emphasis added.)

indecent exposure as a sexually delinquent person. *Campbell (Michael)*, ___ Mich App at ___ (declining to follow, as abrogated by statutory amendment, *Buehler*, 477 Mich at 24-25 n 18). The Court noted that amended MCL 750.335a(2)(c) "is stated in mandatory terms[,]" while, under *People v Lockridge*, 498 Mich 358, 365 (2015), "the guidelines are now merely advisory[;]" "[c]onsequently, after the decision in *Lockridge*," "the conflict between the statutory language provided under MCL 750.335a(2)(c) and the sentencing guidelines, MCL 769.34, must now be resolved in favor of applying MCL 750.335a(2)(c)." *Campbell (Michael)*, ___ Mich App at ___.[225]

3.14 Juvenile Sentencing[226]

See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapters 14-16, for information on sentencing a juvenile in *automatic waiver cases*, i.e., criminal proceedings in circuit court concerning juveniles against whom the prosecution has authorized the filing of a criminal complaint charging a specified juvenile violation (instead of approving the filing of a petition in the family division of the circuit court); *traditional waiver cases*,[227] i.e., cases in which a juvenile is charged solely with an offense over which the family division has waived jurisdiction under MCL 712A.4; or *designated proceedings*,[228] i.e., cases in which a juvenile is tried in an adult criminal proceeding within the family division of the circuit court, and where, if convicted, the court may sentence the juvenile as an adult, delay sentence, or order a juvenile disposition. See Chapter 19 of the *Juvenile Justice Benchbook* for discussion of selected topics involving the imposition of adult sentence on juvenile offenders, including constitutional and statutory limitations on imposing a life-without-parole sentence on an offender who was under the age of 18 at the time of the offense.

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[225] The other sexual delinquency crimes listed in MCL 777.16q (MCL 750.338, MCL 750.338a, and MCL 750.338b), unlike MCL 750.335a, continue to provide that a conviction of one of those offenses as a sexually delinquent person "*may be* punishable by imprisonment[.]" Accordingly, the (now advisory) sentencing guidelines still presumably apply to a conviction under MCL 750.338, MCL 750.338a, or MCL 750.338b as a sexually delinquent person.

[226] As used in the Juvenile Code, the term *juvenile* generally refers to a person who is less than 17 years of age. See MCL 712A.1(1)(i); MCL 712A.2(a). "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth[,]" is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred[]") (emphasis supplied; citations omitted).

[227] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

[228] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

Part D—Habitual Offender Provisions[229]

3.15 Establishing a Defendant's Habitual Offender Status

Michigan's sentencing law is designed so that the punishment possible for conviction of a crime may be increased in proportion to the offender's number of previous felony convictions. The "general" habitual offender statutes are found in the habitual offender act (HOA), MCL 769.10, MCL 769.11, and MCL 769.12, and operate to raise the *statutory maximum sentence* allowed for repeat offenders based on both the number of a defendant's prior felony convictions and the specific maximum penalty authorized for conviction of the sentencing offense.[230] MCL 777.21 is the statutory provision that allows for an incremental increase in the upper limit of the recommended *minimum sentence range* (the "maximum-minimum" sentence) under the statutory sentencing guidelines based on the number of the defendant's previous felony convictions. The trio of "general" habitual offender statutes and MCL 777.21 are discussed in detail in Sections 3.16, 3.17, 3.18, and 3.19.

A. Notice of Intent to Seek Enhancement

In cases in which the prosecuting attorney intends to seek enhancement of a defendant's sentence on the basis that the defendant is a habitual offender, the prosecuting attorney must file written notice with the court within 21 days after the defendant's arraignment on the information. MCR 6.112(F); MCL 769.13(1).[231]

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[229] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

The *Lockridge* Court did not address habitual-offender sentencing. However, "the top of the guidelines range does not implicate the Sixth Amendment[.]" *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the *upper* limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable *statutory maximum* sentence) are presumably not implicated by *Lockridge*. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

[230] Additionally, MCL 769.12, governing fourth habitual offender status, provides for a *mandatory minimum* sentence of 25 years' imprisonment for an offender who has been convicted of three or more prior felonies or felony attempts, including at least one "[l]isted prior felony" as defined in MCL 769.12(6)(a), and who commits or conspires to commit a subsequent "[s]erious crime" as defined in MCL 769.12(6)(c). MCL 769.12(1)(a). See Section 3.19 for discussion of fourth habitual offender status.

"[I]f arraignment is waived or eliminated as allowed under MCR 6.113(E)[232]," the notice of enhancement must be filed "within 21 days after the filing of the information charging the underlying offense." MCL 769.13(1); MCR 6.112(F). This rule applies "in the absence of an arraignment," even if the defendant "never formally waived arraignment." *People v Marshall*, 298 Mich App 607, 627 (2012), vacated in part on other grounds 493 Mich 1020 (2013) (holding that where "it [was] undisputed that [the] defendant was never arraigned on the underlying offense in the circuit court, the first period [set out in MCL 769.13(1) was] not applicable[,]" and that "MCL 769.13(1) clearly contemplates that in the absence of an arraignment, the period for filing the habitual offender notice is to be measured from the date the information charging the underlying offense is filed[]").

If a defendant pleads guilty or nolo contendere at arraignment on the information to the offense charged or to a lesser offense, the prosecuting attorney may file the notice of enhancement after the defendant's conviction by plea or within the 21-day period after the arraignment. MCL 769.13(3).[233]

Before, during, or after trial, the court may permit the prosecutor to amend the notice of intent to seek an enhanced sentence "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H).

~~The prosecution may not amend an otherwise timely supplemental information outside the period set out in MCL 769.13(1) to allege additional prior convictions. *People v Ellis*, 224 Mich App 752, 755 (1997). "[T]he supplemental information may be amended outside the statutory period only to the extent that the proposed amendment does not relate to the specific requirements of MCL 769.13[], i.e., the amendment may not relate to additional prior convictions not included in the timely filed supplemental information." *Ellis*, 224 Mich App at 757; see also *People v Siterlet*,~~

[231] "[T]he applicable time period for measuring the 21-day period" for the prosecution's notice of intent to seek an enhanced sentence under MCL 769.13(1), when the defendant does not waive arraignment, "begins with the date of '[the] defendant's *arraignment on the information* charging the underlying offense[,]'" i.e., the circuit court arraignment, rather than the date of the arraignment on the warrant or complaint. *People v Richards (Kyle)*, ___ Mich App ___, ___ (2016) (quoting MCL 769.13(1) and noting that "there is a distinction between an arraignment on the information and an arraignment on the warrant or complaint[]") (additional citations omitted). Accordingly, the prosecution's notice of intent to seek an enhanced sentence was timely filed where "[the d]efendant was arraigned on the information in circuit court . . . [and o]n that same day, the prosecution filed the first amended information, which contained a fourth offense habitual offender notice." *Richards (Kyle)*, ___ Mich App at ___.

[232] MCR 6.113(E) provides that "[a] circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence[pursuant to MCL 769.13], as provided in MCR 6.112(F)."

~~299 Mich App 180, 186-187 (2012), vacated in part on other grounds 495 Mich 919 (2013). However, "*Ellis* does not preclude the amendment of a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *People v Hornsby*, 251 Mich App 462, 472 (2002); see also *Siterlet*, 299 Mich App at 187-189.~~

~~The unambiguous language in MCL 769.13(1) governing the 21-day period in which the enhancement notice must be filed "does not include any exception for undiscovered out-of-state convictions[.]" *People v Morales*, 240 Mich App 571, 576 (2000).~~

~~The Michigan Supreme Court requires strict adherence to the 21-day limit set out in MCL 769.13, because allowing the prosecution to amend or file a notice after the 21 days has expired would significantly alter the potential consequences to the defendant, i.e., an enhanced sentence due to habitual offender status. See, e.g., *People v Williams (Mary)*, 462 Mich 882 (2000) (sentence vacated and case remanded for resentencing because the prosecution's notice of sentence enhancement was not timely filed within 21 days after arraignment), and *People v Cobley*, 463 Mich 893 (2000) (sentence vacated and case remanded for resentencing because the prosecutor did not prove that the notice of sentence enhancement was served on the defendant within 21 days after arraignment).~~

~~"[A]fter the expiration of the 21-day period provided for in MCL 769.13(1), an amended felony information (that decreased the habitual-offender level charged in an original felony information) may not be amended to increase a defendant's habitual-offender level back to the level charged in the original felony information." *Siterlet*, 299 Mich App at 184, 188-192 (holding that, where the prosecution "intentionally decreased [the] defendant's habitual-offender level [from fourth-offense to third-offense status] . . . in an attempt to obtain a plea[,]" the prosecution should not have been permitted, after trial and outside the 21-day period set out in MCL 769.13(1), to "file[] a second amended felony information to increase [the] defendant's habitual-offender level back to fourth-offense status[;]" however, because this unpreserved error was not plain~~

[233] "[A]n arguable conflict exists between MCR 6.302(B)(2) [(requiring the trial court, before accepting a plea, to "advise the defendant . . . of . . . the maximum possible prison sentence for the offense")] and MCL 769.13(3)." *People v Brown (Shawn)*, 492 Mich 684, 701 (2012). In *Brown (Shawn)*, 492 Mich at 687, the Michigan Supreme Court held that "MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea[,]" and that MCR 6.310(C) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. Noting that "MCL 769.13(3) . . . permits a prosecuting attorney to file a notice of intent to seek an enhanced sentence under the habitual-offender statute *after* a defendant has entered a plea[,]" the Court concluded that "the remedy provided by MCR 6.310(C) will apply [even] when a defendant is not notified of the enhancement until after pleading guilty." *Brown (Shawn)*, 492 Mich at 701 (emphasis supplied).

~~and because "[the] defendant knew that the prosecution would pursue a fourth-offense enhancement after he rejected the prosecution's plea offer[,]" the defendant was not entitled to relief).~~

B. List of Prior Convictions on Which Prosecutor Will Rely

The prosecuting attorney must identify the prior convictions on which the offender's status as a habitual offender is based and on which the prosecutor intends to rely in seeking sentence enhancement. MCL 769.13(2). The list of prior convictions on which the prosecutor's enhancement notice is based must be filed with the court and served on the defendant or his or her attorney within 21 days of the defendant's arraignment on the information, or if arraignment is waived, within 21 days after the information is filed. MCL 769.13(2).

C. Establishing the Existence of a Prior Conviction

A defendant charged as a habitual offender may challenge the accuracy or constitutional validity of any of the prior convictions listed in the prosecutor's notice of enhancement. MCL 769.13(4). To challenge a prior conviction, the defendant must file a written motion with the court and serve the prosecutor with a copy of the motion. *Id*. The court must resolve any challenges raised by the defendant to the accuracy or constitutional validity of a prior conviction at sentencing or at a separate hearing held before sentencing.[234] MCL 769.13(6).

The court must determine the existence of any of the prior convictions listed in the prosecutor's notice to seek enhancement at sentencing, or at a separate hearing scheduled before sentencing for that purpose. MCL 769.13(5); *People v Green (David)*, 228 Mich App 684, 699 (1998). Any evidence relevant to establishing the existence of a prior conviction may be used for that purpose, including one or more of the following items listed in MCL 769.13(5):

> "(a) A copy of a judgment of conviction.
>
> (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
>
> (c) A copy of a court register of actions.
>
> (d) Information contained in a presentence report.

[234] See Section H. for a detailed discussion of the procedure by which a defendant's collateral attack on the constitutional validity of prior convictions is resolved.

(e) A statement of the defendant."

A trial court properly identified the defendant at sentencing as a second habitual offender and sentenced him accordingly based on the defendant's presentence report, which contained details of the defendant's prior felony conviction. MCL 769.13(5)(d); *Green (David)*, 228 Mich App at 699, citing MCL 769.13(5)(c) (relettered to MCL 769.13(5)(d) by 2006 PA 655).

MCL 769.13(6) describes the process by which the trial court must resolve a defendant's properly raised challenge to the use of a prior conviction to enhance his or her sentence under the general habitual offender statutes:

> "The court shall resolve any challenges to the accuracy or constitutional validity of a prior conviction or convictions that have been raised in a motion filed under [MCL 769.13](4) at sentencing or at a separate hearing scheduled for that purpose before sentencing. The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose. The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. If the defendant establishes a prima facie showing that information or evidence concerning an alleged prior conviction is inaccurate, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the information or evidence is accurate. If the defendant establishes a prima facie showing that an alleged prior conviction is constitutionally invalid, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the prior conviction is constitutionally valid."

1. Classification of the Prior Conviction

A "felony" is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). For purposes of the habitual offender statutory provisions, a "prior felony conviction" is a conviction for conduct or attempted conduct that would be a felony if committed in Michigan no matter where the crime was actually committed. MCL 769.10, MCL

769.11, and MCL 769.12. Therefore, whether obtained in Michigan or in another jurisdiction, a defendant's previous convictions for conduct punishable under Michigan law by imprisonment for more than one year or for conduct expressly designated by Michigan law as felonious conduct are "prior felony convictions" for purposes of determining a defendant's habitual offender status.

A prior conviction obtained in another state that, by offense title alone, would qualify only as a misdemeanor offense in Michigan, is not necessarily invalid for purposes of establishing a defendant's habitual offender status. *People v Quintanilla*, 225 Mich App 477, 478-479 (1997). "The [habitual offender statutes] require[] that the offense be a felony in Michigan under Michigan law, irrespective of whether the offense was or was not a felony in the state or country where originally perpetrated. Hence, the facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose, are determinative." *Id.* at 479.

See also *People v Southward*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2004 (Docket No. 249293), slip op p 6 (an out-of-state conviction classified as a misdemeanor may constitute a felony under Michigan law depending on the facts of the case and the penalty imposed).[235] In *Southward*, slip op at 6, the defendant's prior conviction in North Carolina was classified as a misdemeanor, but the defendant was sentenced to two years of imprisonment (suspended) and three years of supervised probation. Under Michigan law, a crime may be labeled a misdemeanor under the Penal Code *and* be punishable by more than one year of imprisonment. *Id*. For purposes of the general habitual offender statutes, any offense punishable by more than one year of imprisonment is a felony. *Id*.

Accord *Burgess v United States*, 553 US 124, 127 (2008) (even if state law classifies the offense as a misdemeanor, a state drug offense punishable by more than one year in prison constitutes a felony drug offense as that term is used in the repeat offender provision of the federal Controlled Substances Act, 21 USC 841(b)(1)(A)).

Prior convictions for offenses that were felonies at the time they were committed but were later reclassified as misdemeanors may be used to establish a defendant's habitual

[235] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C).

offender status. *People v Odendahl*, 200 Mich App 539, 543-544 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686, 691-695 (1996). In support of its conclusion, the *Odendahl* Court cited the Michigan Supreme Court's reasoning in an earlier case:

> "[T]he purpose of the habitual offender statute was punishment for the recidivist, and [] repealing a criminal law did not 'remove from the offender the character of being a violator of the law.'" *Odendahl*, 200 Mich App at 543, quoting *In re Jerry*, 294 Mich 689, 692 (1940).

An adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11. *People v Jones (Jeffrey)*, 297 Mich App 80, 83-86 (2012) (noting that "MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant's sentence[]").[236]

2. Double Jeopardy Challenges

The habitual offender statutes expressly prohibit the use of a conviction to enhance a sentence "if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under [the habitual offender statutes]."[237] MCL 769.10(3), MCL 769.11(3), and MCL 769.12(3).

Use of a defendant's prior felony conviction as the basis for the crime of felon in possession of a firearm and to establish the defendant's status as a habitual offender does not violate the constitutional prohibitions against double jeopardy. *People v Phillips (William)*, 219 Mich App 159, 162-163 (1996). In resolving the defendant's challenge to use of the same prior felony conviction for both purposes, the Michigan Court of Appeals stated:

> "Neither the habitual offender statute nor the felon in possession of a firearm statute prohibits the application of the statutory habitual offender

[236] MCL 769.10, governing second habitual offender status, and MCL 769.12, governing fourth habitual offender status, are textually similar to MCL 769.11, and would therefore presumably be subject to the same construction.

[237] See Section 3.21 for detailed discussion of concurrent/exclusive application of sentencing enhancement schemes contained in the habitual offender statutes and those in other statutory penalty provisions.

> sentence enhancement provision for a conviction of felon in possession of a firearm. Nor do these statutes expressly preclude a prior felony conviction that is used to establish the crime of felon in possession of a firearm from also being used as a prior conviction under the habitual offender statutes." *Phillips (William)*, 219 Mich App at 163.

The same prior felonies may be used to establish a defendant's habitual offender status for more than one subsequent felony conviction when the subsequent felonies were committed at different times. *People v Anderson (Scott)*, 210 Mich App 295, 298 (1995). Because the habitual offender sentencing provisions do not create substantive offenses separate from the underlying prior convictions, a defendant's double jeopardy protection is not implicated. *Id.* at 298.

3. Multiple Convictions From the Same Judicial Proceeding

When counting prior felonies under Michigan's habitual offender statutes, each felony conviction that preceded the sentencing offense is a separate felony conviction, even if more than one conviction arose from the same criminal transaction. *People v Gardner*, 482 Mich 41, 44 (2008). The Court explained that the plain language of the habitual offender statutes, MCL 769.10, MCL 769.11, and MCL 769.12, "directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions." *Gardner*, 482 Mich at 44.[238]

4. Convictions Older Than Ten Years

A trial court may consider convictions that are more than ten years old in determining a defendant's habitual offender status. *People v Zinn*, 217 Mich App 340, 349 (1996). This is unlike the "10-year gap" rule that limits the age of previous convictions that may be counted against a defendant for the purposes of scoring his or her prior record variables under the statutory sentencing guidelines. MCL 777.50.[239]

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[238] However, for purposes of MCL 769.12(1)(a), which provides for a mandatory 25-year minimum sentence for certain fourth habitual offenders, "[n]ot more than [one] conviction arising out of the same transaction shall be considered a prior felony conviction[.]" See Section 3.19 for discussion of MCL 769.12(1)(a).

[239] See Section 3.8(A).

3.16 Determining a Habitual Offender's Recommended Minimum Sentence Range Under the Statutory Sentencing Guidelines[240]

> **Note:** The *general habitual offender* provisions contained in MCL 769.10, MCL 769.11, and MCL 769.12 establish the *maximum* term of imprisonment that may be imposed on a defendant being sentenced as a habitual offender under those statutory provisions. There is a critical distinction between the general habitual offender provisions of MCL 769.10, MCL 769.11, and MCL 769.12 and the sentence enhancements authorized by MCL 777.21. MCL 769.10, MCL 769.11, and MCL 769.12 relate to the *maximum penalty authorized by the statute* under which the defendant's conduct was prohibited. These habitual offender enhancement provisions permit a sentencing court to impose on a *habitual* offender a sentence greater than the maximum sentence permitted by statute for a *first* conviction of the sentencing offense. The maximum term of imprisonment permitted for a habitual offender's felony conviction (as authorized under MCL 769.10, MCL 769.11, and MCL 769.12) must be determined by reference to the specific criminal statute the defendant's conduct violated. In contrast to the general habitual offender provisions, the enhancements authorized by MCL 777.21 increase the recommended *minimum* sentence ranges calculated under the sentencing guidelines as the ranges apply to habitual offenders.

The nine sentencing grids in MCL 777.61 to MCL 777.69 represent the proper sentence ranges for offenders *not* being sentenced as habitual offenders. Separate grids reflecting the recommended sentence ranges for habitual offenders for the same nine crime classes (A through H, and second-degree murder, M2) do not exist in the statutory provisions

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[240] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

The *Lockridge* Court did not address habitual-offender sentencing. However, "the top of the guidelines range does not implicate the Sixth Amendment[.]" *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the *upper* limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable *statutory maximum* sentence) are presumably not implicated by *Lockridge*. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

governing felony sentencing. However, statutory authority exists for determining the upper limit of a habitual offender's recommended minimum sentence range by adding an incremental percentage of the range calculated for first-time offenders (or offenders who are not otherwise being sentenced as habitual offenders).[241] The statutory method of calculating the minimum range recommended for habitual offenders is found in MCL 777.21(3):

> "If the offender is being sentenced under [MCL 769.10, MCL 769.11, or MCL 769.12],[242] determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under [MCL 777.61–MCL 777.69] for the underlying offense as follows:
>
> > "(a) If the offender is being sentenced for a second felony, 25%.
> >
> > (b) If the offender is being sentenced for a third felony, 50%.
> >
> > (c) If the offender is being sentenced for a fourth or subsequent felony, 100%."

MCL 761.1(g) defines a *felony* as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." For purposes of the habitual offender statutory provisions, a *prior felony conviction* is a conviction for conduct or attempted conduct that would be a felony if committed in Michigan no matter where the crime was actually committed. MCL 769.10, MCL 769.11, and MCL 769.12. Therefore, whether obtained in Michigan or in another jurisdiction, a defendant's previous convictions for conduct punishable under Michigan law by imprisonment for more than one year or for conduct expressly designated by Michigan law as felonious conduct are *prior felony convictions* for purposes of determining a defendant's habitual offender status.[243]

When sentencing a defendant as a habitual offender, "[a] court shall not fix a maximum sentence that is less than the maximum term for a first conviction." MCL 769.10(2), MCL 769.11(2), and MCL 769.12(2).

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[241] Numeric values have been rounded down to the nearest whole month. The actual term in months may exceed the value indicated in the cell by a fraction of a month.

[242] The "general" habitual offender statutory provisions.

[243] See Section 3.15(C) for further discussion of establishing prior felony convictions.

"'A trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence.'" *People v Bonilla-Machado*, 489 Mich 412, 429 (2011), quoting *People v Turski*, 436 Mich 878 (1990). Therefore, where the trial court erroneously asserted that it lacked discretion in enhancing a maximum sentence under MCL 769.10(1)(a), the case was properly remanded "to allow the trial court to either clarify that it understood it had discretion in imposing the enhanced sentence[] or to redetermine the maximum sentence[] after properly exercising its discretion." *Bonilla-Machado*, 489 Mich at 430.

The sentencing grids printed in the *Michigan Sentencing Guidelines Manual* (available by clicking here), and as shown in the example in Section 3.17, combine the ranges recommended under the guidelines for *all* offenders—first-time *and* habitual.[244] Locating the appropriate cell for a habitual offender in any of the nine sentencing grids is addressed in the subsections below.

3.17 Second Habitual Offender Status (HO2)

A person who commits a felony in Michigan and who has been previously convicted of a felony or attempted felony (whether or not the previous conviction occurred in Michigan as long as the violation would have been a felony violation if it had been obtained in Michigan) is a second habitual offender subject to the following penalties:

- If the subsequent felony is punishable on first conviction by a term less than life imprisonment, the court may, in its discretion, place the person on probation[245] "or sentence the person to imprisonment for a maximum term that is not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser term." MCL 769.10(1)(a).

- If the subsequent felony is punishable on first conviction by life imprisonment, the court may place the person on probation[246] or sentence the person to imprisonment for life, or for a lesser term. MCL 769.10(1)(b).

- If the subsequent felony is a major controlled substance offense,[247] the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.10(1)(c).

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[244] Numeric values have been rounded down to the nearest whole month. The actual term in months may exceed the value indicated in the cell by a fraction of a month.

[245] Subject to the requirements of MCL 771.1.

[246] Subject to the requirements of MCL 771.1.

- The court must not sentence an offender to a maximum term of imprisonment that is less than the maximum term indicated for a first conviction of the sentencing offense. MCL 769.10(2).

In *People v Jones (Jeffrey)*, 297 Mich App 80, 83-86 (2012), the Michigan Court of Appeals held that because "MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant's sentence," an adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11.[248]

"'A trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence.'" *People v Bonilla-Machado*, 489 Mich 412, 429 (2011), quoting *People v Turski*, 436 Mich 878 (1990). Therefore, where the trial court erroneously asserted that it lacked discretion in enhancing a maximum sentence under MCL 769.10(1)(a), the case was properly remanded "to allow the trial court to either clarify that it understood it had discretion in imposing the enhanced sentence[] or to redetermine the maximum sentence[] after properly exercising its discretion." *Bonilla-Machado*, 489 Mich at 430.

A sentence imposed for a conviction of violating the Sex Offenders Registration Act (SORA) as a second offender ("SORA-2"), MCL 28.729(1)(b), "may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a)." *People v Allen (Floyd)*, ___ Mich ___, ___ (2016), rev'g 310 Mich App 328 (2015). "Nothing in SORA or the [habitual offender act, MCL 769.10—MCL 769.13,] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute." *Allen (Floyd)*, ___ Mich at ___ (concluding that "MCL 28.729(1) sets forth a recidivism statutory scheme that creates three *separate* felonies that elevate on the basis of repeat [SORA] offenses[,]" rather than a *single* offense "with escalating punishments for repeat convictions," and that "the Court of Appeals mistakenly concluded that the phrase 'first conviction of *that offense*' in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)" rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because "[the] defendant was subject to a 7-year maximum term of imprisonment[for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL

[247] Sentences for subsequent major controlled substance offenses are discussed in Section 3.20.

[248] MCL 769.10(1) is textually similar to MCL 769.11(1), and would therefore presumably be subject to the same construction.

769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years." *Allen (Floyd)*, ___ Mich at ___.[249]

The recommended minimum sentence range for an offender being sentenced as a second habitual offender is indicated by the numeric values shown in the "HO2" cells of each sentencing grid. The upper limit of a habitual offender's *minimum* range is calculated by reference to the percentage outlined in MCL 777.21(3)(a). As already indicated, the enhancement authorized by the general habitual offender statutes applies *only* to the maximum term of imprisonment. Therefore, the sentence enhancement authorized by MCL 769.10 is not shown in the sentencing grids. In the example below, the minimum ranges recommended for a second habitual offender, as calculated by the percentages outlined in MCL 777.21(3)(a), are (in months): for level A-I, 0 to 3; for level B-I, 0 to 7; for level C-I, 0 to 11; for level D-I, 2 to 21; for level E-I, 5 to 28; and for level F-I, 10 to 28.[250]

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4

MCL 769.10(1)(a) and MCL 769.10(1)(b) specifically designate probation as a possible disposition in cases involving a criminal defendant being sentenced as a second habitual offender. MCL 771.1 authorizes a court in certain circumstances to place a defendant convicted of a felony on probation rather than sentence the defendant to a term of imprisonment. MCL 771.1(1) also applies to defendants being sentenced as habitual offenders under MCL 769.10(1)(a) and MCL 769.10(1)(b) and limits the court's use of probation to specific circumstances:

[249] MCL 769.11, governing third habitual-offender status, and MCL 769.12, governing fourth habitual-offender status, are textually similar to MCL 769.10, and would therefore presumably be subject to the same construction.

> "In all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer."[251]

3.18 Third Habitual Offender Status (HO3)

A person who commits a felony in Michigan and who has been convicted of any combination of two or more felonies or felony attempts (whether or not the two or more previous convictions occurred in Michigan as long as the violations would have been felony violations if the convictions had been obtained in Michigan) is a third habitual offender subject to the following penalties:

- If the subsequent felony is punishable on first conviction by a term of imprisonment less than life, the court "may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term." MCL 769.11(1)(a).

- If the subsequent felony is punishable by life imprisonment on first conviction, the court may sentence the person to life imprisonment, or to a lesser term. MCL 769.11(1)(b).

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[250] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

The *Lockridge* Court did not address habitual-offender sentencing. However, "the top of the guidelines range does not implicate the Sixth Amendment[.]" *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the *upper* limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable *statutory maximum* sentence) are presumably not implicated by *Lockridge*. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

[251] See Section 3.46 for more information about probation.

- If the subsequent felony is a major controlled substance offense,[252] the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.11(1)(c).

- The court must not sentence an offender to a maximum term of imprisonment that is less than the maximum term indicated for a first conviction of the sentencing offense. MCL 769.11(2).

An adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11. *People v Jones (Jeffrey)*, 297 Mich App 80, 83-86 (2012) (noting that "MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant's sentence[]").

A sentence imposed for a conviction of violating the Sex Offenders Registration Act (SORA) as a second offender ("SORA-2"), MCL 28.729(1)(b), "may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a)." *People v Allen (Floyd)*, ___ Mich ___, ___ (2016), rev'g 310 Mich App 328 (2015). "Nothing in SORA or the [habitual offender act, MCL 769.10—MCL 769.13,] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute." *Allen (Floyd)*, ___ Mich at ___ (concluding that "MCL 28.729(1) sets forth a recidivism statutory scheme that creates three *separate* felonies that elevate on the basis of repeat [SORA] offenses[,]" rather than a *single* offense "with escalating punishments for repeat convictions," and that "the Court of Appeals mistakenly concluded that the phrase 'first conviction of *that offense*' in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)" rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because "[the] defendant was subject to a 7-year maximum term of imprisonment[for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years." *Allen (Floyd)*, ___ Mich at ___.[253]

The recommended minimum sentence range for an offender being sentenced as a third habitual offender is indicated by the numeric values shown in the "HO3" cells of the respective sentencing grids. The upper limit of a third habitual offender's minimum range is calculated by reference to the percentage outlined in MCL 777.21(3)(b). The sentence enhancement authorized by MCL 769.11 refers to the maximum sentence permitted by law for a specific offense as increased by the applicable

[252] Sentences for subsequent major controlled substance offenses are discussed in Section 3.20.

[253] MCL 769.11 is textually similar to MCL 769.10, and would therefore presumably be subject to the same construction.

habitual offender provision and is not shown in the sentencing grids. In the grid below, the minimum ranges recommended for an individual being sentenced as a third habitual offender are (in months): for level A-I, 0 to 4; for level B-I, 0 to 9; for level C-I, 0 to 13; for level D-I, 2 to 25; for level E-I, 5 to 34; and for level F-I, 10 to 34.[254]

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4

3.19 Fourth Habitual Offender Status (HO4)

A. General Enhancement

A person who commits a felony in Michigan and who has been convicted of any combination of three or more felonies or felony attempts (whether or not the previous felony convictions were obtained in Michigan or in another state as long as the offenses

[254] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

The *Lockridge* Court did not address habitual-offender sentencing. However, "the top of the guidelines range does not implicate the Sixth Amendment[.]" *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the *upper* limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable *statutory maximum* sentence) are presumably not implicated by *Lockridge*. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

would have been felony offenses if they had occurred in Michigan) is a fourth habitual offender subject to the following penalties:[255]

- If the subsequent felony is punishable on first conviction by a maximum term of imprisonment of five years or more or for life, the court may sentence the person to life imprisonment, or to a lesser term. MCL 769.12(1)(b).

- If the subsequent felony is punishable on first conviction by a maximum term of imprisonment less than five years, the court may sentence the person to a maximum term of imprisonment of 15 years. MCL 769.12(1)(c).

- If the subsequent felony is a major controlled substance offense,[256] the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.12(1)(d).

- The court must not sentence an offender to a maximum term of imprisonment that is less than the maximum term indicated for a first conviction of the sentencing offense. MCL 769.12(2).

In *People v Jones (Jeffrey)*, 297 Mich App 80, 83-86 (2012), the Michigan Court of Appeals held that because "MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant's sentence," an adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11.[257]

A sentence imposed for a conviction of violating the Sex Offenders Registration Act (SORA) as a second offender ("SORA-2"), MCL 28.729(1)(b), "may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a)." *People v Allen (Floyd)*, ___ Mich ___, ___ (2016), rev'g 310 Mich App 328 (2015). "Nothing in SORA or the [habitual offender act, MCL 769.10—MCL 769.13,] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute." *Allen (Floyd)*, ___ Mich at ___ (concluding that "MCL 28.729(1) sets forth a recidivism statutory scheme that creates three *separate* felonies that elevate on the basis of repeat [SORA] offenses[,]" rather than a *single* offense "with escalating punishments for repeat convictions," and that "the Court of Appeals mistakenly concluded that the phrase

[255] In addition to these general enhancement provisions, MCL 769.12(1)(a) provides for a mandatory 25-year minimum sentence for certain violent fourth habitual offenders. See Section 3.19(B).

[256] Sentences for subsequent major controlled substance offenses are discussed in Section 3.20.

[257] MCL 769.12(1) is textually similar to MCL 769.11(1), and would therefore presumably be subject to the same construction.

'first conviction of *that offense*' in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)" rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because "[the] defendant was subject to a 7-year maximum term of imprisonment[for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years." *Allen (Floyd)*, ___ Mich at ___.[258]

The recommended minimum sentence range for a fourth habitual offender is determined by reference to the numeric values shown in the "HO4" cells of each sentencing grid. The upper limit of a habitual offender's minimum range is calculated by reference to the percentage outlined in MCL 777.21(3)(c). The sentence enhancement authorized by MCL 769.12 refers to the maximum sentence permitted by law for a specific offense as increased by the applicable habitual offender provision and is not shown in the sentencing grids. In the grid appearing below, the minimum ranges recommended for a person being sentenced as a fourth habitual offender are (in months): for level A-I, 0 to 6; for level B-I, 0 to 12; for level C-I, 0 to 18; for level D-I, 2 to 34; for level E-I, 5 to 46; and for level F-I, 10 to 46.[259]

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4

[258] MCL 769.12 is textually similar to MCL 769.10, and would therefore presumably be subject to the same construction.

B. Mandatory Minimum Sentence Enhancement For Subsequent Conviction of a "Serious Crime"

In addition to the general sentence enhancement provisions set out in MCL 769.12 for fourth habitual offenders, MCL 769.12(1)(a) provides for a mandatory minimum sentence of 25 years' imprisonment for certain violent offenders. The sentencing court *must* impose a sentence of imprisonment for not less than 25 years if:

- the offender has been convicted of three or more prior felonies or felony attempts, including at least one "[l]isted prior felony" as defined in MCL 769.12(6)(a),[260] and

- the offender is convicted of committing or conspiring to commit a subsequent felony that is a "[s]erious crime" as defined in MCL 769.12(6)(c).[261]

For purposes of MCL 769.12(1)(a) only, "[n]ot more than [one] conviction arising out of the same transaction shall be considered a prior felony conviction[.]" MCL 769.12(1)(a).

3.20 Sentencing an Offender for a Subsequent Major Controlled Substance Offense

When an offender has a previous felony conviction and is subsequently convicted of a *major controlled substance offense*, MCL 769.10(1)(c), MCL 769.11(1)(c), and MCL 769.12(1)(d) mandate application of the sentencing provisions in part 74 of the Public Health Code (MCL 333.7401-MCL 333.7461). However, as discussed below, the Michigan Court of Appeals and the Michigan Supreme Court have held that if an offender has no prior felony convictions for controlled substance offenses, the sentencing court may enhance an offender's sentence under the general habitual offender statutes.

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[259] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

The *Lockridge* Court did not address habitual-offender sentencing. However, "the top of the guidelines range does not implicate the Sixth Amendment[.]" *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the *upper* limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable *statutory maximum* sentence) are presumably not implicated by *Lockridge*. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

A *major controlled substance offense* is limited to convictions for the commission of one of nine crimes described in MCL 761.2(a)–MCL 761.2(c):

- a violation of MCL 333.7401(2)(a)(*i*)–MCL 333.7401(2)(a)(*iv*).
- a violation of MCL 333.7403(2)(a)(*i*)–MCL 333.7403(2)(a)(*iv*).
- conspiracy to commit an offense under MCL 333.7401(2)(a)(*i*)–MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*i*)–MCL 333.7403(2)(a)(*iv*).

The major controlled substance offense described in MCL 333.7401(2)(a) prohibits an individual from manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a controlled substance listed in the statute, a prescription form, or a counterfeit prescription form. Penalties for violating MCL 333.7401(2)(a) with respect to specific quantities of cocaine or a narcotic drug listed in schedule 1 or 2 are as follows:

- a violation involving 1,000 grams or more of a mixture containing the controlled substance is a felony punishable by life imprisonment or any term of years, a fine of not more than $1,000,000, or both. MCL 333.7401(2)(a)(*i*).
- a violation involving 450 grams or more, but less than 1,000 grams, of a mixture containing the controlled substance is a felony punishable by not more than 30 years in prison, a

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[260] MCL 769.12(6)(a) defines "[l]isted prior felony" as "a violation or attempted violation of any of the following:

"(*i*) . . . MCL 257.602a[(4), MCL 257.602a(5),] [or MCL] 257.625[(4)].

(*ii*) . . . MCL 333.7101[–MCL] 333.7545, [if] punishable by imprisonment for more than 4 years.

(*iii*) . . . MCL 750.72, [MCL] 750.82, [MCL] 750.83, [MCL] 750.84, [MCL] 750.85, [MCL] 750.86, [MCL] 750.87, [MCL] 750.88, [MCL] 750.89, [MCL] 750.91, [MCL] 750.110a[(2)], [MCL 750.110a(3)], [MCL] 750.136b[(2)], [MCL 750.136b(3)], [MCL] 750.145n[(1)], [MCL 750.145n(2)], [MCL] 750.157b, [MCL] 750.197c, [MCL] 750.226, [MCL] 750.227, [MCL] 750.234a, [MCL] 750.234b, [MCL] 750.234c, [MCL] 750.317, [MCL] 750.321, [MCL] 750.329, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.411h[(2)(b)], [MCL] 750.411i, [MCL] 750.479a[(4), [MCL 750.479a(5)], [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, [or] [MCL] 750.530.

(*iv*) A second or subsequent violation or attempted violation of . . . MCL 750.227b.

(*v*) . . . MCL 752.542a."

[261] MCL 769.12(6)(c) defines "[s]erious crime" as "an offense against a person in violation of . . . MCL 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.88, [MCL] 750.89, [MCL] 750.317, [MCL] 750.321, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520g[(1)], [MCL] 750.529, [or] [MCL] 750.529a."

fine of not more than $500,000, or both. MCL 333.7401(2)(a)(*ii*).

- a violation involving 50 grams or more, but less than 450 grams, of a mixture containing the controlled substance is a felony punishable by not more than 20 years in prison, a fine of not more than $250,000, or both. MCL 333.7401(2)(a)(*iii*).

- a violation involving less than 50 grams of a mixture containing the controlled substance is a felony punishable by not more than 20 years in prison, a fine of not more than $25,000, or both. MCL 333.7401(2)(a)(*iv*).

> **Note:** The ameliorative changes made to sentencing for major controlled substance offenses effective March 1, 2003, are not retroactive. *People v Thomas (Carl)*, 260 Mich App 450, 459 (2004). In *Thomas (Carl)*, 260 Mich App at 458, the defendant was sentenced to 10 to 20 years in prison when MCL 333.7401(2)(a)(*iii*) had a mandatory minimum of ten years. Thereafter, MCL 333.7401(2)(a)(*iii*) was amended to provide for imprisonment for not more than 20 years, or a fine of not more than $250,000, or both. *Thomas (Carl)*, 260 Mich App at 458. The Michigan Court of Appeals held that although the statutory change did not retroactively apply to the defendant, the Legislature "specifically provided relief—in the form of early parole eligibility—for individuals, such as [the] defendant, who were convicted and sentenced before the amendatory act became effective." *Id*. at 459. That is, "the plain language of MCL 791.234 specifically provides that individuals previously convicted under MCL 333.7401(2)(a)(*iii*) may become eligible for parole 'after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.'" *Thomas (Carl)*, 260 Mich App at 459, quoting MCL 791.234.

The major controlled substance offense described in MCL 333.7403(2)(a) prohibits an individual from knowingly or intentionally possessing a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner acting in the course of his or her professional practice. Penalties for violating MCL 333.7403(2)(a) with respect to specific

quantities of cocaine or a narcotic drug listed in schedule 1 or 2 are as follows:

- a violation involving 1,000 grams or more of a mixture containing the controlled substance is a felony punishable by life imprisonment or any term of years, a fine of not more than $1,000,000, or both. MCL 333.7403(2)(a)(*i*).

- a violation involving 450 grams or more, but less than 1,000 grams, of a mixture containing the controlled substance is a felony punishable by not more than 30 years in prison, a fine of not more than $500,000, or both. MCL 333.7403(2)(a)(*ii*).

- a violation involving 50 grams or more, but less than 450 grams, of a mixture containing the controlled substance is a felony punishable by not more than 20 years in prison, a fine of not more than $250,000, or both. MCL 333.7403(2)(a)(*iii*).

- a violation involving 25 grams or more, but less than 50 grams, of a mixture containing the controlled substance is a felony punishable by not more than four years in prison, a fine of not more than $25,000, or both. MCL 333.7403(2)(a)(*iv*).

A. Mandatory Sentence Enhancement

MCL 333.7413(1) and MCL 333.7413(3) contain mandatory sentence enhancement provisions for offenders who have multiple convictions of specific controlled substance offenses. Those statutory provisions state:

> "(1) An individual who was convicted previously for a violation of any of the following offenses and is thereafter convicted of a second or subsequent violation of any of the following offenses shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term:[262]
>
> (a) A violation of section 7401(2)(a)(*ii*) or (*iii*).
>
> (b) A violation of section 7403(2)(a)(*ii*) or (*iii*).
>
> (c) Conspiracy to commit an offense proscribed by section 7401(2)(a)(*ii*) or (*iii*) or section 7403(2)(a)(*ii*) or (*iii*).
>
> * * *

> (3) An individual convicted of a second or subsequent offense under section 7410(2) or (3) shall be punished, subject to subsection (4),[263] by a term of imprisonment of not less than 5 years nor more than twice that authorized under section 7410(2) or (3) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7410(2) or (3); and shall not be eligible for probation or suspension of sentence during the term of imprisonment."[264]

These mandatory enhancement provisions apply *only* to offenders who have been convicted of two or more of the drug-related offenses specifically enumerated in MCL 333.7413(1) and MCL 333.7413(3). Note that not all of the *major controlled substance offenses*, as defined in MCL 761.2, are included within the mandatory enhancement provisions of sections 7413(1) and (3). In particular, MCL 333.7401(2)(a)(*i*) and MCL 333.7401(2)(a)(*iv*) and MCL 333.7403(2)(a)(*i*) and MCL 333.7403(2)(a)(*iv*) are not included in MCL 333.7413(1).

Where a defendant commits an eligible second offense before he or she is convicted of the first offense, and is subsequently convicted of the second offense, MCL 333.7413(1) must be applied to the offender. The language of MCL 333.7413(1) unambiguously requires that a defendant who has been "convicted previously" of an enumerated offense and is "thereafter convicted" of a second enumerated offense be sentenced according to the provisions of MCL 333.7413(1). *People v Poole (Terry)*, 218 Mich App 702, 710 (1996). There is no requirement under the Public Health Code's enhancement provisions that a conviction for an offender's first offense be obtained before the commission date of the offender's second offense. *Poole (Terry)*, 218 Mich App at 710.

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[262] However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US ___, ___ (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). See also 2014 PA 23, effective March 4, 2014, which amended numerous provisions of the Michigan Penal Code to effectively eliminate mandatory life-without-parole sentencing for certain offenses when committed by juveniles under the age of 18; however, MCL 333.7413(1) has not yet been amended. For discussion of the constitutional implications of life sentences imposed upon juvenile offenders and the statutory requirements that may apply, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

[263] Subsection (4) deals with a court's departure from the minimum term of imprisonment.

[264] The offenses addressed by MCL 333.7413(3) are predicated on the offender's violation of MCL 333.7401(2)(a)(*iv*) within 1,000 feet of school property. See Section 3.11(A).

As written, the general habitual offender statutes do not require a sentencing court to follow the Public Health Code's sentencing scheme unless the offender's subsequent conviction is for a major controlled substance offense. However, as discussed in Section 3.20(B), it appears that a sentencing court may sentence an offender convicted of a subsequent major controlled substance offense under either of the two sentencing schemes, without regard to the directive found in the general habitual offender statutes for subsequent major controlled substance offenses.

B. Application of the General Habitual Offender Statutes to Cases Involving Controlled Substance Offenses

Michigan's appellate courts have addressed the issue whether the sentencing scheme described in the general habitual offender statutes is to be concurrently applied to criminal offenses contained in part 74 of the Public Health Code or whether the scheme described in the Public Health Code operates to the exclusion of the habitual offender provisions.

Michigan courts have consistently held that a defendant's sentence cannot be "doubly enhanced" by application of the habitual offender statutes *and* any enhancement provisions contained in the statutory language prohibiting the conduct for which the defendant was convicted. *People v Elmore*, 94 Mich App 304, 305-306 (1979); *People v Edmonds*, 93 Mich App 129, 135 (1979). With regard to the enhancement provisions contained in the controlled substances act and those contained in the habitual offender provisions, the Michigan Court of Appeals utilized standard statutory interpretation principles to determine that the more specific sentence enhancements found in the controlled substances act prevailed over general enhancement provisions of the habitual offender statutes:

> "It must be noted that application of the controlled substances act penalty augmentation is proper when the defendant is being sentenced on a drug conviction. If the defendant commits a nondrug felony after one or more drug convictions then the habitual offender act applies upon conviction of that nondrug felony." *Edmonds*, 93 Mich App at 135 n 1.

Where a defendant was convicted of offenses that are not major controlled substance offenses and his sentences were quadrupled when the trial court applied the enhancement provisions of the Public Health Code *and* the habitual offender statutes to the defendant's underlying offenses, the Michigan Court of Appeals

held that such "double enhancement" was improper. *People v Fetterley*, 229 Mich App 511, 525, 540-541 (1998).[265]

Where a defendant with no previous drug-related felony convictions was convicted of a major controlled substance offense, the Michigan Court of Appeals concluded that the Public Health Code's enhancement provisions (MCL 333.7413(2) and MCL 333.7413(3)) were "inapplicable by [their] own terms." *People v Franklin (Gwendolyn)*, 102 Mich App 591, 594 (1980). However, "use of the general habitual offender statutes" to impose an enhanced sentence on the defendant based on the defendant's multiple prior felony convictions was permissible. *Id.* at 594.

Sentence enhancement under either the habitual offender sentencing scheme or the Public Health Code's subsequent offender sentencing scheme is permissible where a defendant with prior felony convictions is subsequently convicted of a major controlled substance offense. *People v Wyrick*, 474 Mich 947 (2005). "[T]he prosecutor may seek a greater sentence under the habitual offender statute even when a defendant is sentenced under the Public Health Code." *Wyrick*, 474 Mich at 947, citing *People v Primer*, 444 Mich 269, 271-272 (1993) (holding that "the legislative purpose [of the provisions of the Code of Criminal Procedure providing that if a subsequent felony is a major controlled substance offense, the person shall be punished as provided in the Public Health Code] was to assure that the mandatory sentences for the commission of a first or subsequent major controlled substance offense would not be ameliorated as the result of the exercise of discretion regarding the length of sentence provided in the habitual offender provisions in the Code of Criminal Procedure, and not to preclude enhancement of a sentence under the habitual offender provisions that might be imposed on a person who has a record of prior felony conviction, albeit not for a major controlled substance offense").

C. Discretionary Sentence Enhancement

Unlike the provisions in MCL 333.7413(1) and MCL 333.7413(3), MCL 333.7413(2) *permits*, but does *not require*, a sentencing court to double the term of imprisonment authorized by the applicable statute for a first conviction of the offense. Where an offender is convicted of a second or subsequent controlled substance offense—"major" *or* "non-major"—MCL 333.7413(2) authorizes a trial court to impose a term of imprisonment not more than twice the term permitted for a first conviction of the offense. MCL 333.7413(2) states:

[265] *Fetterley*, 229 Mich App 511, provides a detailed overview of case law involving the applicability of multiple enhancement provisions.

> "Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both."

The discretionary authority in MCL 333.7413(2) to sentence a repeat offender to not more than twice the term of imprisonment otherwise authorized includes an increase in both the minimum and maximum terms in the minimum range recommended by the statutory sentencing guidelines.[266] *People v Williams (John)*, 268 Mich App 416, 429-431 (2005). In *Williams (John)*, 268 Mich App at 430-431, the trial court properly concluded that MCL 333.7413(2) authorized it to double both values in the range recommended under the guidelines—in that case, from the range of 5 to 23 months "otherwise authorized" for conviction, to a range of 10 to 46 months. The Michigan Court of Appeals held that "the clear and unambiguous language of MCL 333.7413(2) does not differentiate or suggest a distinction, either explicitly or implicitly, between maximum and minimum sentences; therefore, the word 'term' can entail and contemplate both maximum and minimum sentences." *Williams (John)*, 268 Mich App at 427.

See also *People v Lowe*, 484 Mich 718, 724 (2009), overruled in part on other grounds in *People v Peltola*, 489 Mich 174, 189-190 (2011), where the Michigan Supreme Court explained:

> "[U]nder Michigan's scheme of indeterminate sentencing[267] and the courts' implementation of that scheme, the 'term otherwise authorized' is not exclusively the minimum sentence *or* the maximum limits for that sentence. In other words, the 'period of time' that a defendant could potentially spend in prison lies somewhere between the minimum and the maximum allowable sentences, and accordingly those sentences operate in tandem to define the 'term' for which a defendant has been sentenced. In order to double this 'term,' a trial court necessarily has to double

[266] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

> both the minimum and maximum sentences because both are required to constitute a particular 'term.'"

"[W]hen calculating a defendant's recommended minimum sentence range under the sentencing guidelines when the defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7413(2), a trial court should score the PRVs [prior record variables]." *Peltola*, 489 Mich at 190. In *Peltola*, 489 Mich at 184, the defendant contended that MCL 777.21(1)(b), requiring the sentencing court to score a defendant's PRVs "[e]xcept as otherwise provided[,]" does not apply to offenders falling within the purview of MCL 777.21(4).[268] The Supreme Court disagreed, holding that "MCL 777.21(1) sets forth the general rule for determining a defendant's minimum sentence range[]" and that, because MCL 777.21(4) does not direct otherwise but instead "is merely intended to provide guidance regarding how to determine the OV level and offense class for offenders falling under MCL 777.18[,]" the rule requiring the scoring of PRVs remains applicable to those offenders. *Peltola*, 489 Mich at 176, 191.

MCL 333.7413(5) defines "second or subsequent offense" for the purposes of subsection (2):

> "[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug."

Sentence enhancement under MCL 333.7413(2) requires only that an offender's *convictions* must *follow* one another: there is no requirement in the statute regarding the temporal sequence of the

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[267] As the term is used in Michigan, an *indeterminate sentence* is a sentence of unspecified duration. In *Lockridge*, 498 Mich at 380 n 18, the Michigan Supreme Court explained:

> "In [*Drohan*, 475 Mich at 153 n 10, the Court] cited the definition of 'indeterminate sentence' from *Black's Law Dictionary* (8th ed): a sentence 'of an unspecified duration, such as one for a term of 10 to 20 years.' . . . *Drohan* was correct to say that Michigan has an indeterminate sentencing scheme under that definition of the term."

The *Lockridge* Court further noted, however, that "Michigan's sentencing scheme is *not* 'indeterminate' as the United States Supreme Court has ever applied that term." *Lockridge*, 498 Mich at 380, citations omitted; emphasis added. Rather, "the relevant distinction between constitutionally permissible 'indeterminate' sentencing schemes and impermissible 'determinate' sentencing schemes, as the United States Supreme Court has used those terms, . . . turns on whether judge-found facts are used to curtail judicial sentencing discretion by *compelling* an increase in the defendant's punishment[; i]f so, the system violates the Sixth Amendment[, and] Michigan's sentencing guidelines do just that." *Id*. at 383.

[268] MCL 777.21(4) applies to an offender who "is being sentenced for a violation described in [MCL 777.18]," which includes subsequent controlled substance violations under MCL 333.7413(2).

commission dates of the offenses on which the offender's convictions are based. *People v Roseburgh*, 215 Mich App 237, 239 (1996).

3.21 Application of the Habitual Offender Provisions to Offenses Involving Statutory Escalation Schemes

Whether the habitual offender sentencing provisions may be concurrently applied to specific subsequent felony convictions is dependent on whether the Legislature has already provided a sentencing enhancement scheme for successive felony violations. "Where the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted." *People v Fetterley*, 229 Mich App 511, 540-541 (1998); see also *People v Allen (Floyd)*, ___ Mich ___, ___ (2016). However, where the statute under which a defendant was convicted enhances the punishment based on prior convictions of that offense, use of the general habitual offender provisions is improper. See, e.g., *People v Honeycutt*, 163 Mich App 757, 762 (1987) (because MCL 750.227b, the felony-firearm[269] statute, mandates enhanced sentences for subsequent violations of that statute, application of the general habitual offender provisions is improper).

A number of statutes elevate the severity of the offense based on an offender's prior conviction. This section discusses the following offenses:

- criminal sexual conduct offenses;
- violations of the Sex Offenders Registration Act (SORA);
- offenses involving the operation of a motor vehicle while intoxicated or with any amount of certain controlled substances in the body;
- retail fraud offenses; and
- fleeing and eluding offenses.

In addition, a number of statutes expressly prohibit the use of an offender's previous conviction to enhance a sentence under the general habitual offender statutes if the conviction is used to enhance the offense under an internal statutory escalation scheme.

[269] In addition to prohibiting the possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1), MCL 750.227b(2) was added by 2015 PA 26, effective July 1, 2015, to prohibit the possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony.

A. Subsequent Criminal Sexual Conduct (CSC) Convictions

MCL 750.520f provides the penalty for offenders convicted on subsequent occasions of specific criminal sexual conduct (CSC) offenses.[270] That provision requires that a defendant convicted of a second or subsequent violation of MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), or MCL 750.520d (CSC-III) be sentenced to a mandatory minimum term of *at least* five years. MCL 750.520f(1). For purposes of MCL 750.520f, an offense is considered a second or subsequent offense if, before conviction of the second or subsequent offense, the offender has been convicted under MCL 750.520b, MCL 750.520c, MCL 750.520d, or "under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense." MCL 750.520f(2).

Additionally, MCL 750.520b(2)(c) imposes a *mandatory* sentence of imprisonment for life without the possibility of parole for a conviction of CSC-I, if committed against an individual less than 13 years of age by a defendant 18 years of age or older and if the defendant was previously convicted of an enumerated sex crime against an individual less than 13 years of age.

> **Note:** CSC-I, CSC-II, and CSC-III are always considered to be felony convictions. CSC-IV, MCL 750.520e, is not designated as a felony offense by the statutory language defining the crime. However, because CSC-IV is punishable by more than one year of imprisonment, MCL 750.520e(2), it is a felony for purposes of the Code of Criminal Procedure. MCL 761.1(g). Thus, CSC-IV may be used as a prior felony conviction to enhance an offender's sentence under the general habitual offender provisions.

Because the habitual offender statutes address a defendant's *maximum* possible sentence and the subsequent offense provisions of MCL 750.520f address a defendant's *minimum* possible sentence, concurrent application of the statutes is permitted. *People v VanderMel*, 156 Mich App 231, 234-237 (1986). A defendant's habitual offender status and the applicability of MCL 750.520f to a defendant's conviction may be based on the same previous felony conviction. *People v James (Edwin)*, 191 Mich App 480, 482 (1991). In contrast to the habitual offender statutes, MCL 769.10 *et seq*., no additional notice has to be filed to proceed against defendants charged as subsequent offenders under MCL 750.520f. *People v*

[270] See the Michigan Judicial Institute's *Sexual Assault Benchbook* for detailed discussion of CSC offenses.

Eason, 435 Mich 228, 249 n 35 (1990), citing *People v Bailey*, 103 Mich App 619, 627-628 (1981).

"[T]he legislative sentencing guidelines apply to minimum sentences in excess of 5 years that are imposed under MCL 750.520f." *People v Wilcox (Larry)*, 486 Mich 60, 73 (2010). "Although MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it[;]" therefore, "for purposes of applying MCL 769.34(2)(a),[271] the 'mandatory minimum' sentence referred to in MCL 750.520f(1) is a flat 5–year term." *Wilcox (Larry)*, 486 Mich at 69, 73. "Because the trial court imposed a 10-year minimum sentence [under MCL 750.520f's repeat offender provision, and because the 10-year minimum sentence] exceeded both the applicable guidelines range and the 5-year mandatory minimum, [the] defendant's sentence was a departure from the guidelines[,]" and the trial court was required to state substantial and compelling reasons[272] to justify the departure. *Wilcox (Larry)*, 486 Mich at 62-63.

B. Subsequent Sex Offenders Registration Act (SORA) Offenses[273]

MCL 28.729(1) sets out penalties for a first, second, or third (or subsequent) violation of SORA ("SORA-1," "SORA-2," or "SORA-3"). See *Allen (Floyd)*, ___ Mich at ___. MCL 28.729(1) provides:

> "Except as provided in [MCL 28.729(2), MCL 28.729(3), and MCL 28.729(4)], an individual required to be registered under [SORA] who willfully violates [SORA] is guilty of a felony punishable as follows:
>
> > (a) If the individual has no prior convictions for a violation of [SORA], by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

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[271] MCL 769.34(2)(a) provides:

> "If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section."

[272] In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

[273] See the Michigan Judicial Institute's *Sexual Assault Benchbook* for detailed discussion of SORA.

> (b) If the individual has 1 prior conviction for a violation of [SORA], by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both.
>
> (c) If the individual has 2 or more prior convictions for violations of [SORA], by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both."

A sentence imposed for a conviction of SORA-2, MCL 28.729(1)(b), "may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a)." *Allen (Floyd)*, ___ Mich at ___, rev'g 310 Mich App 328 (2015). "Nothing in SORA or the [habitual offender act, MCL 769.10—MCL 769.13,] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute." *Allen (Floyd)*, ___ Mich at ___ (concluding that "MCL 28.729(1) sets forth a recidivism statutory scheme that creates three *separate* felonies that elevate on the basis of repeat [SORA] offenses[,]" rather than a *single* offense "with escalating punishments for repeat convictions," and that "the Court of Appeals mistakenly concluded that the phrase 'first conviction of *that offense*' in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)" rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because "[the] defendant was subject to a 7-year maximum term of imprisonment[for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years." *Allen (Floyd)*, ___ Mich at ___.[274]

C. Third or Subsequent Convictions of Operating While Intoxicated or Operating With Any Amount of Certain Controlled Substances in the Body

For offenses occurring after January 3, 2007,[275] a defendant's third or subsequent conviction under MCL 257.625(1) (operating while intoxicated) or MCL 257.625(8) (operating with any amount of certain controlled substances in the body) constitutes a felony regardless of the number of years that have elapsed between any prior conviction, i.e., even those convictions that occurred more than ten years before the defendant's third conviction. MCL

[274] MCL 769.11, governing third habitual-offender status, and MCL 769.12, governing fourth habitual-offender status, are textually similar to MCL 769.10, and would therefore presumably be subject to the same construction.

[275] See 2006 PA 564, effective January 3, 2007, amending MCL 257.625(9)(c).

257.625(9)(c); *People v Perkins (James)*, 280 Mich App 244, 245-246 (2008). A defendant's prosecution under MCL 257.625(9)(c), as amended by 2006 PA 564, does not violate the ex post facto clauses of the state or federal constitutions. *Perkins (James)*, 280 Mich App at 251-252. The Michigan Court of Appeals explained that although the amended MCL 257.625(9)(c) "certainly works to [the defendant's] disadvantage, [it] did not attach legal consequences to [his] prior offenses, which occurred before the amendment's effective date. Rather, the amendment made the consequences of [the defendant's] current offense[], which occurred after January 3, 2007, more severe on the basis of [the defendant's] prior convictions." *Perkins (James)*, 280 Mich App at 251. See also *People v Sadows*, 283 Mich App 65, 66 (2009) (MCL 257.625, as amended by 2006 PA 564, does not violate the prohibition against ex post facto laws and does not deny a defendant his or her federal and state constitutional rights to equal protection and due process).

For purposes of offenses involving the operation of a motor vehicle while intoxicated, a prior conviction may be a misdemeanor conviction. *People v Bewersdorf*, 438 Mich 55, 64 (1991). "[T]he sentence for [a third conviction of operating while intoxicated], if it is a first felony conviction, shall be as provided in the Motor Vehicle Code[.] . . . However, any subsequent . . . felony [operating while intoxicated] conviction is subject to the repeat offender provisions of the habitual offender act regardless of whether the underlying felony conviction is also [a third or subsequent operating while intoxicated] offense." *Bewersdorf*, 438 Mich at 70-71; see also *People v Stewart (Jerry) (On Remand)*, 219 Mich App 38, 43-44 (1996).

> **Note:** Violations of MCL 257.625(9)(c) are subject to alternate mandatory minimum sentences under MCL 769.34(2), and the trial court may sentence the defendant to either alternative. See *People v Hendrix*, 471 Mich 926 (2004), modifying in part 263 Mich App 18 (2004).

D. Subsequent First-Degree Retail Fraud Convictions

The retail fraud statutes are similar to the operating while intoxicated statutes in that both statutory schemes increase the severity of the offense from misdemeanor to felony as a defendant is convicted of successive violations, and each successive violation is subject to a possibly greater sentence. However, the statute governing retail fraud offenses contains an express prohibition against using a defendant's previous felony conviction for enhancement under both the retail fraud statute and the habitual offender statute. MCL 750.356c(6) states:

> "If the sentence for a conviction under this section is enhanced by 1 or more prior convictions, those prior convictions shall not be used to further enhance the sentence for the conviction pursuant to . . . [sections] 769.10, 769.11, and 769.12."

The corresponding language in the habitual offender statutes is included in subparagraph (3) of each habitual offender statute:

> "A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section." MCL 769.10(3), MCL 769.11(3), and MCL 769.12(3).

In addition to retail fraud offenses, there are numerous statutory schemes that *expressly prohibit* using an offender's previous conviction for enhancement under the general habitual offender statutes if that conviction was used to enhance the offender's sentence under the statute prohibiting the conduct for which the offender was convicted. The statutory schemes governing these offenses contain a provision identical to the provision found in MCL 750.356c(6) (quoted above). Each statutory scheme containing the express prohibition against using an offender's previous conviction to enhance a sentence under the general habitual offender statutes if the conviction is used to enhance the offense under the specific internal escalation scheme also contains a provision requiring the prosecutor to file notice with the court of the intent to seek enhancement under the statute based on an offender's previous convictions. See MCL 750.356c(4), for example.

Similar to the notice requirements of the general habitual offender statutes,[276] where a prosecutor seeks to enhance an offense under an internal escalation scheme, the prosecutor must list the offender's previous convictions on which the enhancement sought will be based. The existence of a prior conviction can be established by any relevant evidence including, but not limited to:

> "(a) A copy of the judgment or conviction.
>
> (b) A transcript of a prior trial, plea-taking, or sentencing.
>
> (c) Information contained in a presentence report.
>
> (d) The defendant's statement." MCL 750.356c(4).

[276] See Section 3.15(B).

E. Subsequent Fleeing and Eluding Convictions

Both MCL 257.602a and MCL 750.479a prohibit fleeing and eluding a police or conservation officer. Like felony-firearm and criminal sexual conduct convictions, any fleeing and eluding conviction is considered to be a felony offense.[277] The statutory scheme governing fleeing and eluding offenses does not contain a method for imposing determinate sentences that increase or escalate with the number of times a defendant is convicted of the same offense. Consistent with the Michigan Supreme Court's decision in *Bewersdorf*, 438 Mich at 70, the Michigan Court of Appeals concluded that where a defendant had prior felony convictions the general habitual offender statutes may be used to enhance the offender's sentence for a subsequent fleeing and eluding conviction even where the fleeing and eluding statute already provided for a enhanced sentence based on the defendant's subsequent conviction of fleeing and eluding. *People v Lynch*, 199 Mich App 422, 424 (1993).

3.22 Habitual Offender's Parole Eligibility and Judicial Authorization

MCL 769.12(4) provides:

> "An offender sentenced [as an habitual offender] under [MCL 769.10, MCL 769.11, or MCL 769.12] for an offense other than a major controlled substance offense is not eligible for parole until expiration of the following:
>
> > (a) For a prisoner other than a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law.
> >
> > (b) For a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge."

Although "MCL 769.12(4)(a) requires written approval before a prisoner otherwise selected for parole will become eligible for the actual grant of parole[, i]t does not require[] . . . written approval before a prisoner can even be *considered* for conditional release." *Hayes v Parole Bd*, 312 Mich App 774, 780 (2015) (emphasis added). "Once that consideration is complete, if the [Parole] Board decides that parole is proper, then it must obtain [judicial] approval before granting parole, as required under MCL

[277] CSC-I, CSC-II, and CSC-III are designated as felonies without regard to possible penalty. CSC-IV is a felony because it is punishable by more than one year of imprisonment. MCL 761.1(g).

769.12(4)(a)." *Hayes*, 312 Mich App at 781 (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).

Part E—Sentence Departures

3.23 Introduction and Effect of *Lockridge* on Departure Caselaw

A. Imposition of Departure Sentence Under *Lockridge*

For felony convictions listed in MCL 777.11 through MCL 777.19 that occur on or after January 1, 1999, the statutory sentencing guidelines require a sentencing court to calculate the appropriate minimum sentence range under the version of the guidelines in effect at the time the crime was committed. MCL 769.34(2). A "departure" is a sentence that does not fall within the appropriate minimum sentence range calculated under the guidelines. MCL 769.31(a).[278]

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). "[U]nder the [previously-mandatory] sentencing guidelines, the abuse of discretion standard . . . applie[d] when an appellate court review[ed] a circuit court's conclusion that there was a 'substantial and compelling reason' to depart from the guidelines." *People v Hardy (Donald)*, 494 Mich 430, 438 n 17 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016, quoting *Babcock*, 469 Mich at 265.

However, in 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US ___ (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[279] or found by the jury to score offense variables (OVs) that *mandatorily*

[278] Notably, the Legislature made no distinction between upward and downward departures. *People v Hegwood*, 465 Mich 432, 440 n 16 (2001). Section 3.25 and Section 3.26 distinguish between upward and downward departures for the purpose of discussing factors considered by a sentencing court in determining whether to depart from the guidelines.

increase the floor of the guidelines minimum sentence range[.]" *People v Lockridge*, 498 Mich 358, 364, 399 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)[,]"[280] 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).[281]

Under *Lockridge*, "the sentencing court may exercise its discretion to depart from [the applicable] guidelines range without articulating substantial and compelling reasons for doing so." *Lockridge*, 498 Mich at 392. In order to facilitate appellate review, the court must justify any sentence imposed outside the advisory minimum guidelines range. *Id*., citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for *reasonableness*[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable." *Lockridge*, 498 Mich at 392 (emphasis supplied), citing *Booker*, 543 US at 261. The *Lockridge* Court did not elaborate on the *Booker* concept of *reasonableness*. However, the Court of Appeals has determined that "a [departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny constitutes a reasonable sentence under *Lockridge*." *People v Steanhouse*, 313 Mich App 1, 47, 48 (2015), lv gtd 499 Mich 934 (2016) (citations omitted).[282]

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[279] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *Lockridge*, 498 Mich at 399, the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea or in testimony or by stipulation or by some similar or analogous route." *People v Garnes*, ___ Mich App ___, ___ (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*. at ___ (citing *Apprendi*, 530 US at 469-471, and remanding "for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admissions" with respect to several contested offense variable scores) (additional citations omitted).

[280] 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.

[281] MCR 6.425(D), which provides, in part, that the sentencing court "must use the sentencing guidelines, as provided by law[,]" and MCR 6.425(E)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure," have not yet been amended to conform to *Lockridge*, 498 Mich 358.

B. Reasonableness of Departure Sentence

1. History: Reasonableness in Federal Courts Post-*Booker*

The *Lockridge* Court did not elaborate on the concept of *reasonableness*. A panel of the Court of Appeals has rejected the analysis that has been used in the federal courts since *Booker*, 543 US 220, in favor of the *principle of proportionality* test that was previously used in Michigan in reviewing sentences under the advisory judicial sentencing guidelines.[283] "[A departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny constitutes a reasonable sentence under *Lockridge*[, 498 Mich 358]." *People v Steanhouse*, 313 Mich App 1, 47, 48 (2015), lv gtd 499 Mich 934 (2016) (concluding that "reinstating the previous standard of review in Michigan, as a means of determining the reasonableness of a sentence, is preferable to adopting the analysis utilized by the federal courts and is most consistent with the Supreme Court's directives in *Lockridge*[]") (citations omitted). However, in *People v Masroor*, 313 Mich App 358, 399 (2015), lv gtd 499 Mich 934 (2016), a different panel declared a conflict with *Steanhouse*, opining that "the application of a reasonableness standard as outlined by the federal courts better comports with *Lockridge* and the Sixth Amendment." Ultimately, the Court of Appeals "order[ed] that a special panel shall not be convened . . . to resolve [the] conflict[.]" *People v Masroor*, unpublished order of the Court of Appeals, issued December 18, 2015 (Docket Nos. 322280, 322281, and 322282).

It is unknown at this time whether the Michigan Supreme Court will approve the *Steanhouse* Court's adoption of the proportionality standard, or reject that standard in favor of the federal (or another) standard. An examination of post-*Booker* federal caselaw may prove useful in understanding the issue. The *Booker* Court commented as follows concerning the concept of reasonableness:

> "We infer appropriate review standards from related statutory language, the structure of the statute, and the '"sound . . . administration of justice."' . . . And in this instance those factors, in addition to the past two decades of appellate

[282] See Section 3.23(B)(2).

[283] See Section 3.23(B)(2).

> practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].' [Former 18 USC 3742(e)(3)].
>
> * * *
>
> [The pre-2003 text of 18 USC 3742(e)(3)] told appellate courts to determine whether the sentence 'is unreasonable' with regard to [18 USC 3553(a)]. Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.
>
> * * *
>
> [W]e [do not] share the dissenters' doubts about the practicality of a 'reasonableness' standard of review. 'Reasonableness' standards are not foreign to sentencing law. The [Sentencing Reform Act of 1984] has long required their use in important sentencing circumstances—both on review of departures, see [former 18 USC 3742(e)(3)], and on review of sentences imposed where there was no applicable Guideline, see [18 USC 3742(a)(4); 18 USC 3742(b)(4); 18 USC 3742(e)(4)]." *Booker*, 543 US at 260-263 (citations omitted).

Additionally, in *Peugh v United States*, 569 US ___, ___ (2013), the United States Supreme Court provided the following review of its post-*Booker* precedent:

> "Our [post-*Booker*] decisions have clarified the role that the Guidelines play in sentencing procedures, both at the district court level and when sentences are reviewed on appeal. First, 'a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.' The district court must then consider the arguments of the parties and the factors set forth in [18 USC 3553(a)]. The district court 'may not presume that the Guidelines range is reasonable,' and it 'may in appropriate cases impose a non-Guidelines sentence based on disagreement with the

> [Sentencing] Commission's views[.]' The district court must explain the basis for its chosen sentence on the record. '[A] major departure [from the Guidelines] should be supported by a more significant justification than a minor one.'
>
> On appeal, the district court's sentence is reviewed for reasonableness under an abuse-of-discretion standard. Failure to calculate the correct Guidelines range constitutes procedural error, as does treating the Guidelines as mandatory. The court of appeals may, but is not required to, presume that a within-Guidelines sentence is reasonable. The reviewing court may not apply a heightened standard of review or a presumption of unreasonableness to sentences outside the Guidelines range, although it 'will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' . . . '[A] district court's decision to vary from the advisory Guidelines may attract greatest respect when' it is based on the particular facts of a case. Overall, this system 'requires a court to give respectful consideration to the Guidelines,' but it 'permits the court to tailor the sentence in light of other statutory concerns as well.'" (Citations and internal quotation marks omitted.)

2. Proportionality Test

Under the advisory judicial sentencing guidelines, a defendant's sentence was reviewed for proportionality under *People v Milbourn*, 435 Mich 630 (1990). Under *Milbourn*, a sentence was proportionate when it reflected the seriousness of the circumstances surrounding the offense and the offender's criminal history. *Id.* at 636.

In *People v Steanhouse*, 313 Mich App 1, 46, 47 (2015), lv gtd 499 Mich 934 (2016), the Court of Appeals readopted the proportionality test as the basis for determining the reasonableness of a departure sentence under the post-*Lockridge* advisory legislative guidelines. "[A departure] sentence that fulfills the principle of proportionality under *Milbourn*[, 435 Mich 630,] and its progeny constitutes a reasonable sentence under *Lockridge*[, 498 Mich 358]." *Steanhouse*, 313 Mich App at 47, 48 (concluding that "reinstating the previous standard of review in Michigan, as a means of determining the reasonableness of a sentence, is

preferable to adopting the analysis utilized by the federal courts [following *United States v Booker*, 543 US 220 (2005),] and is most consistent with the Supreme Court's directives in *Lockridge*[]") (citations omitted). The *Steanhouse* Court noted that the following principles historically applied when determining the proportionality of a sentence under the *Milbourn* test:

> "Under the [proportionality] test, 'a given sentence [could] be said to constitute an abuse of discretion if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' As such, trial courts were required to impose a sentence that took 'into account the nature of the offense and the background of the offender.'
>
> . . . [T]he [*Milbourn*] Court stated:
>
>> 'The guidelines represent the actual sentencing practices of the judiciary, and . . . the sentencing guidelines [are] the best "barometer" of where on the continuum from the least to the most threatening circumstances a given case falls.
>>
>> . . . We note that departures [from the guidelines] are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. . . . To require strict adherence to the guidelines would effectively prevent their evolution, and, for this reason, trial judges may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime.'
>
> The [*Milbourn*] Court also provided the following guidance for appellate courts reviewing a departure from the guidelines:
>
>> 'Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables

> > used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.'
>
> Factors previously considered by Michigan courts under the proportionality standard included, among others, (1) the seriousness of the offense[;] (2) factors that were inadequately considered by the guidelines[;] and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation[.]"

Steanhouse, 313 Mich App at 46, citing *People v Houston*, 448 Mich 312, 321, 323-324 (1995), and quoting *Milbourn*, 435 Mich at 636, 651, 656-657, 659-660 (citations omitted).[284]

Where "[t]he court calculated the minimum period of incarceration for its departure sentence by essentially tripling the applicable guidelines' scores to reflect that there were three complainants[,]" even if "the trial judge's allocution inadvertently satisfied *Milbourn*, [435 Mich 630 (1990),] . . . *Steanhouse*[, 313 Mich App 1,] . . . nevertheless require[d] remand" for "the trial court to specifically justify the *extent* of any departure sentences the court may elect to impose, and to explain why the sentences imposed are proportionate to the seriousness of defendant's convictions, taking into account [the] defendant's background and any mitigating factors brought forward by counsel." *People v Masroor*, 313 Mich App

[284] The *Steanhouse* panel additionally held that "the ['*Crosby* remand'] procedure articulated in *Lockridge*, and modeled on that adopted in *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005), . . . applies . . . [and] is the proper remedy when[] . . . the trial court was unaware of and not expressly bound by a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing." *Steanhouse*, 313 Mich App at 48.

(remanding the case to the trial court "'to determine what effect *Lockridge* would have on the defendant's sentence, so that it may be determined whether any prejudice resulted from the error[]'") (citations omitted). See Section 3.54(E) for discussion of *Crosby* remands.

358, 377-378 (2015), lv gtd 499 Mich 934 (2016) (citations omitted).

See Section 3.4 for discussion of *Lockridge*. See Section 3.34 for a detailed discussion of proportionality.

A word of caution is warranted regarding the following sections in this Part. It is unknown whether or to what extent caselaw addressing departures under the previously-mandatory guidelines will be of continued relevance on review of sentence departures under the now-advisory guidelines. Similarly, it is unknown whether statutory provisions (and corresponding court rules) related to departures, but not expressly struck by the Lockridge Court, continue to apply in the absence of the "substantial and compelling" articulation requirement.[285] Accordingly, until further guidance is provided by the appellate courts, discussion of the statutory provisions and caselaw in this Part will not be deleted from this benchbook. However, the pre-Lockridge content of the following sections should be approached with caution.

3.24 Requirements of a Sentence Departure Under the Previously-Mandatory Guidelines[286, 287]

Previously, sentence departures were governed by the language in MCL 769.34(3), which permitted a court to depart from the range recommended by the guidelines if there was a "substantial and compelling reason" for that departure, and the court articulated that reason on the record. *People v Babcock*, 469 Mich 247, 259-260 (2003). Of critical importance was the trial court's statement (on the record) concerning how the substantial and compelling reason justified the degree of departure chosen by the court. *Id.* at 258-260; *People v Claypool*, 470 Mich 715, 726-727 (2004), abrogated in part as recognized in *People v Lockridge*, 498 Mich 358, 372-373 (2015).

[285] The *Lockridge* Court 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, emphasis supplied. In light of the emphasized limiting language, it is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*.

In construing the former *substantial and compelling reason* departure scheme, the Michigan Supreme Court held that "the statutory guidelines require[d] more than an articulation of reasons for *a* departure; they require[d] justification for the *particular* departure made." *People v Smith (Gary)*, 482 Mich 292, 303 (2008)[288] (the trial court abused its discretion when it sentenced a defendant to twice the highest minimum term recommended under the sentencing guidelines without justifying the extent of the departure on the record). The Michigan Supreme Court concluded that providing substantial and compelling reasons for a departure did not satisfy the trial court's duty to "establish why the sentences imposed were proportionate to the offense and the offender." *Id.* at 295.

The Michigan Supreme Court set out the following summary to assist trial courts in fulfilling their statutory obligations under MCL 769.34(3):

> "(1) The trial court bears the burden of articulating the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.
>
> (2) The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made.
>
> (3) The trial court's articulation of reasons for the departure must be sufficient to allow adequate appellate review.
>
> (4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity

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[286] There is no longer a requirement that a court articulate a substantial and compelling reason to depart from the guidelines range. In 2015, holding that Michigan's mandatory sentencing guidelines scheme was constitutionally deficient, the Michigan Supreme 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)[,]" 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." *People v Lockridge*, 498 Mich 358, 364-365, 391-392, 399 (2015) (emphasis supplied). A sentencing court has discretion to depart from the guidelines range, and a departure sentence "will be reviewed by an appellate court for *reasonableness*." *Lockridge*, 498 Mich at 392, citing *United States v Booker*, 543 US 220, 261 (2005) (emphasis supplied). A panel of the Court of Appeals has determined that "a [departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny, constitutes a reasonable sentence under *Lockridge*." *People v Steanhouse*, 313 Mich App 1, 47, 48 (2015), lv gtd 499 Mich 934 (2016) (citations omitted). Because it is unknown whether or to what extent pre-*Lockridge* caselaw will be of continued relevance in determining the reasonableness of a departure sentence, discussion of these cases will not be deleted from this benchbook at this time. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

[287] Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.

(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.

(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence.

(7) Departures from the guidelines recommendation cannot be assessed with mathematical precision. The trial court must comply *reasonably* with its obligations under the guidelines . . . to further the legislative goal of sentencing uniformity." *Smith (Gary)*, 482 Mich at 318-319.

A. Substantial and Compelling Reason[289]

According to the Michigan Supreme Court, a reason justifying a departure was substantial and compelling if it was "objective and verifiable," if it "'keenly'" or "'irresistibly'" grabbed a court's attention, if it was "'of considerable worth'" in deciding the length of a sentence, and if it arose only in "'exceptional cases.'" *Babcock*, 469 Mich at 257, quoting *People v Fields (Warren)*, 448 Mich 58, 62, 67, 68 (1995).

"The phrase 'objective and verifiable' has been defined to mean that the facts to be considered by the court must be actions or

[288] In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

[289] In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74 (2003).

Proportionality[290] remained a component of sentencing under the mandatory statutory guidelines. *Babcock*, 469 Mich at 262. When deciding whether and to what degree to depart from the recommended sentence, "[a] trial court [was required to] consider whether its sentence [was] proportionate to the seriousness of the defendant's conduct and his [or her] criminal history[.]" *Id.* at 264. "If [the sentence was] not [proportionate], the trial court's departure [was] necessarily not justified by a substantial and compelling reason." *Id*.

Although there was likely no single correct outcome in cases where a departure from the guidelines was considered and imposed, a departure was required to fall within "th[e] principled range of outcomes." *Babcock*, 469 Mich at 269; *People v Reincke (On Remand)*, 261 Mich App 264, 268 (2004). As long as the trial court chose a sentence departure within that principled range of outcomes, the court had properly exercised its discretion. *Reincke*, 261 Mich App at 268. In *Reincke*, 261 Mich App at 265, the trial court imposed a sentence that exceeded by more than four times the minimum sentence recommended under the guidelines—the guidelines recommended a minimum of 81 to 135 months and the court imposed a minimum of 360 months. The Court of Appeals concluded that the trial court's extreme departure from the recommended guidelines range was justified by the "incomprehensible brutality" of the crime. *Id*. at 269 (three-year-old child penetrated with such force that the tissue between the child's rectum and vaginal wall was torn to the point of being unidentifiable, general anesthesia was necessary just to examine the extent of the child's injuries, and the injuries were so extensive that the child required major reconstructive surgery).

An upward departure requires that the trial court, at sentencing, advise the defendant of his or her appellate rights regarding the sentence departure. MCR 6.425(F)(4) states:

> "When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 *et seq*., are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by

[290] The Court of Appeals has determined that "a [departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny, constitutes a reasonable sentence under *Lockridge*[, 498 Mich 358]." *People v Steanhouse*, 313 Mich App 1, 47, 48 (2015), lv gtd 499 Mich 934 (2016) (citations omitted). See Section 3.34 for a detailed discussion of proportionality.

> the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines."[291]

The legislative sentencing guidelines apply to a defendant's sentence of imprisonment following probation revocation when the offense for which the defendant was sentenced to probation was committed on or after January 1, 1999. MCL 769.34(2); *People v Hendrick*, 472 Mich 555, 557, 560 (2005). Trial courts were required to articulate substantial and compelling reasons for imposing a sentence outside of the guidelines range, and it was "perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist[ed] to warrant an upward departure from the legislative sentencing guidelines." *Id.* at 557, 562-563.[292] Accordingly, a court was permitted to consider "the acts giving rise to the probation violation" as a substantial and compelling reason to depart. *People v Church*, 475 Mich 865, 865 (2006), citing *Hendrick*, 472 Mich at 564.

B. Statutory Prohibitions and Caselaw[293]

In addition to the pre-*Lockridge* requirement that the trial court articulate a substantial and compelling reason for departing from the guidelines, the statutory sentencing guidelines expressly prohibited a sentencing court from basing a departure on specific characteristics of a defendant and his or her defense. MCL 769.34(3)(a) states:

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[291] There is no indication in *Lockridge*, 498 Mich 358, that the requirements of MCR 6.425(F)(4) no longer apply, and MCR 6.425(F)(4) has not been amended; therefore, it is unclear to what extent courts must continue to advise defendants of the right to appeal a departure sentence as required under that provision.

[292] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. The *Lockridge* Court did not specifically address intermediate sanctions such as probation. See Section 3.7 for discussion of intermediate sanctions. See also Section 3.4 for discussion of *Lockridge*.

[293] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

> "The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range."

Unless the court concluded that a factor had been given disproportionate or inadequate weight, the guidelines also expressly prohibited a court from basing a sentence departure on a characteristic of the offense or the offender addressed by the offense variables (OVs) and prior record variables (PRVs). MCL 769.34(3)(b) states:

> "The court shall not base a departure on an offense characteristic [(OV)] or offender characteristic [(PRV)] already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight."

Because points are assessed in each OV and PRV according to the applicable statement having the highest number of points and because each variable consists of a finite number of somewhat generic statements, the guidelines necessarily cannot account for the unique circumstances of specific offenses and offenders. The "all or nothing" characteristic of some of the variables further limits the guidelines from accurately accounting for circumstances of an offense not precisely described by the choices available under each variable. For example, OV 7 addresses the aggravated physical abuse component of an offense and allows for only two choices. MCL 777.37. Fifty points must be scored if a victim was subject to treatment characterized as aggravated physical abuse under OV 7, or zero points must be scored if a victim was not subject to such abuse. MCL 777.37(1). OV 7 cannot account for a victim's treatment that falls somewhere in between, or well beyond, the two choices offered by OV 7.

The Michigan Supreme Court has provided guidance for determining when a characteristic of the offense or the offender is already adequately measured by an OV or a PRV:

> "[I]f a defendant convicted of armed robbery is scored 25 points under offense variable one because he [or she] stabbed his [or her] victim, see MCL 777.31, that the defendant stabbed his [or her] victim probably could not constitute a substantial and compelling reason to justify a departure because the Legislature has already

> determined what effect should be given to the fact that a defendant has stabbed his [or her] victim and the courts must abide by this determination. However, if the defendant stabbed his [or her] victim multiple times, or in a manner designed to inflict maximum harm, that might constitute a substantial and compelling reason for a departure because these characteristics may have been given inadequate weight in determining the guidelines range." *Babcock*, 469 Mich at 258 n 12.

A trial court's upward departure based on the defendant's extensive criminal history was held to be appropriate even where the PRVs "partially accounted for" the defendant's prior convictions. *People v Deline*, 254 Mich App 595, 598-599 (2002), vacated in part on other grounds 470 Mich 895 (2004).[294] The Court of Appeals explained:

> "[A]lthough defendant's history of misdemeanors and felonies was partially accounted for in the scoring of prior record variables, that scoring did not account for the number or extent of [the defendant's prior] offenses. Other factors not accounted for in the guidelines scoring indicate that defendant is unwilling or unable to accept responsibility for his actions or make the changes needed to protect the public from further driving offenses by him. For example, he was on probation for drunken driving at the time of his offense, he had a blood-alcohol level far in excess of the legal limit, he was driving although his license had been suspended, and he has been sentenced to jail for numerous drunken driving offenses." *Deline*, 254 Mich App at 598-599.

A trial court's upward departure based on the defendant's commission of multiple acts of aggravated physical abuse against his wife did not constitute an abuse of discretion where the maximum score of 50 points for OV 7 (aggravated physical abuse) could be assigned for a *single* incident; OV 7 did not take into account the number of times (18) the defendant treated his victim with sadism, torture, or excessive brutality. *People v Cline (Stephen)*, 276 Mich App 634, 652 (2007). Similarly, the trial court's upward departure based on the defendant's conviction of 18 counts of crimes against a person did not constitute an abuse of discretion where the defendant's score of 25 points (offense was part of a

[294] Conduct scored under OV 19 was also at issue in *Deline*, 254 Mich App 595, and the *Deline* Court's interpretation of OV 19—that OV 19 was limited to conduct that interfered with the judicial process—was disapproved in *People v Barbee*, 470 Mich 283, 287-288 (2004). The Michigan Supreme Court vacated the part of "the Court of Appeals judgment [in *Deline*] to the extent that it is inconsistent with [the Michigan Supreme Court's] decision in *Barbee*." *People v Deline*, 470 Mich 895 (2004). See Section 3.9(U) for discussion of OV 19.

pattern of felonious criminal activity involving three or more crimes against a person) for OV 13 (continuing pattern of criminal behavior) did not take into account the 18 times the defendant committed a crime against a person. *Id.* at 652-653.

There was no requirement that a trial court's determination that the guidelines gave inadequate or disproportionate weight to a factor be expressly stated—the court's determination could be implied from the record. *People v Lowery*, 258 Mich App 167, 170 (2003). In *Lowery*, 258 Mich App at 171, the Court of Appeals noted that "[t]he trial court expressed its reasoning for the departure by implying that the characteristics were given inadequate weight." The Court of Appeals agreed with the trial court that the guidelines sentence recommendation did not adequately account for the fact that the defendant actually shot the victim. *Id*. The Court of Appeals explained:

> "Although offense variable (OV) 1 considers whether a firearm was discharged at or toward a human being and OV 3 considers whether a victim suffered bodily injury that required medical treatment, . . . neither variable considers someone actually being shot. Injury to a victim as a result of being shot is in fact a substantial and compelling reason to depart from the guidelines, and constituted a substantial and compelling reason for the trial court's *particular* departure in this case[.]" *Lowery*, 258 Mich App at 171.

But see *People v Jackson (James)*, 474 Mich 996 (2006), where, in a peremptory order,[295] the Michigan Supreme Court clearly indicated that a sentencing court *must make a record finding* when its departure from the sentencing guidelines recommendation was based on a characteristic's failure to adequately account for a defendant's conduct or when a characteristic is given disproportionate weight in light of the defendant's conduct. *Id.* at 996. According to the *Jackson (James)* Court:

> "The sentencing court . . . commented on the 'excessive brutality, violence, and terrorism' to which the victims were subjected. But the 50-point score [the] defendant received on Offense Variable 7 already accounted for these circumstances. A sentencing court may base a departure on a characteristic already taken into account by the sentencing guidelines *only if the court finds that the*

[295] "[A] final Supreme Court disposition of an application . . . [that] contains a concise statement of the applicable facts and the reason for the decision[,]" constitutes binding precedent. *People v Crall*, 444 Mich 463, 464 n 8 (1993).

> *characteristic was given inadequate or disproportionate weight. No such finding was made here*." *Id.* at 996 (emphasis added; internal citations omitted).

In a concurring opinion in *Jackson (James)*, 474 Mich at 998, Justice Corrigan noted that "[the d]efendant's crimes [we]re 'off the charts' in terms of extreme brutality, terrorism, and violence[, but b]ecause the trial court failed to state that the factor of excessive brutality, violence, and terrorism was given inadequate weight under the guidelines," the defendant should be remanded for resentencing. Justice Corrigan recognized that language appearing in both MCL 769.34(3)(b) and *People v Babcock*, 469 Mich 247, 268 (2003), justified departure when a characteristic was inadequate or disproportionate to the circumstances of the offense or the offender, and stated that "[i]t appear[ed] to [her] that such magic language [was] now indisputably required before [the] Court [would] sustain an upward departure." *Jackson (James)*, 474 Mich at 998.

See also *People v Corrin*, 489 Mich 855 (2011), where the Michigan Supreme Court agreed that "[t]he psychological injury suffered by the victim's family members and the likelihood of the defendant's reoffending were properly considered by the trial court as substantial and compelling reasons that [justified] a departure from the statutory guidelines[;]"[296] *People v Lockridge*, 304 Mich App 278, 283 (2014), rev'd in part on other grounds 498 Mich 358 (2015) ("given . . . the escalation of the [defendant's] domestic-violence conduct toward the victim, the fact that the crime occurred in plain view of [their] children, and that [the] defendant left his children alone with the trauma of attempting to revive their mother, the trial court did not err by finding that the prior record and offense variables inadequately accounted for [the] defendant's conduct[]").

"The fact that a defendant might have to serve county jail time following additional prison incarceration for a parole violation [was not] a substantial and compelling reason to depart from the sentencing guidelines." *People v Lucey*, 287 Mich App 267, 273 (2010). Citing *People v Ratliff*, 480 Mich 1108 (2008), the *Lucey* Court noted that the Supreme Court in *Ratliff*, 480 Mich 1108, had "suggested that the logistical inconvenience that may occur when sentencing a parolee to an intermediate sanction [did] not constitute a substantial

[296] In this case, the trial court expressed frustration with the fact that OV 4 made no allowance for the severity of a victim's serious psychological injury. *People v Corrin*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 290747). The trial court also expressed its displeasure with the fact that OV 4 did not consider psychological injury to the victim's family members. *Id*. **Note:** OV 5, the variable that reflects psychological injury to a victim's family members, did not apply to the defendant's CSC-II conviction; OV 5 applies only when the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1).

and compelling reason for departure from the sentencing guidelines." *Lucey*, 287 Mich App at 272. See also MCL 769.34(4)(a).

That a defendant presented a danger to him- or herself and the public was not an objective and verifiable factor that could be used as a substantial and compelling reason to depart from the statutory guidelines. *People v Solmonson*, 261 Mich App 657, 670 (2004).

A trial court's characterization of the defendant's offenses as "egregious" was not an objective and verifiable determination that could be used as a substantial and compelling reason to depart from the statutory guidelines. *People v Havens*, 268 Mich App 15, 18 (2005).

However, a trial court's determination that "[a] defendant's repeated perpetration of vicious acts against his wife within a short period was a 'particularly aggravating,' 'particularly compelling,' and 'staggering' factor" was objective and verifiable and constituted a substantial and compelling reason for the trial court's upward departure from the minimum sentence recommended by the statutory guidelines. *People v Horn (Marvin)*, 279 Mich App 31, 46 (2008). The Michigan Court of Appeals noted that the "[d]efendant's determined course to terrorize and abuse his wife, clearly evident from the recurring and escalating acts of violence, [wa]s an objective and verifiable reason . . . based on occurrences external to the sentencing judge's mind, and capable of being confirmed." *Id.* at 46.

If the trial court failed to score points under OV 7, it could not upwardly depart from the guidelines range on the basis that "the sentencing guidelines did not adequately account for [the] defendant's intent to terrorize the victims." *People v Anderson (Michael)*, 298 Mich App 178, 186 (2012) (noting that "OV 7 could have been scored to account for the victims' fear and anxiety that resulted as a result [sic] of waking up to find their home on fire and their escape route blocked by fire, and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant's conduct in this regard[]").

A defendant's cooperation with his attorney and his respectful conduct in the courtroom were not objective and verifiable factors and did not serve as substantial and compelling reasons for departure. *People v Young (Raymond)*, 276 Mich App 446, 458 (2007). Additionally, a defendant's punctuality in reporting to the court, while objective and verifiable, could not serve as a substantial and compelling reason for departure because it did not "keenly" or "irresistibly" grab a court's attention. *Id.* at 458.

3.25 Downward Departures[297, 298]

Objective and verifiable factors appropriately considered in determining whether to depart downward from the recommended minimum sentence range under the previously-mandatory sentencing guidelines included: (1) any mitigating circumstances of the offense; (2) the defendant's previous criminal record; (3) the defendant's age; (4) the defendant's employment history; and (5) any relevant post-arrest events, such as the defendant's cooperation with the police. *People v Daniel (Danny)*, 462 Mich 1, 7 (2000), citing *People v Fields (Warren)*, 448 Mich 58, 76-79 (1995). See *People v Young (Raymond)*, 276 Mich App 446, 449-458 (2007) (addressing all of the factors specified by the Court in *Fields (Warren)*, 448 Mich 58, as appropriate for a sentencing court to consider in deciding whether to depart downward from the recommended minimum sentencing guidelines range).

A. Work History

A sentencing court could consider a defendant's stable and long-term work history when determining whether a substantial and compelling reason existed for a downward departure from the recommended minimum sentencing guidelines range. *People v Shinholster*, 196 Mich App 531, 534-535 (1992). However, employment at a job for two years did not "keenly" or "irresistibly" grab one's attention and therefore, did not constitute a substantial and compelling reason to depart downward from the recommended minimum sentencing guidelines range. *People v Claypool*, 470 Mich 715, 727 (2004), abrogated in part as recognized in *People v Lockridge*, 498 Mich 358, 372-373 (2015).

B. Education

A trial court could consider pursuit of a post-secondary education in determining whether to depart downward from the recommended minimum sentence range under the previously-mandatory sentencing guidelines. *People v Perry (Willie)*, 216 Mich App 277, 280, 282 (1996).

The fact that a defendant pursued an education despite having a learning disability was also an appropriate factor to consider in

[297] In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

[298] Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

determining whether to depart downward. *People v Portellos*, 298 Mich App 431, 455-456 (2012).

C. Guidelines Range Versus Mandatory Minimum

If a crime was scored under the previously-mandatory guidelines and resulted in a lesser minimum sentence than the mandatory minimum term contained in the penal statute under which a defendant was convicted, the guidelines range did not itself constitute a substantial and compelling reason for departing from the mandatory minimum. *People v Izarraras-Placante*, 246 Mich App 490, 498 (2001). Only when—independent of the guidelines range—a substantial and compelling reason to depart from a statutory mandatory minimum existed could a trial court properly look to the minimum range recommended by the guidelines in order to fashion a sentence more proportionate to the offense and the offender. *Id.* at 498-499.

D. Family Support

Strong family support could be considered as a substantial and compelling reason for a trial court's downward departure from the recommended minimum sentencing guidelines range. *People v Harvey (Charles)*, 203 Mich App 445, 448 (1994); *Portellos*, 298 Mich App at 454-455 (noting that "[u]nlike a defendant's remorse, whether a defendant ha[d] family and community support [was] external to the mind and capable of being confirmed[]").

E. Minimal Criminal History

Minimal criminal history could properly be considered as a substantial and compelling reason for a trial court's downward departure from the recommended minimum sentencing guidelines range. *Daniel (Danny)*, 462 Mich at 7. "Though the defendant's lack of criminal record alone [was] not a substantial and compelling factor, it [could] become a substantial and compelling factor when considered in conjunction with the defendant's age and other history." *Portellos*, 298 Mich App at 455, citing *Daniel (Danny)*, 462 Mich at 7; *People v Young (Raymond)*, 276 Mich App 446, 455-456 (2007).

However, the fact that the defendant at the age of 26 had only one previous misdemeanor conviction did not constitute a substantial and compelling reason for a downward departure from the recommended minimum sentencing guidelines range. *Claypool*, 470 Mich at 727. See also *People v Bosca*, 310 Mich App 1, 55 (2015) ("[t]he mere fact of [the] defendant's prior, relatively unblemished criminal

history was not a substantial and compelling reason for departure from the guidelines[]").

F. Police Misconduct

"[P]olice misconduct, [] alone, [was] not an appropriate factor to consider at sentencing[, but] if it [could] be objectively and verifiably shown that police conduct or some other precipitating cause altered a defendant's intent, that altered intent [could] be considered by the sentencing judge as a ground for a downward sentence departure." *Claypool*, 470 Mich at 718.

G. Rehabilitative Potential

Where the trial court indicated that its concern was seeing that the defendant receive the rehabilitative services needed to address the context-specific criminal conduct engaged in by the defendant, and taking judicial notice of the fact that community-based services were more available and better than those offered by the Department of Corrections, the trial court did not abuse its discretion in departing downwardly from the recommended sentence, which resulted in the defendant's probation rather than incarceration for a minimum of 19 to 38 months under the guidelines. *People v Doolittle,* unpublished opinion per curiam of the Court of Appeals, issued September 28, 2010 (Docket No. 292423), slip op pp 1-3.[299]

The Court of Appeals noted that the trial court was in a "vastly superior position to observe and evaluate not only the defendant, but the victim, the context, the community, and anyone else who might have an effect on or be affected by its sentencing decision." *Doolittle*, slip op at 3. Finally, the Court of Appeals further noted that it was clear "that the trial court's real concern was ensuring to the maximum extent possible that [the] defendant would be a 'changed man' after completing whatever sentence was imposed." *Doolittle*, slip op at 2.

H. Immigration Status

The trial court erred in departing downward from the minimum guidelines range based on its erroneous belief that imposing a jail sentence of under one year for the defendant's drug convictions would prevent his deportation under federal immigration law. *People v Akhmedov*, 297 Mich App 745, 749-752 (2012) ("the trial court lacked substantial and compelling reasons to depart from the

[299] An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).

guidelines" range of 51 to 85 months' imprisonment where its sole stated reason for the departure was "premised on a misinterpretation of federal law[]" regarding whether the defendant's convictions qualified as "aggravated felonies" requiring deportation).

I. Learning Disabilities

The fact that a defendant pursued an education despite having a learning disability was an appropriate factor to consider in determining whether to depart downward from the sentencing guidelines range. *Portellos*, 298 Mich App at 455-456.

Additionally, the fact that a defendant's learning disability affected his or her decision-making capacity was an appropriate consideration in determining whether to depart downward. *Portellos*, 298 Mich App at 455-456 (holding that evidence that the defendant "was learning disabled, that she required extra time to process information, and that she did not perform well when making quick decisions and judgments[]" supported "the trial court's finding that [the defendant's] learning disability diminished her ability to make decisions[]").

J. Admission to Specialty Court

Under MCL 600.1062 and MCL 600.1068(2), "[a] court[] [was not permitted to] admit a defendant into a drug treatment court program when doing so depart[ed] from the [previously-mandatory] sentencing guidelines and the prosecutor [had] not approved." *People v Baldes*, 309 Mich App 651, 657 (2015). Moreover, a "prosecuting attorney's decision to sign [a] referral form" for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) "did not constitute a waiver [of the right to challenge the trial court's decision to depart from the sentencing guidelines] or approval[of the defendant's admission into drug treatment court]" where the form "did not state that it constituted approval of the individual's admission into the drug treatment court program[;]" furthermore, "a prosecutor's silence [was] not sufficient to constitute approval under [MCL 600.1068] and [did] not waive the prosecutor's right to later demand enforcement of sentencing guidelines." *Baldes*, 309 Mich App at 656-657.

3.26 Upward Departures[300, 301]

The following factors have been addressed by Michigan's appellate courts when reviewing a trial court's upward departure from the previously-mandatory sentencing guidelines:

A. Factors Related to a Victim of the Offense

1. Identity of the Victim

A defendant's "complete disregard" for a law enforcement officer's life was not adequately accounted for by the guidelines and was properly considered as a substantial and compelling reason to depart from the recommended minimum sentencing guidelines range. *People v Thomas (Samuel)*, 263 Mich App 70, 79 (2004).

2. Identity of the Victims Involved in a Defendant's Repeated Criminal Conduct

A "defendant's past criminal history of sex crimes with children, his [or her] admitted sexual attraction to children, and his [or her] repeated failure to rehabilitate himself [or herself] when given the opportunity[,]" were objective and verifiable factors constituting substantial and compelling reasons to depart from the recommended minimum sentencing guidelines range. *People v Geno*, 261 Mich App 624, 636 (2004). See also *People v Anderson (Michael)*, 298 Mich App 178, 189 (2012) (noting that "OV 4 . . . [did] not adequately consider the ways in which an offense affects familial relationships, . . . nor [did] it always account for the unique psychological injuries suffered by individual victims," and holding that the trial court properly departed from the guidelines range where the defendant set his parents' house on fire, trapping them inside).

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[300] In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

[301] Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

3. Violent Conduct Repeatedly Directed at the Same Individual

A defendant's "actual, established pattern and practice of repeatedly victimizing a targeted individual[]" was properly considered as an objective and verifiable factor constituting a substantial and compelling reason to depart from the recommended minimum sentencing guidelines range. *People v Horn (Marvin)*, 279 Mich App 31, 33 (2008).

4. Domestic Violence

The trial court properly departed upward from the sentencing guidelines range in imposing an eight-year minimum sentence for the defendant's involuntary manslaughter conviction based on the facts "(1) that [the] defendant had violated court orders regarding contact with the victim, (2) that the sentencing guidelines did not reflect the extent of [the] defendant's prior altercations with the victim, (3) that [the] defendant killed the victim in the presence of their children, and then left the residence while the children attempted to revive the victim, and (4) that during and after the offense, [the] defendant showed no concern for the physical or emotional well-being of the children." *People v Lockridge*, 304 Mich App 278, 282-283 (2014), rev'd in part on other grounds 498 Mich 358 (2015) (holding further that "given . . . the escalation of the [defendant's] domestic-violence conduct toward the victim, the fact that the crime occurred in plain view of [their] children, and that [the] defendant left his children alone with the trauma of attempting to revive their mother, the trial court did not err by finding that the prior record and offense variables inadequately accounted for [the] defendant's conduct[]").

5. Effect of the Offense on the Victim

A departure could be justified where the recommended minimum sentencing guidelines range "[did] not take into account the violation of the victim's parents' trust in defendant, the effect on the family occasioned by the victim's loss of trust in all men, including his own father, or the effect on the victim and his sister from having to learn about sexual matters at such a young age." *People v Armstrong (Rodney)*, 247 Mich App 423, 425-426 (2001).

6. Severity of the Victim's Physical Injury

The degree of physical injury sustained by a victim was properly considered as a substantial and compelling reason for

departure when the degree of brutality was not adequately accounted for by the sentencing guidelines. *People v Granderson*, 212 Mich App 673, 680 (1995). "Where a defendant's actions [we]re so egregious that standard guidelines scoring methods simply fail[ed] to reflect their severity," the Court of Appeals affirmed a trial court's upward departure from the recommended sentence under the judicial guidelines then in effect. *Id.* at 680. The Court of Appeals explained:

> "Defendant severely beat an elderly woman who was a near invalid, breaking her nose and arm, and then repeatedly stabbed and shot her. His actions are rendered more appalling by the fact that he committed these acts against a woman who trusted him and who had previously hired him to perform odd jobs around her house. Must a reasonable court conclude that these circumstances are adequately accounted for by the relevant robbery offense variables, such as offense variable (OV) 1, 'A firearm is discharged by offender during commission of the offense,' or OV 2, 'Victim killed'? The answer is obvious. We wholeheartedly agree with the sentencing court in finding that the circumstances of the present crime were not adequately reflected in the offense variables." *Granderson*, 212 Mich App at 680-681.

See also *Anderson (Michael)*, 298 Mich App at 188 ("[t]he fact that the victims [of an arson] suffered extreme burns over much of their bodies is objective and verifiable[,]" and "the severity of those injuries was a substantial and compelling reason in support of [the trial court's] sentencing departure[]"); *People v Reincke (On Remand)*, 261 Mich App 264, 269-270 (2004) (an upward departure from the recommended minimum sentencing guidelines range was appropriate where a three-year-old child was penetrated with such force that the tissue between the child's rectum and vaginal wall was torn to the point of being unidentifiable, general anesthesia was necessary just to examine the extent of the child's injuries, and the injuries were so extensive that the child required major reconstructive surgery).

7. Ethnicity of the Victim

The ethnicity of a victim was not a factor already taken into account by the guidelines and was properly considered as a sufficient substantial and compelling reason for departure

from the recommended minimum sentencing guidelines range under specific circumstances. *People v Phung,* unpublished memorandum opinion of the Court of Appeals, issued June 12, 2003 (Docket No. 239098), aff'd sub nom *Phung v Bell*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 4, 2005 (No. 04-CV-73582-DT).[302]

8. Identity or Age of the Victim

An upward departure could be justified if OV 4 did not adequately account for the additional psychological harm resulting when the defendant and the victim were family members. *Anderson (Michael)*, 298 Mich App at 180, 189 (noting that "OV 4 . . . [did] not adequately consider the ways in which an offense affects familial relationships, . . . nor [did] it always account for the unique psychological injuries suffered by individual victims," and holding that the trial court properly departed from the guidelines range where the defendant set his parents' house on fire, trapping them inside).

A trial court's upward departure from the recommended minimum sentencing guidelines range was appropriate where evidence showed that the "defendant performed sexual acts, including forced fellatio, on defenseless four- and five-year-old children, including his own son." *People v Kahley*, 277 Mich App 182, 190 (2007). The Court explained that although offense variable (OV) 4 addresses psychological injury to a victim, and OV 10 addresses exploitation of a vulnerable victim, those variables were "simply inadequate to address the abhorrent nature of the crimes committed by [the] defendant." *Id.* at 190-191.

However, if the trial court failed to score points under a relevant variable, it could not depart from the sentencing guidelines range on the basis that the guidelines did not adequately account for a fact that could have been scored under that variable. *Anderson (Michael)*, 298 Mich App at 186 (noting that "OV 7 [should] have been scored to account for the victims' fear and anxiety[,] . . . and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant's conduct in this regard[]").

See also *People v Keane,* unpublished opinion per curiam of the Court of Appeals, issued October 21, 2004 (Docket No. 248541)

[302] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

(upward departure from the recommended minimum sentencing guidelines range was appropriate where offense variable (OV) 9 (number of victims) "d[id] not consider the age of the victims or the fact that [the] defendant was willing to forego the lives of his own [two] children in []his plot [to have his former girlfriend and her eight-year-old daughter murdered to eliminate them as potential witnesses after he was charged with criminal sexual conduct involving the daughter]").

9. Unusual Consequences to a Victim of the Offense

A trial court's upward departure from the recommended minimum sentencing guidelines range was appropriate where evidence showed that the trial court based its departure on the victim's—and the victim's family's—exposure to the defendant's sexually transmitted disease, "the communicable nature of the disease[,] and the consequences of such a disease on a young victim." *People v Castro-Isaquirre,* unpublished opinion per curiam of the Court of Appeals, issued April 6, 2004 (Docket No. 242134).

10. Terrorizing a Victim

A trial court's determination that "[a] defendant's repeated perpetration of vicious acts against his wife within a short period was a 'particularly aggravating,' 'particularly compelling,' and 'staggering' factor" was objective and verifiable and constituted a substantial and compelling reason for the trial court's upward departure from the minimum sentence recommended by the statutory guidelines. *People v Horn (Marvin)*, 279 Mich App 31, 46 (2008). The Michigan Court of Appeals noted that the "[d]efendant's determined course to terrorize and abuse his wife, clearly evident from the recurring and escalating acts of violence, [wa]s an objective and verifiable reason . . . based on occurrences external to the sentencing judge's mind, and capable of being confirmed." *Id.* at 46.

However, if the trial court failed to score points under OV 7 ("conduct designed to substantially increase the fear and anxiety a victim suffered during the offense"), it could not upwardly depart from the guidelines range on the basis that "the sentencing guidelines did not adequately account for the defendant's intent to terrorize the victims." *Anderson (Michael)*, 298 Mich App at 186 (noting that "OV 7 could have been scored to account for the victims' fear and anxiety that resulted as a result [sic] of waking up to find their home on fire and

their escape route blocked by fire, and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant's conduct in this regard[]").

B. Factors Involving the Offender

1. Repeat Violent Offenders and Community Protection

A trial court's upward departure from the recommended minimum sentencing guidelines range was proper where the defendant committed the sentencing offense shortly after his release from a 15-year sentence for a criminal episode that involved robbery, kidnapping, and sexual assault. *People v Hicks (Rodney)*, 259 Mich App 518, 535-537 (2003). The sentencing court further explained the departure by noting that the guidelines did not account for the fact that the defendant received 34 misconduct tickets during his previous incarceration and that the conduct precipitating both convictions was predatory conduct from which the community ought to be protected. *Id.* at 535-537.

2. Credible Prediction of the Defendant's Future Conduct

"A court's opinion or speculation about a defendant's future dangerousness [was] not objective or verifiable." *Anderson (Michael)*, 298 Mich App at 189, citing *People v Cline (Stephen)*, 276 Mich App 634, 651 (2007). However, "the trial court [could] base a sentencing departure on a defendant's future dangerousness if objective and verifiable facts support[ed] the court's conclusion, such as the defendant's past failures to rehabilitate or demonstrated 'obsessive or uncontrollable urges to commit certain offenses.'" *Anderson (Michael)*, 298 Mich App at 189-190, quoting *Horn (Marvin)*, 279 Mich App at 45. "[S]pecific characteristics of an offense and an offender that strongly presage[d] future criminal acts [could] justify an upward departure from the recommended sentencing range if they [were] objective and verifiable, and if they [were] not already adequately contemplated by the guidelines. Although a trial court's mere opinion or speculation about a defendant's general criminal propensity [was] not, in itself, an objective and verifiable factor, objective and verifiable factors underlying that conclusion or judgment [were] not categorically excluded as proper reasons for an upward departure." *Id.* at 45.

In *Horn (Marvin)*, 279 Mich at 44, the trial court engaged in an upward departure from the recommended minimum sentencing guidelines range based on its conclusion that the particular danger the defendant presented to his wife justified an increased sentence because the danger was clear from the defendant's pattern of extreme violence against his wife, and the sentencing guidelines did not take into consideration the defendant's determined course of targeting a specific victim. In affirming the trial court, the Court of Appeals noted that "the trial court did not err in finding that [the] defendant's repeated criminal assaults upon his wife and his relentless attempts to brutalize and kill his wife presage future violence and aggression. An individual's established pattern of predatory conduct toward a selected victim clearly constitutes probative evidence of future behavior toward that victim. Accordingly, anticipatory harm based on an established pattern of violence toward a specific victim [was] an objective and verifiable factor, not a speculative prediction." *Id*. at 47-48. See also *Anderson (Michael)*, 298 Mich App at 190 (noting that "[r]ecurring and escalating acts of violence [were] objective and verifiable because they [were] external occurrences that [could] be confirmed[,]" and holding that "[the] defendant's history of violence toward his parents and his inability to benefit from previous counseling justified an upward departure from the guidelines[]").

A trial court's conclusion that the defendant was a pedophile who was likely to repeat his conduct and whose condition was not amenable to treatment was based on facts external to the mind of the court and supported by experts in the area of psychiatry. *Kahley*, 277 Mich App at 188-190. Accordingly, the Court of Appeals affirmed the trial court's upward departure from the recommended minimum sentencing guidelines range, noting its agreement with the trial court's finding "that the guidelines inadequately addressed the factual situation in which the defendant sexually abused extremely young, defenseless children, including his own child." *Id.* at 190.

See also *People v Solmonson*, 261 Mich App 657, 671 (2004), where the trial court properly based its upward departure from the recommended minimum sentencing guidelines range on the defendant's continued criminal conduct despite multiple prior sentences for the same conduct (probation, jail, and prison for drinking and driving offenses).

3. Pattern of Previous Convictions

In *People v Gagnier*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 2009 (Docket No. 281868),[303] the Court of Appeals explained:

> "Although the PRVs [(prior record variables)] take into account an offender's general criminal history, the PRVs do not account for the fact that this was [the defendant's] fourth bank robbery and that he was released from parole for committing a previous bank robbery only l4 months before he committed this robbery. As the trial court noted, [the defendant] has been incarcerated for a large part of his adult life, but this fact has had no deterrent effect on his extreme recidivism. Also as the trial court noted, [the defendant] has fled parole and escaped from jail, demonstrating his noncompliance with previous sentences. This factor was not accounted for in the scoring of the PRVs. Accordingly, the trial court recognized that rehabilitation was not a likely goal and that society needed to be protected from [the defendant's] continuing criminal behavior. . . . In short, the trial court did not abuse its discretion by determining that [the defendant's] extreme recidivism and noncompliance with previous sentences and conditions of parole constituted substantial and compelling reasons to depart from the sentencing guidelines."

4. Excessive Prior Convictions and Adjudications

An upward departure could be justified where a defendant's prior felonies and felony juvenile adjudications greatly exceeded the maximum number scored under the guidelines. *People v Annabel*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2004 (Docket No. 249238) (the trial court's upward departure from the recommended minimum sentencing guidelines range was affirmed where the defendant had eight previous adult felonies (and prior record variable (PRV) 2 only accounts for "4 or more" prior low severity felony convictions); ten previous felony juvenile adjudications (and prior record variable (PRV) 3 only accounts for "3 or more" prior high severity juvenile adjudications); and

[303] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

the defendant was only 22 years of age and had been convicted of felonies in four different states).

See also *People v Lalone,* unpublished opinion per curiam of the Court of Appeals, issued May 5, 2005 (Docket No. 251326) (the trial court's upward departure from the recommended minimum sentencing guidelines range was affirmed where each of the three victims described "'a dozen or more' incidents of sexual abuse" and offense variable (OV) 13 only accounted for "a pattern of felonious criminal activity involving 3 or more crimes against a person").

5. Type and Severity of Prior Convictions Not Accounted for by PRVs

"[A]lthough foreign convictions cannot be considered under PRV [(prior record variable)] 1 [(prior high severity felony convictions)], they [could], under appropriate circumstances, give rise to a substantial and compelling reason to justify a departure from the guidelines range[.]" *People v Price (Tore)*, 477 Mich 1, 5 (2006).

An upward departure from the recommended minimum sentencing guidelines range could be appropriate where the type and severity of a defendant's prior convictions were not accounted for by the prior record variables (PRVs). *People v Thomas (Ernest),* unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 248097), slip op p 3 (the trial court did not abuse its discretion when it departed from the guidelines because PRVs 1 and 7 failed to adequately reflect the circumstances of the offense and the offender—although PRV 1 (prior high severity felony convictions) accounted for the defendant's previous conviction in which a death occurred, it did not reflect the defendant's history of shooting offenses, and although PRV 7 (subsequent or concurrent felony convictions) accounted for the fact that the defendant had a subsequent felony conviction, it did not reflect that the conviction was for first-degree murder).

6. Parole Absconder Status

That a defendant had absconded from parole was not reflected in the sentencing guidelines and was an objective and verifiable factor that was properly considered as a substantial and compelling reason to justify an upward departure from the recommended minimum sentencing guidelines range. *People v Nichols (Terry),* unpublished opinion per curiam of the

Court of Appeals, issued September 16, 2004 (Docket No. 246973).

7. Absconding on Bond

A trial court's upward departure from the recommended minimum sentencing guidelines range "for [an] attempted absconding on bond conviction on the basis of its finding that [the] defendant fled the state and tried to establish a different identity" was appropriate where the "conduct went beyond that of the average absconder" and "show[ed] the great lengths to which [the] defendant was willing to go to evade the charges against him." *People v Kohns,* unpublished opinion per curiam of the Court of Appeals, issued April 12, 2005 (Docket No. 251327).

8. Other Relevant Information About a Defendant's Status at the Time of the Offense

A trial court's upward departure from the recommended minimum sentencing guidelines range could be appropriate where additional information about a defendant's status at the time of the offense was not adequately taken into account by the sentencing guidelines. *People v Ossowski,* unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 246667), slip op pp 2-3. For example, in *Ossowski*, slip op at 2-3, while prior record variable (PRV) 6 (relationship to criminal justice system) "accounted for the fact that [the] defendant committed the [sentencing] offense while on probation," it did not account "for the short time he was on probation before lapsing back into criminal activity[,]" or the "fact that [the] defendant left a rehabilitation program in which he had been ordered to participate as a condition of his probation[.]" In affirming the trial court's upward departure, the Court of Appeals noted that "[the d]efendant's rapid violation of his probation and his unauthorized departure from a court-ordered rehabilitation program were objective and verifiable indications of [the] defendant's unwillingness to appreciate his wrongdoing and modify his behavior." *Id.*, slip op at 3.

9. Perjury

A trial court's upward departure from the recommended minimum sentencing guidelines range could be appropriate where a defendant's perjury was an objective and verifiable factor, and combined with other factors, constituted a substantial and compelling reason for departure from the

guidelines. *Kahley*, 277 Mich App at 188. In *Kahley*, 277 Mich App at 188, the defendant's perjury was objective and verifiable where he "admitted at his sentencing that he lied to the jury and that he committed the offenses." The Court of Appeals recognized, however, that a defendant's perjured testimony was not always an objective and verifiable factor capable of supporting a sentence departure because "whether a person perjured himself or herself at trial [could] on some occasions be a subjective conclusion, i.e., an internal belief that the person was lying without a firm confirmation." *Id*. The Court further noted that a defendant's objective and verifiable commission of perjury alone "would be insufficient to constitute a substantial and compelling reason for departure from the guidelines; otherwise, a departure might be warranted every time a defendant testified and was found guilty." *Id*.

10. Failure to Admit Guilt or Show Remorse

"'A court cannot base its sentence even in part on a defendant's refusal to admit guilt.'" *People v Conley*, 270 Mich App 301, 314 (2006), quoting *People v Yennoir*, 399 Mich 892 (1977). See also *People v Jackson (James)*, 474 Mich 996 (2006).

"[A] defendant's expression of remorse [was] a subjective factor that a trial court [could] not consider in determining whether a departure from the sentence mandated by statute [was] justified." *Daniel (Danny)*, 462 Mich at 6; *People v Davis (Marcus) (On Rehearing)*, 250 Mich App 357, 370 (2002).

C. Factors Involving the Sentencing Offense

1. Dismissed or Uncharged Criminal Conduct

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range based on the prosecutor's dismissal of a more serious charge, as well as the fact that other criminal conduct occurred with which the defendant was not charged. *Armstrong (Rodney)*, 247 Mich App at 426 ("the prosecutor's decision, in exchange for [the] defendant's guilty plea, to dismiss a charge of first-degree CSC [(criminal sexual conduct)], which carries a potential life sentence, and the fact that [the] defendant was not charged with attempted CSC for trying to have the victim perform oral sex on him [were] additional factors that the court [could] consider when deciding whether departure [was] warranted.").

2. Specific Method and Cause of a Victim's Injury

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range where the guidelines failed to account for a very specific consequence of criminal conduct not precisely described in the prior record variables (PRVs) or offense variable (OVs). *People v Lowery*, 258 Mich App 167, 171 (2003). In *Lowery*, 258 Mich App at 171, the Court of Appeals affirmed the trial court's upward departure because no offense variable or combination of variables adequately accounted for the fact that the defendant used a firearm to shoot the victim, the victim was actually shot, and the victim's injuries resulted from being shot.

3. Peculiar Circumstances of the Offense or the Offender

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range where the guidelines failed to take into account the peculiar circumstances of the offense or the offender. *People v Evans (Mario),* unpublished opinion per curiam of the Court of Appeals, issued March 18, 2004 (Docket No. 240357), slip op pp 6-7[304] (the trial court did not abuse its discretion by engaging in an upward departure where the guidelines did not take into account that the defendant "committed two murders, under similar circumstances, i.e., in both cases the evidence established that [the] defendant shot multiple times from a shotgun at close range and that he killed two people he did not know[]").

4. OVs Cannot Measure the Context of the Offense in its Entirety

"In departing from the sentencing guidelines, a trial court [could] 'not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range *unless* the court [found] from the facts contained in the court record, including the presentence investigation report, that the characteristic [was] given inadequate or disproportionate weight.'" *People v Lockridge*, 304 Mich App 278, 283 (2014), rev'd in part on other grounds 498 Mich 358 (2015) (quoting MCL 769.34(3)(b) and holding that "given . . . the escalation of the [defendant's] domestic-violence conduct toward the victim, the fact that the

[304] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

crime occurred in plain view of [their] children, and that [the] defendant left his children alone with the trauma of attempting to revive their mother, the trial court did not err by finding that the prior record and offense variables inadequately accounted for [the] defendant's conduct[]") (emphasis added by Court of Appeals).

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range where the guidelines did not adequately account for "the nature of dangers" presented by the defendant's conduct. *People v Staffney,* unpublished opinion per curiam of the Court of Appeals, issued March 23, 2004 (Docket No. 244516), slip op pp 2, 4 (the trial court did not abuse its discretion by engaging in an upward departure when, although offense variable (OV) 9 (number of victims) accounted for the fact that the defendant "lost control of his vehicle which ran onto a lawn and struck three people, two of whom died[,]" the guidelines did not account for the fact that the "[d]efendant led police on a chase at 80 to 90 miles per hour in a residential area, placing many other residents and police officers at risk[]").

However, if the trial court failed to score points under a relevant variable, it could not depart from the sentencing guidelines range on the basis that the guidelines did not adequately account for a fact that could have been scored under that variable. *Anderson (Michael)*, 298 Mich App at 186 (noting that "OV 7 [should] have been scored to account for the victims' fear and anxiety[,] . . . and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant's conduct in this regard[]").

5. Planning and Deliberation

A defendant's planning and deliberation concerning the commission of a crime could constitute a substantial and compelling reason to support an upward departure. *Anderson (Michael)*, 298 Mich App at 185-186 (holding that "[the d]efendant's attempt to enlist assistance [in burning down his parents' house was] a logical fact supporting the trial court's conclusion that [the] defendant planned and thought about the crime[,]" and that "the trial court did not abuse its discretion when it found that [the] defendant's planning and deliberation constituted a substantial and compelling reason to depart from the guidelines[]").

6. Failure to Assist a Victim

"Whether [a] defendant could have [done more] to assist [a] victim[] [was] not objective and verifiable." *Anderson (Michael)*, 298 Mich App at 186-187 (citing *People v Abramski*, 257 Mich App 71, 74 (2003), and holding that "other actions [the] defendant could have taken to assist [the victims were] not occurrences external to the mind and [were] not capable of being confirmed[]").

3.27 Exceptions: When a Departure Is Not a Departure[305]

Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

The sentencing guidelines expressly describe situations in which a trial court's departure from the minimum sentence recommended under the guidelines is not a departure.

A. Mandatory Minimum Sentences

"If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute.[306] Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the

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[305] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

[306] However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US ___, ___ (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US ___, by effectively eliminating the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and 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.

recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section." MCL 769.34(2)(a).

However, the legislative sentencing guidelines *did* apply when a court imposed a sentence that exceeded a flat mandatory minimum term. *People v Wilcox (Larry)*, 486 Mich 60, 62-63, 73 (2010); *People v Payne (Jarrud)*, 304 Mich App 667, 672 (2014). In *Wilcox (Larry)*, 486 Mich at 62-63, the trial court imposed a 10-year minimum sentence under MCL 750.520f(1), which requires "a mandatory minimum sentence of at least 5 years[]" for certain repeat criminal sexual conduct offenses. Noting that "[a]lthough MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it[,]" the *Wilcox (Larry)* Court concluded that "for purposes of applying MCL 769.34(2)(a), the 'mandatory minimum' sentence referred to in MCL 750.520f(1) is a flat 5–year term." *Wilcox (Larry)*, 486 Mich at 69, 73. "Because the trial court imposed a 10-year minimum sentence that exceeded both the applicable guidelines range and the 5-year mandatory minimum, [the] defendant's sentence was a departure from the guidelines[,]" and the trial court was required to state substantial and compelling reasons to justify the departure. *Wilcox (Larry)*, 486 Mich at 62-63. Similarly, a trial court was required to articulate substantial and compelling reasons sufficient to justify an upward departure from the 25-year mandatory minimum set out in MCL 750.520b(2)(b) for a conviction of first-degree criminal sexual conduct committed against a victim who was less than 13 years of age by a defendant who was 17 years of age or older. *Payne (Jarrud)*, 304 Mich App at 672-673, citing *Wilcox (Larry)*, 486 Mich at 62, 70-73.

MCL 769.34(2)(a) provides:

> "If the Michigan vehicle code . . . MCL 257.1 to [MCL] 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code . . . MCL 257.1 to [MCL] 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section."[307]

See, e.g., *People v Hendrix*, 263 Mich App 18, 19-22 (2004), modified in part 471 Mich 926 (2004), where the trial court's sentence of one year of probation to be served in the county jail, which was equal to the alternative one-year mandatory minimum term of imprisonment under the jurisdiction of the Department of Corrections (DOC) specified in MCL 257.625(9)(c)(*i*), was not a

departure under MCL 769.34(2)(a), even though the recommended guidelines range for the defendant's vehicle code violations was 0 to 11 months.[308]

B. Mandatory Determinate Sentences

"If a crime has a mandatory determina[te] penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. [MCL 769.34] does not apply to sentencing for that crime." MCL 769.34(5).[309]

C. Sentences Pursuant to Valid Plea Agreements

"[A] sentence that exceed[ed] the sentencing guidelines satisfie[d] the requirements of MCL 769.34(3) when the record confirm[ed] that the sentence was imposed as part of a valid plea agreement." *People v Wiley*, 472 Mich 153, 154 (2005). "Under such circumstances, the statute [did] not require the specific articulation of additional 'substantial and compelling' reasons by the sentencing court." *Id.* at 154. See also *People v Malinowski*, 301 Mich App 182, 184-186 (2013) (citing *Wiley*, 472 Mich at 154, and holding that "[t]he trial court did not abuse its discretion by continuing [the] defendant's probation with additional terms" following his plea of guilty of a probation violation, as permitted under MCR 6.445(G), and was not required to "articulate [a] substantial and compelling reason to justify [a] downward departure from the sentencing guidelines range[for the original offense]").

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[307] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. It is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. See Section 3.4 for discussion of *Lockridge*.

[308] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. The *Lockridge* Court did not specifically address intermediate sanctions such as probation. See Section 3.7 for discussion of intermediate sanctions. See also Section 3.4 for discussion of *Lockridge*.

D. Enhancement Under the Repeat Offender Provision of §333.7413(2)

When MCL 333.7413(2) permits a court to impose a sentence of not more than twice the term otherwise authorized, the enhancement authority extends to both the minimum and maximum terms. *People v Williams (John)*, 268 Mich App 416, 428 (2005). For example, if the recommended minimum range under the guidelines is 5 to 23 months, MCL 333.7413(2) permits an increase in both the upper and lower limit of the recommended range so that the allowable range would be 10 to 46 months. *Williams (John)*, 268 Mich App at 431. When, subject to the ranges discussed above, a court imposes a minimum sentence of 38 months, the sentence falls within the enhanced range authorized by MCL 333.7413(2). *Williams (John)*, 268 Mich App at 430-431 (holding that even though a term of 38 months exceeded the original range of 5 to 23 months, the sentence did not represent a departure for which the trial court was required to articulate a substantial and compelling reason).

E. Determining Whether Probation is an Authorized Alternative to Imprisonment

The legislative sentencing guidelines expressly authorize probationary terms for offenses subject to the guidelines when the recommended minimum sentence range falls within an intermediate sanction cell. MCL 769.31(b). In *People v Buehler*, 477 Mich 18, 27-28 (2007), abrogated in part on statutory grounds as recognized by *People v Campbell (Michael)*, ___ Mich App ___, ___ (2016), the Michigan Supreme Court held that, absent any substantial and compelling reason for departure,[310] when an offense was expressly made subject to the legislative sentencing guidelines, probation was a valid alternative sentence only if the properly scored (previously-mandatory) guidelines placed a defendant in an intermediate sanction cell:

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[309] However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US ___, ___ (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US ___, by effectively eliminating the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and 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.

> "[P]robation is *available* [under MCL 771.1(1)] for all nonenumerated crimes; however, this fact does not lead to the conclusion that sentencing courts have unfettered discretion to impose probation for *all* such crimes. . . . [I]f the offense is subject to the mandatory sentencing guidelines[,] . . . [t]he minimum sentence . . . *must* be within the minimum guidelines sentence range. In some instances, the Legislature has determined that probation is a permissible sentence within the sentence range, such as when the guidelines call for an intermediate sanction. However, the guidelines do not indicate that probation is available for ranges that require a minimum term of imprisonment. Therefore, probationary sentences constitute a downward departure from any sentencing guidelines range that does not permit the imposition of intermediate sanctions. In such cases, if the sentencing court desires to impose a probationary sentence, the court must articulate substantial and compelling reasons for the downward departure on the record."

Part E—The Sentencing Hearing

3.28 Requirements and Rights

Timeliness. A defendant's sentence, based on accurate information prepared in advance of the sentencing hearing for the purpose of fashioning an appropriate sentence, must be imposed "within a reasonably prompt time" after the defendant's conviction by plea or

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[310] In *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[,]" and additionally 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, 391, emphasis supplied. The *Lockridge* Court did not specifically address intermediate sanctions such as probation. However, the Court of Appeals has held that, "[p]ursuant to the broad language of *Lockridge*, [498 Mich at 365 n 1, 391], under [MCL 769.34(4)(a) (governing intermediate sanction cells)], a trial court *may*, but is no longer *required to*, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding, "[c]onsistent with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word 'may[,]'" and "strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction[]") (emphasis added). Moreover, "because an intermediate sanction is no longer mandated pursuant to *Lockridge*," a trial court does not violate *Alleyne v United States*, 570 US ___, ___ (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, ___ Mich App at ___. See the *Alleyne/Lockridge* footnote in Section 3.7(A) for more information. See Section 3.4 for discussion of *Lockridge* and *Alleyne*.

verdict unless the court has delayed the defendant's sentencing in a manner provided by law.[311] MCR 6.425(E)(1). The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US ___, ___ (2016) (holding "that the Clause does not apply to delayed sentencing[]"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at ___.

Due process. A sentence based on inaccurate information implicates a defendant's constitutional right to due process. US Const, Am XIV; Const 1963, art 1, § 17; *Townsend v Burke*, 334 US 736, 740-741 (1948); *People v Smith (Timothy)*, 423 Mich 427, 453-454 (1985). Because the sentencing proceeding and the information on which a sentencing court bases its sentencing decision are matters of constitutional magnitude, the Michigan Supreme Court has required strict adherence to the detailed statutory and court rule provisions that govern the sentencing process. At a defendant's sentencing hearing, the court must, on the record, satisfy the requirements listed in MCL 771.14 and MCR 6.425(E)(1)(a)-(f).[312]

Rules of evidence. With the exception of rules involving privilege, the rules of evidence do not apply to sentencing proceedings. MRE 1101(b)(3); *People v Waclawski*, 286 Mich App 634, 690 (2009). However, a defendant must be given an adequate opportunity to rebut any matter he or she believes is inaccurate. *Id.* at 690.

Right to counsel. The sentencing hearing is a critical stage in the criminal proceedings against a defendant at which the defendant—absent a valid waiver—must be represented by counsel. *Mempa v Rhay*, 389 US 128, 134 (1967); *Smith (Timothy)*, 423 Mich at 452. The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the trial court to "assure that each criminal defendant[313] is advised of his or her right to

[311] See Sections 3.47 and 3.48 for more information on delayed sentences and other alternatives.

[312] However, MCR 6.425(E)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure," has not yet been amended to conform to *People v Lockridge*, 498 Mich 358 (2015), in which the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[;]" 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 365, 391-392, 399 (emphasis supplied; citation omitted). See Section 3.4 for discussion of *Lockridge*.

[313] The MIDCA applies to an indigent defendant who "is being prosecuted *or sentenced* for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA) (emphasis supplied).

counsel[]" and to screen all defendants, except those who have retained or waived counsel, for eligibility for the appointment of counsel under the MIDCA. MCL 780.991(1)(c).[314] Even if a defendant has previously waived his or her right to counsel, the trial court is under a continuing duty to inform the defendant of the right to counsel and to obtain the defendant's valid waiver of that right at all subsequent proceedings, including sentencing. MCR 6.005(E). A criminal defendant does not have an absolute right to be represented at sentencing by the same attorney who represented him or her at trial. *People v Davis (Keith)*, 277 Mich App 676, 679-680 (2008), vacated in part on other grounds 482 Mich 978 (2008). However, see MCL 780.991(2)(d), requiring representation by "[t]he same [appointed] defense counsel . . . at every court appearance throughout the pendency of the case[,]" with the permissible exception of "ministerial, nonsubstantive tasks[] and hearings[.]"[315]

A defendant's right to counsel also extends to certain ex parte presentence conferences:

- A trial court's conference with a probation officer is a critical stage of the proceedings at which the defendant has a right to be represented by counsel. *People v Oliver*, 90 Mich App 144, 149-150 (1979), rev'd on other grounds 407 Mich 857 (1979).

- A defendant has the right to be represented by counsel at a presentence conference between the trial judge and a prosecutor. *People v Von Everett*, 110 Mich App 393, 396-397 (1981).

- A defendant has the right to be represented by counsel at a presentence conference between the trial court and a police officer. *People v Vroman*, 148 Mich App 291, 295-296 (1985), overruled in part on other grounds by *People v Wright (Atlee)*, 431 Mich 282, 298 n 18 (1988).

3.29 Presentence Investigation Report (PSIR)

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). Use of a PSIR in misdemeanor cases is discretionary. MCL 771.14(1).

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[314] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook: Vol. 1*, Chapter 3, for discussion of the MIDCA.

[315] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook: Vol. 1*, Chapter 3, for discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*.

> "The presentence report, mandatory for felony cases in Michigan since 1931, allows the court to make an informed judgment as to possibilities for rehabilitation, and to effectively utilize sentencing alternatives. The presentence report has been widely regarded as an effective method of supplying information essential to an informed sentencing decision." *People v Lee (Doursey)*, 391 Mich 618, 635 (1974).

The presentence investigation report is a tool by which the sentencing court gathers information important to the court's ability to fashion a sentence appropriate to the criminal and to the circumstances under which the crime was committed. *Morales v Michigan Parole Bd*, 260 Mich App 29, 45-46 (2003). Long before the statutory sentencing guidelines were enacted, the PSIR was intended to ensure that criminal sentences were tailored both to the offense committed and the offender who committed it. *People v Miles (Dwayne)*, 454 Mich 90, 97 (1997).

A copy of the PSIR (and any amended report) must be provided to the prosecutor and defense counsel or the defendant, if he or she is not represented by an attorney. MCL 771.14(7); MCR 6.425(B). The copy of the PSIR must be provided no fewer than two business days before sentencing unless the defendant waives that time period. *Id*. The prosecutor and defense counsel or the defendant, if he or she is not represented by an attorney, have the right to keep a copy of the report (and any amended report). *Id*.

A. PSIR Content Required for all Felony Offenses

The information that must be included in a PSIR is addressed by both statute and court rule.[316] MCL 771.14(1) indicates that a PSIR is a probation officer's written report of information obtained through the officer's inquiry into the defendant's "antecedents, character, and circumstances[.]" Notwithstanding the specific language found in MCL 771.14(2)(a)-(h) (discussed below), the statute provides little guidance for completing the section of an offender's PSIR in which his or her "antecedents, character, and circumstances" are summarized. But see MCR 6.425(A)(1)(a)-(*l*), which contain very specific guidance about the information required in this section of the PSIR. These provisions are discussed in Section 3.29(C).

Several provisions in the statute and the court rule address the same information to be included in an offender's PSIR. Specifically, MCL 771.14(2)(a)-(d) and equivalent provisions of MCR 6.425(A)(1) detail four items required in a PSIR for *all* felony offenses:

[316] The Department of Corrections requires that an offender's PSIR comply with its operating procedures and policy directives.

- Based on factual information contained in the PSIR, an evaluation of and prognosis for the offender's community adjustment. MCL 771.14(2)(a); MCR 6.425(A)(1)(j).

- A written victim impact statement if requested and provided by a victim. MCL 771.14(2)(b); MCR 6.425(A)(1)(g).

- A written recommendation for a specific disposition. The recommended disposition should be based on "the evaluation and other information as prescribed by the assistant director of the department of corrections in charge of probation." MCL 771.14(2)(c); MCR 6.425(A)(1)(k).

- A statement from the prosecuting attorney regarding whether consecutive sentencing is mandatory or discretionary for the offender's sentencing. MCL 771.14(2)(d); MCR 6.425(A)(1)(i).

A PSIR must *not* include

> "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. Upon request, 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 shall be exempted from disclosure 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).

B. PSIR Content Required for Felony Offenses Under the Sentencing Guidelines

In addition to the information contained in Section 3.29(A), the PSIR of an offender being sentenced for a felony offense under the statutory sentencing guidelines in chapter XVII (MCL 777.11 to MCL 777.19) must include the specific sentence range recommended under the guidelines based on the offender's prior record variable (PRV) and offense variable (OV) scores.[317] MCL 771.14(2)(e)(*v*). After points are assessed for the PRVs and the appropriate OVs, the point totals—the "PRV level" and the "OV level"—determine the offender's placement on the appropriate sentence grid.[318]

In addition to the scoring of an offender's PRVs and OVs, an offender's PSIR must also include:

- The appropriate sentence grid[319] showing the recommended minimum sentence range for each conviction subject to a mandatory or discretionary consecutive sentence. MCL 771.14(2)(e)(*i*).

- Unless a conviction is subject to consecutive sentencing, the sentence grid showing the recommended minimum sentence range for each crime having the highest crime class. MCL 771.14(2)(e)(*ii*).

- Unless a conviction is subject to consecutive sentencing, the computation of OV and PRV scores used to determine the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(*iii*).

- A statement regarding the applicability of intermediate sanctions. MCL 771.14(2)(e)(*iv*).

- The recommended sentence. MCL 771.14(2)(e)(*v*).

- A statement as to whether the offender has provided to the Department of Corrections personal identification documents, such as a Social Security card, photographic identity document, or birth certificate, for purposes of obtaining an operator's license or state personal identification card upon release from incarceration. MCL 771.14(2)(h).[320] See MCL 791.234c(1)(b) and MCL 28.291(1).

C. PSIR Content Defined by Court Rule

The court rule governing a probation officer's compilation of an offender's PSIR requires that the probation officer verify material information included in the report. MCR 6.425(A)(1). The statute governing PSIR content states that an offender's PSIR must include

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[317] An offender's scores were formerly calculated on a SCAO form known as a "Sentencing Information Report" or "SIR." SCAO's SIR form has been discontinued, and sentencing courts are no longer required to submit scoring information to SCAO. Administrative Order 1988-4, as amended, effective July 13, 2005. 473 Mich xviii (2005).

[318] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

[319] Sentence grids are found in MCL 777.61 to MCL 777.69. Sentence grids are available by clicking here.

a written report of the offender's "antecedents, character, and circumstances[.]" MCL 771.14(1). According to MCR 6.425(A)(1), a PSIR is a succinct and written report of the probation officer's investigation into the defendant's background and character. In addition to any information required as discussed in previous subsections of this chapter and depending on the circumstances of the offense and the offender, a PSIR must include:

> "(a) a description of the defendant's prior criminal convictions and juvenile adjudications,
>
> (b) a complete description of the offense and the circumstances surrounding it,
>
> (c) a brief description of the defendant's vocational background and work history, including military record and present employment status,
>
> (d) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,
>
> (e) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,
>
> (f) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,
>
> * * *
>
> (h) any statement the defendant wishes to make,
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> * * *
>
> (*l*) any other information that may aid the court in sentencing." MCR 6.425(A)(1).

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[320] Effective February 23, 2012, 2012 PA 27, as part of a package of public acts designed to assist prisoners in obtaining operator's licenses and state personal identification cards upon their release, amended MCL 771.14(9) to require that a person committed to a state correctional facility be provided notification explaining the importance of obtaining an operator's license or a state identification card, listing the personal identification documents that are necessary to do so, and requesting that the person obtain those documents and provide them to the Department of Corrections. MCL 771.14(9)(b). 2012 PA 27 additionally amended MCL 771.14(2) to require that a PSIR include "[a] statement as to whether the person has provided the identification documents referenced in [MCL 771.14(9)(b)]." MCL 771.14(2)(h). Related provisions were amended or added by 2012 PA 24—2012 PA 26, also effective February 23, 2012. See, e.g., MCL 791.234c and MCL 28.291.

D. PSIR Content Required in Limited Situations

Crimes involving alcohol or a controlled substance. "If a person is to be sentenced for a felony or for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance," the PSIR must contain a statement, if applicable, indicating whether the person is licensed or registered under the public health code (MCL 333.16101 to MCL 333.18838). MCL 771.14(2)(f). See also MCL 769.1(14).

Diagnostic opinions. Unless a diagnostic opinion is exempt from disclosure under MCL 771.14(3), available diagnostic opinions must be included in an offender's PSIR. MCL 771.14(2)(g).

Juveniles. Before a court imposes an adult sentence on a juvenile, the Department of Human Services[321] or county juvenile agency must submit a report required by MCL 771.14a(1) (a written report about "the juvenile's antecedents, character, and circumstances").[322]

E. PSIR Must Be "Reasonably Updated"

The PSIR on which a sentencing court relies must be "reasonably updated." *People v Triplett*, 407 Mich 510, 515 (1980).

A PSIR that is "several years old" is not "reasonably updated." See *Hemphill*, 439 Mich at 580-581. "Without reaching the question of whether a four-month gap between the preparation of the original presentence report and sentencing comports with the reasonableness requirement of *Triplett*, [407 Mich 510,] . . . a defendant is entitled to be sentenced on the basis of a presentence report that is prepared especially for the offense for which he [or she] is being sentenced." *People v Anderson (Kenneth)*, 107 Mich App 62, 66-67 (1981). See also *People v McKeever*, 123 Mich App 533, 540-541 (1983), where the trial court used a five-month-old PSIR prepared for a different offense, and the Court of Appeals held "that a defendant may not be sentenced on the basis of a presentence report prepared for another offense even though the defendant was convicted after a trial. Accordingly, [a] defendant . . . is entitled to resentencing on the basis of a reasonably updated presentence report prepared for the offense for which he [or she] is to be sentenced." The Michigan Supreme Court summarized the issue:

> "Presentence reports that are several years old have been held not to be 'reasonably updated.' Reports that were prepared several months earlier, in connection

[321] Formerly the Family Independence Agency.

[322] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for additional information.

> with unrelated offenses, have also been held not to be adequate. A five-month-old report was found not to have been properly used where there were significant allegations that the defendant's circumstances had changed during the interim. However, the Court of Appeals also has held that a supplemental presentence report can provide the necessary updating." *Hemphill*, 439 Mich at 580-581.

An updated PSIR may not be necessary where the sentencing court has no discretion in the length of the sentence imposed. *Hemphill*, 439 Mich at 581; *People v Foy*, 124 Mich App 107, 111-112 (1983) (trial court directed to impose statutorily mandated two-year term of imprisonment for the defendant's felony-firearm conviction). The requirement that an updated PSIR be utilized at a defendant's sentencing may be satisfied by the submission of a supplementary report. *Hemphill*, 439 Mich at 581; *People v Hart (Leon)*, 129 Mich App 669, 674 (1983).

A defendant may not waive the requirement that a presentence report be utilized at his or her sentencing hearing. *Hemphill*, 439 Mich at 581. However, a defendant may waive the right to an *updated* PSIR at the defendant's *resentencing* as long as the waiver is made intelligently, understandingly, and voluntarily. *Id.* at 581-582. The prosecution may also waive completion of an updated PSIR at a *resentencing* hearing. *Id*. Where a sentencing court relies on a defendant's previously prepared PSIR when resentencing the defendant, the PSIR must be accurate or believed to be accurate by both parties. *Id*. A defendant may not waive preparation of an updated PSIR for resentencing if the information contained in the existing PSIR is "manifestly outdated." *Id*.

F. Review of the Presentence Investigation Report (PSIR) at the Sentencing Hearing

At the sentencing hearing, the court must determine that all parties (prosecutor, defendant, and defense attorney) have had an opportunity to read and discuss the presentence investigation report (PSIR). MCR 6.425(E)(1)(a).

MCR 6.425(B) states:

> "The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not 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. 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. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that the information has not been disclosed and state on the record the reasons for nondisclosure. 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. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review."

G. Objections to Accuracy or Content of the Presentence Investigation Report (PSIR)

Due process requires that a defendant's sentence be based on accurate information and that the defendant be given an opportunity at sentencing to challenge the accuracy of the information on which the trial court bases the defendant's sentence. *People v Eason*, 435 Mich 228, 233 (1990). A sentence is invalid if it is based on inaccurate information. *People v Miles (Dwayne)*, 454 Mich 90, 96 (1997).

Each party must be given an opportunity at the sentencing hearing to explain or challenge the accuracy or relevancy of any information contained in the presentence investigation report (PSIR). MCL 771.14(6); MCR 6.425(E)(1)(b). When a defendant alleges inaccuracies in his or her PSIR, the trial court must respond to those allegations. *People v McAllister*, 241 Mich App 466, 473 (2000). However, 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). See also *People v Maben*, ___ Mich App ___, ___ (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. *Maben*, ___ Mich App at ___. "[A] trial court is not required to strike a victim's subjective statements about the impact of a defendant's crime 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 ___ (citations omitted). See also *People v Norfleet*, ___ Mich App ___, ___ (2016) (the trial court abused its discretion in finding, based solely on the prosecutor's statements, "that the prosecution met its burden to prove [a] challenged statement in the PSIR[]" indicating that the defendant was affiliated with a gang; "[e]ven assuming the truth of the prosecutor's assertions, they at most established that [the] defendant was at one time affiliated with [the] gang[, and t]hey [did] not establish that [he] *was affiliated* with it at the time of the alleged crimes or thereafter, as the PSIR suggest[ed]").

MCL 771.14(6) and MCR 6.425(E) discuss the procedural requirements for disposing of any contemporaneous objections to the information prepared for use at the sentencing hearing.[323]

Challenges to the accuracy or relevancy of information in the PSIR must be made on the record. MCL 771.14(6); MCR 6.425(E)(1)(b). The court may adjourn the sentencing hearing to permit the parties to prepare a challenge or a response to a challenge. MCL 771.14(6). Having given the parties the opportunity to challenge information in the PSIR, the sentencing court is obligated to respond to all challenges raised using any of the discretionary methods approved under the statute, court rule, and relevant case law. *McAllister*, 241 Mich App at 473; MCL 771.14(6); MCR 6.425(E)(1)(b); MCR 6.425(E)(2)(a)-(b). The court must make a record of its response to the challenges raised, and the presentence report must be amended accordingly. MCL 771.14(6); MCR 6.425(E)(2)(a).

[323] These provisions are detailed below in Section I..

There are additional statutory and court rule provisions governing postjudgment challenges to the content of a defendant's PSIR. See MCL 769.34(10). Postjudgment appeals and issue preservation requirements are discussed in Section 3.54.

H. Challenges to the Constitutional Validity of a Prior Conviction or Adjudication

A defendant's prior conviction obtained without counsel or without a proper waiver of counsel must not be considered in sentencing. *United States v Tucker*, 404 US 443, 449 (1972); *People v Carpentier*, 446 Mich 19, 31 n 6 (1994). Constitutionally infirm convictions may not be used to establish a defendant's habitual offender status or to determine a defendant's prior record variable (PRV) level. *People v Daoust*, 228 Mich App 1, 18 (1998), overruled on other grounds by *People v Miller (Michael)*, 482 Mich 540, 561 (2008); *People v Richert (After Remand)*, 216 Mich App 186, 195 (1996). Similarly, a juvenile adjudication obtained in violation of the juvenile's right to counsel is constitutionally infirm and cannot be used to enhance a criminal sentence. *People v Ristich*, 169 Mich App 754, 758 (1988). When a defendant challenges the constitutional validity of a prior conviction used to establish habitual offender status or to score the defendant's PRVs, the trial court is obligated to address and resolve the challenge. MCR 6.425(E)(1)(b).

> **Note:** There are important distinctions between the use of a defendant's prior convictions to establish habitual offender status and the use of a defendant's prior convictions or adjudications to determine the defendant's PRV level: (1) prior convictions used to establish a defendant's habitual offender status are limited to prior felony convictions; (2) PRV scoring accounts for all of a defendant's prior convictions, misdemeanor and felony, as well as all of a defendant's prior juvenile adjudications; (3) prior convictions used to establish a defendant's habitual offender status are not subject to the 10-year gap requirement;[324] and (4) prior convictions and juvenile adjudications used in scoring a defendant's PRVs must satisfy the 10-year gap requirement. This section does not discuss the use of a defendant's prior convictions to establish habitual offender status. That issue is discussed fully in Section 3.15.

[324] See Section 3.8(A) for a detailed discussion of this rule.

1. Prima Facie Showing Required

A defendant who raises a challenge to a previous conviction allegedly obtained in violation of his or her Sixth Amendment right to counsel bears the initial burden of establishing that the previous conviction was obtained in violation of *Gideon v Wainwright*, 372 US 335 (1963); that is, the defendant must show that the previous conviction was obtained without counsel or without a proper waiver of counsel. *Carpentier*, 446 Mich at 31. A defendant may satisfy this initial burden in one of two ways:

> "1) by presenting 'prima facie proof that a previous conviction was violative of *Gideon*, such as a docket entry showing the absence of counsel or a transcript evidencing the same,' or
>
> 2) by presenting evidence that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time." *Carpentier*, 446 Mich at 31, quoting *People v Moore (Reuben)*, 391 Mich 426, 440-441 (1974).

"Mere silence regarding counsel is not the equivalent of the prima facie proof required by *Moore*[, 391 Mich at 440-441,] and *Carpentier*[, 446 Mich at 31.]" *People v Zinn*, 217 Mich App 340, 344 (1996). Similarly, that a defendant simply "ha[s] not received" the requested records is insufficient to satisfy the defendant's burden of proof. *Carpentier*, 446 Mich at 32-33.

> "[The requirement of] *Moore* is in part directed at those situations in which a sentencing court affirmatively and intentionally acts to deny a defendant access to requested trial records. For example, where a sentencing court ignores a proper request for records, that court has 'failed to reply' within the meaning of *Moore*. Alternatively, where a court refuses to forward records in its possession or control, that court has 'refused to furnish' under *Moore*. Accordingly, to interpret *Moore* as only requiring a defendant to have requested but not received trial records opens the door to collateral challenges in a variety of situations not intended by the strict and narrow rule of *Moore*." *Carpentier*, 446 Mich at 33.

In *Carpentier*, 446 Mich at 33-35, the defendant's request was met with neither of the two qualifying responses detailed in *Moore*, 391 Mich at 440-441. The sentencing court did not fail to reply to the defendant's request because it sent the defendant a letter explaining that the defendant's records were unavailable. *Carpentier*, 446 Mich at 34. Further, the sentencing court did not refuse to furnish records in its possession because the court no longer possessed expunged court records. *Id*. The absence or unavailability of a defendant's records does not satisfy the defendant's initial burden. *Id*. at 34 n 9.

A defendant may establish prima facie proof that a prior conviction or juvenile adjudication was obtained without counsel where the presentence report contains a notation to that effect. *People v Alexander (Hamilton) (After Remand)*, 207 Mich App 227, 230 (1994).

2. Burden-Shifting Analysis

If a defendant makes a prima facie showing that a prior conviction or adjudication was obtained without counsel, the court must hold a *Tucker*[325] hearing where the prosecution has the burden of establishing that the prior conviction was constitutionally valid. *Carpentier*, 446 Mich at 31.

Where a defendant's presentence report contains a notation that a prior conviction or juvenile adjudication was obtained without counsel, the burden shifts to the prosecution to establish the constitutional validity of the prior conviction. *Alexander (Hamilton)*, 207 Mich App at 230.

Generally, the prosecution may satisfy this burden in one of three ways:

- producing evidence that the defendant was, in fact, represented by counsel at the prior conviction or adjudication, *Alexander (Hamilton)*, 207 Mich App at 230;

- producing evidence that the defendant effected a valid waiver of the right to counsel at the prior conviction or adjudication, *Moore (Reuben)*, 391 Mich at 441; or

- producing evidence that no right to counsel existed at the prior conviction or adjudication, *Richert*, 216 Mich

[325] *Tucker*, 404 US 443.

> App at 195 (no right to counsel exists in misdemeanor cases if incarceration is not ultimately imposed).

Absent any other constitutional infirmity (and presumably subject to the 10-year gap requirement for prior record variable (PRV) scoring), a defendant's expunged juvenile records are properly considered when imposing sentence. *People v Smith (Ricky)*, 437 Mich 293, 302-303 (1991).

I. Sentencing Court's Duty to Remedy Errors

"If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account, it must direct the probation officer to

> "(a) correct or delete the challenged information in the report, whichever is appropriate, and
>
> (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections." MCR 6.425(E)(2).

"[A] sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges." *People v Spanke*, 254 Mich App 642, 648 (2003). "'[T]he duty of the trial judge to respond involves something more than acknowledging that he [or she] has heard the defendant's claims regarding the contents of a presentence report. [The trial court] must indicate, in exercising [its] discretion, whether [it] believes those claims have merit.'" *People v Garvie*, 148 Mich App 444, 455 (1986), quoting *People v Edenburn*, 133 Mich App 255, 258 (1983). "The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id.* at 648.

1. Determining the Information's Accuracy or Relevance

"If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR [(presentence investigation report)] before sending the report to the Department of Corrections." *Spanke*, 254 Mich App at 649; MCL 771.14(6). Remand is necessary to correct factual inaccuracies in a defendant's PSIR. *Spanke*, 254 Mich App at 650. Whenever information is corrected in or deleted from a

defendant's PSIR, the defendant's attorney must be given the opportunity to review the amended PSIR before it is forwarded to the Department of Corrections. MCR 6.425(E)(2)(b).

An investigating officer's opinion need not be stricken from a defendant's PSIR when the opinion is not declared to be a statement of fact. *Spanke,* 254 Mich App at 649. Similarly, a trial court need not "resolve a claimed inaccuracy in the presentence report where the defendant's objection 'was not to an alleged factual inaccuracy in the report but to a conclusion drawn from the undisputed facts.'" *People v Wybrecht*, 222 Mich App 160, 173 (1997), quoting *People v Greene*, 116 Mich App 205, 210 (1982), rev'd on other grounds 414 Mich 896 (1982). See also *People v Uphaus (On Remand)*, 278 Mich App 174, 181-182 (2008) (trial court properly declined to strike from the PSIR the investigator's comment suggesting that the defendant was "paranoid," where the term "paranoia" did not represent a clinical evaluation of the defendant's actual mental condition, but rather, it was a colloquial term used to characterize certain noteworthy statements made by the defendant).

2. Ignoring the Disputed Information

If the court decides to disregard the challenged information, "it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence." *Spanke*, 254 Mich App at 649. Where the sentencing court's response to a defendant's allegation of inaccuracy is ambiguous, remand is necessary. *People v Brooks (Denford)*, 169 Mich App 360, 364-365 (1988).

A trial court's decision that it will not consider information in a defendant's presentence investigation report (PSIR) that the defendant claims is inaccurate does not conclude the trial court's responsibility regarding the challenged information; the trial court must direct the probation officer to strike the information from the PSIR. *People v Britt*, 202 Mich App 714, 718 (1993); MCL 771.14(6); MCR 6.425(E)(2)(a). Additionally, the probation officer is required to provide defense counsel with an opportunity to review the corrected PSIR before it is sent to the Department of Corrections. MCR 6.425(E)(2)(b).

3. Harmless Error

A trial court's failure to respond to a defendant's challenge to information contained in his or her presentence investigation report (PSIR) or introduced at his or her sentencing hearing may be harmless error if the inaccuracies alleged by the

defendant would have no effect on the sentence imposed. *People v McAllister*, 241 Mich App 466, 473-474 (2000) (although the defendant was employed part-time, his PSIR indicated that he was unemployed).

Where the defendant failed to preserve the issue for appeal,[326] the Michigan Court of Appeals declined to remand the defendant's PSIR to correct the plain error regarding the crime for which the defendant was convicted. *People v McCrady*, 244 Mich App 27, 32 (2000). In *McCrady*, 244 Mich App at 32, the defendant's PSIR indicated that he was convicted of first-degree premeditated murder when, in fact, the jury had convicted him of first-degree felony murder. The Court of Appeals acknowledged that the PSIR's misstatement constituted plain error, but held that remand for correction of the PSIR was unnecessary because the error did not deprive the defendant of any substantial right. *Id*.

3.30 Allocution

"'Allocution' generally refers to '[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.'" *People v Petty*, 469 Mich 108, 119 n 7 (2003), quoting Black's Law Dictionary (7th ed).

The defendant, the defendant's lawyer, the prosecutor, and the victim must be given "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]" MCR 6.425(E)(1)(c). MCR 6.425(E)(1)(c) is "straightforward" in its requirement that a defendant must be given an "opportunity" to address the court before sentence is imposed; however, the court rule does not require a sentencing court to make a "personal and direct inquiry" of the defendant to determine whether he or she would like to speak in his or her own behalf. *People v Petit*, 466 Mich 624, 627-629 (2002). In *Petit*, 466 Mich at 629, 636, the Michigan Supreme Court held that the trial court complied with the mandate of the court rule by "asking generally if there was 'anything further.'" However, the Court noted that "asking generally if there is 'anything further' is certainly not the best way to provide a defendant with an opportunity to allocute. Rather, the best way to provide such an opportunity is to specifically ask the defendant if he [or she] has anything to say." *Id*. at 629 n 3. The Court, in so interpreting MCR 6.425, overruled *People v Berry*, 409 Mich 774, 781 (1980), which indicated that the trial court must "inquire specifically of the defendant

[326] See Section 3.54 for a detailed discussion of appellate review and issue preservation requirements.

separately whether he or she wishes to address the court before the sentence is imposed." *Petit*, 466 Mich at 631-633 n 11.

See *United States v Haygood*, 549 F3d 1049, 1055 (CA 6, 2008) (in federal court, prejudice is presumed when allocution is overlooked, and a new sentencing hearing must be held when a defendant does not receive the shortest allowable sentence because it is at least possible that the defendant's allocution might have affected the sentence imposed).

Where no record evidence indicated that the trial court had decided on a particular sentence before the defendant's allocution, a defendant's right to allocute at his or her sentencing hearing is not rendered meaningless simply because the sentencing judge has prepared a written statement of reasons for departing from the sentencing guidelines before the sentence is actually imposed. *People v Grady*, 204 Mich App 314, 316 (1994).

"[T]he mandatory nature of a sentence does not ipso facto render the common-law right to allocute inapposite." *Petty*, 469 Mich at 120-121. Even where a defendant's statement will not affect the sentence imposed—as in a mandatory term or the penalty outlined in a sentence agreement—a defendant must be given the opportunity to allocute. *People v Smith (Jerry)*, 96 Mich App 346, 348-349 (1980).

A juvenile's right to allocution. A juvenile defendant who is convicted in a designated case proceeding and who receives an adult sentence must be given an opportunity to allocute at his or her sentencing hearing. *Petty*, 469 Mich at 121. In *Petty*, 469 Mich at 122-123, the Michigan Supreme Court remanded a juvenile's case to the trial court for resentencing where a juvenile defendant was not permitted to allocute before the court imposed an adult sentence. The Court explained: "To deny a juvenile a meaningful opportunity to allocute at the only discretionary stage of a combined dispositional and sentencing proceeding would seriously affect the fairness and integrity of the judicial proceeding, particularly when the juvenile is subject to an adult criminal proceeding." *Id*. at 121. See MCR 3.955(A)(6) ("The court . . . shall give the juvenile . . . an opportunity to advise the court of any circumstances [he or she] believe[s] the court should consider in deciding whether to enter an order of disposition or to impose or delay imposition of sentence.").

3.31 Crime Victim's Impact Statement

For purposes of the crime victim's written and oral impact statements, "victim" is broadly defined in the Crime Victim's Rights Act (CVRA)[327] as follows:

- "An individual[328] 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*).
- If the victim is deceased, *one* of the following individuals (other than the defendant or the juvenile offender) in descending order of priority:
  - the spouse of the deceased victim, MCL 780.752(1)(m)(*ii*)(A);
  - a child of the deceased victim if the child is age 18 or older, MCL 780.752(1)(m)(*ii*)(B);
  - a parent of the deceased victim, MCL 780.752(1)(m)(*ii*)(C);
  - the guardian or custodian of a child of the deceased victim if the child is younger than age 18, MCL 780.752(1)(m)(*ii*)(D);
  - a sibling of the deceased victim, MCL 780.752(1)(m)(*ii*)(E); or
  - a grandparent of the deceased victim, MCL 780.752(1)(m)(*ii*)(F).
- A parent, guardian, or custodian (if the individual is not the defendant and is not incarcerated) of a victim who is younger than age 18 if the parent, guardian, or custodian so chooses. MCL 780.752(1)(m)(*iii*).
- A parent, guardian, or custodian of a victim who is less than 18 years old *at the time of the commission of the crime* if the parent, guardian, or custodian so chooses and is neither the defendant nor incarcerated. MCL 780.752(1)(m)(*iii*).[329]

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[327] The definition of "victim" contained in all three articles of the CVRA is substantially similar. MCL 780.752(1)(m) (felony convictions), MCL 780.781(1)(j) (juvenile offenses), and MCL 780.811(1)(h) (serious misdemeanor convictions).

[328] "Person" includes both individuals and business or governmental entities. MCL 780.752(1)(j).

[329] Unlike other provisions included in the definition of "victim" in MCL 780.752(1)(m), this provision applies "[f]or the purpose of making an impact statement only[.]" MCL 780.752(1)(m)(*iii*).

- A parent, guardian, or custodian (if the individual is not the defendant and is not incarcerated) of a victim who is mentally or emotionally unable to participate in the legal process. MCL 780.752(1)(m)(*iv*).

A crime victim has a constitutional right "to make a statement to the court at sentencing." Const 1963, art 1, § 24. The CVRA gives a victim the opportunity to make a statement about the impact of the offense at the defendant's sentencing hearing.[330] MCL 780.765; *People v Cobbs*, 443 Mich 276, 285 (1993); *People v Williams (Anterio)*, 244 Mich App 249, 253-254 (2001). A crime victim who is physically or emotionally unable to make an oral impact statement at the defendant's sentencing hearing may designate any other person (who is at least 18 years of age and who is not the defendant and who is not incarcerated) to make the impact statement on his or her behalf. MCL 780.765. Pursuant to MCL 769.25(8) or MCL 769.25a(4)(c), the right to make an oral impact statement under MCL 780.765 extends to a sentencing or resentencing hearing under either of those provisions.

A crime victim may also make an oral impact statement or submit a written impact statement for consideration in preparing the defendant's presentence investigation report (PSIR). MCL 780.764; *Cobbs*, 443 Mich at 285. The victim must be informed that the PSIR in its entirety will be available to the defendant unless the court exempts certain portions from disclosure. MCL 780.763(1)(e). The court has authority to exempt from disclosure "sources of information obtained on a promise of confidentiality." MCL 771.14(3). See also MCR 6.425(B). When information is exempted from disclosure, the court must state on the record its reasons for the exemption, inform the parties of the nondisclosure, and include a notation in the PSIR indicating the exemption. MCL 771.14(3); MCR 6.425(B). If a crime victim requests that his or her written impact statement be included in the defendant's PSIR, the statement must be included. MCL 771.14(2)(b); MCL 780.764.

The content of a defendant's PSIR (which may include a victim's impact statement) is not limited by statute or court rule. *People v Fleming*, 428 Mich 408, 418 (1987). Therefore, a defendant's PSIR "may include information about a defendant that was not admissible nor admitted at defendant's trial or plea including hearsay, character evidence, prior convictions or alleged criminal activity for which defendant was not charged or convicted, and the victims' version of the offense." *Id.* at 418. However, 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. *People v Maben*, ___ Mich App ___, ___ (2015). "[A] trial court is not required to strike a victim's subjective statements

[330] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for more information about a victim's impact statement.

about the impact of a defendant's crime 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 ___ (citations omitted).

The CVRA requires that a victim be given specific notice that his or her impact statement may include, but is not limited to, the following subject matter:

> "(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.
>
> (d) The victim's recommendation for an appropriate sentence." MCL 780.763(3)(a)-(d).

Subject to the defendant's objections to the information at sentencing and the sentencing court's duty to resolve disputes, the content of a defendant's PSIR and by extension, the content of any victim impact statements included in the PSIR, are properly considered by the sentencing court in making its sentencing decision. *Fleming*, 428 Mich at 418-419.

For purposes of sentencing, a trial court may also consider statements of persons who are not "victims" as defined by the CVRA, MCL 780.752(1)(*m*), 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 from persons not considered victims that were attached to the PSIR concerning society's perceived need for protection from the offender were properly considered by the trial court at sentencing).

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) (holding that "the trial court was able to consider and decide other issues at resentencing . . . includ[ing] consideration of [a] newly appended victim's impact statement[]").

3.32 Additional Information Required at Sentencing

In addition to the content already discussed, the record of a defendant's sentencing hearing must also include the following:

- The court must state the sentence being imposed, the minimum and maximum term of the sentence if applicable, and any credit for time served[331] to which the defendant is entitled. MCR 6.425(E)(1)(d).

- In order to facilitate appellate review for reasonableness, the court must justify any sentence imposed outside the advisory minimum guidelines range. *People v Lockridge*, 498 Mich 358, 392 (2015), citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[332]

- The court must "order that the defendant make full restitution[333] as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(E)(1)(f).

Part F—Special Sentencing Considerations

[331] See Section 3.36 for discussion of sentence credit.

[332] MCR 6.425(E)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure," has not yet been amended to conform to *Lockridge*, 498 Mich 358, in which the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[;]" 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 365, 391-392, 399 (emphasis supplied; citation omitted). See Section 3.4 for discussion of *Lockridge*.

[333] Restitution is discussed in Section 3.44.

3.33 Concurrent and Consecutive Sentences

Sentences run concurrently unless otherwise indicated; consecutive sentences may not be imposed unless expressly authorized by law. *People v Gonzalez (Israel)*, 256 Mich App 212, 229 (2003). Where consecutive sentencing is authorized, the statutory language will indicate whether the consecutive nature of the sentence is mandatory or discretionary. A defendant's presentence investigation report (PSIR) must contain "[a] statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law." MCL 771.14(2)(d). Similarly, a defendant's judgment of sentence must specify whether the sentence for which the defendant is committed to the jurisdiction of the Department of Corrections (DOC) "is to run consecutively to or concurrently with any other sentence the defendant is or will be serving[.]" MCL 769.1h(1). The prosecuting attorney or defense counsel, or the defendant, if he or she is not represented by an attorney, may file an objection to the consecutive or concurrent nature of sentences described in the judgment of sentence. MCL 769.1h(3).

MCL 771.14(2)(e)(*i*) states that the sentencing guidelines must be calculated for each conviction for which consecutive sentencing is required or authorized. *People v Mack*, 265 Mich App 122, 126-127 (2005); see also *People v Alfaro*, 497 Mich 1024, 1024 (2015). Where sentences will run concurrently, the sentencing guidelines need only be calculated for the offense with the highest crime class. MCL 771.14(2)(e)(*iii*); *People v Lopez (Jorge)*, 305 Mich App 686, 690-692 (2014); *Mack*, 265 Mich App at 127-128. However, "when imposing concurrent sentences, . . . [courts should] ensure that each individual sentence, irrespective of any guidelines calculations used, does not exceed its statutory maximum." *Lopez (Jorge)*, 305 Mich App at 686.

> Note: "*Mack* was called into question in dicta in *People v Johnigan*, 265 Mich App 463, 470-472 (2005), and . . . two justices of [the Michigan] Supreme Court have noted that *Johnigan* raises a question regarding whether a trial court is obligated under the statutory sentencing guidelines to score all felonies or only the highest class felony. See *People v Getscher*, 478 Mich 887, 887-888 (2007), and *People v Smith* [*(Rhasiaon)*], 475 Mich [891,] 891-892 (2006)." *People v Stevens (Richard)*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2009 (Docket No. 284000).
>
> In *Lopez (Jorge)*, 305 Mich App at 690 n 2, the Michigan Court of Appeals addressed the question raised in *Johnigan*, 265 Mich App at 470:
>
>> "*Mack*[, 265 Mich App at 126-130,] was . . . called into question by [the Court of Appeals] in [*Johnigan*, 265

> Mich App at 470], in which the lead opinion criticized *Mack*'s failure to properly interpret MCL 777.21(2). The lead opinion in *Johnigan* concluded that *Mack* was erroneous because at the time *Mack* was decided, MCL 777.21(2) stated, "'If the defendant was convicted of multiple offenses, subject to section 14 of *chapter IX*, score each offense as provided in this part.'" [*Johnigan*, 265 Mich App at 470] (emphasis added). The lead opinion observed that §14 of Chapter IX was MCL 769.14, which was inapplicable to *Mack*. [*Johnigan*, 265 Mich App at 470]. The lead opinion, however, noted that if MCL 777.21(2) had referred to "§ 14 of *chapter XI* (MCL 777.14)" instead of Chapter IX, then the author would have agreed with *Mack*'s conclusion. [*Johnigan*, 265 Mich App] at 471 (emphasis added).
>
> "*Johnigan*, however, does not compel us to deviate from *Mack*. First, the opinion's criticism of *Mack* was nonbinding dicta because it was not necessary to the resolution of the case. . . . Second, the Legislature, after the *Johnigan* opinion was issued, amended MCL 777.21(2) to refer to Chapter XI instead of Chapter IX. See 2006 PA 655. Thus, with the amendment of MCL 777.21(2), the lead opinion in *Johnigan* now fully supports *Mack*'s holding. *Johnigan*, 265 Mich App at 471." (Citation omitted.)

For purposes of consecutive sentencing, a "term of imprisonment" includes a defendant's jail sentence. *People v Spann*, 250 Mich App 527, 531-533 (2002) *(Spann I)*, aff'd 469 Mich 904 (2003) *(Spann II)*. In affirming the Michigan Court of Appeals, the Michigan Supreme Court, in *Spann II*, 469 Mich at 904, noted its disapproval of the Court of Appeals determination that statutory use of the term "imprisonment" was ambiguous; according to the Supreme Court, the Legislature uses the term "imprisonment" to refer to both confinement in prison and confinement in jail. See, e.g., MCL 769.28; MCL 35.403; MCL 66.8; MCL 430.55.

"Although a misdemeanor that may result in two years' imprisonment may be deemed a felony for purposes of the . . . consecutive sentencing provision[] of the Code of Criminal Procedure, MCL 760.1 *et seq*.[], it cannot be deemed a felony for purposes of the Penal Code." *People v Williams (Derrick)*, 243 Mich App 333, 335 (2000). However, for purposes of the Public Health Code, offenses "expressly designate[d]" as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. *People v Wyrick*, 474 Mich 947 (2005) (misdemeanor possession of marijuana,

second offense, does *not* constitute a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)).[334]

Unless the Legislature clearly manifests a contrary intent, sentencing provisions in effect at the time an offense is *committed* apply to a trial court's imposition of sentence, not the amended sentencing provisions that became effective after the offense was committed but before the defendant was sentenced. *People v Doxey*, 263 Mich App 115, 121-123 (2004)[335]; *People v Dailey*, 469 Mich 1019 (2004).

A. Computation of Sentences

A correctional facility computes the length of an offender's sentence by reference to the offender's judgment of sentence. MCL 791.264(3). Except in cases where the sentencing offense is for one of the five offenses expressly listed in MCL 791.264(4)–MCL 791.264(5), if a judgment of sentence does not specify whether a sentence is to run concurrently or consecutively to an offender's other sentences, the sentence must be computed as if it is to be served concurrently. MCL 791.264(3).

Where the conviction is for a violation of MCL 750.193 (breaking prison), MCL 750.195(2) (breaking jail when jailed for felony), MCL 750.197(2) (breaking jail while awaiting court proceeding), MCL 750.227b (felony-firearm or possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony), or MCL 750.349a (prison inmate taking a hostage), the sentence must be computed as consecutive to other sentences unless the judgment of sentence indicates that the sentence shall run concurrently with an offender's other sentences. MCL 791.264(4).

If an offender's judgment of sentence fails to specify whether the sentence is to be served concurrently with or consecutively to the offender's other sentences, or if the judgment of sentence indicates that the sentence was to be served concurrently with other sentences and the sentencing offense was one of the five mandatory consecutive sentences enumerated in MCL 791.264(4), the Department of Corrections must notify the sentencing judge, the prosecuting attorney, and the affected prisoner not more than seven days after the sentence is computed. MCL 791.264(5).

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[334] Peremptory order vacating the Court of Appeals decision in *People v Wyrick*, 265 Mich App 483 (2005).

[335] *Doxey*, 263 Mich App at 117, 120, specifically dealt with 2002 PA 665, the amendment to the controlled substance sentencing provisions that eliminated the mandatory consecutive nature of sentences under MCL 333.7401(3) and gave the trial court discretion over whether such a sentence was to be concurrent or consecutive to other sentences.

A trial court's failure to specify in the judgment of sentence whether the sentence is consecutive to or concurrent with another sentence that the defendant is, or will be, serving, as required under MCL 769.1h(1), may constitute "a mistake arising from an omission under MCR 6.435(A)[]" that may be corrected by an amendment to the judgment of sentence without a hearing. *People v Howell (Marlon)*, 300 Mich App 638, 646-651 (2013) (the trial court was permitted under MCR 6.435(A) to amend the defendant's judgments of sentence to specify that the sentences were to be served consecutively to the sentence for which he was on parole when the sentencing offenses were committed, as required by MCL 768.7a(2) and MCL 769.1h(1); no hearing was required under MCR 6.435(A) before correction of a clerical error in a judgment of sentence, and the defendant's rights of due process did not entitle him to a hearing because "[t]he trial court [did] not have the discretion to impose any other sentence than that contained in the judgments of sentence as amended[]").

B. Mandatory Consecutive Sentences

1. Felony or Misdemeanor Offense Punishable by Imprisonment Committed During Offender's Incarceration or Escape

Consecutive sentencing is mandatory when a defendant is convicted of committing a crime punishable by imprisonment when the offense was committed while the defendant was incarcerated in, or had escaped from, a penal institution. MCL 768.7a(1). The unambiguous language of MCL 768.7a(1) indicates that the consecutive sentencing mandated by the statute applies only to offenders who commit a crime while incarcerated in a penal institution *in Michigan*, or while on escape from a penal institution *in Michigan*. *People v Alexander (Ronald)*, 234 Mich App 665, 676-677 (1999) (consecutive sentencing did not apply to the defendant's sentence for commission of a crime in Michigan while on escape from a Louisiana prison). A defendant in the custody of a halfway house is in a penal institution for purposes of the consecutive sentencing mandate. *People v Jennings*, 121 Mich App 318, 319 (1982). Mandatory consecutive sentencing also applies to sentences imposed for crimes committed by an offender during his or her incarceration in a federal penal or reformatory institution *located* in Michigan. *People v Kirkland*, 172 Mich App 735, 737 (1988).

The consecutive sentencing mandate of MCL 768.7a(1) applies when an offender commits a *misdemeanor* offense "punishable by imprisonment" while incarcerated in or on escape from a

penal institution in Michigan. *People v Weatherford*, 193 Mich App 115, 119 (1992). Any sentence imposed for the offender's misdemeanor conviction must be served in the custody of the Department of Corrections and consecutively to the term of imprisonment the offender was serving at the time of the offense. *Id.* at 119.

The consecutive sentencing mandate may result in "stacked" sentences involving more than one consecutive sentence. *People v Piper*, 181 Mich App 583, 585-586 (1989). In *Piper*, 181 Mich App at 584, the defendant escaped from jail where he was serving a life sentence that was imposed in 1966.[336] The defendant committed several felony offenses while he was on escape in 1984 and 1985. *Id*. The defendant was convicted of the offenses that occurred during his escape and sentences for these convictions were imposed in 1986. *Id*. Pursuant to MCL 768.7a(1), the sentences were made consecutive to the defendant's 1966 life sentence. *Piper*, 181 Mich App at 585. In 1988, the defendant pleaded guilty to second-degree murder, an offense he committed while an escapee, and the murder sentence imposed was made consecutive to the terms of imprisonment already imposed in 1966 and 1986. *Id*. at 584. That the defendant's sentence was made consecutive to a term of imprisonment already consecutive to the defendant's original term of imprisonment did not result in impermissible stacking. *Id*. at 585-586.

However, "MCL 768.7a(1) [may not be used] as a means of imposing consecutive sentences for convictions arising out of contemporaneous offenses that were tried together in one trial." *People v Williams (Robert)*, 294 Mich App 461, 476 (2011). In *Williams (Robert)*, 294 Mich App at 465, the defendant was convicted of two offenses that were committed contemporaneously while he was serving a jail sentence for domestic violence. The Court of Appeals held that although the trial court correctly applied MCL 768.7a(1) in ordering that the sentences for the two subsequent convictions run consecutively to the original domestic violence sentence, the trial court erred in further ordering that the sentences for the two subsequent convictions run consecutively to each other. *Williams (Robert)*, 294 Mich App at 476-477. "[A] defendant 'has become liable to serve' a sentence [under MCL 768.7a(1)] only if that sentence was imposed (or the act underlying the sentence occurred) in the past[;]" accordingly, because "[t]he [defendant's two subsequent] offenses occurred at the same

[336] "Apparently because of overcrowding in the state prison system, defendant had been transferred to the county jail because he had been a model prisoner." *Piper*, 181 Mich App at 584 n 1.

time, the charges were tried together, and the court imposed the sentences at one proceeding[,]" the sentences for those offenses were required to run concurrently with each other. *Williams (Robert)*, 294 Mich App at 476-477.

2. Felony Offense Committed During Offender's Parole

A person convicted and sentenced for a felony committed while the person was on parole from a sentence for a previous offense is subject to a mandatory consecutive sentence for the subsequent offense. MCL 768.7a(2). The term of imprisonment for the subsequent offense "shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." *Id*.

> "[T]he 'remaining portion' clause of [MCL 768.]7a(2) requires the offender to serve at least the combined minimums of his [or her] sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him [or her] to serve." *Wayne Co Pros v Dep't of Corrections*, 451 Mich 569, 584 (1996).

The trial court's failure to specify that a defendant's sentence is to be served consecutively to a sentence for which he or she was on parole when the sentencing offense was committed, as required by MCL 768.7a(2) and MCL 769.1h(1), may constitute "a mistake arising from an omission under MCR 6.435(A)[]" that may be corrected by an amendment to the judgment of sentence without a hearing. *Howell (Marlon)*, 300 Mich App at 646-651.

"[A] federal 'supervised release term' [imposed under 18 USC 3583(a)] is not the same as 'parole' under Michigan's criminal justice system[;]" therefore, "MCL 768.7a(2) does not provide statutory authority" for a defendant's sentence to run consecutively to a federal sentence for which the defendant was on supervised release when the sentencing offense was committed. *People v Clark (Tyrone)*, ___ Mich App ___, ___ (2016) (noting that "even though the purpose of each is similar, there are significant differences between 'parole'—under the plain meaning of that term and as practiced in Michigan—and federal 'supervised release[]'") (citations omitted).

3. Major Controlled Substance Offense When a Previous Felony Is Pending Disposition

If a defendant commits a major controlled substance offense while the disposition of another felony offense is pending, consecutive sentencing is mandatory. MCL 768.7b(2)(b). A felony is pending disposition for purposes of consecutive sentencing "if the second offense is committed at a time when a warrant has been issued in the original offense and defendant has notice that the authorities are seeking him [or her] with regard to that specific criminal episode." *People v Waterman*, 140 Mich App 652, 655 (1985) (the defendant left Michigan after he was told that the police were looking for him and a warrant had issued by the time of his arrest in Texas, where he had committed the subsequent offense). See also *People v Henry (William)*, 107 Mich App 632, 637-638 (1981) (a felony charge was not pending where although a warrant had been issued for the defendant's first offense, the defendant was unaware that his conduct was the subject of a criminal prosecution).

"Pending disposition" includes the entire period of time up to the date of sentencing for the pending offense. *People v Morris (Otis)*, 450 Mich 316, 330-331 (1995). A felony charge is no longer pending if probation is imposed following conviction of the charge. *People v Hardy*, 212 Mich App 318, 322 (1995).

4. Convictions of Felony-Firearm or Possession and Use of a Pneumatic Gun in Furtherance of Committing a Felony

The sentence imposed for a felony-firearm conviction under MCL 750.227b(1), or a conviction of possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony under MCL 750.227b(2), must be consecutive to the sentence imposed for the felony or attempted felony on which the conviction is based. MCL 750.227b(3). A sentence for a violation of MCL 750.227b(1) or MCL 750.227b(2) is a determinate number of years depending on the number of the defendant's previous convictions under the applicable subsection. MCL 750.227b(1); MCL 750.227b(2).

A felony-firearm conviction requires that the defendant "carr[y] or ha[ve] in his or her possession a firearm when he or she commits or attempts to commit a felony[.]" MCL 750.227b(1).[337] Similarly, a conviction under MCL 750.227b(2) requires that the defendant "carr[y] or ha[ve] in his or her possession a pneumatic gun and use[] that pneumatic gun in

furtherance of committing or attempting to commit a felony[.]" These provisions list four weapons offenses on which a conviction under MCL 750.227b(1) or MCL 750.227b(2) *cannot* be based:

- unlicensed sale of firearms and sales to convicted felons and minors, MCL 750.223;
- carrying a concealed weapon (CCW), MCL 750.227;
- unlawful possession of a pistol by a licensee, MCL 750.227a; and
- alteration, removal, or obliteration of a firearm's identification mark, MCL 750.230.

A sentence imposed for a violation of MCL 750.227b(1) or MCL 750.227b(2) is to be consecutive only to the sentence imposed for the felony or attempted felony on which the conviction is based. MCL 750.227b(3); see also *People v Clark (Rajahaan)*, 463 Mich 459, 463-464 (2000). If a conviction is based on a qualifying underlying felony (i.e., *not* MCL 750.223, MCL 750.227, MCL 750.227a, or MCL 750.230), the defendant may also be convicted of any of the four offenses exempted from the consecutive sentencing mandate, but the sentence imposed for the conviction must be concurrent to the felony-firearm/ pneumatic gun sentence. See, e.g., *People v Cortez*, 206 Mich App 204, 207 (1994) (trial court erred in ordering the defendant's felony-firearm sentence under MCL 750.227b to run consecutively to his sentence for carrying a concealed weapon under MCL 750.227).

The consecutive sentencing requirement applies only when the penalty imposed for the underlying felony is a term of imprisonment. *People v Brown (Darryl)*, 220 Mich App 680, 682 (1996). If the court imposes a sentence of probation for the felony offense underlying an offender's felony-firearm conviction, the mandatory two-year sentence must run concurrently with the term of probation. *Id.* at 682-685.

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[337] Because "'[a] jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses[,]'" a defendant may properly be convicted by jury of felony-firearm even if the jury acquits the defendant of the underlying felony. *People v Powell (Willie)*, 303 Mich App 271, 273-274 (2013) (noting that MCL 750.227b "necessarily includes a finding that the defendant committed or attempted to commit a felony[,]" and that "[t]he jury may have reached the conclusion that [the] defendant was not guilty of possession of marijuana with intent to deliver under MCL 333.7401(2)(d)(*iii*)[(the underlying felony)], but that he did possess marijuana with intent to deliver for purposes of MCL 750.227b[]") (citation omitted).

5. Other Statutes That Mandate Consecutive Sentencing

MCL 750.193(1) mandates consecutive sentencing for defendants convicted of escape or attempting to escape confinement. A person who violates the terms of his or her parole is not an escapee for purposes of this statute. MCL 750.193(3).

Consecutive sentencing is mandatory when a felony offender escapes or attempts to escape from jail before or after court proceedings related to a felony charge. MCL 750.197(2). Consecutive sentencing is required when a prisoner takes a hostage. MCL 750.349a. MCL 750.195(2) mandates consecutive sentencing when an offender who is in jail on a felony offense escapes or attempts to escape from jail.

C. Discretionary Consecutive Sentences

1. Articulation Requirement and Judicial Factfinding

"[T]rial courts imposing one or more discretionary consecutive sentences are required to articulate on the record reasons for each consecutive sentence imposed." *People v Norfleet*, ___ Mich App ___, ___ (2016). "The decision as to each consecutive sentence is its own discretionary act and must be separately justified on the record. . . . While imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each such sentence so as to allow appellate review." *Id*. at ___ (remanding for resentencing where "the trial court spoke only in general terms" about the defendant's background and history and the nature of the offenses involved and "did not speak separately as to each consecutive sentence[]" imposed under MCL 333.7401(3)).

"[T]he Sixth Amendment does not prohibit the use of judicial fact-finding to impose [discretionary] consecutive sentencing." *People v Deleon*, ___ Mich App ___, ___ (2016), adopting the rationale of *Oregon v Ice*, 555 US 160, 164 (2009). "Although consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense[,]" and *Apprendi v New Jersey*, 530 US 466 (2000), *Alleyne v United States*, 570 US ___ (2013), and *People v Lockridge*, 498 Mich 358 (2015), do not "compel the conclusion that consecutive sentencing in Michigan violates a defendant's Sixth Amendment protections." *Deleon*, ___ Mich App at ___ (additionally noting that "the trial court's imposition of consecutive sentences [would not] be affected by whether the

sentencing guidelines are mandatory or advisory[]"). Therefore, although the jury's verdict "did not necessarily incorporate a finding that [the defendant's first-degree criminal sexual conduct] conviction 'ar[ose] from the same transaction' as did his [second-degree criminal sexual conduct] conviction, . . . [the] defendant [had] no Sixth Amendment right to have a jury make that determination[]" before the trial court could impose a consecutive sentence under MCL 750.520b(3). *Deleon*, ___ Mich App at ___, quoting MCL 750.520b(3) (second alteration in original).

2. Controlled Substance Offenses

A sentence imposed for a controlled substance offense under MCL 333.7401(2)(a)[338] may be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. MCL 333.7401(3).

"MCL 333.7401(3) provides discretion to impose '[*a*] *term* of imprisonment . . . to run consecutively[;]' [t]hus, a trial court may not impose multiple consecutive sentences as a single act of discretion nor explain them as such." *Norfleet*, ___ Mich App at ___. "The decision as to each consecutive sentence is its own discretionary act and must be separately justified on the record[,]" because MCL 333.7401(3) "clearly provides that a discretionary decision must be made as to each sentence and not to them all as a group." *Norfleet*, ___ Mich App at ___ (remanding for resentencing where "the trial court spoke only in general terms" about the defendant's background and history and the nature of the offenses involved and "did not give particularized reasons to impose each sentence under MCL 333.7401(2)(a)(*iv*) consecutive to the other, with reference to the specific offenses and the defendant[]").

3. Violations Arising Out of the Same Transaction as the Sentencing Offense

For the following offenses, consecutive sentencing is discretionary for violations *arising out of the same transaction as the sentencing offense*.

- MCL 333.7401c, possession or provision of equipment or buildings for the purpose of manufacturing controlled substances in violation of MCL 333.7401 or counterfeit controlled substances or controlled

[338] See Section 3.20 for a description of these offenses.

substance analogues in violation of MCL 333.7402. MCL 333.7401c(5).

- MCL 750.81d, assaulting or obstructing a law enforcement officer, firefighter, conservation officer, federal peace officer, emergency medical personnel, or an individual involved in a search and rescue operation when the offender should know that the individual is performing his or her duties. MCL 750.81d(6).

- MCL 750.110a(2), first-degree home invasion. MCL 750.110a(8).

- MCL 750.479, assaulting, battering, wounding, obstructing, or endangering authorized process servers or officers enforcing township ordinances. MCL 750.479(7).

- MCL 750.479b, taking a firearm or other weapon from a peace officer or corrections officer. MCL 750.479b(4).

- MCL 750.529a, carjacking. MCL 750.529a(3).

- MCL 769.36, permitting multiple charges against an offender for each death that results from violating MCL 257.602a(5), MCL 257.617(3), MCL 257.625(4), MCL 257.904(4), MCL 750.317, MCL 750.321, MCL 750.479a(5), MCL 324.80176(4), MCL 324.81134(7), MCL 324.82127(4), MCL 259.185(4), or MCL 462.353(6). MCL 769.36(1).

- MCL 750.520b, first-degree criminal sexual conduct. MCL 750.520b(3).[339]

- MCL 750.520n(2), violations involving equipment used for certain offenders subject to lifetime electronic monitoring under MCL 791.285. MCL 750.520n(4).

"[T]he Sixth Amendment does not prohibit the use of judicial fact-finding to impose" a consecutive sentence under MCL 750.520b(3). *Deleon*, ___ Mich App at ___. Therefore, although the jury's verdict "did not necessarily incorporate a finding that [the defendant's first-degree criminal sexual conduct] conviction 'ar[ose] from the same transaction' as did his [second-degree criminal sexual conduct] conviction, . . . [the] defendant [had] no Sixth Amendment right to have a jury make that determination[]" before the trial court could impose a consecutive sentence. *Id*. at ___, quoting MCL 750.520b(3) (second alteration in original).[340]

4. Sentences Imposed for *Any* Other Crime, Including Crimes Arising Out of the Same Transaction as the Sentencing Offense

For the following offenses, a sentence may be consecutive to a sentence imposed for *any* other crime, including crimes *arising out of the same transaction as the sentencing offense*.

- MCL 750.50, various violations involving the proper care and treatment of animals. MCL 750.50(7).
- MCL 750.119, corruption with the intent to bias the opinion or influence the outcome of any matter pending before the court or other decision-maker. MCL 750.119(3).
- MCL 750.120a(2) and (4), willfully attempting to influence a juror by intimidation, or retaliating or threatening to retaliate against a juror for performing his or her duties. MCL 750.120a(6).
- MCL 750.122, giving or offering anything of value to encourage, discourage, or influence a witness, or retaliating against a person for having been a witness. MCL 750.122(11).
- MCL 750.483a, withholding information ordered by the court or retaliating against an individual for reporting a crime. MCL 750.483a(10).

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[339] "[A]n ongoing course of sexually abusive conduct involving episodes of assault does not in and of itself render the crimes part of the same transaction[; rather, f]or multiple penetrations to be considered as part of the same transaction, they must be part of a 'continuous time sequence,' not merely part of a continuous course of conduct." *People v Bailey (Ryan)*, 310 Mich App 703, 709-710, 723, 725-726 (2015) (citing *People v Brown (Tommy)*, 495 Mich 962, 963 (2014), and *People v Ryan (Sean)*, 295 Mich App 388, 402-403 (2012), and holding that "the trial court erred by ordering that [the defendant's] mandatory minimum sentence [for one count of CSC-I] be served consecutively to his concurrent sentences [for three additional CSC-I convictions]" stemming from the molestation of three victims over a course of several years, because there was no evidence that any offense occurred during the same transaction as any other offense). See also *Brown (Tommy)*, 495 Mich at 962-963 (holding that "[t]he trial court imposed an invalid sentence when it imposed seven consecutive sentences for the defendant's seven convictions of first-degree criminal sexual conduct[;]" under *Ryan (Sean)*, 295 Mich App at 402-403, "the trial court had discretion to impose consecutive sentences for *at most* three of the . . . convictions, because the three sexual penetrations that resulted in those convictions . . . 'grew out of a continuous time sequence' and had 'a connective relationship that was more than incidental[]'").

Under MCL 750.520b(3), the trial court may order that a sentence imposed for a conviction of first-degree criminal sexual conduct (CSC-I) be served consecutively to a sentence for a second conviction of CSC-I arising from the same transaction. *Ryan (Sean)*, 295 Mich App at 404-405 (rejecting the defendant's assertion that the phrase "any other criminal offense arising from the same transaction[]" in MCL 750.520b(3) permits consecutive sentencing for a CSC-I offense only when the other sentence is for an offense *other* than CSC-I, and concluding that "the phrase 'any other criminal offense' means a different sentencing offense[]").

5. Sentences Imposed for an Underlying Misdemeanor or Felony Offense

An offender's sentence for the following offenses may be made consecutive to a sentence imposed for an underlying misdemeanor or felony offense.

- MCL 750.145d, using the internet or a computer to engage in prohibited conduct. MCL 750.145d(3).
- MCL 750.212a, criminal conduct under the provisions of the Penal Code committed in or directed at a vulnerable target. MCL 750.212a(1).
- MCL 750.227f, committing or attempting to commit a violent act against a person while wearing body armor. MCL 750.227f(1).
- MCL 752.796, using a computer or computer network to commit a crime, to conspire to commit a crime, or to solicit another person to commit a crime. MCL 752.797(4).

6. Pending Felonies

With the exception of major controlled substance offenses, MCL 768.7b(2)(a) authorizes consecutive sentencing for an offense committed pending disposition of a prior felony charge. The discretionary authority to impose consecutive sentences applies only to the "last in time" sentencing court. *People v Chambers*, 430 Mich 217, 231 (1988).

7. Medicaid Fraud

A trial court may impose consecutive sentences for an offender's "conviction of separate offenses under [the Medicaid False Claim Act]." MCL 400.609(2).

8. Identity Theft

A sentence imposed for a violation of MCL 445.65 (identity theft) or MCL 445.67 (identity theft and communication under false pretenses involving a business) may be made to run consecutively to any term of imprisonment imposed for another violation committed during a defendant's violation or attempted violation of MCL 445.65 or MCL 445.67, or for

[340] See Section 3.33(C)(1) for additional discussion of the Sixth Amendment in the context of discretionary consecutive sentencing.

another violation occurring after the initial violation using information obtained as a result of the initial violation. MCL 445.69(4).

9. False Statement in Petition for Postconviction DNA Testing

A sentence imposed for a violation of MCL 750.422a(1) (when, pursuant to MCL 770.16, a defendant intentionally makes a material false statement when petitioning for DNA testing of biological material identified during the investigation leading to the defendant's conviction) may be made consecutive to any term of imprisonment the defendant is serving. MCL 750.422a(2).

10. Gang-Related Crimes

A sentence imposed for a violation of MCL 750.411u(1) (gang member/associate guilty of a felony if he or she commits or attempts to commit a felony and his or her relationship with the gang provides the motive, means, or opportunity to commit the felony) is in addition to, and may be made to run consecutively with, and preceding, any term of imprisonment imposed for the conviction of the underlying felony or attempt to commit the underlying felony. MCL 750.411u(2).

A sentence imposed for a violation of MCL 750.411v (causing, encouraging, recruiting, soliciting, coercing another to join, participate in, or assist a gang in committing a felony) is in addition to a sentence imposed for the conviction of another felony or attempted felony arising out of the same transaction, and may be ordered to be served consecutively with, and preceding, a term of imprisonment imposed for the conviction of that felony or attempted felony. MCL 750.411v(4).

11. Embezzlement From Vulnerable Adult

A sentence imposed under MCL 750.174a(4) (embezzlement from vulnerable adult of $1,000 to $20,000 or with prior convictions), MCL 750.174a(5) (embezzlement from vulnerable adult of $20,000 to $50,000 or with prior convictions), MCL 750.174a(6) (embezzlement from vulnerable adult of $50,000 to $100,000 or with prior convictions), or MCL 750.174a(7) (embezzlement from vulnerable adult of $100,000 or more or with prior convictions) may be ordered to be served consecutively to any other sentence imposed for a violation of MCL 750.174a.

12. Standard of Review

"[W]here a statute grants a trial court . . . discretion to impose a consecutive sentence, the trial court's decision to do so is reviewed on an abuse of discretion standard, i.e., whether the trial court's decision was outside the reasonable and principled range of outcomes." *Norfleet*, ___ Mich App at ___, citing *People v Babcock*, 469 Mich 247, 269 (2003).

"[E]ach sentence is to be reviewed on its own merits[,]" and "a proportionality challenge [under *People v Milbourn*, 435 Mich 630, 635-636 (1990),] to a given sentence must be based on the individual term imposed and not on the cumulative effect of multiple sentences." *Norfleet*, ___ Mich App at ___, citing *People v Warner (Marshall)*, 190 Mich App 734, 735-736 (1991). However, "although the combined term [resulting from the imposition of consecutive sentences] is not itself subject to a proportionality review, the decision to impose a consecutive sentence[,] where not mandated by statute, is reviewable for an abuse of discretion." *Norfleet*, ___ Mich App at ___ (noting that "[t]he decision as to each consecutive sentence is its own discretionary act and must be separately justified on the record[]").

3.34 Principle of Proportionality

"The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *People v Babcock*, 469 Mich 247, 263 (2003).

A. Judicial Sentencing Guidelines

Under the judicial sentencing guidelines, a defendant's sentence was reviewed for proportionality under *People v Milbourn*, 435 Mich 630 (1990). A sentence is proportionate when it reflects the seriousness of the circumstances surrounding the offense and the offender's criminal history. *Id.* at 636; *People v Crawford*, 232 Mich App 608, 621 (1998). Sentences imposed within the range recommended by a defendant's properly scored judicial guidelines were presumptively proportionate; that is, a sentence within the guidelines was neither excessively severe nor unfairly lenient. *People v Wybrecht*, 222 Mich App 160, 175 (1997); *People v Kennebrew*, 220 Mich App 601, 609 (1996). A sentence imposed within the range indicated by the judicial guidelines could violate the principle of proportionality only in unusual circumstances. *Milbourn*, 435 Mich at 661; *People v Hadley*, 199 Mich App 96, 105 (1993).

> **Note:** Although the judicial sentencing guidelines did not apply to habitual offender sentences, those sentences were subject to the principle of proportionality. *People v Coy*, 258 Mich App 1, 23 (2003); *People v McFall*, 224 Mich App 403, 415 (1997).

The proportionality of a defendant's sentence is considered by reference to the sentences in the abstract; that is, where a defendant is sentenced to multiple consecutive terms of imprisonment, the proportionality of the sentence is not determined by the cumulative effect of the defendant's sentences. *People v Miles (Dwayne)*, 454 Mich 90, 94-95 (1997); *Kennebrew*, 220 Mich App at 609.

A trial court is not required to consider a codefendant's sentence when imposing sentence on another codefendant; that is, each individual convicted of a crime, when more than one individual participated in the same crime, is not entitled to receive a sentence similar to the sentences received by other participants. *People v Colon*, 250 Mich App 59, 64 (2002).

B. Statutory Sentencing Guidelines[341]

The concept of proportionality is built into the statutory sentencing guidelines. An offender's offense variable (OV) and prior record variable (PRV) levels, as determined by reference to the offense and the offender, are intended to place the offender in a cell on the appropriate sentencing grid that recommends a minimum sentence proportionate to that offense and offender.

> "Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history." *Babcock*, 469 Mich at 263-264.

[341] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 364-365, 399 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). See Section 3.4 for discussion of *Lockridge*.

In caselaw predating its decision in *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court held that unless a trial court relied on inaccurate information or on guidelines that were erroneously scored, a sentence within the appropriate guidelines range is presumptively proportionate and must be affirmed on appeal. *Babcock*, 469 Mich at 261. See also *People v Powell (Kelly)*, 278 Mich App 318, 324 (2008) (holding that the fact that a sentence is made consecutive to the remaining portion of a parole-related sentence does not overcome the presumptive proportionality of a sentence within the guidelines range). Additionally, it has been held that a sentence imposed under the statutory guidelines is reviewed for its proportionality only if it represents a departure from the range recommended under the guidelines. *Id.* at 261-262. See also *People v Armisted*, 295 Mich App 32, 51 (2011) (rejecting the defendant's contention that his sentence, although within the guidelines range, was nevertheless disproportionate to the "relatively benign nature" of the sentencing offense, and noting that "it does not appear that [the] 'unusual circumstances' rule of *Milbourn*[, 435 Mich at 661,] has survived the Legislature's enactment of the statutory sentencing guidelines[]").

However, in *Lockridge*, the Michigan Supreme Court 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[.]" *Lockridge*, 498 Mich at 364, 399, 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)[,]" 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).

Under *Lockridge*, "the sentencing court may exercise its discretion to depart from [the applicable] guidelines range without articulating substantial and compelling reasons for doing so." *Lockridge*, 498 Mich at 392. In order to facilitate appellate review, the court must justify any sentence imposed outside the advisory minimum guidelines range. *Id.*, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for

reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable." *Lockridge*, 498 Mich at 392 (emphasis supplied), citing *Booker*, 543 US at 261.

In *People v Steanhouse*, 313 Mich App 1, 46, 47 (2015), lv gtd 499 Mich 934 (2016), the Court of Appeals readopted the proportionality test as the basis for determining the reasonableness of a departure sentence under the post-*Lockridge* advisory legislative guidelines. "[A departure] sentence that fulfills the principle of proportionality under *Milbourn*[, 435 Mich 630,] and its progeny, constitutes a reasonable sentence under *Lockridge*[, 498 Mich 358]." *Steanhouse*, 313 Mich App at 47, 48 (concluding that "reinstating the previous standard of review in Michigan, as a means of determining the reasonableness of a sentence, is preferable to adopting the analysis utilized by the federal courts [following *Booker*, 543 US 220,] and is most consistent with the Supreme Court's directives in *Lockridge*[]") (citations omitted).

See Section 3.4 for discussion of *Lockridge*. See Section 3.23(B) for discussion of the reasonableness of a departure sentence.

3.35 Additional Information to Consider Before Imposing Sentence

Before the statutory sentencing guidelines were established, the Michigan Supreme Court declined to rigidly define or classify the facts and circumstances surrounding the offense and the offender into facts and circumstances either properly or improperly considered in fashioning a defendant's sentence. *People v Adams (Steven)*, 430 Mich 679, 687 (1988) ("It remains the role of the sentencing judge to weigh facts deemed relevant to the sentencing decision. . . . Our function is to identify those factors which when injected into the sentencing process tread unfairly upon the defendant's rights.").

A. Proper Considerations

Permissible factors that may be considered by the trial court when imposing sentence include:

- the severity and nature of the crime committed;
- the circumstances surrounding the criminal conduct;
- the defendant's attitude toward his or her criminal behavior;
- the defendant's social and personal history; and

- the defendant's criminal history, including subsequent offenses. *People v Oliver*, 242 Mich App 92, 98 (2000).

"A sentencing judge may consider the defendant's false testimony when passing sentence." *Adams (Steven)*, 430 Mich at 688. "[W]hen the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to wil[l]ful, material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation, the trial court properly may consider this circumstance in imposing sentence." *Id.* at 693.

A defendant's post-arrest conduct in prison was properly considered by the court when imposing sentence where the judicial guidelines in effect at the time did not account for a defendant's misconduct while in custody. *People v Houston (John)*, 448 Mich 312, 318, 323 (1995). "[J]ust as an exemplary custodial record might be found to be a mitigating circumstance, misconduct in custody may be an aggravating circumstance indicating a disposition to violence or impulsiveness." *Id.* at 323.

Evidence of a defendant's lack of remorse may be properly considered in determining his or her potential for rehabilitation. *People v Spanke*, 254 Mich App 642, 650 (2003).

Evidence of the effect a crime has had on a victim is an appropriate consideration in fashioning a defendant's sentence. *People v Compagnari*, 233 Mich App 233, 236 (1998).

A sentencing court may properly consider a defendant's age in light of other permissible and relevant factors—criminal history and admitted drug use, for example—to determine the defendant's potential for rehabilitation. *People v Randolph*, 242 Mich App 417, 423 (2000), aff'd in part, rev'd in part 466 Mich 532 (2002). However, a sentencing court may not arbitrarily lengthen an offender's prison sentence for the expressed purpose of incarcerating the offender "beyond the age of violence." *People v Fisher (Richard)*, 176 Mich App 316, 318 (1989). It is also inappropriate to consider a defendant's age in assessing the risk of recidivism where no evidence was presented to support the court's opinion of the defendant's probable recidivism. *People v McKernan*, 185 Mich App 780, 781-783 (1990) ("The theory that the advanced age of a defendant increases the probability of recidivism and justifies a longer sentence than would be given to a younger person (even within the [judicial] guidelines) is sufficiently complex and controversial to require scientific justification before it may be relied upon by a court.").

A sentencing court may consider an adult defendant's juvenile records when imposing sentence, even when the juvenile records

have been automatically expunged. *People v Smith (Ricky)*, 437 Mich 293, 301-303 (1991).

As long as the defendant has an opportunity to refute it, a court may consider a defendant's alleged criminal conduct even when the conduct does not result in conviction. *People v Wiggins (Warren)*, 151 Mich App 622, 625 (1986). A sentencing court may also consider a defendant's conduct in charges dismissed as a result of a plea agreement:

> "The fact that defendant was properly charged in [the dismissed case], had been brought before the trial court on the matter, had not denied the accuracy of the charges themselves, and would have had to answer for these charges except for the agreement between the parties, provides an accurate and adequate basis upon which the judge could consider evidence of that criminal conduct[.]" *People v Moore (Sloan)*, 70 Mich App 210, 213 (1976).

The statutory sentencing guidelines have quantified many of the historical considerations discussed above. For example, the seven prior record variables (PRVs)[342] account for the extent and severity of a defendant's criminal history by assigning point values to a defendant's previous high and low severity felony convictions (PRVs 1 and 2), a defendant's previous high and low severity juvenile adjudications (PRVs 3 and 4), a defendant's prior misdemeanor convictions or prior misdemeanor juvenile adjudications (PRV 5), a defendant's relationship to the criminal justice system at the time he or she is sentenced for the scored offense (PRV 6), and the number of concurrent or subsequent felony convictions accumulated by the defendant at the time of sentencing for the scored offense (PRV 7). Similarly, the offense variables (OVs) account for the circumstances surrounding the defendant's commission of the sentencing offense. For example, OVs 1 and 2 assign points for the defendant's use of a weapon during the offense.

B. Improper Considerations

It is improper to consider the following factors when fashioning an offender's sentence:

- A defendant's refusal to provide authorities with information about other criminal conduct. *People v Johnson (James)*, 203 Mich App 579, 584 (1994).

[342] See Sections 3.8 and 3.9 for detailed information on scoring a defendant's PRVs and OVs.

- Good-time credits, disciplinary credits, or the effect of prison overcrowding. *People v Fleming*, 428 Mich 408, 428 (1987).

- A defendant's refusal to admit guilt. *People v Dobek*, 274 Mich App 58, 104 (2007).

    - "To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, th[e appellate] [c]ourt focuses on three factors: '(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe.'" *Dobek*, 274 Mich App at 104, quoting *People v Wesley*, 428 Mich 708, 713 (1987).

    - Resentencing was required when a sentencing court implied that the defendant would be sentenced more leniently for his felony-firearm conviction if he revealed the location of the weapon, thereby effectively admitting his guilt. *People v Conley*, 270 Mich App 301, 313-315 (2006).

- An independent finding of guilt with regard to other offenses with which a defendant is charged. *People v Grimmett*, 388 Mich 590, 608 (1972), overruled on other grounds by *People v White*, 390 Mich 245 (1973). But see *People v Shavers*, 448 Mich 389, 393 (1995) (it is not an independent finding of guilt when a court considers evidence presented at trial as an aggravating factor to determine the appropriate sentence), and *People v Granderson*, 212 Mich App 673, 679-680 (1995) (a trial court may properly consider facts underlying a defendant's previous acquittal of other charges).

- A defendant's last-minute plea or waiver of the right to a jury trial. *People v Earegood*, 383 Mich 82, 85 (1970).

- A defendant's exercise or waiver of his or her constitutional right to a jury trial. *People v Godbold*, 230 Mich App 508, 517-520 (1998).

- A defendant's polygraph results. *People v Anderson (Jeffry)*, 284 Mich App 11, 16 (2009).

- A defendant's eligibility for parole. *People v Wybrecht*, 222 Mich App 160, 173 (1997).[343]

- The possibility that a defendant may be granted early release or community placement. *People v Miller (Bradley)*,

206 Mich App 638, 642 (1994); *People v McCracken*, 172 Mich App 94, 101-103 (1988).

- Local sentencing policy, to the extent that it prevents an individualized sentence tailored to the circumstances of the offense and the offender. *People v Chapa*, 407 Mich 309, 311 (1979); *People v Catanzarite*, 211 Mich App 573, 583-584 (1995).

3.36 Sentence Credit

A defendant is entitled to credit for presentence time served on the offense for which he or she was convicted and is being sentenced if the presentence incarceration was due to the denial of bond or the defendant's inability to furnish bond. MCL 769.11b. Specifically, MCL 769.11b states:

> "Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he [or she] is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing."

"A defendant is entitled to credit for time served before sentencing [under MCL 769.11b] even if the defendant is sentenced to serve a mandatory term of life imprisonment without parole." *People v Seals*, 285 Mich App 1, 18-19 (2009).

Presentence incarceration must be for sentencing offense. Credit for time served must be time a defendant spent incarcerated for the sentencing offense against which the credit is awarded; a defendant cannot receive credit for time served for an offense unrelated to the sentencing offense. *People v Prieskorn*, 424 Mich 327, 341 (1985).

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[343] However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US ___, ___ (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US ___, by effectively eliminating the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and 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.

When a defendant is serving time on a sentence and a subsequent offense is adjudicated during the incarceration, the defendant is not entitled to credit against the second offense for time served before sentencing because he or she was incarcerated and serving time on an unrelated offense. *People v Givans*, 227 Mich App 113, 125-126 (1997); *People v Alexander (Hamilton) (After Remand)*, 207 Mich App 227, 229 (1994).

A defendant is not entitled to credit for time served against a sentence that must run consecutively to a sentence the defendant was serving at the time of the subsequent offense. *People v Connor*, 209 Mich App 419, 431 (1995). Time spent incarcerated while awaiting disposition of the subsequent offense is "presentence time served that [the defendant] was already obliged to serve under a prior sentence." *Id.* at 431.

A defendant is not entitled to credit against a sentence imposed for a crime committed while the defendant was on parole; time served in jail before being sentenced for the subsequent offense is properly credited against the unexpired portion of the sentence for the offense for which the defendant was paroled. MCL 791.238(2); *People v Stewart (Eric)*, 203 Mich App 432, 433 (1994). See also *People v Stead*, 270 Mich App 550, 551-552 (2006) (a defendant who spends time in jail for an offense committed while the defendant was on parole is a parole detainee for whom bond is not considered; a parole detainee is entitled to credit against the sentence from which he or she was paroled for any time spent in jail awaiting disposition of the new offense).

Presentence incarceration must be due to denial or inability to furnish bond. "[T]he primary purpose of the sentencing credit statute is to equalize, as far as possible, the status of the indigent or lower-income accused with the status of the accused who can afford to post bail." *Givans*, 227 Mich App at 125. "Given that the primary purpose of [MCL 769.]11b is to equalize the position of one who cannot post bond with that of a person who is financially able to do so, a showing that presentence confinement was the result of inability to post bond is an essential prerequisite to the award of sentence credit under the statute." *People v Whiteside*, 437 Mich 188, 196 (1991).

A defendant is not entitled to credit for time spent in boot camp when the defendant's participation in the program was not due to his being denied bond or being unable to furnish bond. *People v Wagner*, 193 Mich App 679, 682 (1992) (the defendant was sentenced after he failed to complete a boot camp program originally imposed in lieu of prison; he was not entitled to sentence credit for the time in boot camp because it did not result from a denial or inability to post bond).

A defendant is not entitled to credit for time spent in a tether program when the defendant's participation in the program was not due to his

being denied bond or being unable to furnish bond. *People v Reynolds (Michael)*, 195 Mich App 182, 183 (1992).

A defendant is not entitled to credit for time spent in a drug rehabilitation program, even when participation in the program was a condition of probation, unless the defendant's placement in the program was due to his or her inability to furnish bond. *Whiteside*, 437 Mich at 196-197. See also *People v Scott (John)*, 216 Mich App 196, 199-200 (1996) (where a defendant's placement in a treatment or rehabilitation facility is not due to his being denied bond or being unable to furnish bond, MCL 769.11b does not apply).

MCL 769.11b does not require sentence credit "for time spent incarcerated in other jurisdictions, for offenses committed while [a defendant] was free on bond for the offense for which he [or she] seeks such credit, from the time that a detainer or hold either was or could have been entered against him [or her] by authorities in the jurisdiction where the defendant is to be sentenced." *People v Adkins (Kenneth)*, 433 Mich 732, 734 (1989). See also *People v Patton*, 285 Mich App 229, 239 (2009) (the defendant was "not entitled to sentence credit for time served from the date a detainer could have, or was, entered against him[,]" because his incarceration in a federal penitentiary was not the result of his being denied or unable to furnish bond for the Michigan charge at issue).

The jail credit statute does not generally apply to parolees who commit new felonies while on parole. *People v Idziak*, 484 Mich 549, 562 (2009). Specifically, "the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his [or her] earlier sentence unless and until discharged by the Parole Board. For that reason, he [or she] remains incarcerated regardless of whether he [or she] would otherwise be eligible for bond before conviction on the new offense." *Id.* at 562. Because the parolee is not being incarcerated due to being denied or unable to furnish bond for the new offense, the jail credit statute, MCL 769.11b, does not apply. *Idziak*, 484 Mich at 562-563 ("reach[ing] essentially the same conclusion as the Court of Appeals did in [*People v*] *Seiders*[, 262 Mich App 702 (2004),] and [*People v*] *Filip*[, 278 Mich App 635 (2008),] . . . [but] on the basis of a somewhat different analysis"). See also *People v Armisted*, 295 Mich App 32, 42, 49-51 (2011) (MCL 769.11b does not apply when a parolee commits a new felony prior to his or her release from a community residential center); *People v Clark (Tyrone)*, ___ Mich App ___, ___ (2016) (rejecting the defendant's argument that, because he committed the sentencing offense while serving a federal supervised release term under 18 USC 3583(a), he was entitled to sentencing credit "based on his being on supervised release or incarcerated for his federal convictions[]").

Refuting the popular argument of recidivist parolees that time spent awaiting sentence on a new conviction is "dead time," the Michigan Court of Appeals explained in *People v Johnson (Robert)*, 283 Mich App 303, 312-313 n 4 (2009), that regardless of whether parole is revoked or not revoked, time served awaiting a subsequent conviction is credited toward the conviction for which the defendant was on parole. "If parole is revoked, the defendant is obligated to serve out the balance of the maximum sentence for the conviction that formed the basis for parole." *Id.* at 311, citing MCL 791.238(5) and MCL 791.234. "If parole is not revoked, the defendant continues to accrue time toward his [or her] ultimate discharge for the conviction upon which the defendant enjoys parole." *Johnson (Robert)*, 283 Mich App at 311, citing MCL 791.238(6). "The only time a defendant stops accruing time toward his or her ultimate discharge from the Department of Corrections is when a parolee has a warrant issued for a parole violation and the parolee remains at large. After a warrant is issued, '[t]he time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.'" *Johnson (Robert)*, 283 Mich App at 311, quoting MCL 791.238(2).

Special alternative incarceration units. When a defendant is ordered to participate in a special alternative incarceration (SAI) unit[344] as a condition of probation, double jeopardy considerations demand that the time spent there be credited against the sentence imposed after the defendant's probation violation if placement in the SAI unit is the equivalent of being "in jail." *People v Hite (After Remand)*, 200 Mich App 1, 2-3, 8 (1993) (the boot camp was enclosed by an eighteen-foot high fence topped with barbed wire).

Double jeopardy considerations when presentence time served is the equivalent of being "in jail." "'Sentence credit under the double jeopardy clauses [(US Const, Am V; Const 1963, art 1, § 15)] is only required for confinements amounting to time spent "in jail" as that term is commonly used and understood.'" *Reynolds (Michael)*, 195 Mich App at 183-184 (sentence credit not required for time defendant spent in tether program), quoting *Wagner*, 193 Mich App at 682 (sentence credit not required for time spent in boot camp). See also *Whiteside*, 437 Mich at 202 (sentence credit not required for time defendant spent in private rehabilitation program).

"The Double Jeopardy Clauses of the United States and Michigan Constitutions [(US Const, Am V; Const 1963, art 1, § 15)] require that a probationer be given credit for time served while *incarcerated* as a condition of probation." *Hite*, 200 Mich App at 4. See also *People v Grazhidani*, 277 Mich App 592, 599 (2008) (credit for time served as a

[344] Sentences involving SAI units are discussed in detail in Section 3.53.

condition of probation limited to time actually spent while incarcerated "in jail").

Sheriff's good-time/disciplinary credits. "'Good time' and 'disciplinary credit,' as the terms are used in [MCL 800.33], refer[] to the graduated monthly reduction from sentences being served by prison inmates as set forth in the statute. It is designated to serve as an inducement to good conduct in state penal institutions and may be earned during the time the prisoner is confined in a penal institution and also while on parole." 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 22:148. "Although . . . there is a distinction between good-time credits and disciplinary credits, [the Michigan Supreme Court] use[s] the terms interchangeably to refer to sentence reductions based on MCL 800.33." *People v Fleming*, 428 Mich 408, 422 n 16 (1987). Under MCL 51.282(2), prisoners are entitled to good-time credit if their record shows that there are no violations of the rules and regulations.

"[A] sentencing court may not revoke good-time credit that a defendant already has earned while serving a jail sentence as a condition of probation." *People v Resler*, 210 Mich App 24, 28 (1995). In *Resler*, 210 Mich App at 25, the defendant was originally sentenced to five years' probation with the first year in jail, and was awarded sixty days of good-time credit under MCL 51.282(2). After release from jail, the defendant was found guilty of violating the terms of his probation and was sentenced to five to ten years in prison. *Resler*, 210 Mich App at 25. The trial court only allowed the defendant credit for the time he actually served in jail on the original charges. *Id*. The Michigan Court of Appeals ruled that the defendant was entitled to good-time credit against his sentence for the probation violation, and ordered that his sentence be amended to reflect the additional credit. *Id*. at 28. The Court explained:

> "[W]e hold that the constitutional guarantee against multiple punishments contemplates protection for good-time credit, but that the ultimate decision of whether such protection applies—that is, whether the good-time credit may be revoked—lies in the discretion of the Legislature. Absent legislative authority, a sentencing court may not revoke good-time credit that a defendant already has earned while serving a jail sentence as a condition of probation." *Resler*, 210 Mich App at 28.

Good-time credit earned during a sentence that is later declared invalid does not transfer to the sentence imposed after the first sentence was declared invalid, where the defendant was not legally entitled to the good-time credit for the first sentence. *People v Tyrpin*, 268 Mich App 368, 369, 373-374 (2005) (holding that "the trial court correctly determined that [the] defendant [could not] benefit from a sentence credit that would

not exist but for an error of law in [the] defendant's original sentencing[]").

"[A]lthough there is no constitutional right to good-time credit, once a good-time credit provision is adopted and a prisoner earns that credit, the deprivation of good-time credit constitutes a substantial sanction, and a prisoner may claim that a deprivation of good-time credit is a denial of a protected liberty interest without due process of law." *People v Cannon (Terrence)*, 206 Mich App 653, 656 (1994). Accordingly, a trial court cannot deny a defendant the good-time credit opportunities provided in MCL 51.282(2). *Cannon (Terrence)*, 206 Mich App at 657. That is, in a defendant's probation order, a court cannot impose a specific term of imprisonment and indicate the date on which the defendant is to be released. *Id*.

Sentence reductions due to overcrowding. Where a defendant is sentenced to probation, the terms of which include incarceration in the county jail, and the defendant is later sentenced to prison for a probation violation, he or she is not entitled to credit for any time by which the original incarceration in the county jail was reduced due to overcrowding. *Grazhidani*, 277 Mich App at 601. The *Grazhidani* Court stated:

> "Obviously the days that defendant did not serve on his sentence because of his early release from the county jail under the jail overcrowding act are not time spent 'in jail.' Because we read *Whiteside*[345] as concluding that the Legislature only intended to grant credit for time actually spent 'in jail,' we conclude that defendant is not entitled to credit for time that he otherwise would have spent in jail except for his early release under the jail-overcrowding act." *Grazhidani*, 277 Mich App at 599.

3.37 Sentence Bargains and Plea Agreements

"Plea agreement" and "sentence bargain" refer generally to an agreement reached by the prosecutor, the defendant's attorney, and the defendant about the offense(s) to which the defendant has agreed to plead guilty or nolo contendere in exchange for an agreed-on sentence or sentence recommendation. Plea agreements and sentence bargains may involve the prosecutor's approval of the defendant's plea to a lesser offense than might be charged under the circumstances and the defendant's decision to accept a specific sentence or recommendation in exchange for his or her plea. The terms used to describe the negotiation

[345] *People v Whiteside*, 437 Mich 188 (1991).

process and eventual outcome are frequently used interchangeably; for example, *sentence bargain*, *plea bargain*, and *sentence agreement* may all be used to refer to a defendant's plea in exchange for a specific sentence.

Where a defendant's sentence will result from a plea-based conviction,[346] the trial court must determine whether the parties have made a plea agreement, "which may include an agreement to a sentence to a specific term or within a specific range[.]" MCR 6.302(C)(1). Any agreement "must be stated on the record or reduced to writing and signed by the parties[,]"[347] and "[t]he written agreement shall be made part of the case file." *Id*.

"If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant." MCR 6.302(C)(2).

Before a trial court may sentence a defendant whose guilty or no contest plea is part of a plea agreement, the court must comply with the procedure in MCR 6.302(C)(3):

> "(3) If there is a plea agreement 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 agreed to; or
> >
> > (c) accept the agreement without having considered the presentence report; or
> >
> > (d) take the plea 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

[346] A comprehensive discussion of the requirements of a plea hearing is beyond the scope of this chapter. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapters 5 & 6, for more information.

[347] "The parties may memorialize their agreement on a form substantially approved by the SCAO." MCR 6.302(C)(1). See SCAO Form CC 414, "Plea Agreement."

> 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 the sentence recommendation does not entitle the defendant to withdraw the defendant's plea."

If there is a plea agreement, the court must ask the defendant "whether anyone has promised anything beyond what is in the plea agreement"; "whether anyone has threatened the defendant"; and "whether it is the defendant's own choice to plead guilty." MCR 6.302(C)(4).

Negotiating a plea agreement or sentence bargain. A prosecutor and a defendant may reach a sentence agreement whereby the defendant agrees to plead guilty in exchange for a sentence to a specified term or within a specified range. The extent to which a trial court may involve itself in sentence negotiations has been set out by the Michigan Supreme Court in *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part by ADM File No. 2011-19,[348] and *People v Cobbs*, 443 Mich 276 (1993). In *Killebrew*, 416 Mich at 205, the Supreme Court held that a trial court may not initiate or participate in discussions "aimed at reaching a plea agreement." In *Cobbs*, 443 Mich at 283, the Supreme Court modified *Killebrew* to allow the trial court, at the request of a party, to state on the record the length of the sentence that appears to be appropriate, based on the information available to the trial court at the time. The *Cobbs* Court made clear that the trial court's preliminary evaluation did not bind the court's ultimate sentencing discretion, "since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources." *Cobbs*, 443 Mich at 283.

Sentence recommendation under *Killebrew*. *Killebrew* limits a trial court's involvement to the approval or disapproval of a nonbinding prosecutorial sentence recommendation linked to a defendant's guilty plea. *Killebrew*, 416 Mich at 209. Under *Killebrew*, 416 Mich at 209, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. Where a trial court decides not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that the recommendation was not accepted and state the sentence that the court finds is the appropriate disposition. *Id*. at 209-210. However, "[a] judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea." MCR 6.302(C)(3).[349]

- **Characteristics of negotiations under *Killebrew***

[348] Effective January 1, 2014. See 495 Mich lxxix (2013).

- a defendant's plea is linked to a nonbinding prosecutorial sentence recommendation.
- the trial court may accept or reject the agreement as it exists.
- if the court rejects the agreement, the court must indicate what sentence it believes is appropriate under the circumstances.

***Cobbs* plea**. *Cobbs* authorizes the trial court, at the request of a party, to state on the record the sentence that appears appropriate for the charged offense, on the basis of information available to the court at the time. *Cobbs*, 443 Mich at 283. Even when a defendant pleads guilty or nolo contendere to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence, the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id.* at 283. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id*.

- **Characteristics of negotiations under *Cobbs***
  - the defendant or the prosecution asks the trial court what sentence appears appropriate under the circumstances if a guilty plea was offered.
  - the court's preliminary evaluation is based on the information then available and the court retains discretion over the actual sentence imposed if additional information warrants a longer sentence.
  - if the court decides to impose a sentence longer than the sentence first indicated by the court, the defendant must be given an opportunity to withdraw his or her plea.
  - if the court's modified sentence is unacceptable to the prosecution, the prosecutor must be permitted to withdraw from the plea agreement.

Distinction between *Killebrew* and *Cobbs*. In *People v Williams (Avana)*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams* (*Avana)* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the

[349] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013).

judge." *Williams (Avana)*, 464 Mich at 177. However, the *Williams* (*Avana)* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams (Avana)*, 464 Mich at 178-179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

> "In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand,[350] is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.
>
> By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.
>
> Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams (Avana)*, 464 Mich at 179-180.

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[350] However, see ADM File No. 2011-19, effective January 1, 2014, amending MCR 6.302(C)(3) and MCR 6.310(B)(2) to eliminate a defendant's ability to withdraw a plea if the court rejects a plea agreement involving a prosecutorial sentence recommendation (effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation). See 495 Mich lxxix (2013).

- **The impact of *Williams (Avana)* on negotiations**

  - the *Williams (Avana)* decision is implicated only when there exists a *Cobbs* agreement (the defendant has agreed to plead guilty based on the trial court's preliminary sentence evaluation), and the trial court determines it will not adhere to the *Cobbs* agreement.

  - the defendant must be given an opportunity to withdraw his or her guilty plea after the court informs the defendant it will not abide by the sentence first announced.

  - unlike the requirement in *Killebrew* that arises when the court refuses to follow a prosecutorial sentence recommendation, when the trial court decides against imposing the sentence first articulated by the court itself (the *Cobbs* agreement), it may *not* inform the defendant of the sentence the court has since decided is appropriate (because to do so would involve the court in the sentence negotiation process to an extent carefully avoided in *Killebrew* and *Cobbs*).

Failure of a plea agreement. Fundamental fairness requires that promises made during plea negotiations should be respected, provided that the person making the promise was authorized to do so and the defendant relied on the promise to his or her detriment. *People v Ryan (Thomas)*, 451 Mich 30, 41 (1996). A defendant is not constitutionally entitled to specific performance of a properly authorized plea agreement, but due process requires that some remedy be employed to cure a defendant's detrimental reliance on the agreement. *People v Wyngaard*, 462 Mich 659, 666-667 (2000). Such remedies include specific performance of the agreement or withdrawal of the plea. *In re Guilty Plea Cases*, 395 Mich 96, 127 (1975).

Violation of precondition. Where a "defendant violate[s] a precondition of [a] plea agreement[,]" he or she "is not entitled to the benefit of [the] bargain[,]" and "the trial court [is neither] bound by the preliminary sentencing evaluation[nor] . . . required to afford [the] defendant an opportunity to withdraw [the] plea." *People v White (Rickey)*, 307 Mich App 425, 434-435 (2014) (holding that where the defendant failed to make a restitution payment that "was a specific precondition of being sentenced in accordance with [his] *Cobbs* evaluation[,]" he was not entitled to withdraw his plea after sentencing on the ground that the sentence imposed exceeded the preliminary evaluation) (citation omitted).

Plea agreements involving probation. A trial court may impose additional conditions on a defendant's sentence of probation, even when the sentence is part of the defendant's plea agreement and did not contain the additional conditions.[351] *People v Johnson (Larry)*, 210 Mich App 630,

632-635 (1995). In *Johnson (Larry)*, 210 Mich App at 632, the defendant moved to withdraw his plea or to force specific performance of the sentence agreement on which he relied when he offered his nolo contendere plea. However, the Michigan Court of Appeals held that "[b]ecause probation is a matter of grace in lieu of a prison sentence aimed, in part, at rehabilitation and is at all times alterable and amendable, we believe that a sentencing court may place conditions on a defendant's probation regardless of whether it was covered in the plea agreement." *Id*. at 634-635.

Withdrawal of plea before acceptance. A defendant has a right to withdraw any plea until the court accepts the plea on the record. MCR 6.310(A).

Withdrawal of plea before sentencing. "There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court." *People v Montrose*, 201 Mich App 378, 380 (1993).

MCR 6.310(B) sets out the requirements for withdrawing a plea after the court accepts it, but before the court imposes sentence. Specifically, MCR 6.310(B) states:

> "Except as provided in [MCR 6.310(B)(3)], after acceptance but before sentence,
>
> > (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent, only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by [MCR 6.310(C)].
> >
> > (2) the defendant is entitled to withdraw the plea if
> >
> > > (a) the plea involves an agreement for a sentence for a specified term or within a specified range, and the court states that it is unable to follow the agreement; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
> > >
> > > (b) the plea involves a statement by the court that it will sentence to a specified term or within a

[351] See Section 3.46 for more information on probation.

> specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.
>
> (3) Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing."

Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

The United States Court of Appeals for the Sixth Circuit has developed the following multi-factor balancing test to guide district courts in deciding whether to grant a motion to withdraw a guilty plea:[352]

> "(1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his [or her] innocence; (4) the circumstances

[352] Rule 11 of the Federal Rules of Criminal Procedure concerns entry of a defendant's a guilty plea.

> underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted." *United States v Haygood*, 549 F3d 1049, 1052 (CA 6, 2008).

"The relevance of each factor will vary according to the 'circumstances surrounding the original entrance of the plea as well as the motion to withdraw.'" *Haygood*, 549 F3d at 1052, quoting *United States v Triplett*, 828 F2d 1195, 1197 (CA 6, 1987). A defendant should not generally be allowed to withdraw his or her plea if he or she made a strategic choice to plead guilty, and later determines that it was a poor decision. *Haygood*, 549 F3d at 1052-1053 (defendant's motion to withdraw his plea was properly denied because defendant did not move to withdraw his plea until more than four months after he entered it, and he used the motion to withdraw as an inappropriate way to challenge the validity of the search warrant that led to his arrest).

In the absence of a procedural error in receiving a plea, a defendant must establish a fair and just reason for withdrawing it. *People v Harris (Lamar)*, 224 Mich App 130, 131 (1997). Examples of fair and just reasons for withdrawal include: when the plea resulted from fraud, duress, or coercion, *People v Gomer*, 206 Mich App 55, 58 (1994); when the plea involved erroneous legal advice coupled with actual prejudice to legal rights, *People v Jackson (Andrew)*, 417 Mich 243, 246 (1983); or "if the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement," *Harris (Lamar)*, 224 Mich App at 132. If the facts of the case indicate that the plea was voluntary, the plea will be upheld regardless whether the defendant received consideration in return. *Id*. at 132-133. "[R]equests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing." *People v Haynes (Kermit)*, 221 Mich App 551, 559 (1997).

"MCR 6.310(B)(1) [does] not permit [a] circuit court to vacate [a] defendant's plea" where the "defendant [has] neither moved for [withdrawal] nor consented to it." *People v Martinez (Gilbert)*, 307 Mich App 641, 647-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles). A trial court may not

sua sponte vacate an accepted plea without the defendant's consent, even if the defendant indicates that he or she is innocent. *People v Strong (Duel)*, 213 Mich App 107, 112 (1995) (after the trial court sua sponte vacated the defendant's plea without the defendant's consent, he was found guilty following a jury trial; the Michigan Court of Appeals reversed the defendant's convictions and remanded the case to permit the defendant to plead guilty in exchange for the terms of the parties' previous plea agreement).

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, 264 Mich App 139, 150 (2004). When recanted testimony provides a substantial part of the factual basis underlying a defendant's nolo contendere plea, the defendant must prove by a preponderance of credible evidence that the original testimony was untruthful, in order to constitute a fair and just reason for allowing the defendant to withdraw his or her plea. *Id.* at 152. If the defendant meets the burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. *Id*. If the defendant fails to meet the burden, or if other evidence is sufficient to support the plea, then the defendant has failed to present a fair and just reason to warrant withdrawal of his or her plea. *Id*.

If the defendant establishes a fair and just reason for withdrawal of the plea, the burden then shifts to the prosecution to establish that substantial prejudice would result from allowing the defendant to withdraw the plea. *People v Jackson (Dwayne)*, 203 Mich App 607, 611-612 (1994). To constitute substantial prejudice, the prosecution must demonstrate that its ability to prosecute is impeded by the delay. *People v Spencer*, 192 Mich App 146, 151-152 (1991) (substantial prejudice not established even though trial was set to begin at the time the pleas were entered, and some witnesses were from out of state). In deciding whether a defendant may withdraw a plea, the trial court should bear in mind what is in the interests of justice. *Id.* at 151-152 ("The fact that [the] defendant's pleas may have been induced by inaccurate legal advice combined with his refusal or inability to personally recount a sufficient basis to substantiate the[] charges made it incumbent upon the trial court to allow [the] defendant to withdraw his pleas.").

Withdrawal of plea after sentencing. MCR 6.310(C) governs withdrawal of a plea after sentencing:

> "The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in [MCR] 6.500.[353] If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give

> the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals."

"MCR 6.310(C) permits a defendant to withdraw a guilty plea after sentencing only if the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside." *People v Sanford (Davontae)*, 495 Mich 989, 989 (2014). "'A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.'" *Id.*, quoting *People v Brown (Shawn)*, 492 Mich 684, 693 (2012).

"[In general], criminal defendants may not withdraw a guilty plea on the ground that they were unaware of the future collateral or incidental effects of the initial valid plea." *People v Haynes (Joseph)*, 256 Mich App 341, 349 (2003). However, defense counsel is constitutionally required to inform his or her client that a plea "may carry a risk of adverse immigration consequences[,]" e.g., deportation. *Padilla v Kentucky*, 559 US 356, 369 (2010).[354]

"MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea[,]" and MCR 6.310(C) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. *Brown (Shawn)*, 492 Mich at 687. In *Brown (Shawn)*, 492 Mich at 687-688, the defendant pleaded guilty, as a second-offense habitual offender under MCL 769.10, to second-degree home invasion. The defendant was advised at his plea hearing that the maximum sentence for second-degree home invasion was 15 years in prison; however, the defendant was subsequently sentenced, as an habitual offender, to a maximum prison term of more than 22 years. *Brown (Shawn)*, 492 Mich at 688. The Michigan Supreme Court concluded that MCR 6.302(B)(2) requires that "before pleading guilty, a defendant must be notified of the maximum possible prison sentence with habitual-

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[353] See Chapter 5 for more information.

[354] "[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]" *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). However, because *Padilla*, 559 US 356, "announced a 'new rule[,]'" it does not apply retroactively on collateral review. *Chaidez v United States*, 568 US ___, ___ (2013). See also *People v Gomez*, 295 Mich App 411, 413-414, 418-419 (2012) (holding that "the new rule of criminal procedure announced in *Padilla*[, 559 US 356,] has prospective application only[]" under both federal and state rules of retroactivity, and that the defendant, who entered a no-contest plea to a drug-possession charge and was subsequently notified that his conviction rendered him subject to deportation, was not entitled to relief from judgment based on *Padilla*, 559 US 356, which was decided several years after he completed his sentence).

offender enhancement[,] because the enhanced maximum becomes the 'maximum possible prison sentence' for the principal offense." *Brown (Shawn)*, 492 Mich at 693-694, overruling *People v Boatman*, 273 Mich App 405, 406-410 (2006). The *Brown (Shawn)* Court additionally held that "MCR 6.310(C) . . . provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea." *Brown (Shawn)*, 492 Mich at 698.

"[W]hen a sentence is modified to make it consistent with state law and to give the defendant the benefit of his [or her] original plea agreement, the Constitution does not require the withdrawal of a once-illegal plea." *Pickens v Howes*, 549 F3d 377, 381-382 (CA 6, 2008).

Vacation of plea on prosecutor's motion. A plea may be vacated on the prosecution's motion if the defendant has failed to comply with the terms of his or her plea agreement. MCR 6.310(E). However, where a "prosecutor's motion [to vacate a plea is] not based on [the] defendant failing to comply with the terms of the plea agreement[and t]he record shows that [the] defendant fully complied with his [or her] part of the plea bargain[,]" MCR 6.310(E) "[does not] permit[] the trial court to vacate [the] plea on its own motion or that of the prosecutor[.]" *Martinez (Gilbert)*, 307 Mich App at 647-654 (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

Challenges to offense variable scoring. Where the prosecution agreed to recommend a sentence *within* a certain minimum-sentence range, but the defendant did not agree to a *specific* sentence range, "the defendant did not bind himself to a particular guidelines range as part of his plea agreement and did not waive his challenges to the offense variable scoring." *People v Osborne (Richard)*, 494 Mich 861, 861 (2013).

3.38 Lifetime Electronic Monitoring

A. Mandatory Lifetime Electronic Monitoring for Certain CSC Offenses

MCL 750.520n(1) provides:

> "A person convicted under [MCL 750.520b (first-degree criminal sexual conduct [CSC-I])] or [MCL 750.520c

> (second-degree criminal sexual conduct [CSC-II])] for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under . . . MCL 791.285.[355]"

"[T]he trial court [must] impose lifetime electronic monitoring [as set out in MCL 791.285] in either of two different circumstances: (1) when any defendant is convicted of CSC-I under MCL 750.520b, and (2) when a defendant who is 17 years old or older is convicted of CSC-II under MCL 750.520c against a victim who is less than 13 years old."[356] *People v Brantley*, 296 Mich App 546, 558-559 (2012), citing MCL 750.520b(2)(d); MCL 750.520n(1). "[A] person convicted under [MCL 750.520b], regardless of the ages [of the parties] involved, is to be sentenced to lifetime electronic monitoring, and a person convicted under [MCL 750.520c] is to be sentenced to lifetime monitoring only if the defendant was 17 or older at the time of the crime and the victim was less than 13." *People v Johnson* (*Todd*), 298 Mich App 128, 136 (2012) ("[the] defendant, having been convicted of first-degree criminal sexual conduct, was properly ordered to submit to lifetime electronic monitoring even though [the victim] was not less than 13 years of age[]").

Under MCL 750.520n(1), lifetime electronic monitoring is "part of the sentence itself for CSC-I[,]" and a "sentence [that does] not include electronic monitoring[] . . . [is] properly considered invalid[.]" *People v Comer*, 312 Mich App 538, 544 (2015), citing *People v Cole (David)*, 491 Mich 325, 327 (2012).

An offender who is convicted of CSC-I under MCL 750.520b or an offender age 17 or older who is convicted of CSC-II against a victim less than 13 years old remains subject to mandatory lifetime electronic monitoring pursuant to MCL 750.520n even if he or she is granted parole for life under MCL 791.242(3). MCL 750.520b(2)(d); MCL 750.520c(2)(b); MCL 750.520n(1).

> **Note:** "[L]ifetime electronic monitoring applies only to persons who have been released on parole, from prison,

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[355] Pursuant to MCL 791.285(3), "'electronic monitoring' means a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded."

[356] Before accepting a plea of guilty or nolo contendere, the trial court must advise the defendant of, and determine that he or she understands, "any . . . requirement for mandatory lifetime electronic monitoring under MCL 750.520b or [MCL] 750.520c[.]" MCR 6.302(B)(2). Advising the defendant of a requirement for mandatory lifetime electronic monitoring is required because "mandatory lifetime electronic monitoring is part of the sentence itself." *People v Cole (David)*, 491 Mich 325, 327 (2012). "Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring." *Id.* at 337.

> or both[.]" *People v Kern*, 288 Mich App 513, 519 (2010) (the defendant, who was sentenced to five years of probation, with 365 days to be served in jail, was not subject to lifetime electronic monitoring). See MCL 791.285(1).

Where an offender is not already subject to lifetime electronic monitoring pursuant to MCL 750.520n, the Parole Board may require electronic monitoring when granting parole to an offender convicted of violating or conspiring to violate MCL 750.520b (CSC-I) or MCL 750.520c (CSC-II). MCL 791.236(15). When an offender is subject to electronic monitoring under such circumstances, the monitoring is limited to the duration of the offender's parole. MCL 791.236(15)(a).

B. Constitutional Concerns

Cruel or Unusual Punishment. "[W]hen employing an as-applied standard under the state Constitution, lifetime electronic monitoring is not cruel or unusual punishment[]" for a conviction of CSC-II committed by a defendant who is 17 years old or older against a victim under age 13, where "evidence of [the defendant's] improper sexual acts . . . suggests that lifetime monitoring would help to protect potential victims from [the] defendant, who in turn would likely be deterred from engaging in such acts if he [or she] were closely monitored." *People v Hallak*, 310 Mich App 555, 559-560, 576-577 (2015), rev'd in part on other grounds ___ Mich ___ (2016) (rejecting, "[f]or these same reasons," the defendant's "facial challenge under the state Constitution[]" and his claim of cruel and unusual punishment under the federal constitution).

Double Jeopardy. "Because the Legislature intended that both [a] defendant's prison sentence and the requirement of lifetime monitoring be sanctions for [CSC-II committed by a defendant who is 17 years of age or older against a victim less than 13 years of age], there [is] no double jeopardy violation." *Hallak*, 310 Mich App at 582-583.

Fourth Amendment. "[T]he placement of an electronic monitoring device to monitor [a] defendant's movement constitutes a search for purposes of the Fourth Amendment." *Hallak*, 310 Mich App at 579, citing *Grady v North Carolina*, 575 US ___, ___ (2015). However, "lifetime electronic monitoring for a defendant 17 years or older convicted of CSC-II involving a minor under 13 is not unreasonable[]" because "on balance the strong public interest in the benefit of monitoring those convicted of CSC-II against a child under the age of 13 outweighs any minimal impact on [the]

defendant's reduced privacy interest." *Hallak*, 310 Mich App at 579, 581.

Part G—Fines, Costs, Assessments, and Restitution

MCL 769.34(6) states in part that "[a]s part of the sentence, the court may . . . order the defendant to pay any combination of a fine, costs, or applicable assessments."

MCL 769.1k[357] provides a general statutory basis for a court's authority to impose fines and costs. Under MCL 769.1k(1)(a), the court *must* impose the minimum state costs as set out in MCL 769.1j[358] at the time the defendant is sentenced, at the time the defendant's sentence is delayed, or at the time entry of judgment is statutorily deferred. MCL 769.1k(1)(a). Under MCL 769.1k(1)(b) and MCL 769.1k(2), the court *may* also impose:

- "[a]ny fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty[,]" MCL 769.1k(1)(b)(*i*);
- "[a]ny cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty[,]" MCL 769.1k(1)(b)(*ii*);
- "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case,[359] including, but not limited to, the following:"

[357] Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k in response to the Michigan Supreme Court's holding in *People v Cunningham (Cunningham II)*, 496 Mich 145 (2014), rev'g 301 Mich App 218 (2013) and overruling *People v Sanders (Robert) (After Remand)*, 298 Mich App 105 (2012), and *People v Sanders (Robert)*, 296 Mich App 710 (2012). In *Cunningham II*, the Court held that MCL 769.1k(1)(b)(*ii*)—which, at the time, provided for the imposition of "[a]ny cost in addition to the minimum state cost"—did "not provide courts with the independent authority to impose 'any cost[;]'" rather, it "provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 147, 158 (concluding that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs[]"). 2014 PA 352 added MCL 769.1k(1)(b)(*iii*) to provide for the imposition of "any cost reasonably related to the actual costs incurred by the trial court[.]"

[358] See Section 3.42 for discussion of minimum state costs.

[359] Court costs may be awarded under MCL 769.1k(1)(b)(*iii*), as amended by 2014 PA 352, effective October 17, 2014. *People v Konopka*, 309 Mich App 345, 357 (2015). See Section 3.41(B) for additional discussion of 2014 PA 352 and the imposition of "court costs."

- "[s]alaries and benefits for relevant court personnel[,]"
- "[g]oods and services necessary for the operation of the court[,]" and
- "[n]ecessary expenses for the operation and maintenance of court buildings and facilities[,]" MCL 769.1k(1)(b)(*iii*)[360];

- the expenses of providing the defendant with legal assistance, MCL 769.1k(1)(b)(*iv*);
- any assessment authorized by law, MCL 769.1k(1)(b)(*v*);
- reimbursement under MCL 769.1f, MCL 769.1k(1)(b)(*vi*); and
- any additional costs incurred to compel the defendant's appearance, MCL 769.1k(2).

The authorized fines, costs, and assessments set out in MCL 769.1k(1) and MCL 769.1k(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3); see also *People v Cunningham (Cunningham II)*, 496 Mich 145, 152 (2014).

"Beginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1)], including information about any cost imposed under [MCL 769.1k(1)(b)(*iii*)]. However, the information is not required to include the calculation of the costs involved in a particular case." MCL 769.1k(7).[361]

"The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under [MCL 769.1k] by wage assignment." MCL 769.1k(4). "The court may provide for the amounts imposed under [MCL 769.1k] to be collected at any time." MCL 769.1k(5). "Except as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine, cost, fee, or assessment that the same defendant owes in any other case." MCL 769.1k(6).

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[360] See 2014 PA 352, effective October 17, 2014 (adding new MCL 769.1k(1)(b)(*iii*)). MCL 769.1k(1)(b)(*iii*) is applicable "[u]ntil 36 months after [October 17, 2014.]" See also 2014 PA 352, enacting section 1 ("[t]his amendatory act applies to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." 2014 PA 352 also added MCL 769.1k(8), which requires courts to annually report to the State Court Administrative Office (SCAO) certain information regarding the imposition and collection of costs under MCL 769.1k(1)(b)(*iii*).

[361] MCL 769.1k(7) was added by 2014 PA 352, effective October 17, 2014.

MCL 769.3(1) states that the court may impose a conditional sentence and order a person convicted of an offense punishable by a fine or imprisonment or both, to pay a fine, with or without the costs of prosecution, within a limited time stated in the sentence. If the person defaults on the payment, the court may sentence him or her as provided by law. *Id*.

Ordinarily, unless a court permits and specifies a different due date, all fines, costs, penalties, and other financial obligations are due at the time the court orders them. MCL 600.4803(1); MCR 1.110. An individual who fails to satisfy in full a penalty, fee, or costs imposed by the court within 56 days after the amount was due is subject to a late penalty equal to 20 percent of the amount that remains unpaid. MCL 600.4803(1). The court must inform an individual that a late penalty will be assessed if payment is not made within 56 days of the order. *Id*.

If the court permits delayed payment of the amount due or permits the individual to pay the amount in installments, the court must inform the individual of the date on which, or time schedule under which, the total or partial amount of the fees, costs, penalties, and other financial obligations is due. MCL 600.4803(1). An individual's late penalty may be waived if requested by the person subject to the penalty. *Id*.

Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See also MCL 769.1k(10), which provides that "[a] defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so."[362]

The following sections address the fines, costs, assessments, and restitution obligations that may, or must, be ordered under various statutory provisions. Additionally, the Appendix in this Benchbook contains three tables setting out statutory authority for imposing costs. See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Table of Felony Costs and Table of Misdemeanor Costs.

For information on options to assist the court with collections issues that may arise, see the State Court Administrative Office's *Trial Court Collections Best Practices Manual*.

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[362] See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

3.39 Imprisonment for Failure to Pay Court-Ordered Financial Obligations: Determination of Ability to Pay

MCL 769.1k(10) provides that "[a] defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." Additionally, MCR 6.610(F)(2) provides that "[t]he court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3)." MCR 6.425(E)(3) provides as follows:

> "(3) Incarceration for Nonpayment.
>
> > (a) The court shall not sentence a defendant to a term of incarceration, nor revoke 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.
> >
> > (b) Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, 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 of money owed to the extent permitted by law.
> >
> > (c) Determining manifest hardship. The court 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."

The court must comply with the provisions of MCR 6.425(E)(3) before sentencing a probationer to prison or jail for failure to pay a court-ordered financial obligation, MCR 6.445(G), or before sentencing a person to a term of incarceration for nonpayment in a proceeding under MCR 3.606 for contempt of court, MCR 3.606(F).

Additionally, the court may not detain or incarcerate a juvenile or parent for the nonpayment of court-ordered financial obligations in probation violation or contempt proceedings involving juveniles without first determining "that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 3.928(D); MCR 3.944(F); MCR 3.956(C); MCR 6.933(E).

An application for remission of a penalty, including a bond forfeiture, "may not be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty, *unless waived by the court*." MCR 3.605(D) (emphasis added).

See the SCAO Ability to Pay Workgroup's *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay*, April 20, 2015,[363] and SCAO Memorandum (*Ability to Pay Court Rule Amendments*), August 16, 2016,[364] for more information on determining a defendant's ability to pay court-ordered financial obligations.

3.40 Fines

At the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose "[a]ny fine authorized by the statute for a violation of which the defendant entered a plea or guilty or nolo contendere or the court determined that the defendant was guilty." MCL 769.1k(1)(b)(*i*).[365]

Specific authority to impose a fine, and the maximum amount of that fine, is often included in the language of the applicable penal statute. For example, if an offender is convicted of violating MCL 750.365, larceny from a car or from a person detained or injured because of an accident

[363] Accessible at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/AbilityToPay.pdf.

[364] Accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2016-25.pdf.

[365] Former MCL 769.1k(1)(b)(*i*) provided simply for the imposition of "[a]ny fine." However, in *People v Cunningham (Cunningham II)*, 496 Mich 145, 158 n 10 (2014) (reversing 301 Mich App 218 (2013)), the Michigan Supreme Court noted that "interpreting MCL 769.1k(1)(b)(*i*) as providing courts with the independent authority to impose 'any fine' would . . . raise constitutional concerns, as 'the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature.'" (Citation omitted.) Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k(1)(b)(*i*) to require that any fine imposed be "authorized by the [applicable penal] statute[.]"

involving a railroad locomotive, tender, or car, the offender may be assessed a fine of not more than $10,000.[366] If a statute authorizes the imposition of a fine but is silent with regard to the amount, the maximum fine permitted for a felony conviction is $5,000. MCL 750.503. Excessive fines are prohibited by the Michigan Constitution. Const 1963, art 1, § 16. MCL 769.1k(1)(b)(*i*) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted. See *People v Johnson (Jordan)*, ___ Mich App ___, ___ (2016); *People v Johnson (Marion)*, ___ Mich App ___, ___ (2016) (citations omitted).

Whenever an offense is punishable by a fine and imprisonment, the court has discretion to impose a sentence comprised of any combination of those penalties: a fine and no imprisonment, no fine and imprisonment, or both a fine and imprisonment. MCL 769.5. The court may require a defendant to pay by wage assignment any fine imposed under MCL 769.1k, and the court may provide that any fine imposed under MCL 769.1k be collected at any time. MCL 769.1k(4); MCL 769.1k(5).

As a condition of probation. When a fine is imposed on a defendant sentenced to probation, payment of the fine may be made a condition of the defendant's probation. MCL 771.3(2)(b). A sentencing court may order the probationer to pay the fine immediately or the court may permit the probationer to make payment within the time period of his or her probation. *Id*.

The fines authorized by MCL 769.1k(1)(b)(*i*) apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

3.41 Costs

A. Generally-Applicable Authority to Impose Costs[367]

MCL 769.1k(1)(b)(*ii*) provides that, at the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose "[a]ny cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty."[368]

[366] In addition to any term of imprisonment up to the statutory maximum of 20 years as determined by proper scoring of the sentencing guidelines.

[367] See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply.

[368] As amended, 2014 PA 352, effective October 17, 2014.

Prior to the enactment of 2014 PA 352, MCL 769.1k(1)(b)(*ii*) provided simply for the imposition of "[a]ny cost." However, in *People v Cunningham (Cunningham II),* 496 Mich 145 (2014), the Michigan Supreme Court held that "MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose 'any cost[,]'" but instead "provides courts with the authority to impose *only those costs that the Legislature has separately authorized by statute.*" *Cunningham II*, 496 Mich at 147, 158 (emphasis supplied), reversing *People v Cunningham (After Remand) (Cunningham I)*, 301 Mich App 218 (2013), and overruling *People v Sanders (Robert) (After Remand)*, 298 Mich App 105 (2012), and *People v Sanders (Robert)*, 296 Mich App 710 (2012).[369] Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k(1)(b)(*ii*) to provide for the imposition of "[a]ny cost authorized by the [applicable penal] statute[.]" MCL 769.1k(1)(b)(*iii*), as amended, "independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense[,]" and "[a] trial court possesses the authority, under MCL 769.1k, as amended by 2014 PA 352, to order defendant to pay court costs[.]" *People v Konopka*, 309 Mich App 345, 350, 358 (2015).[370]

MCL 769.34(6) addresses the sentencing guidelines and the duties of the court when sentencing, and it generally authorizes the court to order court costs ("As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments."). However, "MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute[]" and "does not provide courts with the

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[369] In *Sanders (Robert)*, 296 Mich App at 715, the Court of Appeals held that "a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case," but remanded for a hearing "to establish the factual basis for the [trial court's] use of [a] $1,000 [court costs] figure[.]" After remand, the Court of Appeals held that the trial court "establish[ed] a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(*ii*) [was] a reasonable amount in a felony case conducted in [that court,]" based on financial data demonstrating that "the average cost of handling a felony case was, conservatively, $2,237.55 a case and, potentially, . . . as much as $4,846 each." *Sanders (Robert) (After Remand)*, 298 Mich App at 107-108. Similarly, in *Cunningham (After Remand)*, 301 Mich App at 220, the Court of Appeals affirmed the trial court's imposition of $1,000 in "court costs" under the general authority of MCL 769.1k(1)(b)(*ii*), holding that "a sentencing court may consider overhead costs when determining the reasonableness of a court-costs figure."

However, in *Cunningham II,* 496 Mich at 159, the Michigan Supreme Court held that a sentencing court may not "rel[y] on MCL 769.1k(1)(b)(*ii*) as independent authority to impose . . . court costs[.]" Accordingly, the Court reversed *Cunningham (After Remand)*, 301 Mich App 218, and overruled *Sanders (Robert)*, 296 Mich App 710, and *Sanders (Robert) (After Remand)*, 298 Mich App 105 (as well as any "other decisions of the Court of Appeals [that] are consistent with *Sanders*, and inconsistent with [*Cunningham II.*]" *Cunningham II,* 496 Mich at 147, 159, 159 n 13.

[370] The amended version of MCL 769.1k does not violate a defendant's due process or equal protection rights; nor does it violate the constitutional prohibition on ex post facto punishments or the principle of separation of powers. *Konopka*, 309 Mich App at 365, 367-70, 376. See Section 3.41(B) for additional discussion of 2014 PA 352 and the imposition of "court costs."

independent authority to impose any fine or cost." *Cunningham II*, 496 Mich at 158 n 11.

MCL 769.3 and MCL 769.1f are examples of statutes in which specific court-ordered costs are expressly authorized. MCL 769.3(1) authorizes conditional sentencing where a court may order a defendant to pay the costs of prosecution in cases where the defendant was convicted of an offense punishable by a fine or imprisonment or both. MCL 769.1f(1) authorizes a sentencing court to order a defendant "to reimburse the state or a local unit of government" for certain expenses incurred when a defendant is convicted of the offenses listed in the statute.[371]

B. Court Costs

1. MCL 769.1k

Effective October 17, 2014, 2014 PA 352 added MCL 769.1k(1)(b)(*iii*) to specifically provide for the imposition of court costs.[372] MCL 769.1k(1)(b)(*iii*) provides:

> "Until 36 months after [October 17, 2014], [the court may impose] any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:
>
> > (A) Salaries and benefits for relevant court personnel.
> >
> > (B) Goods and services necessary for the operation of the court.
> >
> > (C) Necessary expenses for the operation and maintenance of court buildings and facilities."

Prior to the enactment of 2014 PA 352, MCL 769.1k(1)(b)(*ii*) provided simply for the imposition of "[a]ny cost[,]" and MCL 769.1k did not contain any separate authorization for the imposition of "court costs." In *Cunningham II,* 496 Mich 145, the Michigan Supreme Court held that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent

[371] The offenses for which costs are authorized under MCL 769.1f are discussed in Section 3.41(H).

[372] The amendments effectuated by 2014 PA 352 "appl[y] to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." 2014 PA 352, enacting section 1.

authority to impose $1,000 in court costs[.]" *Cunningham II*, 496 Mich at 159. The *Cunningham II* Court concluded that "[former] MCL 769.1k(1)(b)(*ii*) [did] not provide courts with the independent authority to impose 'any cost[,]'" but instead "provide[d] courts with the authority to impose *only those costs that the Legislature has separately authorized by statute*." *Cunningham II*, 496 Mich at 147, 158 (emphasis supplied), rev'g 301 Mich App 218 (2013) and overruling *Sanders (Robert) (After Remand)*, 298 Mich App 105, and *Sanders (Robert)*, 296 Mich App 710.[373]

As "a curative measure that addresses the authority of courts to impose costs under . . . MCL 769.1k[] before the issuance of . . . [*Cunningham II*, 496 Mich 145,]" 2014 PA 352, effective October 17, 2014, added MCL 769.1k(1)(b)(*iii*) to specifically provide for the imposition of court costs.[374] See 2014 PA 352, enacting section 2. 2014 PA 352 also added MCL 769.1k(7), which provides:

> "Beginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1)], including information about any cost imposed under [MCL 769.1k(1)(b)(*iii*)]. However, the information is not required to include the calculation of the costs involved in a particular case."

"MCL 769.1k(1)(b)(*iii*) independently authorizes the imposition of costs in addition to those costs authorized by the

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[373] In *Sanders (Robert)*, 296 Mich App at 715, the Court of Appeals held that "a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case," but remanded for a hearing "to establish the factual basis for the [trial court's] use of [a] $1,000 [court costs] figure[.]" After remand, the Court of Appeals held that the trial court "establish[ed] a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(*ii*) [was] a reasonable amount in a felony case conducted in [that court,]" based on financial data demonstrating that "the average cost of handling a felony case was, conservatively, $2,237.55 a case and, potentially, . . . as much as $4,846 each." *Sanders (Robert) (After Remand)*, 298 Mich App at 107-108. Similarly, in *Cunningham (After Remand)*, 301 Mich App at 220, the Court of Appeals affirmed the trial court's imposition of $1,000 in "court costs" under the general authority of MCL 769.1k(1)(b)(*ii*), holding that "a sentencing court may consider overhead costs when determining the reasonableness of a court-costs figure."

However, in *Cunningham II*, 496 Mich at 159, the Michigan Supreme Court held that a sentencing court may not "rel[y] on MCL 769.1k(1)(b)(*ii*) as independent authority to impose . . . court costs[.]" Accordingly, the Court reversed *Cunningham (After Remand)*, 301 Mich App 218, and overruled *Sanders (Robert)*, 296 Mich App 710, and *Sanders (Robert) (After Remand)*, 298 Mich App 105 (as well as any "other decisions of the Court of Appeals [that] are consistent with *Sanders*, and inconsistent with [*Cunningham II*.]" *Cunningham II*, 496 Mich at 147, 159, 159 n 13.

[374] 2014 PA 352 additionally amended MCL 769.1k(1)(b)(*ii*) to provide for the imposition of "[a]ny cost authorized by the [applicable penal] statute[.]"

statute for the sentencing offense[,]" and "[a] trial court possesses the authority, pursuant to MCL 769.1k, as amended by 2014 PA 352, to order court costs[.]" *People v Konopka*, 309 Mich App 345, 350, 358 (2015). "However, although the costs imposed . . . need not be separately calculated, . . . the trial court [must] . . . establish a factual basis[]" demonstrating that "the court costs imposed [are] 'reasonably related to the actual costs incurred by the trial court[.]'" *Konopka*, 309 Mich App at 359, quoting MCL 769.1k(1)(b)(*iii*).[375]

2. MCL 771.3

"Though probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not." *People v Butler-Jackson (Butler-Jackson II)*, ___ Mich ___, ___ (2016) (citing *Cunningham II*, 496 Mich 145 (2014), and *People v Juntikka*, 310 Mich App 306 (2015), and vacating "that part of the Court of Appeals[′] judgment[, 307 Mich App 667 (2014),] addressing the propriety of court costs under MCL 771.3(5)[]").[376] However, see also MCL 769.1k(3) (providing that MCL 769.1k(1) and (2), which authorize the imposition of certain fines, costs, and assessments, including court costs, "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation[]").

C. Costs of a Court-Appointed Attorney

"If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution." MCR 6.005(C). MCL 769.1k(1)(b)(*iv*) specifically permits a court to impose on a defendant "[t]he expenses of providing legal assistance to the defendant." However, "[a] court may not impose upon [a] defendant the expenses of providing his [or her] legal assistance [under MCL 769.1k(1)(b)(*iv*)] until [the] defendant is found guilty, enters a plea of guilty, or enters a plea of nolo contendere." *People v Dyer*, 497 Mich 863 (2014) (noting that "if [a] defendant withdraws

[375] The amended version of MCL 769.1k does not violate a defendant's due process or equal protection rights; nor does it violate the constitutional prohibition on ex post facto punishments or the principle of separation of powers. *Konopka*, 309 Mich App at 365, 367-70, 376.

[376] In *People v Butler-Jackson (Butler-Jackson I)*, 307 Mich App 667, 680-681 (2014) (opinion by Cavanagh, J.), vacated in part by *Butler-Jackson II*, ___ Mich at ___, the Court of Appeals held that the trial court was "authorized by MCL 771.3(2)(c) [and MCL 771.3(5)] to impose" court costs in the amount of $1,000 as a condition of probation.

his [or her] plea [under MCR 6.310(A)], imposition of attorney fees is not appropriate at [that] time[]").

A trial court is not required to analyze a defendant's ability to pay a fee for a court-appointed attorney before imposing the fee; it is only required to do so if the fee is actually enforced. *People v Jackson (Harvey)*, 483 Mich 271, 275 (2009), overruling in part *People v Dunbar*, 264 Mich App 240 (2004). However, "[o]nce an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship." *Id.* at 275. In any event, "remittance orders of prisoner funds, under MCL 769.1*l*, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment because the statute is structured to only take monies from prisoners who are presumed to be nonindigent." *Jackson (Harvey)*, 483 Mich at 275.

As a condition of probation. A court may order a probationer to pay the expenses incurred in providing legal assistance to him or her. See MCL 771.3(2)(c) and MCL 771.3(5)–MCL 771.3(8). A probationer who is not in willful default of his or her payment of costs under MCL 771.3(2)(c) (expenses specifically incurred to prosecute the defendant, provide him or her with legal assistance, and supervise his or her probation) may petition the court at any time for remission of the unpaid part of the total costs ordered. MCL 771.3(6)(b). The court may modify the method of repayment or remit all or a portion of the amount due if the court finds that payment in full would impose a manifest hardship on the probationer or his or her family. *Id*.[377]

The general authority to impose the monetary penalties listed in MCL 769.1k(1)(a) and (b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). A defendant may be required to pay by wage assignment the costs of his or her legal representation imposed pursuant to MCL 769.1k(1)(b)(*iv*), MCL 769.1k(4), and the court may provide that those costs be collected at any time, MCL 769.1k(5).

Reasonableness of attorney fee and county fee schedule. The trial court erred where it limited an award of attorney fees to the maximum allowed for plea cases under the county's fee schedule without consideration of "the reasonableness of the fee in relation to

[377] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

the actual services rendered[.]" *In re Attorney Fees of Ujlaky*, 498 Mich 890, 890 (2015) (citation omitted). "Although the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, ipso facto, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may." *Id.* (directing the trial court, on remand, to "either award the requested fees[] or articulate on the record its basis for concluding that such fees are not reasonable[]") (citations omitted).

Appellate counsel and court's contingency policy. "[T]he trial court's policy of not paying [appointed appellate] counsel for time spent in preparing a delayed application for leave to appeal or for preparing [appellate] motions . . . when [the Court of Appeals] ultimately denies leave to appeal 'for lack of merit in the grounds presented' or denies relief on the motions constituted an abuse of discretion." *In re Attorney Fees of Foster*, ___ Mich App ___, ___ (2016). "[A]ttorneys are not allowed to enter into contingency fee arrangements in criminal matters under the Michigan Rules of Professional Conduct[,] MRPC 1.5(d)[; t]herefore, no attorney in the state of Michigan could agree to be a court-appointed attorney . . . under [the trial] court's current policy because to do so would require entering into a contingency fee arrangement in violation of the attorney's professional responsibilities." *Foster*, ___ Mich App at ___.

Following nolle prosequi. Under MCL 768.34,[378] a defendant may not be ordered to repay the cost of appointed counsel if the prosecution enters an order of nolle prosequi. *People v Jose*, ___ Mich App ___, ___ (2016). "MCL 768.34 precludes a trial court from ordering reimbursement of any costs—including the cost of appointed counsel—for a defendant whose prosecution is suspended or abandoned." *Jose*, ___ Mich App at ___ (additionally holding that MCR 6.005(C) did not provide authority for the trial court to order reimbursement for the work appointed counsel performed before trial where "[t]he court never determined that [the] defendant was 'able to pay part of the cost of a lawyer' and never 'require[d] contribution[]'" under MCR 6.005(C)) (third alteration in original).

[378] MCL 768.34 provides:

> "No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment has been found against him[or her], or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he [or she] was in custody."

D. Costs Incurred to Compel Defendant's Appearance

A defendant may be ordered to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). "The plain language of MCL 769.1k does not require the trial court to consider a defendant's ability to pay before imposing discretionary costs and fees . . . ." *People v Wallace (Steven)*, 284 Mich App 467, 470 (2009).

E. Costs Ordered as a Condition of Probation

Costs Authorized Under MCL 769.1k. The costs authorized by MCL 769.1k(1) and MCL 769.1k(2) also apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

Costs of Prosecution, Legal Assistance, and Supervision. A trial court may require a probationer to pay certain costs as a condition of probation. MCL 771.3(2)(c). For example, offenders must pay a probation supervision fee when sentenced in circuit court.[379] MCL 771.3(1)(d). A table of probation supervision fees as determined by an offender's income is included in MCL 771.3c. "[T]he court shall consider the probationer's projected income and financial resources" when determining the appropriate amount of the probationer's supervision fee. MCL 771.3c(1). In any event, the monthly supervision fee may not exceed $135, and may not continue for more than 60 months. *Id*. If a supervision fee is ordered for months in which a probationer is already subject to a supervision fee, the court must waive the fee having the shorter remaining duration. *Id*.

If the court requires the probationer to pay costs under MCL 771.3(2), "the costs shall be limited to expenses specifically incurred in prosecuting the defendant or[380] providing legal assistance to the defendant and supervision of the probationer." MCL 771.3(5). For example, a trial court may impose costs to reimburse the prosecution for the expense of engaging an expert witness for trial. *People v Brown (Craig)*, 279 Mich App 116, 140 (2008). However, MCL 771.3(2)(d) (authorizing the imposition of "any assessment" other than the required crime victim's rights assessment) "does not provide trial courts with the independent authority to impose any assessment as a condition of probation, but rather permits courts to impose only those assessments that are separately authorized by

[379] See Section 3.46 for a detailed discussion of probation.

[380] In *People v Humphreys*, 221 Mich App 443, 451-452 (1997), the Court of Appeals held that "the Legislature intended the 'or' in [former MCL 771.3(4), now MCL 771.3(5),] to mean 'and[,]'" and, therefore, that "the trial court properly ordered [the] defendant to pay those costs relating to both the prosecution and the defense of his case."

statute." *Juntikka*, 310 Mich App at 313 (citing *Cunningham II,* 496 Mich at 147-156, and holding that "the trial court erred in imposing [a] probation enhancement fee[,]" which "accounted for general operating costs incurred by the probation department[,]" because the "fee was not separately authorized by statute[] and . . . was not a cost 'specifically incurred' in [the] defendant's case [as required] under MCL 771.3(5)[]") (additional citations omitted). Additionally, "[t]hough probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not." *Butler-Jackson (Butler-Jackson II)*, ___ Mich at ___ (citing *Cunningham II*, 496 Mich 145 (2014), and *Juntikka*, 310 Mich App 306, and vacating "that part of the Court of Appeals['] judgment[, 307 Mich App 667 (2014),] addressing the propriety of court costs under MCL 771.3(5)[]").

Ability to Pay. If a trial court imposes costs under MCL 771.3(2) as part of a sentence of probation, the court must not require a probationer to pay those costs "unless the probationer is or will be able to pay them during the term of probation." MCL 771.3(6)(a). "In determining the amount and method of payment of costs under [MCL 771.3(2)], the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations." MCL 771.3(6)(a). A trial court may consider a defendant's potential for employment when determining the defendant's ability to pay. *Brown (Craig)*, 279 Mich App at 139-140. Where the defendant opted to attend school full-time instead of working full-time, the trial court concluded that the defendant could pay if he chose to do so and properly imposed costs under MCL 771.3. *Brown (Craig)*, 279 Mich App at 139-140.

"[A] defendant who timely asserts an inability to pay . . . costs must be heard." *People v Music*, 428 Mich 356, 362 (1987). In that instance, a sentencing court must determine whether the costs are within the probationer's means. *Id.* at 362.

A probationer who is not in willful default of his or her payment of costs under MCL 771.3(1)(g) (minimum state cost) or MCL 771.3(2)(c) (expenses specifically incurred in the case) may petition the court at any time for remission of the unpaid part of the total costs ordered. MCL 771.3(6)(b). The court may modify the method of repayment or remit all or a portion of the amount due if the court finds that payment in full would impose a manifest hardship on the probationer or his or her immediate family. *Id*.

"The court may not sentence the probationer to prison without having considered a current presentence report and may not

sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]." MCR 6.445(G). MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

Conditional Sentence. Except for defendants convicted of first- or third-degree criminal sexual conduct, MCL 769.3(2) authorizes a sentencing court to sentence a defendant to probation, conditioned on the probationer's payment of costs, among other things. The court may establish a time within which the defendant must make repayment in installments, and if the probationer defaults on any payment, the court may sentence him or her to the sentence provided by law. *Id*.[381]

Cost of Electronic Monitoring. Additionally, a probationer who is permitted to be released from jail for purposes of attending work or school under MCL 771.3 and who is ordered to wear an electronic monitoring device under MCL 771.3e must pay for the installation, maintenance, monitoring, and removal of the device. MCL 771.3e(1).

Probation revocation for failure to comply with conditions. Compliance with a court's order to pay costs must be made a condition of probation. MCL 771.3(8). Revocation of probation[382] is authorized where the probationer fails to comply with the order and has failed to make a good faith effort at compliance. *Id*.[383] To determine whether an individual's probation should be revoked on the basis of unpaid costs, the court must consider the following:

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[381] Note, however, that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

[382] See Chapter 4 for more information on probation revocation.

[383] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

- the probationer's employment status, earning ability, and financial resources;
- the willfulness of the probationer's failure to pay; and
- any other circumstances that may impact the probationer's ability to pay. MCL 771.3(8).

F. Costs Ordered as Part of Conditional Sentence

MCL 769.3(1) provides:

> "If a person is convicted of an offense punishable by a fine or imprisonment, or both, the court may impose a conditional sentence and order the person to pay a fine, with or without the costs of prosecution, and restitution as provided under [MCL 769.1a] or the crime victim's rights act, . . . MCL 780.751 to [MCL] 780.834, within a limited time stated in the sentence and, in default of payment, sentence the person as provided by law."

Additionally, except for defendants convicted of first- or third-degree criminal sexual conduct, MCL 769.3(2) authorizes the court to sentence the defendant to probation, conditioned on the probationer's payment of costs, among other things. MCL 769.3(2) provides:

> "Except for a person who is convicted of criminal sexual conduct in the first or third degree, the court may also place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination in installments with any limited time and may, upon default in any of those payments, impose sentence as provided by law."[384]

G. Costs of Prosecution Specifically Authorized by Penal Statutes

Some individual penal statutes specifically authorize a sentencing court to order a defendant to pay the costs of prosecution after the defendant is convicted. These statutes address the costs of prosecution only and do not authorize a court to order other costs

[384] Note, however, that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

that may be permitted pursuant to another statute, e.g., overtime wages for law enforcement personnel, etc.

For specific cost provisions applicable to individual criminal offenses, including statutes authorizing imposition of costs of prosecution, see the Table of Felony Costs and the Table of Misdemeanor Costs.

H. Costs of Emergency Response and Prosecution Under §769.1f[385]

MCL 769.1f authorizes[386] or requires[387] the court to order the defendant to reimburse federal, state, or local units of government for the costs of emergency response and prosecution related to his or her commission of an offense specifically enumerated in the statute. MCL 769.1f(1); MCL 769.1f(9). Allowable expenses include:

- "[t]he salaries or wages, including overtime pay, of law enforcement personnel for time spent responding to the incident from which the conviction arose, arresting the person convicted, processing the person after the arrest, preparing reports on the incident, investigating the incident, and collecting and analyzing evidence, including, but not limited to, determining bodily alcohol content and determining the presence of and identifying controlled substances in the blood, breath, or urine." MCL 769.1f(2)(a).

- "[t]he salaries, wages, or other compensation, including overtime pay, of fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, for time spent in responding to and providing fire fighting, rescue, and emergency medical services in relation to the incident from which the conviction arose." MCL 769.1f(2)(b).

- "[t]he cost of medical supplies lost or expended by fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, in providing services in relation to the incident from which the conviction arose." MCL 769.1f(2)(c).

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[385] See the Table of Felony Costs and the Table of Misdemeanor Costs for offenses to which MCL 769.1f applies.

[386] For offenses set out in MCL 769.1f(1)(a)-(j) ~~MCL 769.1f(1)(a)-(i)~~, a sentencing court has *discretion* to order a defendant to pay the costs authorized under MCL 769.1f.

[387] Reimbursement for expenses listed in MCL 769.1f(2)-(8) *must* be ordered against an offender for a conviction arising from any violation or attempted violation of the statutes enumerated in MCL 769.1f(9).

- "[t]he salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction." MCL 769.1f(2)(d).

- "[t]he cost of extraditing a person from another state to this state including, but not limited to, all of the following:

  - "[t]ransportation costs.

  - "[t]he salaries or wages of law enforcement and prosecution personnel, including overtime pay, for processing the extradition and returning the person to this state." MCL 769.1f(2)(e).

Costs ordered under MCL 769.1f must be paid immediately unless the court authorizes the individual to pay the amount ordered within a certain period of time or in specific installments. MCL 769.1f(4). If personnel from more than one unit of government incurred any of the expenses described in MCL 769.1f(2), the court may require the defendant to reimburse each unit of government for its expenses related to the incident. MCL 769.1f(3).

As a condition of probation or parole. If an individual required to pay costs under MCL 769.1f is placed on probation or is paroled, the court-ordered costs must be a condition of that probation or parole. MCL 769.1f(5).

Probation or parole revocation for failure to comply with court-ordered costs. An offender's probation or parole may be revoked for his or her failure to comply with the court-ordered costs if the offender has not made a good faith effort at compliance. MCL 769.1f(5). To determine whether to revoke an offender's probation or parole, the following circumstances must be considered:

- the offender's employment status, earning ability, and financial resources;

- the willfulness of the offender's failure to pay; and

- any other circumstances that may impact the offender's ability to pay. MCL 769.1f(5).

For a comprehensive list of offenses to which MCL 769.1f applies, see the Table of Felony Costs and the Table of Misdemeanor Costs.

3.42 Minimum State Costs

MCL 769.1k(1)(a) expressly requires a court to "impose the minimum state costs as set forth in [MCL 769.1j]." If a defendant is ordered to pay

any combination of a fine, costs, or applicable assessments, the court must order the defendant to pay costs of not less than $68 if convicted of a felony or $50 if convicted of a misdemeanor or ordinance violation. MCL 769.1j(1)(a)-(b).[388]

> **Note:** Minimum state costs are to be assessed on each qualifying conviction based upon the offense convicted, so long as "any combination of other assessments is also ordered on that count (e.g. fine + cost, fine + restitution, crime victim assessment + restitution, etc.)." SCAO Crime Victim Assessment and Minimum State Cost Charts, p 2, p 2 n 5 (Revised April 1, 2012).[389]

In addition to the authority to impose minimum state costs, a court may order a defendant to pay any costs incurred to compel his or her appearance. MCL 769.1k(2). MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL 769.1k(1) and MCL 769.1k(2). A court may provide for the collection of costs imposed under MCL 769.1k at any time. MCL 769.1k(5). Unless otherwise provided by law, a court may apply any payments made in excess of the total amount owed by a defendant in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

As a condition of probation. Payment of the minimum state cost must be a condition of probation. MCL 769.1j(3); MCL 771.3(1)(g). A probationer who is not in willful default of his or her payment of the minimum state cost may petition the court at any time for remission of the unpaid part of the total costs ordered. MCL 771.3(6)(b). The court may modify the method of repayment or remit all or a portion of the amount due if the court finds that payment in full would impose a manifest hardship on the probationer or his or her family. *Id*.

The requirement under MCL 769.1k(1)(a) to impose the minimum state costs set forth in MCL 769.1j also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

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[388] Effective April 1, 2012, 2011 PA 293 amended MCL 769.1j(1) and MCL 769.1j(7) to eliminate the distinction between "serious" and "specified" misdemeanors, and to provide for a minimum assessment of $50.00 against a defendant who commits *any* misdemeanor or ordinance violation. Related provisions were amended by 2011 PA 294—2011 PA 296, also effective April 1, 2012.

[389] The Crime Victim Assessment and Minimum State Costs Charts are available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/CrimeVictimAssessment.pdf.

3.43 Crime Victim's Rights Fund Assessment[390]

The court is required to "order each person charged with an offense that is a felony, misdemeanor, or ordinance violation . . . that is resolved by conviction . . . or in another way that is not an acquittal or unconditional dismissal, to pay an assessment" of $130.00 if the offense is a felony or $75.00 if the offense is a misdemeanor or ordinance violation. MCL 780.905(1)(a)-(b).[391] In contrast to the minimum state cost, which may be ordered for each conviction arising from a single case,[392] only one crime victim assessment per criminal case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).[393]

MCL 769.1k provides a court with general authority to impose "[a]ny assessment authorized by law" on a defendant at the time a defendant is sentenced, at the time a defendant's sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(b)(*v*). In addition to any assessment imposed, a court may order a defendant to pay any costs incurred to compel his or her appearance. MCL 769.1k(2). MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment an assessment imposed pursuant to MCL 769.1k(1)(b)(*v*). A court may provide for the collection of any assessment imposed under MCL 769.1k(1) at any time. MCL 769.1k(5). Unless otherwise provided by law, a court may apply any payments made in excess of the total amount owed by a defendant in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

As a condition of probation. Payment of the crime victim assessment must be a condition of an offender's probation. MCL 771.3(1)(f).

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[390] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for more information about crime victim assessments.

[391] Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime victim's rights assessment of $75.00 in cases involving a conviction of *any* misdemeanor or ordinance violation (rather than only a "serious" or "specified" misdemeanor). Related provisions were amended by 2011 PA 293, 2011 PA 295, and 2011 PA 296, also effective April 1, 2012.

The imposition of an increased crime victim's rights assessment against a defendant who committed a felony before the effective date of the statutory amendment effecting a fee increase from $60 to $130, 2010 PA 281, does not violate the Ex Post Facto Clauses of the United States Constitution and the Michigan Constitution. *People v Earl (Ronald)*, 495 Mich 33, 34-35, 37, 49 (2014) (affirming *People v Earl*, 297 Mich App 104 (2012), and holding that "an increase in the crime victim's rights assessment [does not] increase[] the punishment for a crime[;]" rather, "the Legislature's intent in enacting the assessment was civil in nature[, and] . . . . the purpose and effect of the assessment is not so punitive as to negate the Legislature's civil intent[]"). For additional discussion of the crime victim's rights assessment, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[392] Minimum state costs are assessed on each count "if any combination of other assessments is also ordered on that count (e.g. fine + cost, fine + restitution, crime victim assessment + restitution, etc.)." SCAO Crime Victim Assessment and Minimum State Cost Charts, p 2, p 2 n 5 (Revised April 1, 2012).

[393] The crime victim assessment is to be "[b]ased upon the [m]ost [s]erious [o]ffense [c]onvicted" in a case. SCAO Crime Victim Assessment and Minimum State Cost Charts, p 1 (Revised April 1, 2012).

The general authority to impose the monetary penalties in MCL 769.1k(1)(b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

3.44 Restitution

Victims have a constitutional right to restitution. Const 1963, art 1, § 24. Additionally, restitution is mandatory under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. See *People v Garrison*, 495 Mich 362, 365, 373 (2014).

"At sentencing, the court must, on the record[,] order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(E)(1)(f); see also MCL 769.1a(2); MCL 780.766(2) (felony article); MCL 780.794(2) (juvenile article); MCL 780.826(2) (misdemeanor article).[394] "[B]oth [the CVRA[395] and MCL 769.1a(2)] impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete." *Garrison*, 495 Mich at 368 (noting that "the plain meaning of the word 'full' is 'complete; entire; maximum[]'") (citation omitted). 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).

Restitution is "specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct." *People v Grant (Dennis)*, 455 Mich 221, 230 (1997). "In determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). These provisions are "'remedial in character and should be liberally construed to effectuate [the] intent [of the CVRA].'" *People v Allen (Regina)*, 295 Mich App 277, 282 (2012). "Because [MCL 780.766(2)]

[394] The felony, juvenile, and misdemeanor articles of the CVRA contain substantially similar language.

[395] Although the *Garrison* Court specifically applied MCL 780.766(2) (the restitution provision that is contained in the felony article of the CVRA), the Court's holding defining the term *full restitution* as "restitution that is maximal and complete[]" would presumably extend to the restitution provisions contained in the CVRA's juvenile article (MCL 780.794(2)) and misdemeanor article (MCL 780.826(2)) as well. See *Garrison*, 495 Mich at 367 n 11 (noting that "MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)[]").

plainly requires the trial court to order 'full' restitution, . . . a trial court abuses its discretion when it orders restitution other than full restitution." *Allen (Regina)*, 295 Mich App at 281 n 1.

Because restitution is mandatory, defendants are on notice that it will be part of their sentences. *People v Ronowski*, 222 Mich App 58, 61 (1997). "[Restitution] is [not] open to negotiation during the plea-bargaining or sentence-bargaining process[.]" *Id.* at 61.

The amount of restitution ordered must 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. *Grant (Dennis)*, 455 Mich at 233-234; *People v Hart*, 211 Mich App 703, 706 (1995). "[T]he standard to be applied when calculating a restitution amount [under the CVRA] is simply one of reasonableness[;]" where "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 "'easily ascertained and measured' formulation[]" set out in *People v Heil*, 79 Mich App 739, 748-749 (1977). 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 court must "consider only the loss sustained by the victims," and must not consider the defendant's ability to pay. *People v Lueth*, 253 Mich App 670, 692 (2002). A defendant need not have personally benefited to the extent reflected by the restitution amount; all that is required is that the defendant's criminal conduct caused the amount of loss addressed by the restitution order. *Id.* at 692.

For the purposes of restitution only, the Code of Criminal Procedure and the CVRA define "victim" as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a [crime]." MCL 769.1a(1); MCL 780.766(1). With a few exceptions,[396] and for purposes of restitution, a victim can be "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 769.1a(1); MCL 780.766(1).

Uncharged conduct and additional victims. "Although courts must order defendants to pay 'full restitution,' their authority to order restitution is not limitless[;] . . . the losses included in a restitution order

[396] For example, legal entities are not victims for purposes of MCL 780.766(4) (physical or psychological injury to a victim), or MCL 780.766(5) (bodily injury resulting in a victim's death or serious impairment of a victim's body function).

must be the result of [the] defendant's criminal course of conduct." *Garrison*, 495 Mich at 372 (noting that MCL 780.766(1) defines "'victim' as 'an individual who suffers *direct* or threatened physical, financial, or emotional harm *as a result* of the commission of a crime[]'").[397] Moreover, because MCL 780.766(2) "authorizes the assessment of full restitution only for 'any victim of the defendant's course of conduct *that gives rise to the conviction*[,]'" trial courts are not "authorize[d] . . . to impose restitution based solely on uncharged conduct[;]" 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.'"[398] 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[]"); *Corbin*, 312 Mich App at 361-362 (citing *McKinley*, 496 Mich at 419, and holding that although the defendant, when tendering his plea of guilty with respect to charged criminal sexual conduct involving one victim, admitted to engaging in criminal sexual conduct with a second victim, restitution should not have been ordered with respect to the second victim where the prosecutor had voluntarily dismissed the charge involving that victim because the statute of limitations had expired).

Future medical or psychological treatment. "[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.'" *Corbin*, 312 Mich App at 366 (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 sustained as a result of the commission of the crime, "render[ed] the court's estimates fatally uncertain[]").

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[397] Although the Michigan Supreme Court's holding in *Garrison* did not specifically address MCL 780.794 or MCL 780.826, its holding that restitution orders may include only those losses that are "the result of [the] defendant's criminal course of conduct[]" would presumably extend to those statutes as well. See *Garrison*, 495 Mich at 367 n 11 (noting that "MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)[]").

[398] 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)."

Routine costs of criminal investigation and prosecution. Although MCL 780.766(1) authorizes restitution for financial harm sustained by a governmental entity, restitution is not properly ordered for the routine costs of a criminal investigation when those costs are ordinarily incurred no matter what the outcome of the investigation. *People v Newton*, 257 Mich App 61, 69-70 (2003). See also *People v Gaines*, 306 Mich App 289, 323, 323 n 10 (2014) (holding that 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] disks[,]" and further noting that "the trial court [may not] . . . order[] [these] 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[]'") (quoting *People v Cunningham (Cunningham II)*, 496 Mich 145, 147 (2014)).[399]

However, the loss of "buy money" may be included in an order of restitution because "buy money" does not represent the costs ordinarily incurred in a county's criminal investigation and would not have been subject to loss were it not for the defendant's commission of a crime. *Id.* at 69. Where a narcotics enforcement team fails to recover money expended during a criminal investigation, a victim (the enforcement team) has suffered financial harm (loss of the "buy money") as a direct result of the defendant's criminal conduct. *Id.*, citing *People v Crigler*, 244 Mich App 420, 427 (2001).

Property that cannot be returned. In situations in which a defendant is ordered to make restitution to a victim for property that is lost, damaged, or destroyed, and the property cannot be returned, MCL 769.1a(3) applies. MCL 769.1a(3) states:

> "If a felony, misdemeanor, or ordinance violation results in damage to or loss or destruction of property of a victim of the felony, misdemeanor, or ordinance violation or results in the seizure or impoundment of property of a victim of the felony, misdemeanor, or ordinance violation, the order of restitution may 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

[399] However, see 2014 PA 352, effective October 17, 2014, amending MCL 769.1k as "a curative measure" following the issuance of *Cunningham II*, 496 Mich 145. 2014 PA 352, enacting section 2. See Section 3.41 for discussion of *Cunningham II* and 2014 PA 352.

> 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."

Civil damages. "[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[;] . . . 'the statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding.'" *People v Lee (Edward)*, ___ Mich App ___, ___ (2016), quoting *In re McEvoy*, 267 Mich App 55, 67 (2005).

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), which provides that "[a]ny amount paid to a victim . . . under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim[.]" *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.

Additionally, "the fact that civil damages are not available . . . does not necessarily mean that restitution is also unavailable." *Lee (Edward)*, ___ Mich App at ___ (holding that "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[]").

Civil agreement. A civil agreement between a defendant and a crime victim limiting future claims against the defendant does not negate the statutory requirement that the defendant be ordered to pay restitution to

any victim of the defendant's conduct or to an entity from which a victim has received compensation. *People v Bell (Bernice)*, 276 Mich App 342, 343-350 (2007).

Insurance company. "[A]n insurance company may be awarded restitution . . . for money paid to a victim for a defendant's criminal act." *Bell (Bernice)*, 276 Mich App at 346-347. "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." *Id.* at 347.

The trial court did not clearly err in determining that an insurance company "suffered a direct financial loss as a result of [the defendant's] course of criminal conduct[]" in attempting to purchase a controlled substance from a pharmacy using an insurance contract number that she extracted from a subscriber database during her employment with the company's vendor. *Allen (Regina)*, 295 Mich App at 279, 283 (affirming the trial court's order requiring the defendant to pay restitution to the company in an amount determined by "assigning a value to the hours [the company's employee] spent on the [fraud] investigation[]"). See also *People v Fawaz*, 299 Mich App 55, 66 (2012) (where the defendant was convicted of arson of a dwelling house and making false statements about material matters for an insurance claim, "[t]he resources [the insurance company] spent determining that [the] defendant's [insurance] claim was fraudulent . . . should have been included in the restitution amount[]").

Lost income. The 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*, ___ Mich App ___, ___ (2016), quoting *Corbin*, 312 Mich App at 371 (second alteration in original).

"[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)]").

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 evidence and by "the victim's extensive, essentially expert, testimony").

The victim "suffered a monetary loss[]" under the CVRA where he "had to use [accumulated] sick, personal, and vacation time in order to recuperate from . . . injuries[]" inflicted by the defendant. *Turn*, ___ Mich App at ___. The victim "earned his accumulated sick, personal, and vacation time by working, and he was entitled to receive monetary compensation from his employer for any unused time[;]" because the victim "lost the ability to use and be paid for taking that time in the future, and . . . the ability to be paid for that time upon termination of his employment[,]" the time constituted *income loss* under MCL 780.766(4)(c) "even though he was paid by his employer for the time he used." *Turn*, ___ Mich App at ___. "[T]he restitution order [did] not entitle [the victim] to be paid twice for the same time because, although [his] employer paid him the wages he would have earned if he had not used his accumulated time, [he] was not compensated by his employer for the loss of his accumulated leave time even though that time had monetary value." *Id.* at ___.

Pleas and admissions concerning uncharged conduct. Because a "court lack[s] any authority to award restitution for [a] defendant's uncharged conduct," admissions in a plea concerning dismissed charges do not provide the basis for a restitution award. *Corbin*, 312 Mich App at 362 (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 conduct with a second victim, restitution should not have been ordered with respect to the second victim where the prosecutor had voluntarily dismissed the charge involving that victim because the statute of limitations had expired).

Restitution hearing. A restitution hearing is not required unless there is an actual dispute as to the amount. *Grant (Dennis)*, 455 Mich at 244. "Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. 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). "'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *Cross (Clifton)*, 281 Mich App at 740.

"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, 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.

Incarceration for willful failure to pay restitution. MCL 769.1a(14) "prohibits incarceration as a consequence for failure to pay [restitution] unless the failure was wil[l]ful." *People v Collins (Richard)*, 239 Mich App 125, 136 (1999). This is because "a sentence that exposes an offender to incarceration unless he [or she] pays restitution . . . violates the Equal Protection Clauses of the federal and state constitutions because it results in unequal punishments for offenders who have and do not have sufficient money." *Id.* at 135-136 (trial court's sentencing order violated Equal Protection principles because it "rewarded restitution payments with a suspension of jail time").[400]

Time limitations on restitution. Generally, restitution must be made immediately. MCL 780.766(10). The Department of Corrections may execute a restitution order by withdrawing funds from a prisoner's account, and there is no legal right "to cessation of [] restitution payments while [a defendant] remains incarcerated." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 222, 225 (1999). However, the court has the discretion to require a defendant to make restitution within a specified period or in installments. MCL 780.766(10).

As a condition of probation. While restitution must be imposed as a condition of probation, MCL 771.3(1)(e) and MCL 780.766(11), the court may not revoke probation on the basis of the defendant's failure to pay restitution that he or she cannot afford. MCL 769.1a(14); MCL 780.766(14).[401] The defendant may petition the sentencing judge to modify the method of payment based upon manifest hardship. MCL 769.1a(12); MCL 780.766(12).

As a condition of parole. While restitution must be imposed as a condition of parole, MCL 780.766(11), the Parole Board may not revoke parole on the basis of the defendant's failure to pay restitution that he or she cannot afford. MCL 769.1a(14); MCL 780.766(14). The defendant may petition the sentencing judge to modify the method of payment based upon manifest hardship. MCL 769.1a(12); MCL 780.766(12).

Additionally, 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

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[400] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

[401] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

(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 obtaining parole or early release." *Greenberg*, 176 Mich App at 310-311.

Restitution not dischargeable in bankruptcy. Restitution ordered as part of a sentence of imprisonment or imposed as a condition of probation is not dischargeable in bankruptcy. 11 USC 523(a)(13).

Joint and several liability. Coconspirators and codefendants may be held jointly and severally liable for a victim's loss. *People v Grant (Dennis)*, 455 Mich 221, 228, 236-237 (1997) (noting that a defendant who is convicted of conspiracy is responsible not only for his or her own acts, but also "for the acts of his [or her] coconspirators made in furtherance of the conspiracy[]"); *Lee (Edward)*, ___ Mich App at ___ (citing *Grant (Dennis)*, 455 Mich at 236-237, and concluding that the 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[]").

Standard of review. "A trial court does not have discretion to order a convicted defendant to pay restitution; it must order the defendant to pay restitution and the amount must fully compensate the defendant's victims." *Allen (Regina)*, 295 Mich App at 281.

> "Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and [the Court of Appeals] reviews de novo the proper interpretation of statutes. . . . However, [the] Court reviews the findings underlying a trial court's restitution order for clear error. . . . A finding is clearly erroneous if [the] Court is left with the definite and firm conviction that a mistake has been made." *Allen (Regina)*, 295 Mich App at 281 (citations omitted).

Sixth Amendment concerns. "[T]he Sixth Amendment erects no obstacle to judicial fact-finding as to the amount [of restitution] owed[.]" *Corbin*, 312 Mich App at 372 (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) (additional citations omitted).

3.45 Use of Bail Money to Pay Costs, Fines, Restitution, and Other Assessments

When a defendant personally makes the cash deposit required for his or her bond, the defendant must be notified that if he or she is convicted, the cash deposit may be applied to any court-ordered fine, costs, restitution, assessment, or other payment. MCL 765.6c. If a defendant's bond or bail is discharged and the defendant himself or herself personally supplied cash for the bond or bail, the balance of the cash may be used toward payment of any court-ordered fine, costs, restitution, assessment, or other payment. MCL 765.15(2). In cases where the court orders a defendant to pay a fine, costs, restitution, assessment, or other payment, the court *must* order that payment be made from the defendant's personally deposited cash bond or bail after it has been discharged. *Id*.

Unless otherwise provided by law, a court may apply any payments made in excess of the total amount owed by a defendant in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

Allocation of the funds available under MCL 765.15, and of payments made by a defendant toward the total amount owed, is governed by MCL 775.22.[402]

- Fifty percent of the amount available or received must be applied to victim payments (without regard to the underlying violation). MCL 775.22(2); MCL 780.766a(2); MCL 780.794a(2); and MCL 780.826a(2).

  > "'Victim payment' means 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 under . . . MCL 780.905."[403] MCL 775.22(5).

In cases involving violations of state law, the balance of the amount available or received (after fifty percent is applied to the victim payment) must be apportioned in the following order of priority:

- Payment of the minimum state cost under MCL 769.1j.[404]
- Payment of other costs.

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[402] Provisions in the Crime Victim's Rights Act concerning the allocation of funds mirror those in MCL 775.22. See MCL 780.766a, MCL 780.794a, and MCL 780.826a.

[403] Crime victim's rights fund assessment. See Section 3.43 for discussion of the crime victim's rights fund assessment.

[404] See Section 3.42 for discussion of minimum state costs.

- Payment of fines.
- Payment of probation or parole supervision fees.
- Payment of assessments and other payments.

MCL 775.22(3); MCL 780.766a(3); MCL 780.794a(3)[405]; and MCL 780.826a(3).[406]

In cases involving violations of local ordinances, the balance of the amount available or received (after fifty percent is applied to the victim payment) must be apportioned as follows:

- Payment of the minimum state cost under MCL 769.1j.[407]
- Payment of other costs.
- Payment of fines.
- Payment of assessments and other payments.

MCL 775.22(4); MCL 780.766a(4); MCL 780.794a(4); and MCL 780.826a(4).

MCL 780.766a(1) governs the allocation of money collected from an offender who is obligated to make payments in more than one proceeding and who, when making a payment, fails to specify the proceeding to which the payment applies. MCL 780.766a(1) states in part:

> "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 this section."

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 or from the department of corrections, sheriff, department of human services, or county juvenile agency, the payment must first be

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[405] MCL 780.794a(3) also expressly includes "reimbursement to third parties who reimbursed a victim for his or her loss."

[406] MCL 780.826a(3) also expressly includes "reimbursement to third parties who reimbursed a victim for his or her loss."

[407] SeeSection 3.42 for discussion of minimum state costs.

applied to victim payments. MCL 780.766a(2); MCL 780.794a(2); MCL 780.826a(2).

Part H—Specific Types of Sentences

3.46 Probation

A. In General

"It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance." MCL 771.4.

A court may place a defendant on probation under the charge and supervision of a probation officer, if the court determines that a defendant convicted of any crime other than murder, treason, first-degree criminal sexual conduct, third-degree criminal sexual conduct, armed robbery, or major controlled substance offenses, is unlikely to engage in an offensive or criminal course of conduct again, and that the public good does not require that the defendant suffer the penalty imposed by law. MCL 771.1(1).

> **Note:** Although not included in MCL 771.1(1), the court may not place a defendant on probation when he or she was convicted of any of the offenses for which mandatory prison sentences are prescribed by statute.

> **Note:** "[T]he Legislature did not include the attempt statute [(MCL 750.92)] in the list of felonies for which a defendant could not be given probation . . . [thereby] evidenc[ing] an intent to include probation as another alternative sentence under the attempt statute." *People v McKeown*, 228 Mich App 542, 545 (1998).

Whether probation is an authorized alternative to imprisonment depends also on whether the legislative sentencing guidelines apply to a specific sentencing offense. *People v Buehler*, 477 Mich 18, 27-28 (2007), abrogated in part on statutory grounds as recognized by *People v Campbell (Michael)*, ___ Mich App ___, ___ (2016). The legislative sentencing guidelines expressly authorize probationary terms for offenses subject to the guidelines when the recommended minimum sentence range falls within an intermediate sanction cell. MCL 769.31(b). Therefore, absent a departure, when an offense is expressly made subject to the legislative sentencing guidelines, probation is a valid alternative sentence only if the properly scored

guidelines place a defendant in an intermediate sanction cell. *Buehler*, 477 Mich at 27-28.[408]

Except as provided in MCL 771.2a (dealing with probation periods for various stalking and sex offenses), the term of probation imposed on a defendant convicted of a felony offense must not exceed five years. MCL 771.2(1). For purposes of the Code of Criminal Procedure's probation statute, "felony" includes two-year misdemeanors. MCL 761.1(g); *People v Smith (Timothy)*, 423 Mich 427, 434 (1985).

If a court sentences a defendant to probation, it must, in a court order filed with the case and made a part of the record, set the length of the probationary period and determine the terms on which the probation is conditioned. MCL 771.2(2).

> **Note:** Effective March 1, 2003, 2002 PA 666 eliminated the "lifetime probation" provision in MCL 771.1(4). Before the amendment, a trial court could sentence a defendant to lifetime probation for violating or conspiring to violate MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*). 2002 PA 666 also amended MCL 771.2 to eliminate lifetime probation sentences imposed before the amendment's effective date—March 1, 2003. MCL 771.2(3). 2010 PA 351, effective December 22, 2010, amended MCL 771.2(3) to extend the probation reforms of 2002 PA 666 to individuals placed on lifetime probation for an offense committed before March 1, 2003. MCL 771.2(3) continues to prohibit any reduction in the probation period imposed under former MCL 771.1(4) "other than by a revocation that results in imprisonment or as otherwise provided by law."

B. Mandatory Conditions of Probation

During the term of an individual's probation, he or she must comply with all of the mandatory conditions of probation set out in MCL 771.3(1)(a)-(h):

- the probationer must not violate any criminal law.

[408] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. The *Lockridge* Court did not specifically address intermediate sanctions such as probation. See Section 3.7 for discussion of intermediate sanctions. See also Section 3.4 for discussion of *Lockridge*.

- the probationer must not leave Michigan without the court's consent.

- the probationer must report (in person or in writing) to his or her probation officer each month, or as often as the probation officer requires.

- if the probationer is sentenced in circuit court, he or she must pay a probation supervision fee as set out in MCL 771.3c.

- the probationer must pay restitution to the victim of the probationer's course of conduct leading to the conviction, or to the victim's estate.

- the probationer must pay a crime victim assessment as set out in MCL 780.905.[409]

- the probationer must pay the minimum state cost as set out in MCL 769.1j.[410]

    - MCL 769.1k(1)(a) requires a court to impose the minimum state cost (set out in MCL 769.1j) on a defendant at the time the defendant is sentenced, at the time entry of judgment of guilt is deferred, or at the time sentence is delayed. The court may also order the defendant to pay any additional costs incurred in compelling his or her appearance. MCL 769.1k(2). MCL 769.1k(1) and MCL 769.1k(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

    - For minimum state costs ordered pursuant to MCL 769.1k, MCL 769.1k(4) authorizes a court to order that a defendant pay such costs by wage assignment. In addition, a court may provide for the collection of any costs imposed pursuant to MCL 769.1k at any time. MCL 769.1k(5).

    - Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

- if required, the probationer must be registered under the sex offenders registration act (MCL 28.721 to MCL 28.736).[411]

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[409] SeeSection 3.43 for discussion of crime victim assessments.

[410] See Section 3.42 for discussion of minimum state costs.

- If a defendant is placed on probation for an offense listed in MCL 28.722 in the sex offenders registration act (SORA), the defendant's probation officer must register the defendant or must accept the defendant's registration. MCL 771.2(4).

C. Discretionary Conditions of Probation

A trial court has broad discretion in determining any additional terms and conditions to impose as part of probation. *People v Oswald*, 208 Mich App 444, 446 (1995). During the term of an individual's probation, he or she may be required to comply with one or more of the following discretionary terms and conditions set out in MCL 771.3(2)(a)-(q) and MCL 771.3(3):

- be imprisoned in the county jail for a maximum period of 12 months or up to the maximum period of confinement allowed for the charged offense if less than 12 months.

  - a period of incarceration may be served at one time or in consecutive or nonconsecutive intervals.

  - the probationer may be allowed day parole as authorized under MCL 801.251 to MCL 801.258.

  - the probationer may be permitted to be released from jail to work at his or her existing job or to attend a school in which he or she is enrolled as a student, subject to MCL 771.3d[412] and MCL 771.3e.[413]

    Note: "If the court permits an individual convicted of a felony to be released from jail under [MCL 771.3] for purposes of attending work or school, the court shall order the individual to wear an electronic monitoring device on his or her person[.]" MCL 771.3e(1).[414] However, MCL 771.3e "applies only if the court has in place a program to

[411] See the Michigan Judicial Institute's *Sexual Assault Benchbook* for detailed information concerning the Sex Offenders Registration Act.

[412] MCL 771.3d(1) provides that the court must not order release for work or school "unless the county sheriff or the [Department of Corrections] has determined that the individual is currently employed or currently enrolled in school," and establishes requirements for ordering and providing this verification. MCL 771.3d(2) defines "'school[,]'" for purposes of MCL 771.3d, as "[a] school of secondary education[,] . . . [a] community college, college, or university[,] . . . [a] state-licensed technical or vocational school or program[,] . . . [or a] program that prepares the person for the general education development (GED) test."

[413] MCL 771.3e provides for the electronic monitoring of felony probationers who are released from jail for work or school.

[414] MCL 771.3e was added by 2012 PA 610, effective March 28, 2013.

provide for the electronic monitoring of individuals placed on probation that complies with the requirements of [MCL 771.3e]." MCL 771.3e(2).

- pay immediately, or within the period of his or her probation, any fine imposed when the individual was placed on probation.

  Note: The probation statutory provision, MCL 771.3(2)(b), does not restrict the amount of the fine a trial court is authorized to impose as a condition of probation. *Oswald*, 208 Mich App at 445-446 ($1,500 fine imposed as a condition of probation was valid where underlying statute permitted a maximum fine of $1,000 for conviction).

- pay costs, limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant, and supervision of the probationer.

  Note: Costs ordered by the trial court must be "limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer." MCL 771.3(5). A defendant may be ordered to pay the costs of prosecution *and* the costs of defense. *People v Humphreys*, 221 Mich App 443, 452 (1997). A trial court may impose costs under MCL 771.3(5) to reimburse the prosecution's expense of an expert witness at trial, because such costs are "'expenses specifically incurred in prosecuting the defendant[.]'" *People v Brown (Craig)*, 279 Mich App 116, 139 (2008). However, "the Legislature did not intend the reimbursement of costs of confinement to be a proper condition of probation." *People v Houston (JT)*, 237 Mich App 707, 719 (1999); see also *People v Juntikka*, 310 Mich App 306, 315 (2015) (holding that "the trial court erred in imposing [a] probation enhancement fee[,]" which "was not a cost 'specifically incurred' in [the] defendant's case [as required] under MCL 771.3(5)[]") (citations omitted); *People v Butler-Jackson (Butler-Jackson II)*, ___ Mich ___, ___ (2016) (vacating "that part of the Court of Appeals['] judgment[, 307 Mich App 667 (2014),] addressing the propriety of court costs under MCL 771.3(5)[,]" and holding that "[t]hough probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not[]" (citations omitted).

However, the express text of MCL 771.3(2)(p) authorizes a trial court to require, as a condition of probation, that the offender "[r]eimburse[] the county for expenses incurred by the county in connection with the conviction for which probation was ordered as provided in the prisoner reimbursement to the county act, . . . MCL 801.81 to [MCL] 801.93." And see MCL 801.81, specifically referred to by the probation statute, MCL 771.3(2)(p), where the Legislature expressly provides authority—without judiciary involvement—to collect reimbursement for a defendant's confinement in a county jail. MCL 801.83 states in relevant part:

> "(1) The county may seek reimbursement for any expenses incurred by the county in relation to a charge for which a person was sentenced to a county jail as follows:
>
> > (a) From each person who is or was a prisoner, not more than $60.00 per day for the expenses of maintaining that prisoner or the actual per diem cost of maintaining that prisoner, whichever is less, for the entire period of time the person was confined in the county jail, including any period of pretrial detention."[415]

Additionally, a felony offender who is imprisoned as a condition of probation and who is permitted to be released from jail for purposes of attending work or school under MCL 771.3(2)(a) must pay for "[t]he installation, maintenance, monitoring, and removal costs of [an] electronic monitoring device" if he or she is ordered to wear such a device. MCL 771.3e(1).

MCL 800.404a and MCL 800.405 represent statutory authority to collect amounts owed by an offender using any appropriate legal action.

- pay any assessment ordered by the court other than the crime victim assessment.

  Note: MCL 771.3(2)(d) (authorizing the imposition of "any assessment" other than the required crime victim's rights assessment) "does not provide trial courts with the independent authority to impose any assessment as a condition of probation, but rather permits courts to

[415] MCL 800.403 - MCL 800.404.

impose only those assessments that are separately authorized by statute." *People v Juntikka*, 310 Mich App 306, 313 (2015) (citing *People v Cunningham (Cunningham II),* 496 Mich 145, 147-156 (2014), and holding that "the trial court erred in imposing [a] probation enhancement fee[,]" which "accounted for general operating costs incurred by the probation department[,]" because the "fee was not separately authorized by statute[] and . . . was not a cost 'specifically incurred' in [the] defendant's case [as required] under MCL 771.3(5)[]") (additional citations omitted).

- perform community service.
- agree to pay by wage assignment any court-ordered restitution, assessment, fine, or cost.
- participate in inpatient or outpatient drug treatment or a drug treatment court.

  Note: A drug treatment court may accept participants from any other jurisdiction based on the participant's residence or the unavailability of a drug treatment court in the jurisdiction where the participant is charged, if the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving court, and the prosecutor of the receiving drug treatment court's funding unit agree to the defendant's participation in the drug treatment court. MCL 600.1062(4)(a)-(d).

- participate in mental health treatment.
- participate in mental health or substance abuse counseling.
- participate in a community corrections program.
- be under house arrest.
- be subject to electronic monitoring.
- participate in a residential probation program.
- satisfactorily complete a program of incarceration in a special alternative incarceration unit as set out in MCL 771.3b.[416]

[416] See Section 3.53 for more information.

- be subject to conditions reasonably necessary for the protection of one or more named persons.

- reimburse the county for expenses incurred in connection with the probationer's conviction as set out in MCL 801.81 to MCL 801.93.

- complete a high school education or the equivalent by attaining a general education development (GED) certificate.

- be subject to other lawful conditions of probation deemed proper by the court or warranted by the circumstances of the case.

  Note: "In setting additional conditions [under MCL 771.3(3)], a sentencing court must be guided by factors that are lawfully and logically related to the defendant's rehabilitation." *People v Johnson (Larry)*, 210 Mich App 630, 634 (1995).

D. Requirements When Costs Are Imposed

If costs are imposed on a probationer under MCL 771.3(2) as part of a sentence of probation, all of the provisions of MCL 771.3(6) apply:

- the court must not require the probationer to pay costs unless he or she is, or will be, able to pay them during the term of probation.

- the court must take into account the probationer's financial resources and the nature of the burden that payment of the costs will cause, considering the probationer's other obligations.

- a probationer who is required to pay costs under MCL 771.3(1)(g) or MCL 771.3(2)(c), and who is not in willful default of payment, may at any time petition the sentencing judge (or his or her successor) for a remission of the payment of any unpaid portion of those costs.

- if the court determines that payment of the amount due will cause the probationer or his or her immediate family a manifest hardship, the court may remit all or part of the amount of costs due, or modify the payment method.

If a probationer is required to pay costs as part of a sentence of probation, the court may require him or her to pay the costs:

- immediately, or

- within a specified time period, or
- in installments. MCL 771.3(7).

Whenever a probationer is ordered to pay costs as part of his or her sentence of probation, compliance with that order must be a condition of probation. MCL 771.3(8). If the probationer fails to comply with the order to pay costs, and has not made a good faith effort at compliance, the court has discretion to revoke probation. *Id*. In deciding whether to revoke probation, the court must consider the factors set out in MCL 771.3(8):

- the probationer's employment status.
- the probationer's earning ability.
- the probationer's financial resources.
- the willfulness of the probationer's failure to pay.
- any other special circumstances that may impact a probationer's ability to pay.

~~"The court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court~~ "The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]." MCR 6.445(G). MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

E. Plea Agreements and Orders of Probation

A defendant is not entitled to withdraw his or her plea or to demand specific performance of a plea agreement when a trial court imposes otherwise valid conditions on the defendant's probation even if the conditions were not included in the plea agreement. *Johnson (Larry)*, 210 Mich App at 634-635.

F. Amending an Order of Probation

A court may amend a probation order in form or substance at any time, MCL 771.2(2), and a defendant is not entitled to notice or an opportunity to be heard regarding an amendment, unless the amendment would result in a fundamental change in his or her liberty interest, such as confinement. *People v Britt*, 202 Mich App 714, 716 (1993) (placement in an electronic tether program is not the equivalent of confinement; accordingly, due process protections do not attach before amendment of a probation order to include placement in an electronic tether program).

G. Revoking Probation

"If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation." MCL 771.4. A trial court's jurisdiction to revoke a defendant's probation and sentence him or her to imprisonment is limited to the duration of the probationary period; if the probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass*, 288 Mich App 399, 408-409 (2010).

H. Termination of the Probation Period

When a probationer's term of probation terminates, the probation officer must report to the court that the probation period has ended. MCL 771.5(1) The officer must also inform the court of the probationer's conduct during the probation period. *Id*. "Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded." *Id*.

I. Stalking Offenses and Orders of Probation

1. Stalking

In accord with the general rule in MCL 771.2(1), an individual convicted of violating MCL 750.411h (stalking) may be sentenced to no more than five years of probation. MCL 771.2a(1); MCL 750.411h(3). A probationary period imposed for a stalking conviction is subject to the terms and conditions of probation contained in MCL 750.411h(3) and MCL 771.3. MCL 771.2a(1). In addition to other lawful conditions imposed,

MCL 750.411h(3) permits a court to order a defendant sentenced to probation to:

- refrain from stalking any person during his or her probationary term;
- refrain from any contact with the victim of the offense for which the defendant is placed on probation;
- be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; and
- if the court determines it is appropriate, receive the indicated counseling at the defendant's own expense. MCL 750.411h(3)(a)-(c).

2. Aggravated Stalking

An individual who is sentenced to probation for a violation of MCL 750.411i (aggravated stalking) may be sentenced to probation for any term of years, but the court must sentence the individual to a term of probation of not less than five years. MCL 771.2a(2); MCL 750.411i(4). A probationary period imposed for an aggravated stalking conviction is subject to the terms and conditions of probation contained in MCL 750.411i(4) and MCL 771.3.[417] MCL 771.2a(2). MCL 750.411i(4) also authorizes a court to order a defendant who is sentenced to probation to:

- refrain from stalking any person during the term of probation;
- refrain from any contact with the victim of the offense for which the defendant is placed on probation;
- be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; and
- if the court determines it is appropriate, receive the indicated counseling at the defendant's own expense. MCL 750.411i(4)(a)-(c).

[417] See Section 3.46(B) and Section 3.46(C) for mandatory and discretionary conditions of probation under MCL 771.3.

J. Sex Offenders and Probation Orders

Except for the nonprobationable offenses in MCL 771.1 and as otherwise provided by law, a court may place an individual convicted of a "listed offense"[418] on probation for any term of years but not less than five years. MCL 771.2a(6). Additional conditions of probation must be ordered when an individual is placed on probation under MCL 771.2a(6). Subject to the provisions in MCL 771.2a(7)-(12), the court must order an individual placed on probation under MCL 771.2a(6) **not** to do any of the following:

- reside within a student safety zone, MCL 771.2a(7)(a);
- work within a student safety zone, MCL 771.2a(7)(b); or
- loiter within a student safety zone, MCL 771.2a(7)(c).

A "student safety zone" is defined as the area that lies 1,000 feet or less from school property. MCL 771.2a(13)(f).

For purposes of MCL 771.2a, "school" and "school property" are defined in MCL 771.2a(13) as follows:

> "(d) 'School' means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school.
>
> (e) 'School property' means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:
>
> > (*i*) It is used to impart educational instruction.
> >
> > (*ii*) It is for use by students not more than 19 years of age for sports or other recreational activities."

K. Sex Offenders Exempted from Probation

Even if a person was convicted of a "listed offense," MCL 771.2a(12) permits the court to exempt that person from being placed on probation under MCL 771.2a(6) if either of the following circumstances apply:

[418] Tier I, tier II, and tier III listed offenses are described in the Sex Offenders Registration Act at MCL 28.722(s), MCL 28.722(u), and MCL 28.722(w), respectively.

> "(a) The individual has successfully completed his or her probationary period under [the youthful trainee act, MCL 762.11-MCL 762.15,] for committing a listed offense and has been discharged from youthful trainee status.
>
> (b) The individual was convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)[419]], and at the time of the violation was 17 years of age or older but less than 21 years of age and is not more than 5 years older than the victim."

L. School Safety Zones

There are exceptions to the mandatory probation conditions concerning school safety zones. Under the circumstances described below, the prohibitions found in MCL 771.2a(7) do not apply to individuals convicted of a listed offense.

1. Residing Within a Student Safety Zone

The court shall not prohibit an individual on probation after conviction of a listed offense from residing within a student safety zone, MCL 771.2a(7)(a), if any of the following provisions in MCL 771.2a(8) apply:

> "(a) The individual is not more than 19 years of age and attends secondary school or postsecondary school, and resides with his or her parent or guardian. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends secondary school or postsecondary school in conjunction with that school attendance.
>
> (b) The individual is not more than 26 years of age, attends a special education program, and resides with his or her parent or guardian or in a group home or assisted living facility. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The

[419] CSC-IV where the individual is at least 5 years older than the victim and the victim is at least 13 years of age but less than 16 years of age.

> individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends a special education program in conjunction with that attendance.
>
> (c) The individual was residing within that student safety zone at the time the amendatory act that added this subdivision was enacted into law. However, if the individual was residing within the student safety zone at the time the amendatory act that added this subdivision was enacted into law,[420] the court shall order the individual not to initiate or maintain contact with any minors within that student safety zone. This subdivision does not prohibit the court from allowing contact with any minors named in the probation order for good cause shown and as specified in the probation order."

In addition to the above exceptions, the prohibition against residing in a student safety zone, MCL 771.2a(7)(a), does not prohibit a person on probation after conviction of a listed offense from "being a patient in a hospital or hospice that is located within a student safety zone." MCL 771.2a(9). The hospital exception "does not apply to an individual who initiates or maintains contact with a minor within that student safety zone." *Id*.

2. Working Within a Student Safety Zone

If an individual on probation under MCL 771.2a(6) was working within a student safety zone at the time the amendatory act adding these prohibitions was enacted into law,[421] he or she cannot be prohibited from working in that student safety zone as indicated in MCL 771.2a(7)(b). MCL 771.2a(10). If a person was working within a student safety zone at the time of this amendatory act, "the court shall order the individual not to initiate or maintain contact with any minors in the course of his or her employment within that student safety zone." *Id*. As with MCL 771.2a(8)(c), for good cause shown, a court is not prohibited by MCL 771.2a(10) from allowing the probationer contact with any minors named in the probation order and as specified in the probation order. MCL 771.2a(10).

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[420] Effective January 1, 2006. 2005 PA 126.

[421] Effective January 1, 2006. 2005 PA 126.

If an individual on probation under MCL 771.2a(6) only intermittently or sporadically enters a student safety zone for work purposes, the court shall not impose the condition in MCL 771.2a(7)(b) that would prohibit the person from working in a student safety zone. MCL 771.2a(11). Even when a person intermittently or sporadically works within a student safety zone, he or she shall be ordered "not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone." *Id*. For good cause shown and as specified in the probation order, the court may allow the person contact with any minors named in the order. *Id*.

3.47 Delayed Sentencing

Under MCL 771.1(2), if a defendant is eligible for a sentence of probation, the court may elect to delay imposing sentence on the defendant for up to one year to allow the defendant to demonstrate that probation, or other leniency compatible with the ends of justice and the defendant's rehabilitation, is an appropriate sentence for his or her conviction. MCL 771.1(2) provides:

> "In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court . . . . When sentencing is delayed, the court shall enter an order[422] stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay."

"Reasonable conditions may be imposed for the delay if they will give the defendant an opportunity to prove his or her eligibility for probation or leniency." *People v Saenz*, 173 Mich App 405, 409 (1988); see also, generally, *People v Cannon (Todd)*, 145 Mich App 100, 104 (1985), *People v Saylor (Barry)*, 88 Mich App 270, 274-275 (1979); *People v Clyne*, 36 Mich App 152, 154-155 (1971).

> "The purpose of a delayed sentence is to give the defendant an opportunity to demonstrate that he [or she] can fairly be placed on probation rather than be sentenced to prison. The

[422] See SCAO Form MC 294, *Order Delaying Sentence*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/criminaldisposition/mc294.pdf.

> trial court may impose conditions and restrictions with which the defendant must comply during the period of the delay, so long as the restrictions are reasonably designed to help the court determine whether probation will ultimately be appropriate. The imposition of such conditions or restrictions should not be confused with a sentence of probation, even though they are similar to those associated with probation. Thus, a delayed sentence means that no sentence is initially imposed . . . ." *People v Salgat*, 173 Mich App 742, 745-746 (1988).

Requiring a defendant to participate in a drug court, MCL 771.1(2), or obtain psychiatric treatment, may be valid conditions of a delayed sentence. *Saenz*, 173 Mich App at 409. Incarceration in jail is not a valid condition of a delayed sentence. *Id*.[423]

"The sentence ultimately imposed should be based upon all of the circumstances of the defendant's background. Among the factors to be considered in sentencing [are] the defendant's failure to comply with the conditions and restrictions imposed in conjunction with the sentence delay." *Salgat*, 173 Mich App at 746.

A defendant generally does not have a right to a formal hearing on whether he or she violated a condition of a delayed sentencing arrangement. *Salgat*, 173 Mich App at 746. Due process is satisfied if a defendant is given the opportunity to respond to information contained in his or her presentence investigation report, and to bring any other pertinent information to the court's attention. *Saylor (Barry)*, 88 Mich App at 275.

"[T]he plain language of MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence[.]" *People v Smith (Ryan)*, 496 Mich 133, 142-143 (2014), overruling *People v Boynton*, 185 Mich App 669 (1990), *People v Dubis*, 158 Mich App 504 (1987), *People v Turner (Halbert)*, 92 Mich App 485 (1979), and *People v McLott*, 70 Mich App 524 (1976) ("to the extent they hold that a court loses jurisdiction to sentence a defendant as a remedy for a violation of MCL 771.1(2)[]"). "After the one-year statutory limitation elapses, sentencing may no longer be delayed for the purpose of permitting a defendant the opportunity to prove that he [or

[423] But see MCL 771.3(10), providing that "[i]f *sentencing is delayed* or entry of judgment is deferred *in the district court or in a municipal court*, the court . . . may impose, as applicable, the conditions of probation described in [MCL 771.3(1), (2), and (3)]" (emphasis supplied), and MCL 771.3(2)(a), which allows the court to order "imprison[ment] in the county jail for not more than 12 months[.]" MCL 771.3(9), which similarly permits the *circuit* court to "impose, as applicable, the conditions of probation described in [MCL 771.3(1), (2), and (3)]," applies only in cases in which "entry of judgment is deferred[;]" unlike MCL 771.3(10), MCL 771.3(9) does not state that it also applies to cases in which sentencing is delayed.

she] is worthy of leniency, and the judge is required to sentence [the] defendant as provided by law." *Smith (Ryan)*, 496 Mich at 142.

The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US ___, ___ (2016) (holding "that the Clause does not apply to delayed sentencing[]"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id*. at ___.

Supervision fees. In cases involving delayed sentencing, supervision fees are authorized under MCL 771.1(3).

If the court delays imposing sentence under MCL 771.1(2), it must indicate in the delayed sentence order that the Department of Corrections must collect a supervision fee from the defendant as provided in MCL 771.1(3).

MCL 771.1(3) contains the monetary considerations to be applied to a defendant whose sentencing has been delayed. The court must determine the amount of the monthly supervision fee owed by a defendant by considering the defendant's projected income and financial resources. MCL 771.1(3). Unlike the supervision fee ordered when a defendant is *sentenced* to a probationary period that may be for as many as 60 months (MCL 771.3c(1)), the supervision fee ordered in cases of delayed sentencing can be for no more than 12 months. MCL 771.1(3). The maximum monthly amount that may be ordered is $135, and a defendant cannot be subject to more than one supervision fee at a time. *Id*. "If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration." *Id*.

Other costs. In addition to a supervision fee, a defendant whose sentencing is delayed must pay the minimum state costs detailed in MCL 769.1j.[424] MCL 769.1k(1)(a). MCL 769.1k provides a court with general authority to impose fines, costs (including court costs), expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time his or her sentence is delayed. MCL 769.1k(1).[425] A court may also order a defendant whose sentence is delayed to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). A court may require a defendant to pay any

[424] See Section 3.42 for discussion of minimum state costs.

[425] As amended, 2014 PA 352, effective October 17, 2014. See Section 3.41 for discussion of costs.

fine, cost, or assessment ordered to be paid under MCL 769.1k by wage assignment. MCL 769.1k(4). In addition, a court may provide for the amounts imposed under MCL 769.1k to be collected at any time. MCL 769.1k(5). Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

Incarceration for failure to pay court-ordered financial obligations. Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

Traffic offenses and Secretary of State records. A trial court may not require the Secretary of State to amend driving records when a conviction is dismissed following a guilty plea and delayed sentencing under MCL 771.1. *People v McCann (Marcus)*, ___ Mich App ___, ___ (2016). Although MCL 257.732(1)(b) of the Michigan Vehicle Code "requires a trial court to forward abstracts to the Secretary of State following the dismissal of charges, . . . it does not command the secretary to take specific action in response[,]" and MCL 257.732(22) prohibits a court from ordering the expunction of a Secretary of State record of a reportable offense that has been set aside or dismissed. *McCann (Marcus)*, ___ Mich App at ___ (citations omitted).

3.48 Deferred Adjudication of Guilt

Deferred adjudication refers to the situation in which a defendant pleads or is found guilty of a charged offense, but where the adjudication of guilt is not immediately entered. There are several specific statutes authorizing a court to defer sentencing a defendant for a plea-based conviction provided the defendant complies with any terms or conditions on which the period of deferment is based. Under these statutes, the court places the defendant on probation and if he or she successfully completes the terms and conditions of probation, the court must discharge the defendant and dismiss the proceedings; no judgment of guilt is entered against the defendant. If the defendant violates a term or condition of probation during the probationary period, the court has the discretion to continue the probationary period, or to enter an adjudication of guilt and sentence the defendant.

Under very specific circumstances, a court may defer adjudication of guilt and place an individual on probation for the following types of offenses:[426]

- controlled substances, MCL 333.7411 (the statutory violations listed in MCL 333.7411 include both misdemeanor and felony offenses). The offenses under MCL 333.7411 for which deferred adjudication is authorized are as follows:

  - MCL 333.7403(2)(a)(*v*), possession of less than 25 mg of a schedule 1 or 2 controlled substance or cocaine-related substance (felony).

  - MCL 333.7403(2)(b), possession of a schedule 1, 2, 3, or 4 controlled substance or controlled substance analogue, or ecstasy, or methamphetamine, etc. (felony).

  - MCL 333.7403(2)(c), possession of a schedule 5 controlled substance, LSD, peyote, mescaline, etc. (misdemeanor).

  - MCL 333.7403(2)(d), possession of marijuana (misdemeanor).

  - MCL 333.7404, use of a controlled substance or controlled substance analogue without a valid prescription (misdemeanor).

  - MCL 333.7341, possession/use of an imitation controlled substance—second offense (misdemeanor).

- minor in possession, MCL 436.1703 (misdemeanor).

- impaired healthcare professional, MCL 750.430 (misdemeanor).

- domestic violence/spousal abuse, MCL 769.4a. The offenses under MCL 769.4a for which deferred adjudication is authorized are:

  - MCL 750.81, domestic assault or assault of a pregnant individual—first offense (misdemeanor).

  - MCL 750.81a, assault causing serious injury—first offense (misdemeanor).

- parental kidnapping, MCL 750.350a (felony).

- certain prostitution offenses committed by human trafficking victims, MCL 750.451c.[427]

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[426] Deferred adjudication is also permitted in certain circumstances for offenders admitted to a drug treatment court or a veterans treatment court. See Section 3.48(L) for discussion of these specialized courts. Additionally, certain crimes committed by youthful offenders are eligible for deferred adjudication under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*. See Section 3.49 for discussion of the HYTA.

The procedure involved in deferred adjudication cases is similar for all of the areas listed above. The steps of the process for deferral under these statutes are discussed in general below, and provisions unique to any of the five areas in which a deferred adjudication of guilt is available will be noted within the discussion itself.

A. Defendant Must Have No Previous Convictions for Offenses Specified in Statute

To qualify for deferral, a defendant must not have a previous conviction for any of the offenses specified by the applicable statute.

Controlled substances ("§7411"). A defendant must have no previous convictions for an offense listed under article 7 of the controlled substance act or an offense under any statute of the United States or any state related to narcotic drugs, cocaine, marijuana, stimulants, depressants, or hallucinogenic drugs. MCL 333.7411(1).

A conviction entered simultaneously with the charge to which a defendant seeks deferment under §7411 is not a "previous conviction" for purposes of §7411 and so does not render the defendant ineligible for §7411 status. *People v Ware*, 239 Mich App 437, 442 (2000).

Minor in possession. An individual must not have a previous conviction or a juvenile adjudication for violating MCL 436.1703(1), which prohibits a minor from purchasing/attempting to purchase, consuming/attempting to consume, possessing/attempting to possess alcoholic liquor, or having any bodily alcohol content. MCL 436.1703(3). "A violation of [MCL 436.1703(1)] successfully deferred, discharged, and dismissed under [MCL 436.1703(3)] is considered a prior violation for the purposes of [MCL 436.1703(1)(b) (governing second violations of MCL 436.1703(1)) and MCL 436.1703(1)(c) (governing third or subsequent violations)]." MCL 436.1703(4).

Impaired healthcare professional. A defendant must not have a previous conviction for violating MCL 750.430(1) (engaging in the practice of his or her profession with a bodily alcohol content specified in the statute or while under the influence of an illegally or improperly used controlled substance that visibly impairs the individual's ability to practice safely). MCL 750.430(9). In addition, to qualify for deferral under this provision, the conduct for which the defendant seeks deferral must not have resulted in physical harm or injury to the patient. *Id*.

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[427] See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 3, for detailed information concerning deferral for human trafficking victims.

Domestic violence/spousal abuse. A defendant must have no previous convictions for an assaultive crime as defined in MCL 769.4a(8)(a). MCL 769.4a(1).

Parental kidnapping. A defendant must not have a previous conviction for violating MCL 750.349 (kidnapping), MCL 750.350 (taking a child under age 14 from the child's parent, adoptive parent, or legal guardian), or MCL 750.350a (adoptive or natural parent taking a child, or retaining a child for more than 24 hours, with intent to conceal or detain the child), or for violating any statute of the United States or other state related to kidnapping. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. Deferment is available under MCL 750.451c for certain enumerated prostitution-related offenses "only if the violation . . . was committed as a direct result of the individual being a victim of a human trafficking violation[]"[428] and the individual "has not been convicted previously" of an enumerated offense. MCL 750.451c(1)-(2).

B. Defendant's Guilt Is Established by Plea or by Verdict

Generally, to qualify for deferral a defendant must plead guilty to or be found guilty of an offense listed in the statutory provision under which deferred adjudication is sought.

§7411. A defendant must plead guilty to or be found guilty of an offense expressly listed in MCL 333.7411(1). These offenses are possession of a controlled substance under MCL 333.7403(2)(a)(*v*), MCL 333.7403(2)(b), MCL 333.7403(2)(c), or MCL 333.7403(2)(d); use of a controlled substance under MCL 333.7404; or possession or use of an imitation controlled substance under MCL 333.7341 for a second time. MCL 333.7411(1).

Minor in possession. The individual must plead guilty to, or offer a plea of admission in a juvenile delinquency proceeding for, a violation of MCL 436.1703(1). MCL 436.1703(3).

Impaired healthcare professional. The statutory provision contains no language requiring a plea or other finding of guilt. See MCL 750.430(9). The provision later refers to the court's entry of an adjudication of guilt, an act that implicitly requires that the defendant's guilt be established in some manner. *Id*.

[428] For purposes of MCL 750.451c, "'human trafficking violation' means a violation of [MCL 750.462a *et seq*.]." MCL 750.451c(9).

Domestic violence/spousal abuse. An individual must plead guilty to or be found guilty of a violation of MCL 750.81 (domestic assault or assault of a pregnant individual) or MCL 750.81a (assault causing serious injury). MCL 769.4a(1). The statutory provision also requires that the victim of the defendant's conduct be a person listed in the statute: the defendant's spouse/former spouse; an individual with whom the defendant has a child in common; an individual who is dating or has dated the defendant; or an individual residing in or who has resided in the same household as the defendant. *Id*.

Parental kidnapping. An individual must plead guilty to or be found guilty of a violation of MCL 750.350a. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. Deferral is available to an individual who pleads guilty to, or is found guilty of, a violation of MCL 750.448 (accosting/soliciting/inviting another person to commit prostitution or do a lewd/immoral act), MCL 750.449 (admitting another person for purposes of prostitution), MCL 750.450 (aiding/abetting another person in violating MCL 750.448, MCL 750.449, or MCL 750.449a[429]), or MCL 750.462 (detaining or allowing a person 16 years of age or less to remain in a house of prostitution for a purpose other than prostitution), or a local ordinance substantially corresponding to one of these provisions. MCL 750.451c(2).

C. Defendant Must Consent to a Deferral of Adjudication

§7411. Deferred adjudication requires the defendant's consent. MCL 333.7411(1).

Minor in possession. Deferred adjudication requires the defendant's or juvenile's consent. MCL 436.1703(3).

Impaired healthcare professional. In addition to the defendant's consent, deferred adjudication also requires the prosecutor's consent. MCL 750.430(9).

Domestic violence/spousal abuse. In addition to the defendant, the prosecuting attorney, in consultation with the victim, must consent to a defendant's deferred adjudication. MCL 769.4a(1).

Parental kidnapping. The defendant must consent to deferred adjudication. MCL 750.350a(4).

[429] MCL 750.449a prohibits engaging or offering to engage the services of another person for the purpose of prostitution, lewdness, or assignation.

Prostitution offenses committed by human trafficking victims. Both the accused and the prosecuting attorney must consent to deferral. MCL 750.451c(2).

D. Defendant Placed on Probation and Proceedings Deferred

When all of the requirements in Section 3.48(A), Section 3.48(B), and Section 3.48(C), are satisfied, the court places the defendant on probation, further proceedings are deferred, and no judgment or adjudication of guilt is entered.

§7411. MCL 333.7411(1).

Minor in possession. MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(9).

Domestic violence/spousal abuse. Before deferring proceedings under MCL 769.4a, the court must first contact the department of state police to determine whether, according to police records, the defendant has previously been convicted of an assaultive crime or has previously availed himself or herself of the deferral described in MCL 769.4a. MCL 769.4a(1). If the records show that a defendant was arrested for an assaultive crime but do not show a disposition, the court must contact the arresting agency and the court with jurisdiction over the violation to determine the disposition of the arrest. *Id*.

Parental kidnapping. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. "The accused bears the burden of proving to the court by a preponderance of the evidence that the violation was a direct result of his or her being a victim of human trafficking." MCL 750.451c(2)(c)(*i*). In addition, before deferring proceedings, the court must contact the Department of State Police to determine whether the offender was previously convicted of an enumerated offense or has previously availed himself or herself of deferment under MCL 750.451c. MCL 750.451c(2)(a). If a search of State Police records "reveals an arrest for an assaultive crime but no disposition, the court shall contact the arresting agency and the court that had jurisdiction over the violation to determine the disposition of that arrest[.]" MCL 750.451c(2)(b). Upon fulfillment of these requirements, without entering a judgment of guilt, the court may defer the proceedings, place the accused on probation, and impose any conditions permitted under MCL 771.3 or MCL 750.451c(4). MCL 750.451c(2); MCL 750.451c(4).

E. Terms and Conditions of Probation Imposed Pursuant to Deferred Adjudication Provisions

The offenses for which deferred adjudication is available are not limited to felony offenses. Therefore, jurisdiction over the offenses may be in district court or circuit court, depending on whether the offense is a misdemeanor or a felony. MCL 771.3(9) specifically applies to deferred adjudications occurring in circuit court, and MCL 771.3(10) specifically applies to deferred adjudications occurring in district court.

According to MCL 771.3(9):

> "If entry of judgment is deferred *in the circuit court*, the court shall require the individual to pay a supervision fee in the same manner as is prescribed for a delayed sentence under [MCL 771.1(3)], shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j],[430] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)]." (Emphasis added.)

According to MCL 771.3(10):

> "If . . . entry of judgment is deferred *in the district court* . . . , the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j],[431] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)]." (Emphasis added.)

For deferred adjudications in circuit court, the supervision fee required by MCL 771.1(3) must be imposed on the defendant pursuant to MCL 771.3(9). However, no express language requires that a supervision fee be imposed on a defendant whose adjudication is deferred in district court.

Imposition of a supervision fee for a defendant whose adjudication is deferred by the district court appears to be authorized by MCL 771.3(5) when costs are imposed under MCL 771.3(2), a provision expressly mentioned in MCL 771.3(10). MCL 771.3(10) expressly authorizes a district court to impose any of the conditions described in MCL 771.3(1), (2), and (3), and MCL 771.3(2) expressly authorizes the district court to require the defendant to "[p]ay costs pursuant to subsection (5)." MCL 771.3(5) states: "If the court requires the

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[430] See Section 3.42 for discussion of minimum state costs.

[431] See Section 3.42 for discussion of minimum state costs.

probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant *and supervision of the probationer*." (Emphasis added.)

In sum, the interaction between and among MCL 771.3(9), MCL 771.3(10), and the individual deferred adjudication statutes must be examined carefully to determine the court's authority with regard to the imposition of supervision fees. Supervision fees are expressly required when an adjudication is deferred in circuit court. Supervision fees are not required when an adjudication is deferred in district court. However, MCL 771.3(5) may provide the district court with the authority and the discretion to impose supervision fees when adjudication is deferred in district court for misdemeanor offenses.

In the benchbook's discussion regarding the imposition of costs and supervision fees in deferred adjudication cases, care will be taken to first explain any express provisions in each individual deferred adjudication statute concerning the imposition of costs or supervision fees, followed by an explanation of the provisions in MCL 771.3(9) and MCL 771.3(10) concerning those same issues.

Any mandatory terms or conditions of probation[432] imposed under each of the areas discussed in this subsection are outlined below.

§7411. Under §7411, the defendant must pay a probation supervision fee as prescribed by MCL 771.3c. MCL 333.7411(1). The statutory language in MCL 333.7411(1) expressly mentions only that a defendant may be ordered to participate in a drug treatment court, but MCL 771.3(9) and MCL 771.3(10) authorize the court to impose any other term or condition it deems appropriate to the offense and the offender.[433]

A defendant convicted of violating article 7 of the controlled substance act (except for violations of MCL 333.7401(2)(a)(*i*) to (*iv*) or MCL 333.7403(2)(a)(*i*) to (*iv*)[434]) may, as part of the defendant's confinement or probation, be required to attend a program addressing the medical, psychological, and social effects of the misuse of drugs. MCL 333.7411(5). The defendant may be required to pay a fee for the program, and failure to complete a court-ordered

[432] See Section 3.46 for detailed information regarding terms and conditions of probation.

[433] MCL 333.7411(1) expressly requires the court to impose on the probationer the supervision fee indicated in MCL 771.3c. This express language appears to require that the supervision fee be imposed without regard to whether the offense for which adjudication is being deferred is a misdemeanor or felony offense under the jurisdiction of either the district or the circuit court.

[434] *Major controlled substance offenses* are discussed in detail in Section 3.20.

program is a violation of the terms and conditions of the defendant's probation. *Id*.

If a defendant is twice convicted of violating MCL 333.7341(4),[435] the court must, before the court imposes a sentence under MCL 333.7411(1), order the defendant to undergo substance abuse screening and assessment to determine whether rehabilitative services would likely benefit the defendant. MCL 333.7411(6). As part of a sentence imposed under MCL 333.7411(1), the defendant may be required to participate in and successfully complete one or more appropriate rehabilitation programs (e.g., alcohol or drug education and alcohol or drug treatment programs). MCL 333.7411(6). The defendant must pay the costs of screening, assessment, and rehabilitative services, and failure to complete a court-ordered rehabilitation program is a violation of the defendant's probation. *Id*.

Minor in possession. The minor must comply with the sanctions outlined in MCL 436.1703(1)(a):

- a fine of not more than $100;
- if ordered, participation in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in MCL 333.6107;[436]
- if ordered, community service; and
- if ordered, substance abuse screening and assessment at his or her own expense as set out in MCL 436.1703(5).

The minor must also pay costs including the minimum state cost described in MCL 712A.18m and MCL 769.1j[437] and probation costs required by MCL 771.3. MCL 436.1703(3). Because a violation of MCL 436.1703(1) is a misdemeanor offense over which the district court has jurisdiction, see also MCL 771.3(10), which expressly discusses terms and conditions of probation when adjudication is deferred in district court:

> "If . . . entry of judgment is deferred in the district court . . . , the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j][438] and may impose, as applicable, the conditions of

[435] Prohibits use/possession with intent to use an imitation controlled substance.

[436] MCL 333.6107 was repealed on December 28, 2012. See 2012 PA 500. MCL 436.1703(1)(a) has not yet been amended to reflect this change.

[437] SeeSection 3.42 for discussion of minimum state costs.

[438] See Section 3.42 for discussion of minimum state costs.

> probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)]."

Supervision fees for deferrals in district court are authorized by MCL 771.3(5). According to MCL 771.3(5), "[i]f the court requires the probationer to pay costs under [MCL 771.3(2)], the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer."

Impaired healthcare professionals. The defendant must participate in the health professional recovery program established by MCL 333.16167. MCL 750.430(9). The statutory provision also expressly mentions that a defendant may be ordered to participate in a drug treatment court as a condition of his or her probation. *Id*.

Other than the specific conditions of probation discussed above, MCL 750.430(9) makes no other express reference to the terms and conditions of probation found in MCL 771.3. MCL 750.430(9) states only that court "may defer further proceedings and place the accused on probation[.]" However, because a violation of MCL 750.430 is a misdemeanor under the district court's jurisdiction, "the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j][439] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)]." MCL 771.3(10).

Supervision fees for deferred adjudications in district court are authorized by MCL 771.3(5). According to MCL 771.3(5), "[i]f the court requires the probationer to pay costs under [MCL 771.3(2)], the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer."

Domestic violence/spousal abuse. No mandatory terms or conditions of probation are required by the provision authorizing deferral for the offenses listed in this statute. MCL 769.4a(3) expressly indicates that a defendant may be required to participate both in a mandatory counseling program and a drug treatment court, and that "[a]n order of probation entered under [MCL 769.4a(1)] may include any condition of probation authorized under [MCL 771.3]." MCL 769.4a(3). The defendant may be required to pay the reasonable costs of the counseling program. MCL 769.4a(3).

In addition, because the qualifying violations under MCL 750.430 are misdemeanor offenses under the district court's jurisdiction,[440]

[439] See Section 3.42 for discussion of minimum state costs.

"the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j][441] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)]." MCL 771.3(10).

Supervision fees for deferred adjudications in district court are authorized by MCL 771.3(5). According to MCL 771.3(5), "[i]f the court requires the probationer to pay costs under [MCL 771.3(2)], the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer."

Parental kidnapping. No mandatory terms or conditions of probation are required by the provision authorizing deferral for the offense listed in MCL 750.350a. Express language in MCL 750.350a(4) states only that the accused parent may be placed on probation "with lawful terms and conditions[that] . . . may include participation in a drug treatment court[.]" The statute makes no reference to the imposition of costs or supervision fees. Therefore, because a violation of MCL 750.350a(1) is a felony offense, the provisions of MCL 771.3(9) apply. According to MCL 771.3(9), when a defendant's adjudication is deferred in circuit court, the court must order the defendant to pay a supervision fee as designated in MCL 771.1(3). The court must also order the defendant to pay the minimum state costs prescribed by MCL 769.1j.[442] In addition, and as applicable, MCL 771.3(9) authorizes the court to impose any condition of probation listed in MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3).

Prostitution offenses committed by human trafficking victims. No mandatory terms or conditions of probation are required under MCL 750.451c; however, MCL 750.451c(4) sets out conditions of probation the court *may* include in the order of probation entered under MCL 750.451c(2):

> "An order of probation . . . may include any condition of probation authorized under . . . MCL 771.3, including, but not limited to, requiring the accused to participate in a mandatory counseling program. The court may order the accused to pay the reasonable costs of the mandatory counseling program. The court also may order the accused to participate in a drug treatment court under . . . MCL 600.1060 to [MCL] 600.1084. The

[440] First-time violations of MCL 750.81 and MCL 750.81a are misdemeanor offenses for which deferred adjudication is available under MCL 769.4a. MCL 769.4a(1).

[441] See Section 3.42 for discussion of minimum state costs.

[442] See Section 3.42 for discussion of minimum state costs.

> court may order the defendant to be imprisoned for not more than 93 days at a time or at intervals, which may be consecutive or nonconsecutive and within the period of probation, as the court determines. However, the period of imprisonment shall not exceed the maximum period of imprisonment authorized for the offense if the maximum period is less than 93 days. The court may permit day parole as authorized under . . . MCL 801.251 to [MCL] 801.258. The court may permit a work or school release from jail."

F. Failure to Successfully Complete the Probationary Period

With the exceptions detailed below, the court generally has discretion to enter a judgment of guilt and proceed to sentencing when a defendant violates a term or condition of his or her probation.

§7411. The court has discretion to enter an adjudication of guilt and proceed to sentencing if a defendant violates a term or condition of probation. MCL 333.7411(1). Adjudication of guilt is not mandatory under §7411 under these circumstances. *Id*.

Minor in possession. The court has discretion to enter an adjudication of guilt or finding of responsibility if a defendant or a juvenile violates a term or condition of probation, or when the court finds that the defendant or juvenile is using MCL 436.1703(3) in another court. MCL 436.1703(3).

Impaired healthcare professional. If a defendant violates a term or condition of probation, the court has discretion to enter an adjudication of guilt and sentence the defendant to imprisonment for not more than 180 days or impose a fine of not more than $1,000, or both. MCL 750.430(8)(a); MCL 750.430(9).

Domestic violence/spousal abuse. Except as described below, a court has discretion to enter an adjudication of guilt and proceed to sentencing if a defendant violates a term or condition of probation. MCL 769.4a(2).

A court must enter an adjudication of guilt and proceed to sentencing if the defendant commits an assaultive crime during the period of his or her probation. MCL 769.4a(4)(a). An "assaultive crime" for purposes of this provision means the term as it is defined in MCL 770.9a(3), a violation of MCL 750.81 to MCL 750.90h, or a violation of a law of another state or of a local ordinance of a political subdivision of this state or of another state that

substantially corresponds to an offense found in MCL 770.9a(3) or MCL 750.81 to MCL 750.90h. MCL 769.4a(8)(a)(*i*)-(*iii*).

Entry of an adjudication of guilt and proceeding to sentencing is also mandatory if the defendant violates a court order requiring that the defendant receive counseling for his or her violent behavior, MCL 769.4a(4)(b), or if the defendant violates a court order prohibiting contact with a named individual, MCL 769.4a(4)(c).

Parental kidnapping. The court has discretion to enter an adjudication of guilt and proceed to sentencing if the defendant violates a term or condition of probation. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. The court may enter an adjudication of guilt upon a violation of a term or condition of probation. MCL 750.451c(3). Additionally, the court *must* enter an adjudication of guilt if the offender commits an enumerated offense or violates an order that he or she receive counseling for violent behavior or that he or she have no contact with a named individual. MCL 750.451c(5).

G. Successful Completion of the Probationary Period

A court must discharge the defendant (or juvenile) and dismiss the proceedings against him or her when the defendant (or juvenile) has fulfilled the terms and conditions of his or her probationary period.

§7411. MCL 333.7411(1).

Minor in possession. MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(9).

Domestic violence/spousal abuse. MCL 769.4a(5).

Parental kidnapping. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. MCL 750.451c(6).

H. Discharge and Dismissal Without Entry of an Adjudication of Guilt

§7411. Except as otherwise provided by law,[443] a discharge and dismissal under §7411 is not a conviction for purposes of MCL 333.7411 or for purposes of disqualifications or disabilities imposed

[443] See MCL 600.1076(4)(e).

by law for criminal convictions. MCL 333.7411(1). Additionally, the discharge and dismissal is not a conviction for purposes of the penalties imposed for subsequent convictions under MCL 333.7413. MCL 333.7411(1).

When a defendant has successfully completed the term of probation imposed under MCL 333.7411, the felony charge is dismissed and is not a felony conviction for purposes of the concealed pistol licensing act (CPLA), MCL 28.421 *et seq*. *Carr v Midland Co Concealed Weapons Licensing Bd*, 259 Mich App 428, 438 (2003).

Minor in possession. Discharge and dismissal under MCL 436.1703 is without an adjudication of guilt or a determination of responsibility in a delinquency proceeding and is not a conviction or juvenile adjudication for purposes of MCL 436.1703 or for purposes of disqualifications or disabilities imposed by law for criminal convictions (including additional penalties imposed for second or subsequent convictions or juvenile adjudications under MCL 436.1703(1)(b) and MCL 436.1703(1)(c)). MCL 436.1703(3).

Impaired healthcare professional. A discharge and dismissal under MCL 750.430 is without adjudication of guilt and is not a conviction for purposes of MCL 750.430 or for purposes of disqualifications or disabilities imposed by law for conviction of a crime, including additional penalties imposed for second or subsequent convictions under MCL 750.430(8)(b). MCL 750.430(9).

Domestic violence/spousal abuse. A discharge and dismissal under MCL 769.4a is without adjudication of guilt and is not a conviction for purposes of MCL 769.4a or for purposes of disqualifications or disabilities imposed by law for conviction of a crime. MCL 769.4a(5). However, a discharge and dismissal *does* constitute a prior conviction for purposes of a prosecution under MCL 750.81(4) or MCL 750.81(5)[444] (certain repeat offenses involving domestic assault or assault of a pregnant individual), or a prosecution under MCL 750.81a(3) for aggravated domestic assault with one or more previous domestic assault convictions. MCL 769.4a(5).

Parental kidnapping. A discharge and dismissal under MCL 750.350a is without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law for conviction of a crime, including any additional penalties imposed for second or subsequent convictions. MCL 750.350a(4). Unlike

[444] Effective July 25, 2016, 2016 PA 87 amended MCL 750.81 (governing domestic assault) by adding new MCL 750.81(3) to prescribe an additional misdemeanor penalty for the assault or assault and battery of a pregnant individual, and to add this new offense to provisions prescribing enhanced penalties for subsequent convictions. Although the amendments resulted in the renumbering of former MCL 750.81(3) and MCL 750.81(4), MCL 769.4a(5) was not amended accordingly and still refers to the former subsections.

other deferred adjudication statutes, MCL 750.350a(4) does not include express language excepting a discharge and dismissal under this provision from being considered a conviction for purposes of MCL 750.350a. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. Discharge and dismissal is without adjudication of guilt and "is not a conviction for purposes of [MCL 750.451c] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." MCL 750.451c(6).

I. Record of Deferred Adjudication

§7411. All court proceedings under MCL 333.7411 are open to the public. MCL 333.7411(2). "[I]f the record of proceedings . . . is deferred under [MCL 333.7411], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 333.7411(2). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 333.7411(3). This nonpublic record is open, for limited purposes as set out in MCL 333.7411(3)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 333.7411(3).

An offender whose adjudication of guilt is deferred under MCL 333.7411 and whose case is dismissed after successful completion of the terms of probation does not qualify as "not guilty" for purposes of MCL 28.243(8), and is therefore not entitled to the destruction of his or her fingerprints and arrest card. *People v Benjamin*, 283 Mich App 526, 527-528, 537 (2009).

A discharge and dismissal following a defendant's successful fulfillment of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring prior record variable (PRV) 5. *People v James (Derrick)*, 267 Mich App 675, 678-680 (2005). MCL 333.7411(1) specifically states that "[d]ischarge and dismissal under [MCL 333.7411] shall be without adjudication of guilt and . . . is not a conviction for purposes of [MCL 333.7411] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . ."

Minor in possession. During the period when proceedings are deferred and the individual is on probation, and if there is a discharge and dismissal, the court must maintain a nonpublic record of the matter. MCL 436.1703(3). The secretary of state must retain a nonpublic record of a plea and of the discharge and

dismissal under MCL 436.1703(3). MCL 436.1703(3). See MCL 436.1703(3)(a)-(b) for circumstances under which, and people to whom, the record will be furnished.

Impaired healthcare professional. Unless the court enters a judgment of guilt, the state police records and identifications division must retain a nonpublic record of the arrest, court proceedings, and disposition under MCL 750.430(9). MCL 750.430(9). See MCL 750.430(9)(a)-(c) for circumstances under which, and people to whom, the record will be furnished.

Domestic violence/spousal abuse. All court proceedings under MCL 769.4a are open to the public. MCL 769.4a(6). "[I]f the record of proceedings . . . is deferred under [MCL 769.4a], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 769.4a(6). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 769.4a(7). This nonpublic record is open, for limited purposes as set out in MCL 769.4a(7)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 769.4a(7).

An offender whose adjudication of guilt was deferred under MCL 769.4a and whose case is dismissed after successful completion of a diversionary program does not qualify as "not guilty" and is not entitled to the destruction of his or her fingerprint card under MCL 28.243(8). *McElroy v Michigan State Police Criminal Justice Info Ctr*, 274 Mich App 32, 33 (2007).

Parental kidnapping. All court proceedings under MCL 750.350a are open to the public. MCL 750.350a(5). "[I]f the record of proceedings . . . is deferred under [MCL 750.350a], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 750.350a(5). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 750.350a(6). This nonpublic record is open, for limited purposes as set out in MCL 750.350a(6)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 750.350a(6).

Prostitution offenses committed by human trafficking victims. All court proceedings under MCL 750.451c are open to the public. MCL 750.451c(7). "[I]f the record of proceedings . . . is deferred . . . , the record of proceedings during the period of deferral shall be closed to public inspection." MCL 750.451c(7). However, unless a

judgment of guilt is entered, the Department of State Police must retain a nonpublic record, which is open, for limited purposes as set out in MCL 750.451c(8)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 750.451c(8).

J. Only One Discharge and Dismissal Available

An individual may obtain only one discharge and dismissal under each of the deferred adjudication statutes discussed in this section.

§7411. MCL 333.7411(1).

Minor in possession. MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(9).

Domestic violence/spousal abuse. MCL 769.4a(5).

Parental kidnapping. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. MCL 750.451c(6).

K. Fines, Costs, and Assessments

MCL 769.1k[445] provides a court with general authority to impose fines, costs (including court costs), expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time entry of an adjudication of guilt is deferred. The court must order a defendant to pay the minimum state costs as prescribed by MCL 769.1j. MCL 769.1k(1)(a).[446] In addition, a court may order a defendant to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). The general authority to impose the monetary penalties listed in MCL 769.1k(1)-(2) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).[447] MCL 769.1k(4) authorizes a court to order a defendant to pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of the penalties imposed

[445] As amended, 2014 PA 352, effective October 17, 2014. See Section 3.41 for discussion of costs.

[446] See Section 3.42 for additional discussion of minimum state costs.

[447] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

pursuant to MCL 769.1k at any time. MCL 769.1k(5). Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

Whenever adjudication is deferred for commission of a felony offense, the court must order the individual to pay a $130 crime victim assessment. MCL 780.905(1)(a). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2). A $75 crime victim assessment must be ordered in cases involving misdemeanors or ordinance violations. MCL 780.905(1)(b).[448]

L. Specialized Treatment Courts

Deferred adjudication, delayed sentencing, and discharge and dismissal of proceedings may be obtained under certain circumstances in drug treatment courts and veterans treatment courts.

1. Drug Treatment Courts[449]

a. Creation of and Admission to a Drug Treatment Court

MCL 600.1062(1)-(2) provide that a district court, circuit court, or Family Division of circuit court may adopt or institute a drug treatment court or juvenile drug treatment court.

If a drug treatment court or juvenile drug treatment court will include in its program individuals who may be eligible for discharge or dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines, the court must "enter[] into a memorandum of understanding" with each participating prosecuting attorney in the district, a representative of the criminal defense bar (specializing in juvenile law, in the case of a juvenile drug treatment court), and a representative or

[448] Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime victim assessment of $75.00 in cases involving a conviction of *any* misdemeanor or ordinance violation (rather than only a "serious" or "specified" misdemeanor). Related provisions were amended by 2011 PA 293, 2011 PA 295, and 2011 PA 296, also effective April 1, 2012. See Section 3.43 for additional discussion of crime victim assessments.

[449] See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 9, for a thorough discussion of drug treatment courts.

representatives of community treatment providers. MCL 600.1062(1)-(2).

MCL 600.1064 sets forth the general requirements an individual must meet in order to be admitted into a drug treatment court. No individual has a right to be admitted into a drug treatment court. MCL 600.1064(1). Instead, it is up to each individual drug court to determine whether an individual may be admitted. *Id*. Furthermore, an individual is not eligible for admission into a drug treatment court if he or she is a violent offender, as defined by MCL 600.1060(g). MCL 600.1064(1).

If preadmissions screening and other requirements are met, see MCL 600.1064(1); MCL 600.1064(3), individuals who have been assigned the status of youthful trainee under MCL 762.11, or who have been placed on probation pursuant to the deferred adjudication provisions of MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (specific domestic violence offenses), MCL 750.430 (impaired healthcare professionals), or MCL 750.350a (parental kidnapping), are eligible for admission into a drug treatment court. MCL 600.1064(2).

b. Applicants Who Are Currently Charged With a Criminal Offense

MCL 600.1068 governs those cases where the applicant is charged with a crime. If the applicant is charged with a crime, or is a juvenile alleged to have engaged in activity that would constitute a criminal act if committed by an adult, his or her admission is subject to the following conditions:

- the offense(s) allegedly committed must be related to the abuse, illegal use, or possession of a controlled substance or alcohol. MCL 600.1068(1)(a).

- the individual, if an adult, must plead guilty to the charge(s) on the record, or if a juvenile, must admit responsibility for the violation(s) that he or she is accused of having committed. MCL 600.1068(1)(b).

- the individual must waive, in writing, the right to a speedy trial, the right to representation by an attorney at drug treatment court review hearings, and, with the agreement of the prosecutor, the right to

a preliminary examination. MCL 600.1068(1)(c).

- the individual must sign a written agreement to participate in the drug treatment court. MCL 600.1068(1)(d).

"In the case of an individual who will be eligible for discharge and dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines, the prosecutor must approve of the admission of the individual into the drug treatment court in conformity with the memorandum of understanding under [MCL 600.]1062." MCL 600.1068(2). See also *People v Baldes*, 309 Mich App 651, 656-657 (2015) (holding that "courts may not admit a defendant into a drug treatment court program when doing so departs from the sentencing guidelines and the prosecutor has not approved[]"). Moreover, a "prosecuting attorney's decision to sign [a] referral form" for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) "[does] not constitute a waiver [of the right to challenge the trial court's decision to depart from the sentencing guidelines] or approval[of the defendant's admission into drug treatment court]" if the form "[does] not state that it constitute[s] approval of the individual's admission into the drug treatment court program[;]" furthermore, "a prosecutor's silence is not sufficient to constitute approval under [MCL 600.1068] and does not waive the prosecutor's right to later demand enforcement of sentencing guidelines." *Baldes*, 309 Mich App at 656-657.

An individual may not be admitted to, or remain in, a drug treatment court if his or her admission and participation would permit a discharge or dismissal of a traffic offense upon successful completion of the drug treatment court program. MCL 600.1068(3).

c. Post-Admission Procedures

MCL 600.1070(1) sets forth three separate dispositional rules, depending on the status of the case against the applicant at the time he or she is admitted to drug treatment court.

- **Criminal charges pending at time of admission.** When an individual is admitted to drug treatment court based on criminal

charges that are still pending against him or her, the drug treatment court must accept the guilty plea or, in the case of a juvenile, the admission of responsibility. MCL 600.1070(1)(a).

- **Guilty plea or admission of responsibility entered prior to admission.** When an individual is admitted to drug treatment court based on criminal charges to which the individual has pleaded guilty or, in the case of a juvenile, has admitted responsibility, the drug treatment court has two dispositional options: (1) if the offense was not a traffic offense and the individual may be eligible for discharge and dismissal of the charge upon successful completion of the drug treatment court program, the court must not enter a judgment of guilt or adjudication of responsibility, MCL 600.1070(1)(b)(*i*); or (2) if the offense was a traffic offense, or where the individual may not be eligible for discharge and dismissal upon successful completion of the drug treatment court program, the court must enter a judgment of guilt or an adjudication of responsibility, MCL 600.1070(1)(b)(*ii*).

- Deferred or immediate sentence. When an individual is admitted to drug treatment court based on criminal charges for which the individual and the prosecuting attorney have reached an agreement, the court may either defer proceedings until completion of the drug treatment court program, or may proceed to sentencing and place the individual on probation or other court supervision with participation in drug treatment court as a term of the individual's probation or supervision. MCL 600.1070(1)(c).

d. Successful Completion of the Drug Court Treatment Program

For participants who successfully complete probation or other supervision by the court and whose proceedings were deferred or who were sentenced pursuant to MCL 600.1070, "the court shall comply with the agreement made with the participant upon admission into the drug treatment court, or the agreement as it was altered after

admission by the court with approval of the participant and the prosecutor for that jurisdiction as provided in [MCL 600.1076(3)-(8)]." MCL 600.1076(2).

- **Deferred adjudication.** If an individual who successfully completes drug treatment court is participating pursuant to MCL 762.11 (youthful trainee status), MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (domestic violence offenses), MCL 750.350a (parental kidnapping), or MCL 750.430 (impaired healthcare professionals), the court shall proceed pursuant to the applicable section of law. MCL 600.1076(3). Only one discharge or dismissal is permitted under MCL 600.1076(3).

- **Discharge and dismissal.** Subject to the memorandum of understanding under MCL 600.1062, and with the prosecutor's consent, proceedings may be dismissed and discharged against a drug court participant who satisfies the requirements of MCL 600.1076(4)(a)-(e). Additional requirements apply to dismissal and discharge of proceedings against an individual charged with a domestic violence offense. MCL 600.1076(5). A discharge and dismissal under MCL 600.1076(4) is without adjudication of guilt or responsibility, and does not represent a conviction or finding of responsibility for purposes of MCL 600.1076 or for purposes of any disqualifications or disabilities imposed by law for conviction of a crime or a finding of responsibility. MCL 600.1076(6). An individual is only entitled to one discharge and dismissal under MCL 600.1076(4). MCL 600.1076(6).

- **Participants not entitled to dismissal and discharge.** Participants who successfully complete a drug treatment court program but are not entitled to dismissal and discharge of the proceedings against them are subject to the provisions of MCL 600.1076(7).

e. Records

All court proceedings under MCL 600.1076 are open to the public. MCL 600.1076(9).

Unless a judgment of guilt or adjudication of responsibility is entered under MCL 600.1076, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 600.1076(10). This nonpublic record is open, for limited purposes as set out in MCL 600.1076(10)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 600.1076(10).

The following additional requirements apply, depending on the outcome of the proceedings under MCL 600.1076:

- **Deferred adjudication.** Except for the nonpublic record that must be maintained by the Department of State Police under MCL 600.1076(10), "if the record of proceedings . . . is deferred under [MCL 600.1076], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 600.1076(9).

- **Discharge and dismissal.** Following a discharge and dismissal under MCL 600.1076(4), the court must send a record of the discharge and dismissal to the Department of State Police, which must "enter that information into the law enforcement information network with an indication of participation by the individual in a drug treatment court." MCL 600.1076(6). All records of the drug treatment court proceedings under MCL 600.1076(4) are closed to public inspection and exempt from public disclosure under the Freedom of Information Act, MCL 15.231 *et seq*. MCL 600.1076(6).

- **Successful participants not entitled to dismissal and discharge.** If an adjudication of guilt or responsibility and a sentence or disposition are entered following successful participation in the drug treatment court program, the court must "[s]end a record of the conviction and sentence or the finding or adjudication of responsibility and

disposition" to the Department of State Police, which must then "enter that information into the law enforcement information network with an indication of successful participation by the individual in a drug treatment court." MCL 600.1076(7)(c).

- **Unsuccessful participants.** Upon sentencing or disposition of an individual whose participation is terminated or who fails to successfully complete the drug treatment court program, the court must send a record of the sentence or disposition and the individual's unsuccessful participation in the drug treatment court to the Department of State Police, which must "enter that information into the law enforcement information network, with an indication that the individual unsuccessfully participated in a drug treatment court." MCL 600.1076(8).

2. Veterans Treatment Courts[450]

a. Creation of and Admission to a Veterans Treatment Court

Circuit and district courts are authorized to adopt or institute a veterans treatment court. MCL 600.1201(2).

MCL 600.1201(2) provides that "if the veterans treatment court [adopted or instituted by a circuit or district court under MCL 600.1201] will include in its program individuals who may be eligible for discharge and dismissal of an offense, a delayed sentence, deferred entry of judgment, or a sentence involving deviation from the sentencing guidelines[,]" the circuit or district court must include the prosecuting attorney in the memorandum of understanding that must, in order to establish a veterans treatment court, be entered into with representatives of various entities specified in MCL 600.1201(2).

"An individual who may be eligible for discharge and dismissal of an offense, delayed sentence, deferred entry of judgment, or deviation from the sentencing guidelines

[450] Effective October 16, 2012, 2012 PA 335 added MCL 600.1200 *et seq*. to the Revised Judicature Act to establish veterans treatment courts to provide treatment programs for veterans who are either substance abusers or mentally ill. See MCL 600.1201(2); MCL 600.1204(b).

shall not be admitted to a veterans treatment court unless the prosecutor first approves the admission of the individual into the veterans treatment court in conformity with the memorandum of understanding under [MCL 600.]1201(2)." MCL 600.1205(2). See also *People v Baldes*, 309 Mich App 651, 656-657 (2015), applying MCL 600.1068(2) (a similar provision governing admission to drug treatment court) and noting that "courts may not admit a defendant into a drug treatment court program when doing so departs from the sentencing guidelines and the prosecutor has not approved." Additionally, the *Baldes* Court held that a "prosecuting attorney's decision to sign [a] referral form" for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) "[does] not constitute a waiver [of the right to challenge the trial court's decision to depart from the sentencing guidelines] or approval[of the defendant's admission into drug treatment court]" if the form "[does] not state that it constitute[s] approval of the individual's admission into the drug treatment court program[,]" and that "a prosecutor's silence is not sufficient to constitute approval under [MCL 600.1068] and does not waive the prosecutor's right to later demand enforcement of sentencing guidelines." *Baldes*, 309 Mich App at 656-657.

Admission to a veterans treatment court is available to a veteran who is dependent on alcohol or drugs, a substance abuser, or mentally ill and who meets certain additional requirements, including that he or she is not a violent offender[451] or an unwarranted or substantial risk to the safety of the public or an individual. MCL 600.1204.

In addition to individuals currently charged with a crime or other qualifying individuals, an eligible individual may be admitted to a veterans treatment court if he or she has been assigned youthful trainee status under MCL 762.11 or has had criminal proceedings against him or her deferred and has been placed on probation under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), MCL 750.430 (practice of profession by health care professional while

[451] "'Violent offender' means an individual who is currently charged with or has pled guilty to an offense involving the death of, or a serious bodily injury to, any individual, whether or not any of these circumstances are an element of the offense, or an offense that is ~~[sic]~~ criminal sexual conduct in any degree." MCL 600.1200(k)~~MCL 600.1200(m)~~.

under the influence of alcohol or controlled substance), or an ordinance or law that is substantially similar to one of these provisions. MCL 600.1203(2).

An individual admitted to a veterans treatment court is entitled to certain services, including close monitoring, a mentorship relationship with another veteran, and substance abuse and mental health treatment services as appropriate and practicable. MCL 600.1207(1).

b. Applicants Who Are Currently Charged With a Criminal Offense

If an individual seeking admission to a veterans treatment court is charged in a criminal case, the offenses must be generally related to his or her military service, including substance abuse or mental illness arising as a result of service; additionally, the individual must plead guilty, waive certain rights, and sign a written agreement to participate in the court. MCL 600.1205(1).

c. Post-Admission Procedures

- **Criminal charges pending at time of admission.** If a criminal charge was pending against the individual at the time of admission to a veterans treatment court, he or she must enter a plea of guilty. MCL 600.1205(1); MCL 600.1206(1)(a).

- **Guilty plea entered prior to admission.** "If the individual pled guilty to an offense that is not a traffic offense and may be eligible for discharge and dismissal under the agreement with the court and prosecutor upon successful completion of the veterans treatment court program, the court shall not enter a judgment of guilt[;]" otherwise, the court must enter a judgment of guilt. MCL 600.1206(1)(b)(*i*)-(*ii*).

- **Deferred or immediate sentence.** "Under the agreement with the individual and the prosecutor, the court may delay or defer further proceedings as provided in . . . MCL 771.1, or proceed to sentencing, as applicable in that case under that agreement, and place the individual on probation or other court supervision in the

veterans treatment court program[.]" MCL 600.1206(1)(c).

d. Successful Completion of the Veterans Treatment Court Program

Upon successful completion by an individual whose proceedings were deferred or who was sentenced under MCL 600.1206, the court must comply with the agreement made with the individual. MCL 600.1209(2).

- **Deferred adjudication.** If the individual is participating under MCL 762.11 (youthful trainee status) or has had criminal proceedings against him or her deferred and has been placed on probation under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance), or an ordinance or law that is substantially similar to one of these provisions, "the court shall proceed under the applicable section of law[, and t]here shall be not more than 1 discharge or dismissal" in such a case. MCL 600.1203(2); MCL 600.1209(3).

- **Discharge and dismissal.** With the exception of traffic offenses and certain domestic violence offenses, the court, with the agreement of the prosecutor,[452] may discharge and dismiss the proceedings against a successful first-time veterans treatment court participant who is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty; the participant must not have previously been assigned

[452] MCL 600.1201(2) provides that "if the veterans treatment court [adopted or instituted by a circuit or district court under MCL 600.1201] will include in its program individuals who may be eligible for discharge and dismissal of an offense, a delayed sentence, deferred entry of judgment, or a sentence involving deviation from the sentencing guidelines[,]" the circuit or district court must include the prosecuting attorney in the memorandum of understanding that must, in order to establish a veterans treatment court, be entered into with representatives of various entities specified in MCL 600.1201(2). "An individual who may be eligible for discharge and dismissal of an offense, delayed sentence, deferred entry of judgment, or deviation from the sentencing guidelines shall not be admitted to a veterans treatment court unless the prosecutor first approves the admission of the individual into the veterans treatment court in conformity with the memorandum of understanding under [MCL 600.]1201(2)." MCL 600.1205(2).

youthful trainee status or had criminal proceedings dismissed under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance). MCL 600.1209(4). Discharge and dismissal of a domestic violence offense may be granted only if the individual has not previously had proceedings dismissed under MCL 769.4a (Spouse Abuse Act), the offense is eligible to be dismissed under the Act, and the individual fulfills the terms imposed under the Act. MCL 600.1209(5). A discharge and dismissal under MCL 600.1209(4) must "be without adjudication of guilt and is not a conviction for purposes of [MCL 600.1209] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." MCL 600.1209(6). The court must send a record of the discharge and dismissal to the Department of State Police, which must enter this information into the law enforcement information network (LEIN) with an indication that the individual participated in a veterans treatment court. *Id*.

- Successful completion without discharge or dismissal. Except as provided in MCL 600.1209(3)-(5) (governing discharge and dismissal), "if an individual has successfully completed probation or other court supervision," the court must enter an adjudication of guilt, if it has not already entered an adjudication of guilt or responsibility; proceed to sentencing, if it has not already sentenced the individual; and send a record of the conviction and sentence, or the finding or adjudication of responsibility and disposition, to the criminal justice information center of the Department of State Police, which must enter the information into the LEIN with an indication of successful participation by the individual in a veterans treatment court. MCL 600.1209(7).

e. Failure to Successfully Complete Veterans Treatment Court Program

MCL 600.1209(8) provides:

> "For a participant whose participation is terminated or who fails to successfully complete the veterans treatment court program, the court shall enter an adjudication of guilt if the entering of guilt was deferred or sentencing was delayed under [MCL 600.1206] and shall then proceed to sentencing or disposition of the individual for the original charges to which the individual pled guilty prior to admission to the veterans treatment court. Upon sentencing or disposition of the individual, the court shall send a record of that sentence or disposition and the individual's unsuccessful participation in the veterans treatment court to the criminal justice information center of the [D]epartment of [S]tate [P]olice, . . . [which] shall enter that information into the [law enforcement information network (LEIN)], with an indication that the individual unsuccessfully participated in a veterans treatment court."

f. Records

MCL 600.1209(6) provides, in relevant part:

> "Unless the court enters a judgment of guilt, all records of the proceedings regarding the participation of the individual in the veterans treatment court under [MCL 600.1209(4)] are closed to public inspection and are exempt from public disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, but shall be open to the courts of this state, another state, or the United States, the [D]epartment of [C]orrections, law enforcement personnel, and prosecutors only for use in the performance of their duties or to determine whether an employee of the court, [D]epartment, law enforcement agency, or prosecutor's office has violated his or her conditions of employment or whether an applicant meets criteria for employment with

> the court, [D]epartment, law enforcement agency, or prosecutor's office. The records and identifications division of the [D]epartment of [S]tate [P]olice shall retain a nonpublic record of an arrest and the discharge and dismissal under [MCL 600.1209(6)]."

3. Mental Health Courts[453]

a. Adoption or Institution of a Mental Health Court

Circuit and district courts are authorized to adopt or institute a mental health court pursuant to statute or court rules.[454] MCL 600.1091(1). In addition, "[a] family division of circuit court . . . may adopt or institute a juvenile mental health court pursuant to statute or court rules." MCL 600.1091(2).[455]

MCL 600.1091(1) provides that "if [a] mental health court will include in its program individuals who may be eligible for discharge and dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines[,]" the circuit or district court must "enter[] into a memorandum of understanding with each participating prosecuting attorney in the circuit or district court district[]" and representatives of various specified entities.[456]

"A mental health court may hire or contract with licensed or accredited treatment providers[] . . . to assist the mental health court in fulfilling its requirements under [Chapter 10B, MCL 600.1090 *et seq*.]." MCL 600.1092.

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[453] Effective December 30, 2013, 2013 PA 274—2013 PA 277 added Chapter 10B, MCL 600.1090 *et seq*., to the Revised Judicature Act to establish mental health courts and juvenile mental health courts to provide "court-supervised treatment program[s] 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[,]" or "[p]rograms designed to adhere to the 10 essential elements of a mental health court promulgated by the [B]ureau of [J]ustice [A]ssistance" that include certain defined characteristics. See MCL 600.1090(e); MCL 600.1091(1)-(2).

[454] The Michigan Supreme Court "is responsible for the expenditure of state funds for the establishment and operation of mental health courts[,]" and a mental health court must provide quarterly reports to the State Court Administrative Office (SCAO) regarding the funds received and expended. MCL 600.1099a(1)-(2).

[455] "A juvenile mental health court is subject to the same procedures and requirements provided in [Chapter 10B] for a mental health court created under [MCL 600.1091(1)], except as specifically provided otherwise in [Chapter 10B]." MCL 600.1091(2). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1, for discussion of juvenile mental health courts.

[456] A similar requirement applies to juvenile mental health courts. See MCL 600.1091(2).

b. Definition of "Mental Health Court"

MCL 600.1090(e) defines "'[m]ental health court'" as 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.[457]
>
> (*ii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the [B]ureau of [J]ustice [A]ssistance that include all of the . . . characteristics[set out in MCL 600.1090(e)(*ii*)(A)-(J).[458]]"

c. Eligibility

"Admission into a mental health court program is at the discretion of the court based on the individual's legal or clinical eligibility." MCL 600.1093(1). Prior participation in or completion of a mental health court program does not preclude admission; however, a violent offender[459] may not be admitted. *Id*.

An eligible individual may also be admitted to a mental health court if he or she has been assigned youthful trainee status under MCL 762.11 or has had criminal

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[457] "[S]erious mental illness," "serious emotional disturbance," and "developmental disability[]" mean those terms as defined in the Mental Health Code, MCL 330.1100 *et seq*. MCL 600.1090(c); MCL 600.1090(g); MCL 600.1090(h); see also MCL 330.1100a; MCL 330.1100d. "'Co-occurring disorder' means having [one] 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 [one] disorder of each type can be established independent of the other and is not simply a cluster of symptoms resulting from [one] disorder." MCL 600.1090(a).

[458] Required characteristics include "[e]ligibility 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[,]" MCL 600.1090(e)(*ii*)(B), and the provision of "legal counsel to indigent defendants [in accordance with the Michigan Indigent Defense Commission Act, MCL 780.981 *et seq*.,] to explain program requirements, including voluntary participation, and guide[] defendants in decisions about program involvement[,]" MCL 600.1090(e)(*ii*)(E).

[459] "'Violent offender' means an individual who is currently charged with, or has been convicted of, an offense involving the death of, or a serious bodily injury to, any individual, whether or not any of these circumstances are an element of the offense, or with criminal sexual conduct in any degree." MCL 600.1090(i).

proceedings against him or her deferred and has been placed on probation under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance). MCL 600.1093(2).

The court may, but is not required to, "accept participants from any other jurisdiction in [the] state based upon the residence of the participant in the receiving jurisdiction, the nonavailability of a mental health court in the jurisdiction where the participant is charged, and the availability of financial resources for both operations of the mental health court program and treatment services." MCL 600.1091(3).

d. Preadmission Screening and Evaluation Assessment

MCL 600.1093(3) provides:

> "To be admitted to a mental health court, an individual shall cooperate with and complete a preadmission screening and evaluation assessment and shall submit to any future evaluation assessment as directed by the mental health court.[460] A preadmission screening and evaluation assessment shall include all of the following:
>
> > (a) A review of the individual's criminal history. A review of the law enforcement information network [(LEIN)] may be considered sufficient for purposes of [MCL 600.1093(3)(a)] unless a further review is warranted.[461] The court may accept other verifiable and reliable information from the prosecution or

[460] "Except as otherwise permitted in [Chapter 10B, MCL 600.1090 *et seq*.], any statement or other information obtained as a result of participating in a preadmission screening and evaluation assessment under [MCL 600.1093(3)] is confidential and is exempt from disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, and shall not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal drug use." MCL 600.1093(4).

[461] "The court may request that the [D]epartment of [S]tate [P]olice provide to the court information contained in the law enforcement information network [(LEIN)] pertaining to an individual applicant's criminal history for the purposes of determining an individual's eligibility for admission into the mental health court and general criminal history review." MCL 600.1093(5).

> defense to complete its review and may require the individual to submit a statement as to whether or not he or she has previously been admitted to a mental health court and the results of his or her participation in the prior program or programs.
>
> (b) An assessment of the risk of danger or harm to the individual, others, or the community.
>
> (c) A mental health assessment, clinical in nature, and using standardized instruments that have acceptable reliability and validity, meeting diagnostic criteria for a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.[462]
>
> (d) A review of any special needs or circumstances of the individual that may potentially affect the individual's ability to receive mental health or substance abuse treatment and follow the court's orders.
>
> (e) For a juvenile, an assessment of the juvenile's family situation, including, to the extent practicable, a comparable review of any guardians or parents."

Any victim of a charged offense, or any victim of a prior offense of which the individual was convicted or adjudicated responsible, may, in addition to rights accorded under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., "submit a written statement to the court regarding the advisability of admitting the individual into the mental health court." MCL 600.1094(4).

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[462] "[S]erious mental illness," "serious emotional disturbance," and "developmental disability[]" mean those terms as defined in the Mental Health Code, MCL 330.1100 *et seq*. MCL 600.1090(c); MCL 600.1090(g); MCL 600.1090(h); see also MCL 330.1100a; MCL 330.1100d. "'Co-occurring disorder' means having [one] 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 [one] disorder of each type can be established independent of the other and is not simply a cluster of symptoms resulting from [one] disorder." MCL 600.1090(a).

e. Conditions of Admission

MCL 600.1094(1) provides:

> "If the individual is charged in a criminal case or, in the case of a juvenile, is alleged to have engaged in activity that would constitute a criminal act if committed by an adult, his or her admission to mental health court is subject to all of the following conditions:
>
> > (a) The individual, if an adult, pleads guilty, no contest, or be convicted [sic] of any criminal charge on the record. The individual, if a juvenile, admits responsibility for the violation or violations that he or she is accused of having committed.
> >
> > (b) The individual waives, in writing, the right to a speedy trial and, with the agreement of the prosecutor, the right to a preliminary examination.
> >
> > (c) The individual signs a written agreement to participate in the mental health court. If the individual is a juvenile or an individual who has been assigned a guardian, the parent or legal guardian is required to sign all documents for the individual's admission in the mental health court."[463]

f. Withdrawal of Plea If Not Admitted

"An individual who has waived his or her right to a preliminary examination, who has pled guilty or no contest or, in the case of a juvenile, has admitted responsibility, as part of his or her referral process to a mental health court, and who is subsequently not admitted to a mental health court may withdraw his or her plea and is entitled to a preliminary examination or, in the case of a juvenile, may withdraw his or her admission of responsibility." MCL 600.1094(3).

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[463] "Nothing in [Chapter 10B, MCL 600.1090 *et seq*.,] shall be construed to preclude a court from providing mental health services to an individual before he or she enters a plea and is accepted into the mental health court." MCL 600.1094(2).

g. Post-Admission Procedures

- **Entry of plea.** If an individual was admitted to mental health court based upon a pending criminal charge, the court must accept his or her plea of guilty or no contest[464] if a plea has not already been entered. MCL 600.1095(1)(a); see also MCL 600.1094(1)(a).

- **No entry of judgment of guilt if individual pled guilty or no contest to non-traffic offenses if individual may be eligible for discharge and dismissal.** "In the case of an individual who pled guilty or no contest to criminal offenses that are not traffic offenses and who may be eligible for discharge and dismissal under the agreement for which he or she was admitted into mental health court upon successful completion of the mental health court program, the court shall not enter a judgment of guilt or, in the case of a juvenile, shall not enter an adjudication of responsibility." MCL 600.1095(1)(b)(*i*); see also MCL 600.1098(3)-(6).

- **Entry of judgment of guilt if individual pled guilty to a traffic offense or if individual may not be eligible for discharge and dismissal.** "In the case of an individual who pled guilty to a traffic offense or who pled guilty to an offense but may not be eligible for discharge and dismissal pursuant to the agreement with the court and prosecutor upon successful completion of the mental health court program, the court shall enter a judgment of guilt or, in the case of a juvenile, shall enter an adjudication of responsibility." MCL 600.1095(1)(b)(*ii*); see also MCL 600.1098(3)-(6).

- **Delayed sentence or imposition of probation or other supervision for individual who pled guilty or no contest to criminal charges.** If the individual pled guilty or no contest to, or admitted responsibility for, criminal charges, "[p]ursuant to the agreement with the

[464] Or, in the case of a juvenile, an admission of responsibility. MCL 600.1094(1)(a); MCL 600.1095(1)(a).

> individual and the prosecutor, the court may either delay further proceedings as provided in . . . MCL 771.1, or proceed to sentencing, as applicable, and place the individual on probation or other court supervision in the mental health court program with terms and conditions according to the agreement and as considered necessary by the court." MCL 600.1095(1)(b)(*iii*).

h. Mental Health Court Services

MCL 600.1096(1) requires a mental health court to provide a participant[465] with all of the following:

> "(a) Consistent and close monitoring of the participant and interaction among the court, treatment providers, probation, and the participant.
>
> (b) If determined by the mental health court to be necessary or appropriate, periodic and random testing for the presence of any nonprescribed controlled substance or alcohol in a participant's blood, urine, or breath, using to the extent practicable the best available, accepted, and scientifically valid methods.
>
> (c) Periodic evaluation assessments of the participant's circumstances and progress in the program.
>
> (d) A regimen or strategy of appropriate and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of incarceration or confinement.
>
> (e) Mental health services, substance use disorder services, education, and vocational opportunities as appropriate and practicable."[466]

If a participant formally objects to an individual plan of services developed under section 712(2) of the Mental Health Code, MCL 330.1712, the responsible mental

[465] A "'[p]articipant' [is] an individual who is admitted into a mental health court." MCL 600.1090(f).

health agency must notify the court; "[h]owever, the court is not obligated to take any action in response to [this] notice[.]" MCL 600.1097(4).

i. Costs and Fees

- **Mental health court fee.** "The mental health court may require an individual admitted into the court to pay a reasonable mental health court fee that is reasonably related to the cost to the court for administering the mental health court program as provided in the memorandum of understanding. The clerk of the mental health court shall transmit the fees collected to the treasurer of the local funding unit at the end of each month." MCL 600.1095(3).

- **Required costs, fees, and restitution.** "The court shall require that a participant pay all court fines, court costs, court fees, restitution, and assessments and pay all, or make substantial contributions toward payment of, the costs of the treatment[467]and the mental health court program services provided to the participant, including, but not limited to, the costs of drug or alcohol testing or counseling." MCL 600.1097(3). "However, except as otherwise provided by law, if the court determines that the payment of court fines, court fees, or drug or alcohol testing expenses under [MCL 600.1097(3)] would be a substantial hardship for the individual or would interfere with the individual's treatment, the court may waive all or part of those court fines, court fees, or drug or alcohol testing expenses." *Id*.[468]

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[466] "Any statement or other information obtained as a result of participating in assessment, treatment, or testing while in a mental health court is confidential and is exempt from disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, and shall not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal controlled substance use." MCL 600.1096(3).

[467] "The cost of treatment shall be governed by [C]hapter 8 of the [M]ental [H]ealth [C]ode, . . . MCL 330.1800 to [MCL] 330.1842, if applicable." MCL 600.1097(3).

[468] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

j. Successful Completion of Mental Health Court Program

- **Compliance with court orders.** "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).

- **Deferred adjudication.** If the individual is participating in a mental health court under MCL 762.11 (youthful trainee status), MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance), "the court shall proceed under the applicable section of law." MCL 600.1098(2). "There may only be [one] discharge or dismissal" in such a case. *Id*.

- **Discharge and dismissal.** Except as additionally provided in MCL 600.1098(4) for domestic violence offenses, "the court, with the agreement of the prosecutor and in conformity with the terms and conditions of the memorandum of understanding under [MCL 600.1091], may discharge and dismiss the proceedings" against a first-time mental health court participant who has successfully completed the terms and conditions of the program and who is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty; the participant must not have previously been assigned youthful trainee status under MCL 762.11 or had criminal proceedings dismissed under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance). MCL 600.1098(3). Discharge and dismissal of a

domestic violence offense[469] may be ordered only if the individual has not previously had proceedings dismissed under MCL 769.4a (Spouse Abuse Act), the offense is eligible to be dismissed under the Act, the individual fulfills the terms and conditions imposed under the Act, and the discharge and dismissal is processed and reported under the Act. MCL 600.1098(4). A discharge and dismissal under MCL 600.1098(3) must "be without adjudication of guilt or, for a juvenile, without adjudication of responsibility and [is] not a conviction or a finding of responsibility for purposes of [MCL 600.1098] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or, for a juvenile, a finding of responsibility." MCL 600.1098(5). "There may only be [one] discharge and dismissal under [MCL 600.1098(3)] for an individual." MCL 600.1098(5). The court must send a record of the discharge and dismissal to the Department of State Police, which must enter this information into the law enforcement information network (LEIN) with an indication that the individual participated in a mental health court. *Id*.

- Successful completion without discharge or dismissal. Except as provided in MCL 600.1098(2)-(4) (governing discharge and dismissal), "if an individual has successfully completed probation or other court supervision," the court, if it has not already done so, must enter an adjudication of guilt, proceed to sentencing according to the agreement, and send a record of the conviction and sentence to the criminal justice information center of the Department of State Police.[470] MCL 600.1098(6).

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[469] "'Domestic violence offense' means any crime alleged to have been committed by an individual against his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or an individual who resides or has resided in the same household." MCL 600.1090(d).

[470] In the case of a juvenile, the court must enter a finding or adjudication of responsibility, proceed to disposition according to the agreement, and send a record of the finding or adjudication of responsibility and disposition to the Department of State Police. MCL 600.1098(6).

k. Failure to Successfully Complete Mental Health Court Program

"If the participant is accused of a new crime, the judge shall have the discretion to terminate the participant's participation in the mental health court program." MCL 600.1097(2).

MCL 600.1098(7) provides, in part:

> "For a participant whose participation is terminated or who fails to successfully complete the mental health court program, the court shall enter an adjudication of guilt, or, in the case of a juvenile, a finding of responsibility, if the entry of guilt or adjudication of responsibility was delayed or deferred under [MCL 600.1094], and shall then proceed to sentencing or disposition of the individual for the original charges to which the individual pled guilty or, in the case of a juvenile, to which the juvenile admitted responsibility prior to admission to the mental health court. Except for program termination due to the commission of a new crime, failure to complete a mental health court program shall not be a prejudicial factor in sentencing."

l. Jurisdiction Over Participant

The court's jurisdiction over a participant must be maintained until final disposition of the case, but not longer than the probation period set out in MCL 771.2 (generally not longer than five years for felonies or two years for other offenses).[471] MCL 600.1095(2).

m. Record of Completion or Termination

"Upon completion or termination of the mental health court program, the court shall find on the record or place a written statement in the court file indicating whether the participant completed the program successfully or whether the individual's participation in the program was terminated and, if it was terminated, the reason for the termination." MCL 600.1098(1).

[471] The court may also obtain jurisdiction over a juvenile's parents or guardians. MCL 600.1095(2).

n. Exit Evaluation

"Upon an individual's completion of the required mental health court program participation, an exit evaluation should be conducted in order to assess the individual's continuing need for mental health, developmental disability, or substance abuse services." MCL 600.1096(2).

o. Collection and Reporting of Data

MCL 600.1099(1)-(2) provides:

> "(1) Each mental health court shall collect and provide data on each individual applicant and participant and the entire program as required by the state court administrative office[(SCAO)]. [SCAO] shall provide appropriate training to all courts entering data, as directed by the [S]upreme [C]ourt.
>
> (2) Each mental health court shall maintain files or databases on each individual participant in the program for review and evaluation as well as treatment, as directed by [SCAO]. The information collected for evaluation purposes must include a minimum standard data set developed and specified by [SCAO]."[472]

The information collected under MCL 600.1099 "regarding individual applicants to mental health court programs for the purpose of application to that program and participants who have successfully completed mental health courts is exempt from disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246." MCL 600.1099(4).

p. Use of Statements or Information Obtained During Preadmission Screening or Participation in Mental Health Court

Any statement or other information obtained as a result of participating in a preadmission screening and evaluation assessment, or as a result of participating in

[472] SCAO is required to provide standards for mental health courts; "[t]hese standards must provide comparability between programs and their outcomes." MCL 600.1099(3). Additionally, SCAO, in conjunction with the Department of Community Health, must provide training and technical assistance to all mental health courts. MCL 600.1099a(4).

assessment, treatment, or testing while in a mental health court, is confidential and exempt from disclosure under the Freedom of Information Act, MCL 15.231 *et seq*. MCL 600.1093(4); MCL 600.1096(3).

Additionally, any such statement or information may not be used in a criminal prosecution unless it reveals criminal acts other than, or inconsistent with, personal use of drugs, MCL 600.1093(4), or controlled substances, MCL 600.1096(3).

q. Records of Proceedings in Mental Health Court

MCL 600.1098(5) provides, in relevant part:

> "All records of the proceedings regarding the participation of the individual in the mental health court under [MCL 600.1098(3) (governing discharge and dismissal)] are closed to public inspection from the date of deferral and are exempt from public disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, but shall be open to the courts of this state, another state, or the United States, the [D]epartment of [C]orrections, law enforcement personnel, and prosecutors only for use in the performance of their duties or to determine whether an employee of the court, [D]epartment, law enforcement agency, or prosecutor's office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, [D]epartment, law enforcement agency, or prosecutor's office. The records and identifications division of the [D]epartment of [S]tate [P]olice shall retain a nonpublic record of an arrest, court proceedings, and the discharge and dismissal under [MCL 600.1098(5)]."

"For a participant whose participation is terminated or who fails to successfully complete" the program, "[a]ll records of the proceedings regarding the participation of the individual in the mental health court shall remain closed to public inspection and exempt from public disclosure as provided in [MCL 600.1098(5)]." MCL 600.1098(7).

3.49 Holmes Youthful Trainee Act (HYTA)—Deferred Adjudication[473]

"The [Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*.,] provides a mechanism for individuals who commit certain crimes between the time of their seventeenth and [twenty-fourth] birthdays[474] to be excused from having a criminal record." *People v Rahilly*, 247 Mich App 108, 113 (2001). Specifically, MCL 762.11(1) states that "[e]xcept as provided in [MCL 762.11(2)] and [MCL 762.11(3)[475]], if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-fourth birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee."[476] Additionally, an individual over 14 years of age whose jurisdiction has been waived may be eligible for youthful trainee status. MCL 762.15.

Assignment of an individual to youthful trainee status under MCL 762.11 is discretionary. *People v Gow*, 203 Mich App 94, 96 (1994). MCL 762.11 is remedial "and should be construed liberally for the advancement of the remedy."*People v Bobek*, 217 Mich App 524, 529 (1996). However, the trial court must "take into account the nature and severity of the crimes and the importance of public safety[]" when deciding whether to grant youthful trainee status. *People v Khanani*, 296 Mich App 175, 181-182 (2012) ("[g]iven the trial court's description of [the] defendant as 'frighten[ing]' and its apparent agreement with the prosecutor's description of [the] defendant as a serious predator," the trial court abused its discretion in nevertheless granting the defendant youthful trainee status for first-degree home invasion and several additional offenses).

A. Certain Individuals Are Ineligible

An individual is not eligible for youthful trainee status if the offense for which he or she seeks deferral is any of the following:

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[473] Individuals who have been granted youthful trainee status may be eligible to participate in a drug treatment court or a veterans treatment court. See Section 3.48(L) for discussion of these specialized courts.

[474] Although HYTA previously applied to individuals who committed crimes between their seventeenth and *twenty-first* birthdays, MCL 762.11(1) was amended by 2015 PA 31, effective August 18, 2015, to raise the maximum eligible age.

[475] See Section 3.49(A) for more information on these exceptions.

[476] See SCAO Form MC 242, *Assignment to Youthful Trainee Status*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/criminaldisposition/mc242.pdf.

- a felony punishable by life imprisonment. MCL 762.11(2)(a).

- a major controlled substance offense. MCL 762.11(2)(b).[477]

- a traffic offense. MCL 762.11(2)(c).

  - "'Traffic offense' means a violation of the Michigan vehicle code, . . . MCL 257.1 to [MCL] 257.923, or a violation of a local ordinance substantially corresponding to that act, that involves the operation of a vehicle and, at the time of the violation, is a felony or a misdemeanor." MCL 762.11(6)(b).

- a violation, attempted violation, or conspiracy to violate MCL 750.520b (first-degree criminal sexual conduct—CSC-I); MCL 750.520c (second-degree criminal sexual conduct—CSC-II); MCL 750.520d (third-degree criminal sexual conduct—CSC-III, other than MCL 750.520d(1)(a)); or MCL 750.520e (fourth-degree criminal sexual conduct—CSC-IV, other than MCL 750.520e(1)(a)). MCL 762.11(2)(d).

- a violation, attempted violation, or conspiracy to violate MCL 750.520g (assault with intent to commit CSC), with the intent to commit CSC-I, CSC-II, CSC-III (other than MCL 750.520d(1)(a)); or CSC-IV (other than MCL 750.520e(1)(a)). MCL 762.11(2)(e).

In addition, an individual is not eligible for youthful trainee status if any of the following apply:

- the individual was previously convicted of, or adjudicated for, a listed offense for which registration is required under the Sex Offenders Registration Act (SORA)[478] (MCL 28.721 to MCL 28.736). MCL 762.11(3)(a).

  - "'Listed offense' means that term as defined in . . . MCL 28.722." MCL 762.11(6)(a).

- the individual is charged with a listed offense for which registration is required under the SORA, and the individual fails to carry the burden of proving by clear and convincing evidence that he or she is not likely to engage in further listed offenses, MCL 762.11(3)(b).

- the court determines that the offense involved a factor set out MCL 750.520b(1)(a)-(h) (CSC-I), MCL 750.520c(1)(a)-(*l*)

[477] *Major controlled substance offenses* are discussed in Section 3.20.

[478] See the Michigan Judicial Institute's *Sexual Assault Benchbook* for a detailed discussion of the Sex Offenders Registration Act.

(CSC-II), MCL 750.520d(1)(b)-(e) (CSC-III), or MCL 750.520e(1)(b)-(f) (CSC-IV). MCL 762.11(3)(c).

A "defendant [i]s not ineligible for sentencing under the [youthful trainee act] solely because he [or she] was convicted of two criminal offenses." *People v Giovannini*, 271 Mich App 409, 410 (2006). "Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Giovannini*, 271 Mich App at 417.

"[T]he sentencing guidelines have not been held to apply to the decision whether to grant youthful trainee status." *People v Khanani*, 296 Mich App 175, 183 (2012).

When a "trial court place[s a] defendant on HYTA status[]" for committing felony-firearm under MCL 750.227b, the court is "not required to sentence him [or her] to two years' imprisonment" as is otherwise mandatory under MCL 750.227b(1). *People v Jaquery*, unpublished opinion per curiam of the Court of Appeals, issued August 12, 2014 (Docket No. 315065), slip op pp 4-5 (concluding that "[the] defendant was not convicted under MCL 750.227b, because MCL 762.14 provides that an assignment to HYTA status is not a conviction[]").[479]

B. Consent to Deferred Adjudication Must Be Obtained

An offender must consent to be assigned the status of a youthful trainee. MCL 762.11(1). Additionally, "[i]f the offense was committed on or after the individual's twenty-first birthday but before his or her twenty-fourth birthday, the individual shall not be assigned to youthful trainee status without the consent of the prosecuting attorney." *Id*.

C. Guilt Must Be Established by Guilty Plea

To be assigned the status of a youthful trainee, an individual must plead guilty to the criminal offense. MCL 762.11(1). A defendant found guilty as a result of a trial does not qualify for youthful trainee status because a guilty plea is required. *People v Dash*, 216 Mich App 412, 414 (1996). A nolo contendere plea precludes assignment to youthful trainee status because it is not a plea of "guilty." *People v Harns*, 227 Mich App 573, 579-580 (1998), vacated in part on other grounds 459 Mich 895 (1998).

[479] An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).

D. Proceedings Are Deferred

When the above requirements are satisfied with regard to an individual seeking deferral as a youthful trainee, no judgment of conviction is entered and adjudication is deferred. MCL 762.11(1).

E. Terms and Conditions Imposed Pursuant to Deferred Adjudication

Underlying charge punishable by more than one year of imprisonment. If the underlying charge is an offense punishable by imprisonment for a term of more than one year, and the individual was assigned to HYTA status on or after August 18, 2015,[480] the court must do one of the following:

- commit the individual, for not more than two years, to the Department of Corrections (DOC)[481] for custodial supervision and training. (If the individual is less than 21 years of age, the institutional facility must be designated by the DOC for the purpose of custodial supervision and training.) MCL 762.13(1)(a).

- place the individual on probation for not more than three years, subject to the conditions in MCL 771.3. MCL 762.13(1)(b).

- commit the individual to the county jail for not more than one year. MCL 762.13(1)(c).

- commit the individual to the DOC for custodial supervision and training under MCL 762.13(1)(a) or to the county jail under MCL 762.13(1)(c), *then* place the

[480] See 2015 PA 33, effective August 18, 2015, enacting section 2. If the underlying charge is an offense punishable by imprisonment for a term of more than one year, and the individual was assigned to HYTA status *before* August 18, 2015, the court must do one of the following: (1) commit the individual, for not more than three years, to the Department of Corrections (DOC) for custodial supervision and training in an institutional facility designated by the DOC for that purpose (former MCL 762.13(1)(a)); (2) place the individual on probation for not more than three years, subject to the conditions in MCL 771.3 (former MCL 762.13(1)(b)); (3) commit the individual to the county jail for not more than one year (MCL 762.13(1)(c)).

[481] However, MCL 762.13(2) provides that an individual assigned to HYTA status on or after August 18, 2015, may *not* be committed to the DOC for custodial supervision and training under MCL 762.13(1)(a) or MCL 762.13(1)(d) if the underlying charge is for a violation of any of the following: a controlled substance violation under Article 7 of the Public Health Code, MCL 333.7101 to MCL 333.7545; breaking and entering a building with intent to commit a felony or larceny, MCL 750.110; third-degree home invasion, MCL 750.110a(4); certain crimes involving financial transaction devices, MCL 750.157n to MCL 750.157v and MCL 750.157w(1)(c); carrying a concealed weapon (CCW), MCL 750.227; larceny, MCL 750.356; larceny from a person, MCL 750.357; unlawfully driving away a motor vehicle ("UDAA"), MCL 750.413; unarmed robbery, MCL 750.530; certain offenses involving receiving and concealing stolen property, MCL 750.535(3); or receiving and concealing a stolen motor vehicle, MCL 750.535(7). See 2015 PA 33, effective August 18, 2015, enacting section 2.

individual on probation for not more than one year, subject to the conditions in MCL 771.3. MCL 762.13(1)(d).

If a youthful trainee is placed in the county jail under MCL 762.13(1)(c) or MCL 762.13(1)(d), or as a condition of probation, the court may authorize release for work or for educational purposes. MCL 762.13(5).

If a youthful trainee is placed on probation following a commitment to the DOC under MCL 762.13(1)(d), he or she shall be reassigned to the supervision of a probation officer. MCL 762.13(4).

Underlying charge punishable by one year or less of imprisonment. If the underlying charge is for an offense punishable by imprisonment for one year or less, the court must place the individual on probation for not more than two years, subject to the conditions in MCL 771.3. MCL 762.13(3).

Fees, fines, and costs, etc. If the individual is placed on probation, the court must order payment of a supervision fee for each month during which the individual is on probation, up to 36 months. MCL 762.13(6).

MCL 769.1k[482] provides a court with general authority to impose fines, costs (including court costs), expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time entry of an adjudication of guilt is deferred. The court must order a defendant to pay the minimum state costs as prescribed by MCL 769.1j. MCL 769.1k(1)(a).[483] In addition, a court may order a defendant to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). The general authority to impose the monetary penalties listed in MCL 769.1k(1) and (2) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). MCL 769.1k(4) authorizes a court to order a defendant to pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of the penalties imposed pursuant to MCL 769.1k at any time. MCL 769.1k(5).[484] Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

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[482] As amended, 2014 PA 352, effective October 17, 2014. See Section 3.41 for discussion of costs.

[483] See Section 3.42 for additional discussion of minimum state costs.

[484] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

Whenever an individual charged with a felony offense is assigned to youthful trainee status, the court must order the individual to pay a $130 crime victim assessment. MCL 780.905(1)(a). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2). A $75 crime victim assessment must be ordered in cases involving misdemeanors or ordinance violations. MCL 780.905(1)(b).[485]

Employment or school. The court may require an individual assigned to HYTA status "to maintain employment or to attend a high school, high school equivalency program, community college, college, university, or trade school[]" or "to actively seek employment or entry into a high school, high school equivalency program, community college, college, university, or trade school." MCL 762.11(4).

Electronic monitoring. An individual assigned to HYTA status for an offense committed on or after his or her twenty-first birthday may be subject to electronic monitoring during his or her probationary term as provided under MCL 771.3. MCL 762.11(5).

F. Termination or Revocation of Youthful Trainee Status

1. Discretionary Revocation

Subject to MCL 762.12(2),[486] a court may terminate its consideration of an individual for youthful trainee status at any time, or may revoke youthful trainee status already granted at any time before the individual's final release. MCL 762.12(1). However, a youthful trainee is entitled to a hearing before his or her status is revoked. *People v Webb (Homer)*, 89 Mich App 50, 53 (1979); *People v Roberson*, 22 Mich App 664, 668-669 (1970).

While "[t]here is no provision in the [youthful trainee act] that expressly prohibits modification of the probationary term or early dismissal of the charges[,]" a court must not terminate youthful trainee status without "sufficient reason." *Bobek*, 217 Mich App at 530-531 ("[t]he fact that the defendant's [youthful trainee status] was discovered by the press was not a sufficient

[485] Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime victim assessment of $75.00 in cases involving a conviction of *any* misdemeanor or ordinance violation (rather than only a "serious" or "specified" misdemeanor). Related provisions were amended by 2011 PA 293, 2011 PA 295, and 2011 PA 296, also effective April 1, 2012. See Section 3.43 for additional discussion of crime victim assessments.

[486] MCL 762.12(2) *requires* revocation in some circumstances. See Section3.46(F)(2).

reason to discharge the defendant from probation after twenty-eight days.").

2. Mandatory Revocation

Under MCL 762.12(2), a court *must* revoke HYTA status if the individual pleads guilty to or is convicted of any of the following offenses during the period of HYTA assignment:

- a felony for which the maximum penalty is imprisonment for life;
- a major controlled substance offense;
- a firearm offense[487]; or
- a violation, attempted violation, or conspiracy to violate any of the following:
  - MCL 750.82 (felonious assault);
  - MCL 750.84 (assault with intent to do great bodily harm less than murder);
  - MCL 750.88 (assault with intent to rob while unarmed);
  - MCL 750.110a (home invasion);
  - MCL 750.224f (felon in possession of a firearm);
  - MCL 750.226 (going armed with a dangerous weapon with unlawful intent);
  - MCL 750.227 (carrying a concealed weapon (CCW));
  - MCL 750.227a (unlawful possession of a pistol by a licensee);
  - MCL 750.227b (felony-firearm or possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony);
  - MCL 750.520b (first-degree criminal sexual conduct (CSC-I));

[487] A *firearm offense*, for purposes of MCL 762.12(2)(e), is "a crime involving a firearm as that term is defined in . . . MCL 28.421, whether or not the possession, use, transportation, or concealment of a firearm is an element of the crime." MCL 762.12(2)(e). MCL 28.421(1)(c) defines *firearm* as "any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive."

- MCL 750.520c (second-degree criminal sexual conduct (CSC-II));
- MCL 750.520d (third-degree criminal sexual conduct (CSC-III)), *except* under MCL 750.520d(1)(a) (victim at least 13 but under 16 years of age);
- MCL 750.520e (fourth-degree criminal sexual conduct (CSC-IV)), *except* under MCL 750.520e(1)(a) (victim at least 13 but under 16 years of age, and defendant 5 or more years older than the victim);
- MCL 750.529a (carjacking);
- MCL 750.530 (unarmed robbery); or
- MCL 750.520g (assault with intent to commit criminal sexual conduct), *except* with intent to violate MCL 750.520d(1)(a) (victim at least 13 but under 16 years of age) or MCL 750.520e(1)(a) (victim at least 13 but under 16 years of age, and defendant 5 or more years older than the victim).

Additionally, "[a]n individual assigned to youthful trainee status before October 1, 2004 for a listed offense enumerated in . . . MCL 28.722, is required to comply with the requirements of [the SORA]." MCL 762.14(3).[488] If an individual who is required to be registered under the SORA willfully violates that act, the court is required to revoke the individual's youthful trainee status. MCL 762.12(3).

3. Adjudication of Guilt and Imposition of Sentence

If consideration of an individual for youthful trainee status is terminated, or if an individual's youthful trainee status is revoked, the court may enter an adjudication of guilt. MCL 762.12(3). If a court revokes youthful trainee status, enters an adjudication of guilt, and imposes sentence, it must specifically grant credit against the individual's sentence for time served as

[488] "SORA does not violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment[]" as applied to an individual who was adjudicated under HYTA before October 1, 2004, for second-degree criminal sexual conduct involving a minor under age 13 and who was therefore required under MCL 762.14(3) to register pursuant to the SORA, "which took effect after [the individual] had pleaded guilty." *People v Temelkoski*, 307 Mich App 241, 244, 249-250, 270-271 (2014). But see *Does v Snyder*, ___ F3d ___, ___ (CA 6, 2016) (concluding that SORA imposes punishment and that the retroactive application of SORA's 2006 and 2011 amendments constitutes an unconstitutional ex post facto punishment). Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

a youthful trainee in a DOC institutional facility or county jail. *Id*.

G. Successful Completion of Probationary Period

If the individual successfully completes the probationary period, the court is required to discharge the individual and dismiss the proceedings after the individual's final release from youthful trainee status. MCL 762.14(1).

H. Assignment as Youthful Trainee Is Not a Conviction

With the exception of the three circumstances listed below, assignment of an individual to youthful trainee status is not a conviction for a crime, and "[an] individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." MCL 762.14(2).

- An assignment to youthful trainee status before October 1, 2004, constitutes a conviction for purposes of registering under the SORA unless "a petition was granted under [MCL 28.728c] at any time allowing the individual to discontinue registration under [the SORA], including a reduced registration period that extends to or past July 1, 2011, regardless of the tier designation that would apply on or after that date." MCL 28.722(b)(*ii*)(A).[489]

- An assignment to youthful trainee status before October 1, 2004, constitutes a conviction for purposes of registering under the SORA if the individual is convicted of any other felony on or after July 1, 2011. MCL 28.722(b)(*ii*)(B).

- Assignment to youthful trainee status constitutes a conviction that is counted for purposes of scoring the sentencing guidelines. MCL 777.50(4)(a)(*i*).

[489] "SORA does not violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment[]" as applied to an individual who was adjudicated under HYTA before October 1, 2004, for second-degree criminal sexual conduct involving a minor under age 13 and who was therefore required under MCL 762.14(3) to register pursuant to the SORA, "which took effect after [the individual] had pleaded guilty." *People v Temelkoski*, 307 Mich App 241, 244, 249-250, 270-271 (2014). But see *Does v Snyder*, ___ F3d ___, ___ (CA 6, 2016) (concluding that SORA imposes punishment and that the retroactive application of SORA's 2006 and 2011 amendments constitutes an unconstitutional ex post facto punishment). Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

I. Record of Deferral

"Unless the court enters a judgment of conviction against the individual for the criminal offense under [MCL 762.12], all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the [department of human services], law enforcement personnel, and . . . , prosecuting attorneys for use only in the performance of their duties." MCL 762.14(4).

When no conviction results from an individual's youthful trainee status, the closed hearings established by MCL 762.14(4) are necessary to prevent the harm the youthful trainee act seeks to prevent—"public . . . access to information regarding the criminal charge[.]" *Bobek*, 217 Mich App at 530.

J. No Specified Limit on Use of Deferral Provision

The statute governing an individual's assignment to the status of youthful trainee does not contain any language limiting the number of times an individual may utilize the provisions of the statute. See MCL 762.11 *et seq*.

See also *Giovannini*, 271 Mich App at 410, in which the Court of Appeals held that a "defendant was not ineligible for sentencing under the [youthful trainee act] solely because he was convicted of two criminal offenses." The Court noted that "[i]nterpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Giovannini*, 271 Mich App at 417.

K. Review of Decision to Assign Youthful Trainee Status

A trial court's decision concerning a defendant's assignment under the HYTA is reviewed for an abuse of discretion. *People v Khanani*, 296 Mich App 175, 177-178 (2012); *Giovannini*, 271 Mich App at 411. "'An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.'" *Khanani*, 296 Mich App at 178, quoting *People v Unger*, 278 Mich App 210, 217 (2008).

The trial court abused its discretion in granting youthful trainee status to the defendant, who pleaded guilty in three separate cases to six offenses, including first-degree home invasion; the trial court's decision fell outside the range of reasoned and principled outcomes in light of the defendant's age and the seriousness and timing of the

home invasion offense, which was committed shortly after he turned 19 while he was on bond awaiting sentencing for the other offenses. *Khanani*, 296 Mich App at 179-182.

3.50 Conditional Sentences

When a person is convicted of an offense punishable by a fine or imprisonment, or both, the court has the discretion to impose a conditional sentence and order the person to pay a fine (with or without the costs of prosecution), and restitution as indicated in MCL 769.1a(11) or the Crime Victim Rights Act (MCL 780.751 to MCL 780.834), within a limited time stated in the sentence. MCL 769.3(1). If the person defaults on payment, the court may impose sentence. MCL 769.3(1).

If a court imposes a conditional sentence under MCL 769.3, restitution ordered under MCL 769.1a must be made a condition of the sentence. MCL 769.1a(11). The court may impose imprisonment under the conditional sentence if the offender fails to comply with the order of restitution and if he or she has failed to make a good faith effort at compliance with the order. *Id*. When determining whether to impose imprisonment, the court must consider the offender's employment status, earning ability, financial resources, the willfulness of the offender's noncompliance, and any other circumstances that may impact the offender's ability to pay restitution. *Id*.[490]

With the exception of a person convicted of CSC-I or CSC-III, the court may also place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination, in installments within a limited time. MCL 769.3(2). If the offender defaults on any of the payments, the court may impose sentence. MCL 769.3(2).

3.51 Suspended Sentences

Absent statutory authority to do so, a court may not indefinitely suspend a defendant's sentence, because to do so would effectively pardon a defendant for his or her crime. *People v Morgan (Sillerton)*, 205 Mich App 432, 434 (1994). Certain statutes specifically authorize a court to suspend a defendant's sentence. See MCL 750.165(4) (felony nonsupport statute specifically authorizes a court to suspend a defendant's sentence if he or she posts a bond and any sureties required by the court).

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[490] Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

A court may not suspend a defendant's sentence once the defendant has started to serve it. *Oakland Co Pros v 52nd Dist Judge*, 172 Mich App 557, 560 (1988).

3.52 Mandatory Sentences

A. Sentencing Guidelines Do Not Apply to Mandatory Sentences

If a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, the court is required to impose that penalty. MCL 769.34(5).[491] The sentencing guidelines are inapplicable to mandatory sentences. *Id*.

B. Sentencing Juveniles to Life Imprisonment Without the Possibility of Parole

Certain homicide and nonhomicide crimes are generally punishable under Michigan law by mandatory life imprisonment without the possibility of parole. See MCL 791.234(6)(a)-(f).[492] However, an offender who was under the age of 18 at the time of the commission of an offense is not subject to the imposition of a mandatory sentence of life imprisonment without the possibility of parole. *Miller v Alabama*, 567 US ___, ___ (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense).[493]

Effective March 4, 2014, 2014 PA 22 added MCL 769.25 and MCL 769.25a to Chapter IX of the Code of Criminal Procedure in order to achieve compliance with *Miller*, 567 US ___, by establishing

[491] However, see Section 3.52(B) for discussion of constitutional and statutory restrictions on sentencing a juvenile offender to life imprisonment without the possibility of parole.

[492] MCL 791.234(6)(a)-(f) provides that prisoners who are sentenced to life imprisonment for certain enumerated offenses are not eligible for parole, and are instead subject to the provisions of MCL 791.244 (governing reprieves, commutations, and pardons). The enumerated offenses include first-degree murder, MCL 750.316; certain offenses involving the alteration, adulteration, misbranding, or mislabeling of a drug, medicine, or device with the intent to kill or to cause serious impairment of a body function of two or more individuals, resulting in death, MCL 333.17764(7); MCL 750.16(5); MCL 750.18(7); a violation of Chapter XXXIII of the Michigan Penal Code ("Explosives, Bombs, and Harmful Devices"), MCL 750.200—MCL 750.212a; first-degree criminal sexual conduct committed against an individual less than 13 years of age by a defendant 18 years of age or older, if the defendant was previously convicted of an enumerated sex crime against an individual less than 13 years of age, MCL 750.520b(2)(c); and any other violation for which parole eligibility is expressly denied under state law.

sentencing and resentencing procedures applicable to certain offenders under the age of 18 who are convicted of certain offenses carrying mandatory life-without-parole sentences. Also effective March 4, 2014, 2014 PA 23 amended several provisions of the Michigan Penal Code governing offenses that are subject to the mandatory imposition of life-without-parole sentences to provide exceptions to these mandatory sentences as set out in MCL 769.25 and MCL 769.25a. Under circumstances in which MCL 769.25 or MCL 769.25a applies to an offender, the prosecuting attorney must file a motion if he or she intends to seek imposition of a life sentence without the possibility of parole, MCL 769.25(3); MCL 769.25a(4)(b), and the sentencing court must conduct a hearing and consider the factors set out in *Miller*, 567 US at ___, before imposing sentence, MCL 769.25(6); MCL 769.25a(4)(b). If a timely motion for a life-without-parole sentence is not filed by the prosecution, or if the court decides not to grant such a motion, "the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years." MCL 769.25(9); see also MCL 769.25(3); MCL 769.25(4).

"[A] life-without-parole sentence is an unconstitutional penalty for all juveniles but for those whose crimes reflect irreparable corruption[;]" accordingly, in sentencing a juvenile under MCL 769.25, "the sentencing judge must honor the mandate that was made abundantly clear in [*Miller*, 567 US ___], and other recent Eighth Amendment caselaw: life without parole is to be reserved for only the rarest of juvenile offenders so as to avoid imposing an unconstitutionally disproportionate life-without-parole sentence on a transiently immature offender." *People v Hyatt*, ___ Mich App ___, ___ (2016), abrogating in part *People v Skinner*, 312 Mich App 15 (2015).

For discussion of juvenile sentencing under MCL 769.25 and MCL 769.25(a), see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19. Additionally, for a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

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[493] In determining an offender's age at the time of the offense, "the birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth[,]" is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred[]") (emphasis supplied; citations omitted).

C. No Judicial Discretion to Deviate From Mandatory Sentence

Where a statute mandates the imposition of a sentence of imprisonment for an offense, the trial court may not sentence the defendant to an at-home electronic monitoring program "in lieu of the statutorily required . . . incarceration[.]" *People v Pennebaker*, 298 Mich App 1, 4-9 (2012) (holding that because MCL 257.625(7)(a)(*ii*) "unequivocally [requires a] trial court [to] sentence a defendant to a minimum of 30 days in the county jail[]" for a second violation of MCL 257.625(7)(a), "the trial judge did not have discretion to sentence [the] defendant to less than 30 days in jail[;]" furthermore, "[t]he placement of an electronic-monitoring device on [the] defendant [was] not 'imprisonment in the county jail' as required by the statute[,]" and the statute did not authorize participation in a work-release program).

3.53 Special Alternative Incarceration (SAI) Units—"Boot Camp"

Certain defendants are eligible to be placed in "boot camp" as a condition of probation. MCL 771.3b(1).[494] The Special Alternative Incarceration (SAI) units provide a program of physically strenuous work and exercise, modeled after military basic training. MCL 798.14(1).

A. Prisoners

If a defendant is sentenced to an indeterminate prison term, the Department of Corrections (DOC) is required to consider placing him or her in an SAI program, unless the sentencing court prohibited that type of placement. MCL 791.234a(1); MCL 791.234a(2)(f); MCL 791.234a(4). The DOC must determine whether a defendant within its jurisdiction and sentenced to an indeterminate term is eligible for placement in an SAI program according to the requirements in MCL 791.234a(2) and MCL 791.234a(3).

To be eligible for placement in an SAI program, the prisoner must meet all of the following requirements set out in MCL 791.234a(2):

- The prisoner's minimum sentence does not exceed either of the following: (1) 24 months or less for a violation of MCL 750.110 (breaking and entering) and MCL 750.110a (home

[494] A defendant convicted of committing or attempting to commit any of the following crimes is not eligible for placement in an SAI program: MCL 750.72, MCL 750.73, MCL 750.75, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, and MCL 750.520g. MCL 771.3b(17)(a)-(c).

invasion), if the violation involved any occupied dwelling house; or (2) 36 months or less for any other crime. MCL 791.234a(2)(a)(*i*)-(*ii*).

- The prisoner has never previously been placed in an SAI unit as a prisoner or a probationer, unless he or she was placed in an SAI unit and was removed from the unit for medical reasons as specified in MCL 791.234a(7). MCL 791.234a(2)(b).

- The prisoner is physically capable of participating in the SAI program. MCL 791.234a(2)(c).

- The prisoner does not appear to have any mental disability that would prevent him or her from participating in the program. MCL 791.234a(2)(d).

- The prisoner is serving his or her first prison sentence. MCL 791.234a(2)(e).

- The sentencing judge, in the judgment of sentence, did not prohibit the prisoner's participation in the program. MCL 791.234a(2)(f).

- The DOC determines that the prisoner is otherwise suitable for the program. MCL 791.234a(2)(g).

- The prisoner is not serving a sentence for crimes expressly set out in MCL 791.234a(2)(h)(*i*)-(*vii*),[495] and the prisoner was not sentenced as an habitual offender, MCL 791.234a(2)(h)(*viii*).

Additionally, a prisoner who is serving a sentence for violating MCL 333.7401 or MCL 333.7403, and who has previously been convicted of violating MCL 333.7401, MCL 333.7403(2)(a), MCL 333.7403(2)(b), or MCL 333.7403(2)(e), is not eligible for placement in an SAI unit until after he or she has served the equivalent of the mandatory minimum sentence prescribed by statute for that violation. MCL 791.234a(3).

If the sentencing judge permitted the prisoner's participation in the SAI program in the judgment of sentence, that prisoner may be placed in an SAI unit if the DOC determines that the prisoner also meets the requirements of MCL 791.234a(2) and MCL 791.234a(3). MCL 791.234a(4).

If the sentencing judge neither prohibited nor permitted a prisoner's participation in an SAI program in the judgment of sentence, and

[495] MCL 791.234a(2)(h)(*i*)-(*vii*) lists more than 40 crimes for which a defendant would be ineligible for placement in an SAI unit.

the DOC determines that the prisoner meets the eligibility requirements of MCL 791.234a(2) and MCL 791.234a(3), the DOC must notify the judge or successor judge, the prosecuting attorney for the county in which the prisoner was sentenced, and any crime victim who has requested notification, of the proposed placement in the SAI unit. MCL 791.234a(4). The notices must be sent no later than 30 days before placement is intended to occur. MCL 791.234a(4).

The DOC is not allowed to place a prisoner in an SAI unit unless the sentencing judge or successor judge notifies the DOC in writing that he or she does not object to the proposed placement. MCL 791.234a(4). In deciding whether to object, the judge or successor judge is required to review any victim impact statements submitted by the victim(s) of the crime for which the prisoner was convicted. MCL 791.234a(4).

The prosecution waives objection to a defendant's placement in an SAI program if it does not raise the issue at sentencing. *People v Krim*, 220 Mich App 314, 320-321 (1997).

A prisoner must consent to placement in an SAI program. MCL 791.234a(5). The prisoner must also agree that "the [DOC] may suspend or restrict privileges generally afforded other prisoners including, but not limited to, the areas of visitation, property, mail, publications, commissary, library, and telephone access. However, the [DOC] may not suspend or restrict the prisoner's access to the prisoner grievance system." MCL 791.234a(5).

Notwithstanding MCL 791.234a(4) and MCL 791.234a(5), a prisoner must not be placed in an SAI unit unless all of the following conditions are met:

- "Upon entry into the [SAI] unit, a validated risk and need assessment from which a prisoner-specific transition accountability plan and prisoner-specific programming during program enrollment are utilized." MCL 791.234a(6)(a).

- "Interaction with community-based service providers through established prison in-reach services from the community to which the prisoner will return is utilized." MCL 791.234a(6)(b).

- "Prisoner discharge planning is utilized." MCL 791.234a(6)(c).

- "Community follow-up services are utilized." MCL 791.234a(6)(d).

Placement in an SAI program must be for a period of not less than 90 days or more than 120 days. MCL 791.234a(7).

If, during the prisoner's placement, the prisoner misses more than five days of participating in the program because of medical excuse for an illness or injury that occurred after placement, the period of placement must be increased by the number of days missed, beginning with the sixth day of excused participation, but for no more than 20 days. MCL 791.234a(7). The maximum number of days in a prisoner's placement cannot exceed 120 days, including the days missed. *Id*. A prisoner who is unable to participate in the SAI program for more than 25 days must be returned to the appropriate correctional facility but may be readmitted to the program subject to the requirements for eligibility in MCL 791.234a(2) and MCL 791.234a(3). MCL 791.234a(7).

"A prisoner who fails to work diligently and productively at the [SAI unit program], or who fails to obey the rules of behavior established for the unit, shall be returned to a state correctional facility and shall no longer be eligible for placement in the program." MCL 798.16(2). If a prisoner is removed from an SAI unit on this basis, the prisoner must be credited for time served in the unit, but all disciplinary credits accumulated in the unit may be forfeited. *Id*.

Once the prisoner's completion of the SAI program is certified, the prisoner must be placed on parole. MCL 791.234a(8). The parole board must determine appropriate conditions of parole for a prisoner paroled under MCL 791.234a. MCL 791.234a(8). A prisoner paroled under MCL 791.234a must be placed on parole for not less than 18 months, or the remainder of the prisoner's minimum sentence, whichever is greater. A prisoner paroled under MCL 791.234a must be under intensive supervision for the first 120 days. MCL 791.234a(8).

The parole board may suspend or revoke parole for any prisoner paroled under MCL 791.234a subject to MCL 791.239a (arrest for alleged parole violation) and MCL 791.240a (parole revocation for cause). MCL 791.234a(9).

Each prisoner placed in the SAI program must fully participate in Michigan's prisoner reentry initiative. MCL 791.234a(12).

B. Probationers

In addition to any other term or condition of probation, the court may require an individual convicted of a crime for which he or she may be sentenced to a state correctional facility to satisfactorily

complete an SAI program and to serve 120 days of probation under intense supervision. MCL 771.3b(1). This does not apply if the individual was convicted of a crime specified in MCL 771.3b(17).[496]

To be eligible for placement in an SAI program and placement on probation, the individual must meet all of the following requirements set out in MCL 771.3b(2):

- The individual has never served a sentence of imprisonment in a state correctional facility. MCL 771.3b(2)(a).
- The individual would likely be sentenced to imprisonment in a state correctional facility for conviction of the offense. MCL 771.3b(2)(b).
- The upper limit of the recommended minimum sentence under the sentencing guidelines for the individual's offense is 12 months or more, unless (1) the felony sentencing guidelines do not apply to the individual's offense, or (2) the reason the individual is being considered for placement is that he or she violated the conditions of his or her probation. MCL 771.3b(2)(c).
- The individual is physically capable of participating in the SAI program. MCL 771.3b(2)(d).
- The individual does not have any apparent mental disability that would prevent his or her participation in the SAI program. MCL 771.3b(2)(e).

An individual is ineligible for placement in an SAI program if:

- He or she has previously been incarcerated in an SAI unit, MCL 771.3b(15), except that an individual may be placed in an SAI program for a second time if that individual had been placed in an SAI program but was removed from the program and returned to court for sentencing due to a medical condition existing at the time of the placement, and the medical condition has since then been corrected, MCL 771.3b(16).
- He or she has been convicted of any of the following crimes, or attempts to commit the following crimes: MCL 750.72, MCL 750.73, MCL 750.75, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, or MCL 750.520g. MCL 771.3b(17).

[496] MCL 771.3b(17)(a)-(c) prohibits offenders convicted of violating or attempting to violate MCL 750.72, MCL 750.73, MCL 750.75, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, and MCL 750.520g, from being placed in an SAI program.

Before a court can place an individual in an SAI program, an initial investigation to establish that the person meets the requirements of MCL 771.3b(2)(a) and MCL 771.3b(2)(b) must be completed by a probation officer. MCL 771.3b(4).

After an individual is placed in an SAI program, the DOC must establish that the person meets the requirements in MCL 771.3b(2). If the person does not meet those requirements, the probation order is rescinded, and he or she must be returned to the court for sentencing. MCL 771.3b(5).

An individual must consent to his or her placement in an SAI program. MCL 771.3b(6).

Except as provided in MCL 771.3b(9) to MCL 771.3b(12), the maximum amount of time an individual may be placed in an SAI program is 120 days. MCL 771.3b(8); MCL 798.14(1). Participants are required to make up for days missed due to illness or injury. MCL 771.3b(8). If an individual misses more than five days of participation in the program because of an illness or injury that occurred after he or she was placed in the program, one day is added to the term of his or her placement for every day missed, beginning with the sixth day missed. MCL 771.3b(8). A maximum of 20 days may be added to an individual's placement. *Id*. A copy of the individual's verified medical excuse must be provided to the sentencing court. MCL 771.3b(8). If an individual is not able to participate for more than 25 days, he or she must return to the court for sentencing pursuant to MCL 771.3b(5). MCL 771.3b(8).

If the local unit of government has created a residential program providing vocational training, education, and substance abuse treatment designed for individuals who have completed an SAI program, a probationer may be required, immediately after successful completion of the SAI program, to successfully complete an additional period of up to 120 days in the local unit of government's residential program. MCL 771.3b(9); MCL 798.14(1).

A probationer who satisfactorily completes an SAI program must be placed on probation under intensive supervision for a minimum of 120 days following his or her completion of the SAI program. MCL 771.3b(12). If the probationer has been ordered to complete a program of residential treatment after completion of the SAI program, MCL 771.3b(9) or MCL 771.3b(10), the 120-day period of intensive supervision begins after the probationer completes the residential program. MCL 771.3b(12).

The court must authorize the release of the individual from confinement in the SAI unit after it receives a satisfactory report from the DOC of the individual's performance in the program. MCL

771.3b(13). The court must revoke an individual's probation after receiving an unsatisfactory report of the individual's performance in the SAI program. *Id*.

"A probationer who fails to work diligently and productively [in an SAI program], or who fails to obey the rules of behavior established for the unit, may be reported to the sentencing court for possible revocation of probation[.]" MCL 798.16(1). While the probationer awaits a probation revocation hearing on his or her failure to satisfactorily perform in the SAI program, he or she may be incarcerated in a county jail as an alternative to remaining in the SAI program. *Id*.

A probationer is entitled to credit for time spent in an SAI program if his or her probation is later revoked and he or she is sentenced to a term of imprisonment on the underlying crime. *People v Hite (After Remand)*, 200 Mich App 1, 2 (1993).

Part J—Selected Post-Sentencing Issues[497]

3.54 Appellate Review of Felony Sentences

A. Record on Appeal

In addition to other relevant and applicable preservation requirements, a copy of the defendant's presentence investigation report (PSIR)[498] must accompany any appellate brief if an issue on appeal concerns the defendant's sentence. MCL 769.34(8)(b); MCR 7.212(C)(7); *People v Callon*, 256 Mich App 312, 332 (2003). When appealing any sentence imposed under the statutory guidelines, MCL 769.34(8) also requires that the record filed for appeal includes "[a]n entire record of the sentencing proceedings . . . [and a]ny other reports or documents the sentencing court used in imposing sentence." MCL 769.34(8)(a) and MCL 769.34(8)(c).

B. Review of Guidelines Scoring

"Under the [legislative] sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be

[497] Other postsentencing issues, such as motion for relief from judgment and setting aside a conviction, are discussed in Chapter 5. Habeas corpus is discussed in Chapter 6.

[498] See Section 3.29 for information on presentence investigation reports.

supported by a preponderance of the evidence." *People v Hardy (Donald)*, 494 Mich 430, 438, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016 (citing *People v Osantowski*, 481 Mich 103, 111 (2008), and noting that, contrary to several Court of Appeals decisions, "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines[]") (additional citations omitted); see also *People v Steanhouse*, 313 Mich App 1, 38 (2015), lv gtd 499 Mich 934 (2016).[499]

"Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy (Donald)*, 494 Mich at 438, citing *People v Babcock*, 469 Mich 247, 253 (2003). See also *Steanhouse*, 313 Mich App at 38; *People v Rhodes (Anthony)*, 495 Mich 938, 938-939 (2014) ("[d]etermining whether a trial court properly scored sentencing variables is a two-step process[: f]irst, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence[;] . . . [s]econd, the appellate court considers de novo 'whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute[]'") (citations omitted); *People v Gullett*, 277 Mich App 214, 217 (2007).[500]

"[T]he 'right result—wrong reason' doctrine . . . [cannot] be employed to allow impermissible appellate fact-finding[]" in reviewing the propriety of an OV score; "'[a] *trial court* determines the sentencing variables by reference to the record[,]' not [the Court of Appeals]." *People v Thompson (Jackie)*, ___ Mich App ___, ___ n 5 (2016) (citing *Anspaugh v Imlay Twp*, 480 Mich 964 (2007), and holding that where "the trial court assessed 50 points for OV 7 solely on the basis of sadistic behavior, . . . [i]t would not be appropriate for [the Court of Appeals] to consider whether" the score would nevertheless have been appropriate on the alternative basis that "[the] defendant's conduct was designed to substantially increase the victim's fear and anxiety[]") (additional citations omitted). See also *People v Gloster*, ___ Mich ___, ___ (2016) (holding

[499] See also *People v Jones (Byron)*, 494 Mich 880, 880-881 (2013) (explaining that "an appellate court reviews for clear error a trial court's finding of facts, and '[a] trial court determines the sentencing variables by reference to the record, *using the standard of preponderance of the evidence*[,]'" and vacating the portion of *People v Jones (Byron)*, 299 Mich App 284, 286 (2013), stating that "'[a] scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision[]'") (citations omitted).

[500] In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the guidelines "are advisory only." The Court of Appeals has since concluded that, "given the continued relevance to the Michigan sentencing scheme of the scoring variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*." *Steanhouse*, 313 Mich App at 38, citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438; *Gullett*, 277 Mich App at 217.

that the trial court erred as a matter of law in scoring OV 10 solely on the basis of the conduct of the defendant's co-offenders, and that the Court of Appeals additionally "erred by concluding that the trial court's scoring of OV 10 was supported by [the] defendant's *own* conduct[; b]ecause the trial court did not *itself* find that [the] defendant's own conduct was predatory in nature, the Court of Appeals failed to review the trial court's findings for clear error as required by [*Hardy (Donald)*, 494 Mich at 438]") (emphasis added).

> **Note:** "An error in scoring the judicial [sentencing] guidelines does not provide a basis for appellate relief." *People v Walker (Robert)*, 485 Mich 870 (2009), citing *People v Raby*, 456 Mich 487, 496 (1998).

C. Review of Guidelines Departures

In cases involving a sentence departure under the previously-mandatory sentencing guidelines, "whether a [particular] factor exist[ed was] reviewed for clear error, whether a factor [was] objective and verifiable [was] reviewed de novo, and whether a reason [was] substantial and compelling [was] reviewed for an abuse of discretion[.]" *Babcock*, 469 Mich at 265; see also *Hardy (Donald)*, 494 Mich at 438 n 17 (citing *Babcock*, 469 Mich at 265, and noting that "under the sentencing guidelines, the abuse of discretion standard only applie[d] when an appellate court review[ed] a circuit court's conclusion that there was a 'substantial and compelling reason' to depart from the guidelines[]").

Under *People v Lockridge*, 498 Mich 358, 392 (2015), however, "the sentencing court may exercise its discretion to depart from [the applicable] guidelines range without articulating substantial and compelling reasons for doing so." In order to facilitate appellate review, the court must justify any sentence imposed outside the advisory minimum guidelines range. *Id*., citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for *reasonableness*[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable." *Lockridge*, 498 Mich at 392 (emphasis supplied), citing *Booker*, 543 US at 261.

In *People v Steanhouse*, 313 Mich App 1, 46, 47 (2015), lv gtd 499 Mich 934 (2016), the Court of Appeals readopted the proportionality test, formerly used in reviewing sentences imposed under the advisory judicial guidelines, as the basis for determining the reasonableness of a departure sentence under the post-*Lockridge* advisory legislative guidelines. "[A departure] sentence that fulfills the principle of proportionality under *Milbourn*[, 435 Mich 630,] and its progeny,

constitutes a reasonable sentence under *Lockridge*[, 498 Mich 358]." *Steanhouse*, 313 Mich App at 47, 48 (concluding that "reinstating the previous standard of review in Michigan, as a means of determining the reasonableness of a sentence, is preferable to adopting the analysis utilized by the federal courts [following *Booker*, 543 US 220,] and is most consistent with the Supreme Court's directives in *Lockridge*[]") (citations omitted).

If an appellate court determines that a departure sentence is reasonable, resentencing is not required, even if the lower court erred in scoring the guidelines. *People v Ambrose*, ___ Mich App ___, ___ (2016) (quoting *Lockridge*, 498 Mich at 394, and holding that resentencing was not required under *People v Biddles*, ___ Mich App ___, ___ (2016),[501] for an error under *People v Francisco*, 474 Mich 82, 92 (2006), in the scoring of the guidelines where the trial court imposed a reasonable departure sentence "and the sentence 'did not rely on the minimum sentence range from the improperly scored guidelines' at issue[]"). In *Ambrose*, ___ Mich App at ___, the Court of Appeals concluded that, "[i]n light of the facts of [the] case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[;]" accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables.

See Section 3.4 for discussion of *Lockridge*. See Section 3.23(B) for discussion of the reasonableness of a departure sentence. See Section 3.34 for discussion of the principle of proportionality.

D. Unpreserved Sentencing Issues

Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. *Callon*, 256 Mich App at 332; see also *Lockridge*, 498 Mich at 392-393. For claims of constitutional error in the scoring of the guidelines under *Lockridge*, see Section 3.54(E).

E. Review of Claims of Constitutional Guidelines-Scoring Error Under *Lockridge*[502]

In 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US ___ (2013), and *Apprendi v New Jersey*, 530 US 466

[501] In *Biddles*, ___ Mich App at ___, the Court of Appeals clarified the difference between a successful guidelines-scoring *evidentiary* challenge (for which resentencing under *People v Francisco*, 474 Mich 82 (2006), is required) and a successful *Lockridge* challenge (for which remand for *possible* resentencing is required). See Section 3.54(E)(5) for discussion of *Biddles*, ___ Mich App ___.

[502] See the Michigan Judicial Institute's Quick Reference Guide for handling "*Crosby* remands" under *Lockridge*.

(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[503] 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, 399 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)[,]" 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).

Noting that "*Apprendi* errors are not structural errors," and that unpreserved *Apprendi/Alleyne/Lockridge* errors are therefore reviewed "for plain error affecting substantial rights[,]" the *Lockridge* Court held that defendant Lockridge "[could not] show prejudice from any error in scoring the OVs in violation of *Alleyne*[, 570 US ___,]" and was therefore not entitled to resentencing, "[b]ecause he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines[.]" *Lockridge*, 498 Mich at 392, 392-393 n 29, 393-394 (citations omitted).

The *Lockridge* Court then addressed "how [the plain-error standard applicable to claims of error under *Lockridge*] is to be applied in the many cases that [were] held in abeyance for [*Lockridge*]."[504] The Court addressed three broad categories of cases, each discussed in the following subsections:

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[503] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *People v Lockridge*, 498 Mich 358, 399 (2015), the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea or in testimony or by stipulation or by some similar or analogous route." *People v Garnes*, ___ Mich App ___, ___ (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*. at ___ (citing *Apprendi*, 530 US at 469-471, and remanding "for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admissions" with respect to several contested offense variable scores) (additional citations omitted).

[504] The *Lockridge* Court did not address its retroactive application to cases that became final for purposes of direct appellate review before *Lockridge* was decided. The Court also did not address review of preserved *Apprendi/Alleyne* errors (i.e., cases in which the defendant objected to the scoring of the OVs at sentencing on *Apprendi/Alleyne* grounds); the Court noted that "virtually all of [the cases held in abeyance for *Lockridge*] involve[d] challenges that were not preserved in the trial court." *Lockridge*, 498 Mich at 394. However, the Court of Appeals subsequently held that the identical process applies to *preserved* errors. *People v Stokes*, 312 Mich App 181, 192-203 (2015). See Section 3.54(E)(4).

- cases in which plain error categorically cannot be established (no resentencing);[505]
- cases in which sentence was imposed on or before July 29, 2015 (subject to *Crosby* remand and possible resentencing);[506] and
- cases in which sentence was imposed after July 29, 2015 (subject to traditional plain-error review).[507]

1. Cases in Which Plain Error Categorically Cannot Be Established

a. Established Sentencing Facts

In cases in which "facts admitted by the defendant[508] and . . . facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced[,] . . . because the defendant suffered no prejudice from any error, there is no plain error and no further inquiry is required." *Lockridge*, 498 Mich at 394-395.

Nevertheless, in *People v Terrell*, 312 Mich App 450, 465, 466 (2015), the Court of Appeals concluded that "regardless that judicial fact-finding did *not* increase [the] defendant's minimum sentence guidelines range, [a] trial court's compulsory use of the guidelines [is] erroneous in light of *Lockridge*[, 498 Mich 358;]" accordingly, where the defendant has preserved a claim of error under *Alleyne*, 570 US ___, "a [*Crosby*] remand . . . is necessary to determine whether the error resulting from the [trial court's] compulsory use of the guidelines was harmless[,]" even if "any judicial fact-finding did not increase the minimum sentence guidelines [range]

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[505] See Section3.9(I)(2)(a).

[506] See Section3.46(F)(2). See the Michigan Judicial Institute's Quick Reference Guide for handling *Crosby* remands.

[507] See Section3.46(F)(3).

[508] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *People v Lockridge*, 498 Mich 358, 399 (2015), the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea or in testimony or by stipulation or by some similar or analogous route." *People v Garnes*, ___ Mich App ___, ___ (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*. at ___ (citing *Apprendi*, 530 US at 469-471, and remanding "for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admissions" with respect to several contested offense variable scores) (additional citations omitted).

because the scoring was supported by the jury verdict[]" (citations omitted).

Where a "defendant does not argue [on appeal] that the [trial] court's factual findings in scoring [any OVs] were clearly erroneous or not supported by a preponderance of the evidence[,]" but argues only "that the facts supporting the scoring . . . were not necessarily found by the jury or admitted by [the] defendant," a threshold showing of plain error has not been made, and "remand is not required under *Lockridge*[, 498 Mich 358,]" if "[r]educing [the] defendant's OV score by [the number of points scored for an OV on the basis of judicially-found facts] . . . would not alter [the] defendant's minimum sentencing guidelines range." *People v Jackson (Kevin) (On Reconsideration)*, ___ Mich App ___, ___ (2015).

Where the "defendant had pled guilty . . . to two charges of home invasion related to offenses committed [before the sentencing offense] . . . [and d]efense counsel stipulated to these convictions at sentencing[,] . . . the facts underlying the scoring of OV 13 [based on these offenses as part of a pattern of felonious activity] were admitted by [the] defendant, and the points scored for OV 13 [did not need to] be subtracted in considering [the] defendant's total OV score under *Lockridge*[, 498 Mich 358]." *Jackson (Kevin) (On Reconsideration)*, ___ Mich App at ___. "[I]n pleading guilty to those crimes against a person, [the] defendant admitted his commission of those crimes, and admitted the factual basis for his guilty pleas to those crimes, in 'proceedings with substantial procedural safeguards of their own.'" *Id*. at ___, quoting *Apprendi v New Jersey*, 530 US 466, 487 (2000) (additional citation omitted).

b. Sentence Departures

As a matter of law, "[i]n cases . . . that involve a minimum sentence that is an upward departure, a defendant necessarily cannot show plain error because the sentencing court has already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines and expressed its reasons for doing so on the record." *Lockridge*, 498 Mich at 393-394, 395 n 31 (determining that because defendant Lockridge "received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines[,] . . . [he could not] show prejudice from

any error in scoring the OVs in violation of *Alleyne*[, 570 US ___][]").

The Court of Appeals has issued conflicting opinions with respect to whether a remand under *United States v Crosby*, 397 F3d 103 (CA 2, 2005), is necessary where the trial court imposed a departure sentence before *Lockridge* was decided. In *People v Steanhouse*, 313 Mich App 1, 48 (2015), lv gtd 499 Mich 934 (2016), the Court of Appeals adopted the principle of proportionality as the appropriate standard for review of the reasonableness of a departure sentence under *Lockridge*,[509] and held that "the ['*Crosby* remand'] procedure articulated in *Lockridge*[] . . . should apply here . . . [and] is the proper remedy when[] . . . the trial court was unaware of, and not expressly bound by, a reasonableness standard rooted in the . . . principle of proportionality at the time of sentencing." *Steanhouse*, 313 Mich App at 48 (remanding the case to the trial court "'to determine what effect *Lockridge* would have on the defendant's sentence, so that it may be determined whether any prejudice resulted from the error[]'") (citations omitted); see also *People v Masroor*, 313 Mich App 358, 377 (2015), lv gtd 499 Mich 934 (2016) (holding that, under *Steanhouse*, 313 Mich App 1, a *Crosby* remand was required where "[t]he court calculated the minimum period of incarceration for its departure sentence by essentially tripling the applicable guidelines' scores to reflect that there were three complainants[;]" the Court of Appeals directed "the trial court to specifically justify the *extent* of any departure sentences the court may elect to impose, and to explain why the sentences imposed is proportionate to the seriousness of defendant's convictions[]"). See also *People v Stevens (Monica)*, ___ Mich App ___, ___ (2016) (noting that although "the [Michigan] Supreme Court stated in *Lockridge*, 498 Mich at 394, that a defendant cannot establish plain error supporting relief where the court imposed an upwardly departing sentence and explained its reasons on the record[,]" the Court of Appeals was bound under *Steanhouse*, 313 Mich App at 46-49, to remand for proportionality review, even if the Court believed that a pre-*Lockridge* departure sentence was reasonable).

However, in *People v Ambrose*, ___ Mich App ___, ___ (2016), the Court of Appeals held that a remand for

[509] See Section 3.23(B) for discussion of the reasonableness of a departure sentence.

resentencing[510] is *not* always required where the trial court imposed a departure sentence before *Lockridge* was decided. The *Ambrose* majority held that resentencing was not required under *People v Biddles*, ___ Mich App ___, ___ (2016),[511] for a guidelines-scoring error under *People v Francisco*, 474 Mich 82, 92 (2006), where the trial court imposed a departure sentence that the Court of Appeals determined was reasonable "and the sentence 'did not rely on the minimum sentence range from the improperly scored guidelines' at issue." *Ambrose*, ___ Mich App at ___, quoting *Lockridge*, 498 Mich at 394. "In light of the facts of [the] case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[;]" accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables. *Ambrose*, ___ Mich App at ___.

In any event, the trial court must actually score the guidelines before imposing a departure sentence. See *People v Geddert*, ___ Mich ___, ___ (2016). Where the trial court failed to score points for any offense variables but departed from the guidelines range in part on the basis of conduct that should have been scored under OV 13, resentencing was required under *Francisco*, 474 Mich 82; "[e]ven though the guidelines ranges are now advisory[under *Lockridge*, 498 Mich 358]," resentencing was required "[b]ecause correcting the OV score would change the applicable guidelines range[.]" *Geddert*, ___ Mich at ___.

c. No Change in Applicable Minimum Sentence Range

A defendant cannot make a threshold showing of plain error that could require resentencing if a "reduction in [his or her] OV score to account for [an alleged *Apprendi*/*Alleyne*/*Lockridge*] error would [not] change the applicable guidelines minimum sentence range." *Lockridge*, 498 Mich at 399.

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[510] The *Ambrose* Court did not specifically address whether remand for *possible* resentencing under *Crosby*, 397 F3d 103, was necessary; however, the Court cited *Lockridge*, 498 Mich at 394.

[511] In *Biddles*, ___ Mich App at ___, the Court of Appeals clarified the difference between a successful guidelines-scoring *evidentiary* challenge (for which resentencing under *People v Francisco*, 474 Mich 82 (2006), is required) and a successful *Lockridge* challenge (for which remand for *possible* resentencing is required). See Section 3.54(E)(5) for discussion of *Biddles*, ___ Mich App ___.

2. Sentence Imposed On or Before July 29, 2015, and *Crosby* Remand for Possible Resentencing[512]

In cases that involve sentences imposed on or before July 29, 2015 (the date *Lockridge* was decided), if "a defendant's minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error[; i]f the trial court determines that the answer to that question is yes, the court shall order resentencing." *Lockridge*, 498 Mich at 397, citing *United States v Crosby*, 397 F3d 103, 118 (CA 2, 2005). This process applies only to "defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure[.]" *Lockridge*, 498 Mich at 395.

a. Plain Error and Threshold Showing Requiring Remand

In cases in which "[t]he defendant did not object to the scoring of the OVs at sentencing on *Apprendi*/*Alleyne* grounds, . . . [appellate] review is for plain error affecting substantial rights[under *People v Carines*, 460 Mich 750, 763, 774 (1999)]." *Lockridge*, 498 Mich at 392.[513] "To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range." *Id*. at 399. "If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand [to] the trial court[.]" *Id*.

See *Jackson (Kevin) (On Reconsideration)*, ___ Mich App at ___ (holding that the scoring of five points for OV 16 (value of stolen property) over the defendant's objection was erroneous under *Lockridge*, 498 Mich 358, "because the jury was only required to find that [the] defendant

[512] See the Michigan Judicial Institute's Quick Reference Guide for handling *Crosby* remands.

[513] Although *Lockridge* addressed only unpreserved *Alleyne* errors, the Court of Appeals subsequently held that the identical process applies to *preserved* errors. *People v Stokes*, 312 Mich App 181, 192-203 (2015). See Section 3.54(E)(4).

intended or did commit a larceny, not a larceny of a specific value, . . . [and the facts] were not admitted by [the] defendant[;]" however, because "[r]educing [the] defendant's OV score by 5 points . . . would not alter [his] minimum sentencing guidelines range[,] . . . remand [was] not required under *Lockridge*[]") (citations omitted). See also *People v Norfleet*, ___ Mich App ___, ___ (2016) (holding that because OV 12 "specifically states that it cannot be scored for criminal acts for which there was a conviction, . . . any criminal act scored under OV 12 would not be a criminal act found by the jury[;]" accordingly, where there was no indication in the record that the defendant admitted committing the contemporaneous felonious criminal acts supporting the score of 10 points for OV 12, and where removing the 10 points resulted in a change in the applicable guidelines range, he was entitled to a remand for possible resentencing under *Lockridge*, 498 Mich 358, and *Crosby*, 397 F3d 103, even though the "evidence was [otherwise] sufficient to support" the score).

Where "facts found by the jury were sufficient to assess the minimum number of OV points necessary for [the] defendant's placement in the . . . cell of the sentencing grid under which [he or] she was sentenced, there [is] no plain error and [the] defendant is not entitled to resentencing or other relief [on an unpreserved claim] under *Lockridge*[, 498 Mich 358]." *People v Bergman*, 312 Mich App 471, 499 (2015). The trial court's assessment of 50 points for OV 3 and 100 points for OV 9 did not violate the defendant's Sixth Amendment right to a jury trial where the "jury . . . found [the] defendant guilty of OUIL causing death, which required the jury to find that [the] defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof[,]" and "two counts each of second-degree murder[,] . . . reflect[ing] that the jury found beyond a reasonable doubt that multiple deaths occurred[;]" under these circumstances, "each of the facts necessary to support [the OV scores] was necessarily found by the jury beyond a reasonable doubt." *Bergman*, 312 Mich App at 498, 499.

b. Sentencing Court Procedure on Remand: Determination Whether Resentencing is Required

If a case is remanded to the sentencing court upon a threshold showing of plain error that may require resentencing, the trial court must first "determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion." *Lockridge*, 498 Mich at 399. "If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant." *Id*.

"[A] trial court considering a case on a *Crosby* remand should first and foremost 'include an opportunity for a defendant to avoid resentencing by promptly notifying the [trial] judge that resentencing will not be sought.'" *Lockridge*, 498 Mich at 398, quoting *Crosby*, 397 F3d at 118. "If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, [at least in writing,] (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant[.]" *Lockridge*, 498 Mich at 398, citing *Crosby*, 397 F3d at 118, 120. "Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the 'circumstances existing at the time of the original sentence.'" *Lockridge*, 498 Mich at 398, quoting *Crosby*, 397 F3d at 117 (additional citation omitted).

c. Decision Whether to Resentence

"Upon making [its] decision[whether to resentence the defendant], the trial court shall 'either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and[] . . . resentence [the defendant.]'" *Lockridge*, 498 Mich at 398, quoting *Crosby*, 397 F3d at 120.

d. Resentencing Procedure

The sentencing court "must have the defendant present, as required by law, if it decides to resentence the defendant." *Lockridge*, 498 Mich at 398, citing MCR 6.425. The resentencing must be conducted "'in conformity

with' [*Lockridge*, 498 Mich 358]." *Lockridge*, 498 Mich at 398, quoting *Crosby*, 397 F3d at 120.

3. Sentence Imposed After July 29, 2015, and Traditional *Carines* Review

"*Crosby* remands are warranted only in cases involving sentences imposed on or before July 29, 2015, the date [that *Lockridge*, 498 Mich 358, was decided; a]ccordingly, for defendants sentenced after [July 29, 2015], the [traditional plain-error] review from [*Carines*, 460 Mich 750,] will apply." *Lockridge*, 498 Mich at 397, citing *Crosby*, 397 F3d at 116.

4. Preserved *Alleyne* Errors

Where a defendant presents on appeal a *preserved* claim "pursuant to *Alleyne v United States*, [570 US ___ (2013)], [that] his [or her] Sixth Amendment right to a jury trial was violated when the trial court made factual determinations to determine [his or her] minimum sentence[,]" the claim is subject to the same remand procedure, "modeled on that adopted in [*Crosby*, 397 F3d 103,]" that was adopted by the Michigan Supreme Court in *Lockridge*, 498 Mich 358, for addressing *unpreserved* claims of sentencing error under *Alleyne*. *People v Stokes*, 312 Mich App 181, ___ (2015) (citations omitted). The *Stokes* Court explained that, although "the Second Circuit [Court of Appeals later] repudiated *Crosby* to the extent it held that its remand procedure applie[d] to preserved claims[,]" the Michigan Supreme Court apparently "intended that the *Crosby* procedure would apply to both preserved and unpreserved errors[,]" given that the Court "specifically expressed its 'agreement with'" the portion of *Crosby* indicating that its reasoning applied equally to the plain error and harmless error doctrines. *Stokes*, 312 Mich App at ___ ("remand[ing] the matter to the trial court to follow the *Crosby* procedure in the same manner as outlined in *Lockridge* for unpreserved errors[]") (some citations omitted).

Moreover, "regardless of the fact that judicial fact-finding did *not* increase [the] defendant's minimum sentence guidelines range, [a] trial court's compulsory use of the guidelines [is] erroneous in light of *Lockridge*[, 498 Mich 358;]" accordingly, where the defendant has preserved a claim of error under *Alleyne*, 570 US ___, "a [*Crosby*] remand . . . is necessary to determine whether the error resulting from the [trial court's] compulsory use of the guidelines was harmless[,]" even if "any judicial fact-finding did not increase the minimum sentence guidelines [range] because the scoring was supported by the

jury verdict." *People v Terrell*, 312 Mich App 450, 465, 466 (2015) citing *Lockridge*, 498 Mich at ___; *Stokes*, 312 Mich App at 200.

Additionally, where the "defendant raise[s an] *Alleyne* issue in [a] motion for resentencing, [the] claim [is] . . . considered preserved[]" under *Lockridge*, 498 Mich 358, and is therefore reviewed "for harmless error beyond a reasonable doubt." *Terrell*, 312 Mich App at 450, 464 n 40 (citing *People v Kimble*, 470 Mich 305, 310-311 (2004), and *Stokes*, 312 Mich App at 198, and additionally noting that the defendant's "agreement to the scoring [of OVs is] not an admission for *Lockridge* purposes[; r]ather, [the defendant's agreement may] reasonably be interpreted as only an admission that the OVs were supported by a preponderance of the evidence[]").

5. Cases in Which Defendant Presents Both Evidentiary and *Lockridge* Claims

A remand under *Lockridge*, 498 Mich 358, and *Crosby*, 397 F3d 103, "results in *the possibility* of resentencing, whereas, in the context of a successful evidentiary challenge[to the scoring of the guidelines], resentencing is actually ordered by the appellate court[;]" therefore, when an appellant raises both "an evidentiary *and* a constitutional challenge regarding the scoring of the guidelines, the evidentiary challenge must initially be entertained, because if it has merit and requires resentencing, the constitutional or *Lockridge* challenge becomes moot, as a defendant will receive the protections of *Lockridge* on resentencing." *People v Biddles*, ___ Mich App ___, ___ (2016). "[I]f an evidentiary challenge does not succeed, then and only then should [the appellate court] entertain the constitutional challenge." *Id*. at ___.

3.55 Trial Court's Responsibility in Providing Documents to Defendant Pursuing Postconviction Proceedings

A. Appeals of Right

- An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. MCR 6.433(A).

- The court must order the clerk to provide an indigent defendant with copies of documents without cost to the defendant, and, unless the transcript has already been

ordered as set out in MCR 6.425(G)(2), must order the preparation of the transcript. MCR 6.433(A).

B. Appeals by Leave

- An indigent defendant who may file an application for leave to appeal may obtain copies of transcripts and other documents as provided in MCR 6.433(B).

- An indigent defendant must make a written request to the sentencing court for specified documents or transcripts indicating that they are required to prepare an application for leave to appeal. MCR 6.433(B)(1).

- If the requested materials have been filed with the court and not previously provided to the defendant, the court clerk must provide a copy to the defendant. MCR 6.433(B)(2).

- If the requested materials have been previously provided to the defendant, on the defendant's showing of good cause to the court, the clerk must provide the defendant with another copy. MCR 6.433(B)(2).

- If the defendant requests the transcript of a proceeding that has not been transcribed, the court must order the materials transcribed and filed with the court. MCR 6.433(B)(3).

- After the transcript has been prepared, the court clerk must provide a copy to the defendant. MCR 6.433(B)(3).

C. Other Postconviction Proceedings

- An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in MCR 6.433(C).

- An indigent defendant must make a written request to the sentencing court for specific court documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to him or her. MCR 6.433(C)(1).

- If the documents or transcripts have been filed with the court and not previously provided to the defendant, the clerk must provide the defendant with copies of those materials without cost to the defendant. MCR 6.433(C)(2). If the requested materials have been previously provided to the defendant, the clerk is required to provide the defendant with another copy if the defendant

demonstrates good cause to obtain an additional set of court documents. MCR 6.433(C)(2).

- The court may order the transcription of additional proceedings if it finds that there is good cause for doing so. MCR 6.433(C)(3); *People v Caston*, 228 Mich App 291, 302 (1998) ("MCR 6.433(C)(3), by requiring an indigent defendant to demonstrate 'good cause' to obtain a transcript in a postconviction proceeding, does not violate [a] defendant's right to equal protection, even though a defendant with funds might decide to purchase the transcript").

- After a transcript of additional proceedings has been prepared, the clerk must provide a copy to the defendant. MCR 6.433(C)(3).

- Nothing in MCR 6.433(C) precludes the court from ordering materials to be supplied to the defendant in a proceeding under MCR 6.501 *et seq*. MCR 6.433(C)(4).

3.56 Motion to Correct Invalid Sentence

"The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." MCR 6.429(A); *People v Moore (Louis)*, 468 Mich 573, 579 (2003) ("[a] trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid."). A "trial court lacks authority to set aside a valid sentence once [a] defendant begins serving it[,]" *People v Wybrecht*, 222 Mich App 160, 166 (1997), and a trial court may not modify a valid sentence after it has been imposed, except as provided by law. MCR 6.429(A). For example, in *People v Holder*, 483 Mich 168, 170, 177 (2009), the Supreme Court held that the trial court did not have the authority to modify the defendant's sentence under MCR 6.429(A), because the sentence was valid when it was imposed. In *Holder*, 483 Mich at 169-170, the defendant committed several crimes after receiving an early discharge from parole, and thereafter received notice from the Department of Corrections (DOC) that his parole discharge was cancelled. The DOC then requested that the trial court "amend [the] defendant's judgment of sentence to reflect that the sentence imposed was to be served consecutively to the sentence for which the defendant was on parole." *Id*. at 170. However, "because the original judgment of sentence was valid when imposed, the court had no authority to modify it in response to the DOC's [requests]." *Id*. at 177.

"A motion to correct an invalid sentence may be filed by either party." MCR 6.429(A). "A sentence may be invalid no matter who is benefited by the error, because sentencing not only must be tailored to each defendant, but also must satisfy society's need for protection and interest

in maximizing the offender's rehabilitative potential." *People v Harris (Marcus)*, 224 Mich App 597, 600 (1997).

MCR 6.429(B) sets out the time requirements for filing a motion to correct an invalid sentence:

> "(1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.
>
> (2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
>
> (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.
>
> (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500."

However, "'a motion for resentencing is not a condition precedent for a trial court to correct an invalid sentence under MCR 6.429(A),' and . . . [MCR 6.429] 'does not set time limits with respect to a trial court's authority to correct an invalid sentence.'" *People v Comer*, 312 Mich App 538, 545 (2015), quoting *Harris (Marcus)*, 224 Mich App at 601. Furthermore, because MCR 6.429 does not "'contain[] a jurisdictional time limitation[,] . . . there [is] no impediment to the time of [a] trial court's decision . . . that would preclude it from ordering a resentencing pursuant to MCR 6.429(A)[;]'" rather, a "trial court [is] empowered to correct [a] defendant's invalid sentence without time limitation." *Comer*, 312 Mich App at 545 (quoting *Harris (Marcus)*, 224 Mich App at 601, and holding that "the trial court possessed the authority to correct [the] defendant's sentence [for first-degree criminal sexual conduct] 20 months after the original sentencing[]" where the sentence "violated the law by omitting a provision for lifetime [electronic] monitoring[]").

A. Invalid Sentences

A sentence is invalid under the following circumstances:

- When it violates the "two-thirds rule" in *People v Tanner*, 387 Mich 683, 689-690 (1972),[514] and MCL 769.34(2)(b).

[514] See Section 3.1(B) for more information.

- When it exceeds statutory limits. *People v Shipley*, 256 Mich App 367, 378 (2003). A sentence in excess of the statutory limit is only invalid to the extent it exceeds the statutory limit. MCL 769.24; *People v Thomas (Gerry)*, 447 Mich 390, 393 (1994).

- When it is an impermissible combination of terms. *People v Parish*, 282 Mich App 106, 107-108 (2009) (the defendant's sentence of a minimum term of years and a maximum of life in prison violated MCL 769.9(2), which provides that "[t]he court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.").

- When concurrent sentences were imposed and consecutive sentencing was mandatory.[515] *People v Howell (Marlon)*, 300 Mich App 638, 646-647 (2013); *People v Thomas (Roberto)*, 223 Mich App 9, 11 (1997). The due process afforded by a resentencing hearing is required when a defendant is exposed to a greater possible penalty or when a defendant's original sentence would be "drastically increased" by the modified sentence. *Thomas (Roberto)*, 223 Mich App at 15-16. However, "precepts of due process [do] not entitle [a defendant] to a hearing before the trial court correct[s a] judgment[] of sentence[]" when the trial court lacks "discretion to sentence [the defendant] any differently[.]" *Howell (Marlon)*, 300 Mich App at 646-651 (holding that the trial court's failure to specify that the defendant's sentences were to be served consecutively to the sentence for which he was on parole when the sentencing offenses were committed, as required by MCL 768.7a(2) and MCL 769.1h(1), constituted "a mistake arising from an omission under MCR 6.435(A)," and that the trial court therefore properly amended the defendant's judgments of sentence to correct the mistake; the defendant's rights of due process did not entitle him to a hearing because "[t]he trial court [did] not have the discretion to impose any other sentence than that contained in the judgments of sentence as amended[]").

- When the court mistakenly imposes consecutive sentences without statutory authority to do so. *People v Alexander (Ronald)*, 234 Mich App 665, 677-678 (1999). However, resentencing in *Alexander (Ronald)*, 234 Mich App at 678, was not required because, unlike the situation in *Thomas (Roberto)*, 223 Mich App 9, the defendant's due process rights were not implicated. In *Thomas (Roberto)*, 223 Mich App at 15-16, resentencing made the defendant vulnerable to an increased total term of incarceration. In *Alexander*

[515] See Section 3.33 for more information on concurrent and consecutive sentencing.

(Ronald), 234 Mich App at 678, a resentencing hearing was unnecessary because correction of the invalid sentence would result in a decrease in the defendant's overall prison term.

- When the sentence is based on inaccurate information or an error in scoring the sentencing guidelines.[516] *People v Jackson (Leonard)*, 487 Mich 783, 792 (2010). A defendant must be resentenced when the sentencing judge relied on the minimum range indicated in a cell that, due to an error in scoring, was later determined to be the wrong cell range, even when the defendant's original sentence falls within either of the cell ranges. *Id.* at 792. MCL 769.34(10) states "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Stated another way, "the Court shall not remand for resentencing *unless* there was either an error in scoring or [the] defendant's sentence was based on inaccurate information." *Jackson (Leonard)*, 487 Mich at 792. "Conversely, this means that the Court is required to remand whenever one of these two circumstances is present." *Id*. In sum, "the Court may not ignore the two criteria for when a case should be remanded merely because the sentence is within the appropriate guidelines range. When the defendant's sentence is based on an *error in scoring* or *based on inaccurate information*, a remand for resentencing is required." *Id*.[517] In *Jackson (Leonard)*, 487 Mich at 787-789, the defendant was entitled to resentencing for an armed robbery conviction where the Court of Appeals vacated his concurrent convictions for felonious assault that had been used in calculating prior record variable (PRV) 7 for his armed robbery sentence. Because the defendant's sentence was based on inaccurate information, the Court of Appeals erred in holding that it was barred from remanding for resentencing because the defendant's minimum sentence still fell within the corrected sentencing guidelines range. *Id*. at 793.

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[516] In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the guidelines "are advisory only." Because nothing in *Lockridge* specifically calls into question the standards currently governing appellate review of judicial fact-finding in scoring the (now advisory) guidelines, it is unclear to what extent these standards remain good law.

[517] However, *Jackson (Leonard)*, 487 Mich 783, "does not require resentencing if [an] inaccurate score did not affect the applicable sentencing guidelines range." *People v Sims,* 489 Mich 970 (2011), modified on other grounds 490 Mich 857 (2011) (reversing the judgment of the Court of Appeals to the extent that it ordered resentencing based on an error in the scoring of an offense variable).

- When the sentence is based on constitutionally impermissible grounds. *People v Miles (Dwayne)*, 454 Mich 90, 96 (1997).

    - Where a trial court implies that it might impose a more lenient sentence if the defendant provides the court with information that requires the defendant to effectively admit his guilt, the court "violate[s] [the defendant's] constitutional right against self-incrimination[,]" and the sentence is invalid. *People v Conley*, 270 Mich App 301, 314-316 (2006).

    - The statutory mandate of MCL 769.34(10)—a minimum sentence within the appropriate guidelines range must be affirmed on appeal unless it was based on inaccurate information or a scoring error—does not override the relief due a defendant for a "sentencing error[] of constitutional magnitude." *Conley*, 270 Mich App at 316. Specifically, "[i]t is axiomatic that a statutory provision, such as MCL 769.34(10), cannot authorize action in violation of the federal or state constitutions." *Conley*, 270 Mich App at 316.

    - It is constitutionally impermissible when fashioning a defendant's sentence for a trial court to rely on a defendant's constitutionally infirm prior convictions. *People v Whalen*, 412 Mich 166, 169 (1981). However, there exists no presumption that a court considered an unconstitutional prior conviction simply because the conviction was included in the information before the court at the time of sentencing. *Alexander (Ronald)*, 234 Mich App at 672. For such an issue to merit review, there must be some affirmative evidence that a sentencing court actually considered the conviction in question. *Id.* at 672.

- When the sentence is based on a trial court's improper assumption of the defendant's guilt. *Miles (Dwayne)*, 454 Mich at 96.

- When the sentence "conforms to local sentencing policy rather than individualized facts." *Miles (Dwayne)*, 454 Mich at 96.

- When a trial court "fails to exercise its discretion because of a mistaken belief in the law." *People v Green (Donte)*, 205 Mich App 342, 346 (1994).

    - A sentence was deemed invalid when the trial court imposed consecutive sentences under the mistaken belief that consecutive sentencing was mandatory.

People v Daniels (Virgil), 69 Mich App 345, 349-350 (1976).

- "[T]here is no legal requirement that a trial court state on the record that it understands it has [sentencing] discretion and is utilizing that discretion [when imposing a sentence]." *People v Knapp*, 244 Mich App 361, 389 (2001). In the absence of record evidence that a court wrongly believed it had no discretion, a court is presumed to know the law and the judicial discretion the law authorizes. *Id.* at 389.

- When a court fails to utilize a reasonably updated presentence investigation report (PSIR) when imposing a sentence.[518] *People v Hemphill*, 439 Mich 576, 580-581 (1992).

- When the defendant and defense counsel are not given the opportunity to address the court before sentence is imposed. MCR 6.425(E)(1)(c); *People v Wells (Davan)*, 238 Mich App 383, 392 (1999).[519]

A trial court's uncertainty about the parolable life sentence it imposed on a defendant does not entitle the defendant to later be resentenced when the Parole Board's review process ultimately did not accommodate the court's intention. *Moore (Louis)*, 468 Mich at 580. In *Moore (Louis)*, 468 Mich at 580, the trial court clearly expressed its intention that—despite imposing a sentence of life imprisonment—the defendant be considered for parole. On appeal, the Michigan Supreme Court emphasized that "the sentencing judge did not express any intention that defendant *actually be paroled*, but only that the Parole Board consider whether to parole him." *Id*. The Court concluded that the trial court's expectations were satisfied when the Parole Board considered the defendant for parole even though it expressed "no interest" in pursuing the matter. *Id*. "The only sense in which the sentencing judge expressed that he had been under a 'misapprehension or misunderstanding' was that he did not anticipate the infrequency with which the Parole Board would grant parole to defendants sentenced to life terms. However, the failure to accurately predict the actions of the Parole Board does not constitute a misapprehension of the law that could render the sentence invalid." *Id*.

B. Correcting Invalid Sentences

The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and *People v Tanner*, 387 Mich 683 (1972),[520] is a

[518] See Section 3.29(E) for more information.

[519] See Section 3.30 for information on allocution.

reduction in the minimum sentence. *People v Thomas (Gerry)*, 447 Mich 390, 392-394 (1994).

"Certain sentence modifications of invalid sentences are ministerial in nature and do not require a resentencing hearing; however, other modifications require the due process protections of a resentencing hearing." *Miles (Dwayne)*, 454 Mich at 98-99.

"Where a sentence is partially invalid, only the invalid part is to be vacated for resentencing; however, a wholly invalid sentence is to be vacated in its entirety, and resentencing is to be de novo." *People v Parish*, 282 Mich App 106, 108 (2009). In *Parish*, 282 Mich App at 107, the defendant's sentence of 126 months to life in prison violated MCL 769.9(2), which provides that a court "shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." The Court of Appeals held that the defendant's original sentence was wholly invalid because it was "an impermissible *combination of* terms." *Parish*, 282 Mich App at 108. Because the sentence was wholly invalid, the trial court was not limited to imposing "a new and valid maximum term [of imprisonment]" when it resentenced the defendant. *Id*. The Court explained that the trial court was not precluded from imposing a new sentence with a longer minimum term because resentencing on a wholly invalid sentence is de novo. *Id*.

"[O]nce an original sentence is vacated, the case is placed in a presentence posture[, and] . . . [a]s a result, at resentencing, 'every aspect of the sentence is before the judge de novo[.]'" *People v Davis (Stafano)*, 300 Mich App 509 (2013) (citation omitted). In resentencing the defendant, "[t]he trial court may consider the contents of the presentence investigation report [(PSIR)] when calculating the guidelines and the victims may have their statements included in the PSIR." *Id*. at 509-510 (holding that where the Court of Appeals remanded to the trial court with instructions to reconsider the scoring of OV 13 and, if the trial court determined that OV 13 was improperly scored, to "'consider whether to resentence [the] defendant[,]' . . . [the] remand order did not limit the trial court's ability to only a consideration of whether OV 13 was properly scored, [and the trial court] . . . had full authority to resentence [the] defendant, placing the case in a presentence posture[;]" accordingly, "the trial court was able to consider and decide other issues at resentencing once it determined that OV 13 had been erroneously scored[,] . . . includ[ing] consideration of [a] newly appended victim's impact statement[]").

[520] See Section 3.1(B) for more information.

MCL 769.27 states that a court must provide notice to all parties of any change made to a sentence:

> "If the court changes any sentence imposed under this act in any respect, the clerk of the court shall give written notice of the change to the prosecuting attorney, the defendant, and the defendant's counsel. The prosecuting attorney, the defendant's counsel, or the defendant may file an objection to the change. The court shall promptly hold a hearing on any objection filed."

MCR 6.435(A) may permit a trial court to amend a judgment of sentence to correct an error of omission. *People v Howell (Marlon)*, 300 Mich App 638, 646 (2013). In *Howell (Marlon)*, the defendant's original judgments of sentence failed to specify, as required under MCL 768.7a(2) and MCL 769.1h(1), that the sentences were to run consecutively to the sentence for which he was on parole at the time the sentencing offenses were committed. *Howell (Marlon)*, 300 Mich App at 646-647. The Court of Appeals held that "the trial court's failure to address whether [the defendant's] new sentences were consecutive to or concurrent with his parole sentence" constituted "an omission within the meaning of MCR 6.435(A), not a reconsideration within the meaning of MCR 6.425(B)[,]" and that the trial court therefore properly amended the defendant's judgments of sentence to correct the mistake. *Howell (Marlon), 300* Mich App at 647-648.

No hearing is required under MCR 6.435(A) before correction of a clerical error in a judgment of sentence. *Howell (Marlon)*, 300 Mich App at 649. Additionally, "precepts of due process [do] not entitle [a defendant] to a hearing before the trial court correct[s a] judgment[] of sentence[]" when the trial court lacks "discretion to sentence [the defendant] any differently[.]" *Id*. at 650-651 (holding that the defendant's rights of due process did not entitle him to a hearing before correction of his judgments of sentence under MCR 6.435(A) to reflect the mandatory consecutive nature of the sentences, because "[t]he trial court [did] not have the discretion to impose any other sentence than that contained in the judgments of sentence as amended[]").

C. Sentences Imposed Under the Statutory Guidelines

> **Note:** In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]" the guidelines "are advisory only." Because nothing in *Lockridge* specifically calls into question the standards

currently governing appellate review of sentences imposed under the (now advisory) guidelines, it is unclear to what extent all of these standards remain good law.[521] See, however, *People v Conley*, 270 Mich App 301, 316 (2006) (noting that the statutory mandate of MCL 769.34(10) does not override the relief due a defendant for a "sentencing error[] of constitutional magnitude[]").

"MCL 769.34(10) provides a defendant with three separate opportunities to raise a scoring error: at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in [the Court of Appeals]." *People v Hershey*, 303 Mich App 330, 353 (2013). "Furthermore, if the scoring error results in a sentence that is outside the appropriate guidelines range, a defendant has a fourth opportunity to raise the issue, given that it may be appealed 'regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand,' albeit under a plain-error analysis." *Id*., quoting *People v Kimble (Richard)*, 470 Mich 305, 310, 312 (2004).

1. Sentences Within the Guidelines Range

"If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines[522] or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). "In other words, if a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon." *People v Francisco*, 474 Mich 82, 88 (2006). However, "MCL 769.34(10) cannot constitutionally be applied to preclude relief for sentencing errors of constitutional magnitude." *People v Conley*, 270 Mich App 301, 316-317 (2006)

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[521] See, however, *People v Steanhouse*, 313 Mich App 1, 38 (2015), lv gtd 499 Mich 934 (2016) (concluding that "the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*[, 498 Mich 358][]") (citations omitted).

[522] "Under the [legislative] sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy (Donald)*, 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016; see also *People v Jones (Byron)*, 494 Mich 880, 880-881 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy (Donald)*, 494 Mich at 438. "[T]he standards of review traditionally applied to the trial court's scoring of the variables remain viable after [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Steanhouse*, 313 Mich App 1, 38 (2015), lv gtd 499 Mich 934 (2016), citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438 (additional citation omitted).

(resentencing required when, even though the defendant's sentence was within the appropriate guidelines sentence range, the trial court constitutionally erred in considering the defendant's refusal to admit guilt at sentencing).

The requirements for appealing a sentence within the guidelines are found in MCL 769.34(10) and MCR 6.429(C):

> "A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals."

However, resentencing is not required where a scoring error did not alter the applicable sentencing guidelines range. *Sims*, 489 Mich at 970 (2011), modified on other grounds 490 Mich 857 (2011), citing *Jackson (Leonard)*, 487 Mich 783, and *Francisco*, 474 Mich at 89 n 8.

If the trial court declines to impose an intermediate sanction under MCL 769.34(4)(a) and instead imposes a prison sentence that is within the recommended minimum sentencing range, the prison sentence "is within the range authorized by law." *People v Schrauben*, ___ Mich App ___, ___ (2016), citing *Alleyne v United States*, 570 US ___, ___ (2013). Under such circumstances, MCL 769.34(10) requires that "the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Schrauben*, ___ Mich App at ___ (holding that, "[p]ursuant to the broad language of [*People v Lockridge*, 498 Mich 358, 365 n 1, 391 (2015)], under [MCL 769.34(4)(a)], a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less[]").[523]

"[W]hen the request to remand will not be ripe for review until after the Court of Appeals has adjudicated the merits, the mandate of a *proper motion* in MCL 769.34(10) is met when a defendant makes a request to remand for resentencing with supporting grounds within his [or her] appellate brief." *Jackson (Leonard)*, 487 Mich at 800 (the error in scoring the defendant's

[523] See Section 3.7 for discussion of intermediate sanctions. See also Section 3.4 for discussion of *Lockridge*.

variables required the Court of Appeals to first find that the defendant was wrongly convicted of two felonies on which the trial court relied when scoring PRV 7).

Where the prosecution agreed to recommend a sentence *within* a certain minimum-sentence range, but the defendant did not agree to a *specific* sentence range, "the defendant did not bind himself to a particular guidelines range as part of his plea agreement and did not waive his challenges to the offense variable scoring." *People v Osborne (Richard)*, 494 Mich 861, 861 (2013).

"Under MCL 769.34(10), [the appellate courts] may not consider challenges to a sentence based exclusively on proportionality, if the sentence falls within the guidelines." *People v Pratt*, 254 Mich App 425, 429-430 (2003). In fact, "a sentence within the guidelines range is presumptively proportionate[.]" *People v Powell (Kelly)*, 278 Mich App 318, 323 (2008).

2. Sentences Outside the Guidelines Range[524]

Resentencing is required when a scoring error alters the appropriate guidelines range, even if the initial sentence falls within the corrected range, because if resentencing does not occur, "the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention." *Francisco*, 474 Mich at 89-92. "[R]equiring resentencing in such circumstances . . . respects the defendant's right to be sentenced on the basis of the law, [as well as] the trial court's interest in having defendant serve the sentence that it truly intends." *Id*.

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[524] A sentence "outside the guidelines range" is a departure. Departures are discussed in detail in Part E.

There is no longer a requirement that a court articulate a substantial and compelling reason to depart from the guidelines range. In 2015, holding that Michigan's mandatory sentencing guidelines scheme was constitutionally deficient, the Michigan Supreme 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)[,]" 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." *People v Lockridge*, 498 Mich 358, 364-365, 391-392, 399 (2015) (emphasis supplied). A sentencing court has discretion to depart from the guidelines range, and a departure sentence "will be reviewed by an appellate court for *reasonableness*." *Lockridge*, 498 Mich at 392, citing *United States v Booker*, 543 US 220, 261 (2005) (emphasis supplied). A panel of the Court of Appeals has determined that "a [departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny, constitutes a reasonable sentence under *Lockridge*." *People v Steanhouse*, 313 Mich App 1, 47, 48 (2015), lv gtd 499 Mich 934 (2016) (citations omitted). Because it is unknown whether or to what extent pre-*Lockridge* caselaw will be of continued relevance in determining the reasonableness of a departure sentence, discussion of these cases will not be deleted from this benchbook at this time. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

at 92. See also *People v Geddert*, ___ Mich ___, ___ (2016) (citing *Francisco*, 474 Mich 82, and holding that "[e]ven though the guidelines ranges are now advisory[under *Lockridge*, 498 Mich 358]," resentencing was required because the trial court failed to properly score an offense variable and "correcting the OV score would change the applicable guidelines range[]"); *People v Biddles*, ___ Mich App ___, ___ (2016) (noting that a defendant who raises a successful evidentiary challenge to the scoring of the variables, resulting in an alteration of the minimum sentence range, is entitled to resentencing under *Francisco*, 474 Mich at 89).

MCL 769.34(7) and MCR 6.425(F)(4) authorize defendants to appeal a sentence outside the guidelines range on that basis alone. However, unlike MCL 769.34(10) and MCR 6.429(C) (provisions applicable to appealing sentences within the guidelines), MCL 769.34(7) and MCR 6.425(F)(4), the provisions governing appeals of sentences outside the guidelines, make no mention of preservation requirements. Even though the language used in MCL 769.34(7) and MCR 6.425(F)(4) is not identical, there is no conflict between the two provisions and neither one requires something the other does not:

> "If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range." MCL 769.34(7).
>
> When imposing sentence in a case in which sentencing guidelines enacted in . . . MCL 777.1 *et seq*., are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines." MCR 6.425(F)(4).

"[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless

of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *Kimble (Richard)*, 470 Mich at 310.

3. Scoring Error and Departure Sentence

As a matter of law, "[i]n cases . . . that involve a minimum sentence that is an upward departure, a defendant necessarily cannot show plain error because the sentencing court has already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines and expressed its reasons for doing so on the record." *Lockridge*, 498 Mich at 393-394, 395 n 31 (determining that because defendant Lockridge "received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines[,] . . . [he could not] show prejudice from any error in scoring the OVs in violation of *Alleyne*[, 570 US ___][]").

The Court of Appeals has issued conflicting opinions with respect to whether a remand under *United States v Crosby*, 397 F3d 103 (CA 2, 2005), is necessary where the trial court imposed a departure sentence before *Lockridge* was decided. In *People v Steanhouse*, 313 Mich App 1, 48 (2015), lv gtd 499 Mich 934 (2016), the Court of Appeals adopted the principle of proportionality as the appropriate standard for review of the reasonableness of a departure sentence under *Lockridge*,[525] and held that "the ['*Crosby* remand'] procedure articulated in *Lockridge*[] . . . should apply here . . . [and] is the proper remedy when[] . . . the trial court was unaware of, and not expressly bound by, a reasonableness standard rooted in the . . . principle of proportionality at the time of sentencing." *Steanhouse*, 313 Mich App at 48 (remanding the case to the trial court "'to determine what effect *Lockridge* would have on the defendant's sentence, so that it may be determined whether any prejudice resulted from the error[]'") (citations omitted); see also *People v Masroor*, 313 Mich App 358, 377 (2015), lv gtd 499 Mich 934 (2016) (holding that, under *Steanhouse*, 313 Mich App 1, a *Crosby* remand was required where "[t]he court calculated the minimum period of incarceration for its departure sentence by essentially tripling the applicable guidelines' scores to reflect that there were three complainants[;]" the Court of Appeals directed "the trial court to specifically justify the *extent* of any departure sentences the court may elect to impose, and to explain why the sentences

[525] See Section 3.23(B) for discussion of the reasonableness of a departure sentence.

imposed is proportionate to the seriousness of defendant's convictions[]"). See also *People v Stevens (Monica)*, ___ Mich App ___, ___ (2016) (noting that although "the [Michigan] Supreme Court stated in *Lockridge*, 498 Mich at 394, that a defendant cannot establish plain error supporting relief where the court imposed an upwardly departing sentence and explained its reasons on the record[,]" the Court of Appeals was bound under *Steanhouse*, 313 Mich App at 46-49, to remand for proportionality review, even if the Court believed that a pre-*Lockridge* departure sentence was reasonable).

However, in *People v Ambrose*, ___ Mich App ___, ___ (2016), the Court of Appeals held that a remand for resentencing[526] is *not* always required where the trial court imposed a departure sentence before *Lockridge* was decided. The *Ambrose* majority held that resentencing was not required under *People v Biddles*, ___ Mich App ___, ___ (2016),[527] for a guidelines-scoring error under *People v Francisco*, 474 Mich 82, 92 (2006), where the trial court imposed a departure sentence that the Court of Appeals determined was reasonable "and the sentence 'did not rely on the minimum sentence range from the improperly scored guidelines' at issue." *Ambrose*, ___ Mich App at ___, quoting *Lockridge*, 498 Mich at 394. "In light of the facts of [the] case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[;]" accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables. *Ambrose*, ___ Mich App at ___.

In any event, the trial court must actually score the guidelines before imposing a departure sentence. See *People v Geddert*, ___ Mich ___, ___ (2016). Where the trial court failed to score points for any offense variables but departed from the guidelines range in part on the basis of conduct that should have been scored under OV 13, resentencing was required under *Francisco*, 474 Mich 82; "[e]ven though the guidelines ranges are now advisory[under *Lockridge*, 498 Mich 358]," resentencing was required "[b]ecause correcting the OV score would change the applicable guidelines range[.]" *Geddert*, ___ Mich at ___.

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[526] The *Ambrose* Court did not specifically address whether remand for *possible* resentencing under *Crosby*, 397 F3d 103, was necessary; however, the Court cited *Lockridge*, 498 Mich at 394.

[527] In *Biddles*, ___ Mich App at ___, the Court of Appeals clarified the difference between a successful guidelines-scoring *evidentiary* challenge (for which resentencing under *People v Francisco*, 474 Mich 82 (2006), is required) and a successful *Lockridge* challenge (for which remand for *possible* resentencing is required). See Section 3.54(E)(5) for discussion of *Biddles*, ___ Mich App ___.

4. Waiver

"[P]ursuant to MCL 769.34(10) and *Kimble* [*(Richard)*], 470 Mich at 310-312," if a defendant's sentence is outside the appropriate guidelines range, he or she "is entitled to appeal the matter unless he [or she] is deemed to have waived the error at sentencing." *Hershey*, 303 Mich App at 349.[528] "[T]here are no 'magic words' that constitute a waiver and . . . a waiver analysis should consider the entire context of a defendant's conduct concerning a purportedly waived issue to determine whether the defendant, in fact, intentionally relinquished a known right." *Id*. at 350, 351, 353-354 (citing and quoting *People v Kowalski*, 489 Mich 488, 503-504, 504 n 26, 505 (2011), and holding that "[the] defendant did not waive his right to appellate review of the [claimed] scoring errors" where "the record, at most, represent[ed] a failure to recognize a scoring error and lodge an objection[;]" although both the defendant and defense counsel indicated that they did not have any "'additions or corrections'" to the PSIR, there was never "any actual discussion about the scoring of the variables[,]" and "it [was] not clear from the entire record that [the] defendant 'clearly express[ed] satisfaction with [the] trial court's decision[]'").

5. *Apprendi/Alleyne* Errors in Calculating Guidelines Scores

In 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US ___ (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[529] or found by the jury to score

[528] There is no longer a requirement that a court articulate a substantial and compelling reason to depart from the guidelines range. In 2015, holding that Michigan's mandatory sentencing guidelines scheme was constitutionally deficient, the Michigan Supreme 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)[,]" 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." *People v Lockridge*, 498 Mich 358, 364-365, 391-392, 399 (2015) (emphasis supplied). A sentencing court has discretion to depart from the guidelines range, and a departure sentence "will be reviewed by an appellate court for *reasonableness*." *Lockridge*, 498 Mich at 392, citing *United States v Booker*, 543 US 220, 261 (2005) (emphasis supplied). A panel of the Court of Appeals has determined that "a [departure] sentence that fulfills the principle of proportionality under [*People v*] *Milbourn*[, 435 Mich 630 (1990),] and its progeny, constitutes a reasonable sentence under *Lockridge*." *People v Steanhouse*, 313 Mich App 1, 47, 48 (2015), lv gtd 499 Mich 934 (2016) (citations omitted). Because it is unknown whether or to what extent pre-*Lockridge* caselaw will be of continued relevance in determining the reasonableness of a departure sentence, discussion of these cases will not be deleted from this benchbook at this time. See Section 3.23; see also Section 3.4 for additional discussion of *Lockridge*.

offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range[.]" *People v Lockridge*, 498 Mich 358, 364, 399 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)[,]" 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).

A defendant raising an *Apprendi*/*Alleyne*/*Lockridge* guidelines-scoring error may be entitled to resentencing. See Section 3.54(E) for discussion of *Lockridge* and its application to cases in which offenders were sentenced under the previously-mandatory sentencing guidelines.[530]

[529] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *People v Lockridge*, 498 Mich 358, 399 (2015), the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea or in testimony or by stipulation or by some similar or analogous route." *People v Garnes*, ___ Mich App ___, ___ (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*. at ___ (citing *Apprendi*, 530 US at 469-471, and remanding "for possible resentencing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admissions" with respect to several contested offense variable scores) (additional citations omitted).

[530] Retroactive application of *Lockridge*, 498 Mich 358, to a defendant whose case was pending on direct review when *Lockridge* was issued does not violate the Ex Post Facto Clause. *People v Richards (Kyle)*, ___ Mich App ___, ___ (2016) (citations omitted).

Chapter 4: Probation Revocation

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Part A: Governing Law and Principles

4.1 Overview of Probation Revocation

"[A] judge who sentences a defendant to probation retains jurisdiction over the case in all subsequent proceedings, including revocation of probation." *People v Manser*, 172 Mich App 485, 487 (1988). "'The underlying policy is simply to insure that revocation will be considered by the judge who is most acquainted with the matter.'" *Id.* at 487, quoting *People v Clemons (Alvin)*, 116 Mich App 601, 604 (1981).

"[V]iolation of probation is not a crime, and a ruling that probation has been violated is not a new conviction." *People v Kaczmarek*, 464 Mich 478, 482-483 (2001). "'If a judge finds that a probationer violated his [or her] probation by committing an offense, the probationer is neither burdened with a new conviction nor exposed to punishment other than that to which he [or she] was already exposed . . . .'" *Id.* at 483, quoting *People v Johnson (Eddie)*, 191 Mich App 222, 226 (1991). "Instead, revocation of probation simply clears the way for a resentencing on the original offense." *Kaczmarek*, 464 Mich at 483.

A trial court only has jurisdiction to revoke a defendant's probation and sentence him or her to imprisonment during the probationary period; if the probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass*, 288 Mich App 399, 408-409 (2010).

A. Rules Governing Probation Revocation

1. Governing Statutory Authority

Probation proceedings are governed by MCL 771.1 *et seq*. The imposition of probation, including duration, conditions, placement in special incarceration programs, supervision fees, termination, and discharge, is governed by MCL 771.1—MCL 771.3c, MCL 771.5, and MCL 771.6.[1] Rules governing probation revocation and imposition of sentence are contained in MCL 771.4, MCL 771.4a, MCL 771.7, MCL 771.14, and MCL 771.14a.

a. Probation Revocation: § 771.4

In cases involving adults or juveniles who are sentenced to adult probation,[2] MCL 771.4 contains the general

[1] For general discussion of the imposition of probation, see Section 3.46.

standard for probation revocation. This statute provides the sentencing court broad discretion to revoke probation:

> It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest. . . .

MCL 771.4 also provides general procedural guidance for probation revocation proceedings:

> Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials. In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good. The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing. The court may investigate and enter a disposition of the probationer as the court determines best serves the public interest. If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made. . . .

[2] See Section 4.16 for discussion of revocation of juvenile probation.

b. Additional Provisions

Additional relevant statutory provisions include:

- MCL 771.3(8) (permitting revocation of probation if the probationer fails to make a good faith effort to comply with an order to pay costs imposed as a condition of probation)[3]
- MCL 771.4a (requiring revocation of probation if the probationer willfully violates the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*.)
- MCL 771.7 (governing revocation of juvenile probation in automatic waiver proceedings)[4]
- MCL 771.14 (governing presentence investigation reports)
- MCL 771.14a (governing presentence investigation reports in juvenile automatic waiver proceedings)[5]
- MCL 771A.1 *et seq*. (governing voluntary, grant-funded swift and sure probation supervision programs established under the Probation Swift and Sure Sanctions Act)[6]

2. Governing Court Rules

MCR 6.445 sets forth the required procedures for probation revocation proceedings in felony cases. See MCR 6.001(A). In misdemeanor cases, MCR 6.445(A)-(G) apply. See MCR 6.001(B).

Additional relevant court rules include:

- MCR 1.111(B)(1) (appointment of foreign language interpreter for party or witness with limited English proficiency if "necessary for the person to

[3] However, a sentence that exposes an indigent offender to incarceration unless he or she pays fines, costs, or restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on economic status. See *Tate v Short*, 401 US 395, 397-400 (1971); *People v Collins (Richard)*, 239 Mich App 125, 135-136 (1999). See Section 4.4(A) for additional discussion of revocation of probation for failure to pay restitution, costs, or fees.

[4] See Section 4.16 for discussion of juvenile probation.

[5] See Section 4.16 for discussion of juvenile probation.

[6] A program of probation supervision implemented under the Probation Swift and Sure Sanctions Act is subject to requirements in addition to those imposed under the generally-applicable statutes and court rules that are discussed throughout this chapter. See Section 4.17 for discussion of swift and sure probation supervision programs.

meaningfully participate in the case or court proceeding[]"); see also MCR 1.111(A)(1)[7]

- MCR 6.005(E) (advice of continuing right to counsel at subsequent proceedings following waiver of counsel); see MCR 6.445(D)
- MCR 6.103(B)-(C) (form, service, and return of summons for probationer to appear for arraignment on alleged violation); see MCR 6.445(A)(1)
- MCR 6.403 (judicial findings of fact and conclusions of law); see MCR 6.445(E)(2)
- MCR 6.425(B) (presentence report); see MCR 6.445(G)
- MCR 6.425(E) (sentencing procedure); see MCR 6.445(G)

B. Issuance of Summons or Warrant

"On finding probable cause to believe that a probationer has violated a condition of probation, the court may (1) issue a summons in accordance with MCR 6.103(B) and MCR 6.103(C) for the probationer to appear for arraignment on the alleged violation, or (2) issue a warrant for the arrest of the probationer." MCR 6.445(A). "An arrested probationer must promptly be brought before the court for arraignment on the alleged violation." *Id*.[8]

C. Arraignment[9]

At the arraignment on the alleged probation violation, the court must follow the procedures set out in MCR 6.445(B).

The probationer may plead guilty to the probation violation at the arraignment. MCR 6.445(F).

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[7] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

[8] A probationer who is participating in a program of swift and sure probation supervision under the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq*., must be brought before a judge for a probation violation "as soon as possible but within 72 hours after the violation is reported to the court" unless good cause is shown for the delay. MCL 771A.5(1)(c). See Section (H) for discussion of the Probation Swift and Sure Sanctions Act.

[9] See Section 4.10 for more information on arraignment for probation violation charges.

D. Hearing[10]

Probation revocation hearings are summary and informal. MCL 771.4. "The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach." *People v Pillar*, 233 Mich App 267, 269 (1998). "However, probationers are afforded certain due process at violation hearings because of the potential for loss of liberty." *Id.* at 269.

The rules of evidence are inapplicable at probation violation hearings, except those pertaining to privileges. MCL 771.4; MCR 6.445(E)(1); MRE 1101(b)(3).

The state has the burden of proving a probation violation by a preponderance of the evidence. MCR 6.445(E)(1).

A probationer has the right to a procedure comprised of:

- a factual determination that he or she is in fact guilty of violating probation; and
- a discretionary determination of whether the violation warrants revocation. *Pillar*, 233 Mich App at 269.

The court is required to make specific findings at the conclusion of the hearing, either: (1) on the record, or (2) in a written opinion made a part of the record. MCR 6.445(E)(2).

E. Plea[11]

A defendant may plead guilty to a probation violation. MCR 6.445(F). The court must comply with MCR 6.445(F) when accepting a probationer's guilty plea. Failure to comply "in all respects" with the requirements of MCR 6.445(F) may result in vacating a court's revocation of probation and sentence. *People v Burbank*, 461 Mich 870 (1999).

Committee Tip:

Even though not specifically required by the court rule, it is good practice to place the probationer under oath before accepting the plea. See MCR 6.302(A).

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[10] See Section 4.12 for more information on probation violation hearings.

[11] See Section 4.11 for more information taking a plea during a probation violation proceeding.

F. Sentencing[12]

The court may enter a disposition of the probationer according to what best serves the public interest. MCL 771.4.

MCR 6.445(G) sets out a list of actions the court may take if it finds that a probationer has committed a probation violation, or if the probationer pleads guilty to a probation violation. The court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made. MCL 771.4.[13]

The legislative sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 557, 565 (2005). *Hendrick* applies retroactively. *People v Parker (Charles)*, 267 Mich App 319, 328 (2005). However, "the holding in *Hendrick*[, 472 Mich at 557,] is not applicable when probation is [not revoked, but is instead] continued, modified, or extended pursuant to MCR 6.445(G)." *People v Malinowski*, 301 Mich App 182, 183-184, 187 (2013).

"The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]." MCR 6.445(G). MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

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[12] See Section 4.13 for more information on sentencing a defendant after finding a probation violation.

[13] A swift and sure probation supervision program that is funded under the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, is required to "[p]rovide for the immediate imposition of sanctions and remedies approved by the state court administrative office [(SCAO)] to effectively address probation violations." SCAO-approved sanctions and remedies may include temporary incarceration, extension of the period of supervision, additional reporting and compliance requirements, drug and alcohol testing, mental health treatment, and/or probation revocation. MCL 771A.5(1)(d)(*i*)-(*vi*). See Section (H) for discussion of the Probation Swift and Sure Sanctions Act.

G. Appeal Rights[14]

On the record and immediately after imposing a sentence that involves incarceration, the court must advise the probationer of his or her appellate rights. MCR 6.445(H)(1). If the underlying conviction resulted from a trial, the probationer has an appeal of right. MCR 6.445(H)(1)(a). If the underlying conviction resulted from a guilty or nolo contendere plea, the probationer is entitled to file an application for leave to appeal. MCR 6.445(H)(1)(b).

On the record and immediately after imposing sentence in cases involving a sentence other than incarceration, the court must advise the probationer that he or she is entitled to file an application for leave to appeal. MCR 6.445(H)(2).

H. Probation Swift and Sure Sanctions Act[15]

Effective January 9, 2013, 2012 PA 616 added the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq*., establishing a voluntary, grant-funded "state swift and sure sanctions program" for the supervision of participating offenders who have been placed on probation for committing a felony. MCL 771A.3; see also MCL 771A.2(b). Under the Probation Swift and Sure Sanctions Act, a circuit court may apply to the State Court Administrative Office (SCAO) for a grant to fund a swift and sure probation supervision program. MCL 771A.4(2).[16] A probationer participating in such a program is subject to close monitoring and to prompt arrest and the immediate imposition of sanctions following a probation violation. See MCL 771A.3; MCL 771A.5(1).

4.2 Scope of This Chapter

This chapter discusses the procedures for conducting probation revocation proceedings. Rules governing the imposition of probation are briefly discussed only when relevant to revocation of probation.

Sections 4.3, 4.4, 4.5, and 4.6 address topics including due process requirements applicable to probation revocation proceedings, the types of conduct that may justify revocation, and general time and notice requirements for initiating and pursuing revocation. Part B discusses

[14] See Section 4.15 for more information on appeals.

[15] See Section 4.17 for more information on the Probation Swift and Sure Sanctions Act.

[16] "The funding of all grants under [Chapter XIA of the code of criminal procedure] is subject to appropriation." MCL 771A.4(2).

probation revocation procedure, from the issuance of a warrant or summons to the filing of an appeal or application for leave to appeal.

The rules and procedures discussed in this chapter apply to juveniles who are tried as adults following traditional waiver proceedings, as well as to juveniles who are tried and sentenced as adults in designated and automatic waiver proceedings. However, different rules apply to revocation of *juvenile* probation, which may be imposed as a juvenile disposition in a delinquency, designated, or automatic waiver proceeding. Revocation of probation in cases involving juveniles is briefly discussed in Section 4.16.

Section 4.17 discusses the Probation Swift and Sure Sanctions Act,[17] under which courts may apply for participation in the voluntary, grant-funded state swift and sure sanctions program. A program of probation supervision implemented under the Probation Swift and Sure Sanctions Act is subject to requirements in addition to those imposed by the generally-applicable statutes and court rules that are discussed throughout this chapter.

For related topics, see the following:

- Imposition of probation, Section 3.46.
- Delayed, conditional, or suspended sentencing, Section 3.47.
- Deferred adjudication of guilt, Section 3.48.
- Imposition and revocation of youthful trainee status under the Holmes Youthful Trainee Act (HYTA), Section 3.49.
- Special alternative incarceration (SAI) units ("boot camp"), Section 3.53.
- Imposition of probation in juvenile delinquency cases, Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 10.
- Probation violations in cases involving juvenile dispositions, including delinquency and designated proceedings, Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 11.
- Probation violations in juvenile designated cases in which the court has delayed imposition of an adult sentence,

[17] MCL 771A.1 *et seq.*

Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 15.

- Imposition and revocation of probation in juvenile automatic waiver cases in which juvenile probation and commitment are ordered, Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16.

4.3 Due Process Considerations

A. Limited Nature of Due Process Rights Applicable in Probation Revocation Proceedings

"'Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property.'" *In re Parole of Hill*, 298 Mich App 404, 412 (2012), quoting *Kampf v Kampf*, 237 Mich App 377, 382 (1999). "'Whether the due process guarantee is applicable depends initially on the presence of a protected "property" or "liberty" interest.'" *In re Parole of Hill*, *298* Mich App at 412, quoting *Hanlon v Civil Serv Comm'n*, 253 Mich App 710, 723 (2002); see also *Morrissey v Brewer*, 408 US 471, 481 (1972); *Williams v Hofley Mfg Co*, 430 Mich 603, 610 (1988).

"[A] sentence of supervised release necessarily involves the surrender of certain constitutional rights." *People v Glenn-Powers*, 296 Mich App 494, 502 (2012), citing *People v Harper*, 479 Mich 599, 627 (2007), abrogated in part on other grounds by *People v Lockridge*, 498 Mich 358, 364-365 (2015). "Because probation occurs after the end of a criminal prosecution, probation revocation proceedings are not a stage of a criminal prosecution." *People v Breeding*, 284 Mich App 471, 482 (2009), citing *Gagnon v Scarpelli*, 411 US 778, 782 (1973); *Morrissey*, 408 US at 480; *People v Ritter*, 186 Mich App 701, 705 (1991); see also *People v Rial*, 399 Mich 431, 435 (1976). Therefore, "a probationer in a probation revocation hearing is not entitled to the full range of due process rights associated with a criminal trial." *Breeding*, 284 Mich App at 481 n 3, citing *Ritter*, 186 Mich App at 705-706; see also *Morrissey*, 408 US at 480. For example, a probationer "'may . . . face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt,[18] among other things, do not apply.'" *Samson v California*, 547 US 843, 849 (2006), quoting *United States v Knights*, 534 US 112, 120 (2001); see also *Harper*, 479 Mich at 627.

[18] "The state has the burden of proving a [probation] violation by a preponderance of the evidence." MCR 6.445(E)(1).

Nevertheless, "[p]robation revocation[] . . . does result in a loss of liberty[,]" and "a probationer [therefore cannot] be denied due process[.]" *Gagnon*, 411 US at 782, 782 n 4. However, "[i]nherent in the very nature of probation is that probationers 'do not enjoy "the *absolute* liberty to which every citizen is entitled."'" *Knights*, 534 US at 119 (emphasis supplied; citations omitted). Rather, "[p]robation is 'one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service[,]'" *id.* at 119, quoting *Griffin v Wisconsin*, 483 US 868, 874 (1987), and "probation revocation deprives a probationer of the conditional liberty that is properly dependent on observance of the terms of the probation order, rather than the absolute liberty to which every citizen is entitled," *Breeding*, 284 Mich App at 481 n 3, citing *Ritter*, 186 Mich App at 705-706.

The due process rights "of one who is a probationer . . . only because he [or she] has [already] been convicted of a crime[]" are "more limited" than the rights applicable to a defendant in a criminal prosecution, *Gagnon*, 411 US at 789, "allow[ing] for procedures that are more flexible than those required during a criminal prosecution[,]" *Breeding*, 284 Mich App at 483-484; see also *Rial*, 399 Mich at 435. "'Due process requires only that the revocation proceedings be conducted in a fundamentally fair manner.'" *People v Belanger*, 227 Mich App 637, 645 (1998), quoting *Ritter*, 186 Mich App at 706.

B. *Morrissey / Gagnon* Minimum Due Process Requirements

In *Gagnon*, 411 US at 782, 782 n 3, 786-787, the United States Supreme Court adopted, for purposes of the revocation of probation, the "'minimum requirements of due process'" that were set out in *Morrissey*, 408 US at 484-489, for the "constitutionally indistinguishable" revocation of parole. Under this constitutional framework, there are "two important stages": (1) the arrest and detention of the probationer for a violation of probation, and (2) the formal revocation of probation. *Morrissey*, 408 US at 485, 487; *Gagnon*, 411 US at 781-782, 784. "[A] probationer[] . . . is entitled to [both] a preliminary and a final revocation hearing, under the conditions specified in *Morrissey*[, 408 US at 484-489]."

1. Preliminary Hearing

After a probationer is arrested for an alleged probation violation, he or she is entitled to "an inquiry . . . in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested [probationer] has committed acts that would constitute a violation of [probation] conditions." *Morrissey*, 408 US at 485; see

Gagnon, 411 US at 782. At this stage, a probationer is entitled to (1) notice of the preliminary hearing and of the alleged violation(s); (2) the opportunity to appear and present evidence at the hearing; (3) the right, if requested, to confront an adverse witness, unless the hearing officer determines that confrontation of the witness would subject him or her to a risk of harm; (4) a determination, by "an independent decisionmaker[,]" whether probable cause exists to believe that a condition of probation has been violated; and (5) a written report by the hearing officer. *Gagnon*, 411 US at 786; *Morrissey*, 408 US at 485-487.

2. Final Revocation Hearing

"[I]f it is desired by the [probationer], prior to the final decision on revocation" and "within a reasonable time after [he or she] is taken into custody[,]"[19] the probationer is entitled to a hearing "lead[ing] to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Morrissey*, 408 US at 487-488; see *Gagnon*, 411 US at 786. "[T]he 'minimum requirements of due process'" at this "less summary" final hearing are "very similar" to those applicable at the preliminary hearing, including:

> "(a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him [or her]; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body[,] . . . members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation]." *Gagnon*, 411 US at 786, quoting *Morrissey*, 408 US at 489.

The *Morrissey* Court, emphasizing that revocation is not a criminal prosecution, noted that these procedural guarantees are not intended "to create an inflexible structure for . . . revocation procedures[,]" but are simply part of the "informal hearing structured to assure that the finding of a . . . violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge

[19] The *Morrissey* Court noted that "[a] lapse of two months[] . . . would not appear to be unreasonable." *Morrissey*, 408 US at 488.

of the [probationer's] behavior." *Morrissey*, 408 US at 484, 489, 490; see also *Gagnon*, 411 US at 781-782.

3. Compliance with *Morrissey* / *Gagnon* in Michigan

Michigan's probation revocation procedure consists of a judicial finding of probable cause for issuance of a warrant or summons, followed by arraignment, a violation hearing, and sentencing. See MCR 6.445(A)-(G); see also *People v Jackson (Leroy)*, 63 Mich App 241, 246-247 (1975). Although this procedure does not typically include separate "preliminary" and "final" revocation hearings, the preliminary probable cause determination and subsequent single revocation hearing required in Michigan "far exceed[] the minimum due process requirements set forth in *Morrissey*[, 408 US 471,] and *Gagnon*[, 411 US 778]." *Triplett v Deputy Warden, Jackson Prison*, 142 Mich App 774, 782-783 (1985), citing *Jackson (Leroy)*. In *Jackson (Leroy)*, 63 Mich App at 246-248, the Court explained how the many protections afforded to Michigan probationers more than sufficiently satisfy these constitutional requirements:

> "[Under] the Michigan procedure for revocation of probation pursuant to MCL 771.4[,] . . . a probation officer files a petition with the court alleging a probation violation. If the probationer is not in custody, the judge determines whether probable cause exists to believe that the probationer has violated one or more of the conditions of probation. In the event probable cause exists a bench warrant is issued for the probationer's arrest.[20] Upon apprehension the probationer is brought before the court at the "earliest opportunity".
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> * * *
>
> In Michigan the probationer must be served with written notice of the charges against him [or her] prior to the hearing. . . . At the hearing the probationer is entitled to produce witnesses and evidence as well as to cross-examine and confront witnesses. . . . The state must present proof of violation of the charges. . . . Evidence of the charge is the only factor to be considered in determining whether to revoke probation. . . . There must be a

[20] Under MCR 6.445(A)(1), a court may alternatively elect to issue a summons to appear for arraignment on the alleged violation.

> record of the hearing that demonstrates the due process requirements have been satisfied. . . . If the probationer desires, he [or she] is entitled to representation by counsel. . . . The probationer is entitled to an appeal as of right[21] following determination of a probation violation on those matters relating to the probation violation and the hearing thereon. . . .
>
> . . . [T]his alternative procedure does not violate *Gagnon* or *Morrissey*. "Although *Gagnon* and *Morrissey* 'mandate' two hearings—preliminary and final—those decisions dealt with administrative revocations of parole or probation. We deal [in Michigan] rather with judicial revocation of probation where procedures and processes differ and where a decision is made by the repository of 'due process'—the courts." . . . Michigan's judicial warrant procedure coupled with the strict due process requirements of the revocation hearing is constitutionally equal or superior to the preliminary "minimal inquiry" hearing and final revocation hearing procedure required by *Morrissey* and *Gagnon*." [Citations omitted.]

Subsequent Court of Appeals cases suggest that if there is an unusually lengthy delay between arrest or issuance of the notice of probation violation and the revocation hearing, a separate probable cause determination should be made. See *People v Irving*, 116 Mich App 147, 151 (1982) ("'[t]his Court has held several times that the due process requirements of *Morrissey*[] . . . and *Gagnon*[] . . . are satisfied by Michigan's single revocation hearing procedure *if that hearing is held sufficiently close in time to the notice of the probation violation*[]'") (emphasis supplied; citations omitted); *People v Miller (Buford)*, 77 Mich App 381, 384-386 (1977) (holding that a nearly five-month delay between issuance of the notice of violation and the single revocation hearing comported with due process, despite the omission of a separate probable cause hearing, because "[the d]efendant's hearing, as originally scheduled, was sufficiently close in time [to the notice of violation, and] . . . [s]ubsequent delays were due solely to adjournments requested by defense counsel[]"). MCR 6.445(C) addresses the potential due process

[21] An appeal of right is not available to a probationer whose underlying conviction was the result of a guilty or nolo contendere plea. See MCR 6.445(H)(1)(b). See Section 4.15 for discussion of appeal following probation revocation.

concerns associated with such a delay by requiring the probationer's release if the revocation hearing is not held within 14 days after arraignment.[22]

C. Right to Counsel

1. Federal Constitutional Right to Counsel During Revocation Proceedings and Sentencing

"[A]n indigent criminal defendant has the right to appointed counsel 'at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.'" *In re Parole of Hill*, 298 Mich App at 413, quoting *Mempa v Rhay*, 389 US 128, 134 (1967). Because probation revocation is not itself a stage of a criminal prosecution, the states are not "under a constitutional duty to provide counsel for indigents in all probation . . . revocation cases." *Gagnon*, 411 US at 782, 787.

Nevertheless, due process may, in certain circumstances, require the appointment of counsel at a preliminary or final revocation hearing. *Gagnon*, 411 US at 789-791. Noting that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings," the *Gagnon* Court explained, by way of example, that counsel should be appointed in a case in which the probationer has requested counsel and claims either that he or she did not commit a violation or that "there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." *Id.* at 790. On the other hand, there is presumably no right to the appointment of counsel if the probationer admits that he or she has committed another serious crime. *Id*. at 791. In considering a request for counsel, consideration must be given to "whether the probationer appears to be capable of speaking effectively for himself [or herself]." *Id*. at 790-791.

If a request for counsel is refused, "the grounds for refusal should be stated succinctly in the record." *Gagnon*, 411 US at 791.[23]

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[22] See Section 4.10(D) for additional discussion of MCR 6.445(C).

[23] By court rule, Michigan provides broader entitlement to appointed counsel than is constitutionally required. MCR 6.445(B)(2)(b) provides that *any* probationer facing revocation must be advised at arraignment that he or she is entitled to the appointment of counsel at the violation hearing and at all subsequent court proceedings. MCR 6.445(B)(3) additionally provides that the court should appoint a lawyer for the defendant at the arraignment "if requested and appropriate[.]" See Section 4.3(C) for discussion of this broader right to counsel in Michigan.

Because *sentencing* is a "'stage of a criminal proceeding where substantial rights of a criminal accused may be affected,'" an indigent probationer is entitled, under the Sixth Amendment, to the appointment of counsel if the revocation proceeding involves sentencing. *Gagnon*, 411 US at 781, quoting *Mempa*, 389 US at 134; see also *People v Gulley*, 66 Mich App 112, 117 (1975); *People v Brown (Charles)*, 17 Mich App 396, 397 (1969).[24]

2. Right to Counsel Afforded Under Michigan Law

A probationer's right to the assistance of appointed counsel under Michigan law is broader than what is required under the United States Constitution, applying equally in all revocation proceedings. See *Jackson (Leroy)*, 63 Mich App at 247-248 (noting that the protections applicable in Michigan probation revocation proceedings, including the right to counsel, "far exceed[]" federal constitutional requirements). "The fundamental right to be represented by counsel is maintained in probation revocation hearings." *Belanger*, 227 Mich App at 641, citing *People v Kitley*, 59 Mich App 71, 73 (1975) ("a probationer at a revocation proceeding has the right to counsel[,] . . . [and t]he trial court ha[s] the duty to advise [a probationer] of his [or her] right to be represented by counsel, either appointed or retained[]").[25]

The Michigan Court Rules reinforce that a probationer is entitled to appointed counsel upon request during all revocation proceedings. MCR 6.445(B)(2)(b) provides that the court must advise the defendant at arraignment that:

> "the probationer is entitled to a lawyer's assistance at the [contested] hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is unable to retain one[.]"

MCR 6.445(B)(3) additionally provides that the court must appoint a lawyer for the defendant at the arraignment "if requested and appropriate[.]"

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[24] See Section 4.3(C) for discussion of limitations on the court's authority to incarcerate a probationer who was not represented by counsel at the criminal trial for the offense that led to probation or an offense that is the basis for the revocation proceeding.

[25] The *Kitley* Court cited *Mempa*, 389 US 128, for the proposition that a probationer has a right to counsel "at a revocation proceeding[.]" *Kitley*, 59 Mich App at 73. However, *Mempa*, 389 US at 134, requires counsel only at revocation proceedings that also involve *sentencing*. This limitation has been acknowledged in other Court of Appeals cases. See *Gulley*, 66 Mich App at 117; *Brown*, 17 Mich App at 397. Although *Kitley* itself apparently involved a combination revocation/sentencing proceeding, see *Kitley*, 59 Mich App at 73, in *Belanger*, 227 Mich App at 638-639, separate revocation and sentencing proceedings were conducted.

Moreover, "[e]ven [if] a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E)." MCR 6.445(D).[26]

Additionally, the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*,[27] requires the trial court to "assure that each criminal defendant[28] is advised of his or her right to counsel[,]" MCL 780.991(1)(c); to screen all defendants, except those who have retained or waived counsel, for eligibility for the appointment of counsel under the MIDCA, MCL 780.991(1)(c); and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a).[29]

In addition to the appointment of counsel for an indigent probationer, the right to counsel involves allowing a non-indigent probationer "a reasonable opportunity to obtain counsel of his [or her] own choosing." *Gulley*, 66 Mich App at 117. The Court of Appeals has held that allowing a probationer only one day to obtain counsel does not afford a "'reasonable opportunity[.]'" *Id.* at 117.

3. Requirements for a Valid Waiver of Counsel

a. Due Process Requirements

Because probation revocation is not a stage of a criminal prosecution, "'[d]ue process requires only that the revocation proceedings be conducted in a fundamentally fair manner.'" *Belanger*, 227 Mich App at 645, quoting *Ritter*, 186 Mich App at 706. Accordingly, all of the constitutional and procedural requirements for a valid initial waiver of counsel at a criminal trial as set forth in MCR 6.005(D) and *People v Anderson (Donny)*, 398 Mich

[26] However, all of the constitutional safeguards that normally apply before a criminal defendant may be permitted to waive counsel do *not* apply in probation revocation proceedings. *Belanger*, 227 Mich App at 641-648. See Section 4.3(C) for discussion of waiver of counsel.

[27] 2013 PA 93, effective July 1, 2013.

[28] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA).

[29] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook: Vol. 1*, Chapter 3, for a thorough discussion of the MIDCA and the appointment of counsel for indigent defendants.

361 (1976), do not apply. *Belanger*, 227 Mich App at 641-648; see also *Rial*, 399 Mich at 435-436.

Rather, "due process is satisfied in a probation revocation proceeding if a trial court advises a defendant of his [or her] right to counsel and the appointment of counsel, if he [or she] is indigent, and determines if there is a knowing and intelligent waiver of that right." *Belanger*, 227 Mich App at 647. "'Factors to be considered when deciding whether [the] defendant ha[s] made a knowing waiver of his [or her] right to counsel are [the] defendant's age, education, prior criminal experience, mental state, financial condition, and the various factors, pressures or inducements which led him [or her] to admit the allegations against him [or her] without the assistance of counsel.'" *Id.* at 646, quoting *Kitley*, 59 Mich App at 76.

b. Advice and Waiver Procedure

At arraignment, the court must advise the probationer that he or she has the right to the assistance of appointed counsel, and the court must appoint counsel "if requested and appropriate[.]" MCR 6.445(B)(2)(b); MCR 6.445(B)(3).

MCR 6.445(D) imposes upon the court a continuing duty to advise the probationer of the right to counsel:

> Even though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E).

MCR 6.005(E) provides that if the defendant waives his or her right to the assistance of a lawyer, "the record of each subsequent proceeding . . . need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right." MCR 6.005(E) further provides:

> "Before the court begins such proceedings,
>
> > (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
> >
> > (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one."

However, "[t]he court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel." MCR 6.005(E).

The court must strictly comply with MCR 6.005(E), and a failure to do so may require reversal of a sentence imposed following probation revocation. *People v McKinnie*, 197 Mich App 458, 460-461 (1992). However, "[u]nlike the rules relating to an initial waiver of counsel, the procedure outlined in MCR 6.005(E) does not stem from any constitutional requirement[,]" and "a trial court's failure to strictly comply with these requirements can be harmless error." *People v Campbell (Michael)*, ___ Mich App ___, ___ (2016) (citing *People v Lane (Raymond)*, 453 Mich 132, 139-142 (1996), and concluding that "[a]lthough the trial court did not explicitly remind" the defendant, at several hearings following his initial waiver and at trial, "that he had the continued right to the assistance of counsel, it [was] evident [from the record] that the court operated on that assumption and that [the defendant] was aware of that right and continued to assert his right to represent himself[]").

The sentencing phase of a single revocation and sentencing proceeding is "not a 'subsequent proceeding'" requiring the court to readvise the defendant of his or her right to counsel. *People v Graber*, 128 Mich App 185, 195 (1983) (construing former GCR 1963, 791.3).

4. Sentence Imposed Following Revocation of Probation Based on Uncounseled Misdemeanor Offense

There is no federal or state constitutional right to appointed counsel when a defendant is charged with a misdemeanor and "no incarceration is ultimately imposed[.]" *People v Richert (After Remand)*, 216 Mich App 186, 192-194 (1996). However, no person may receive an actual or suspended sentence for any offense—petty, misdemeanor, or felony—unless he or she was represented by counsel at trial or knowingly and intelligently waived representation. *Alabama v Shelton*, 535 US 654, 657-659, 662 (2002) (noting that no real distinction exists between "actual

imprisonment" and probated or "threatened" imprisonment for purposes of an indigent defendant's right to counsel, and holding that an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment).

MCR 6.610(F)(3)[30] provides:

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction."

On the other hand, it appears that no due process violation would result from the revocation of probation and incarceration of a probationer on the basis of a *new* uncounseled misdemeanor conviction that did not result in actual or threatened imprisonment. In *People v Olah,* 409 Mich 948, 948-949 (1980), the Michigan Supreme Court, relying on *Baldasar v Illinois*, 446 US 222 (1980), held that a sentencing court could not revoke probation on the basis of new uncounseled misdemeanor convictions. See also *People v Courtney*, 104 Mich App 454, 456-457 (1981). However, *Baldasar* was overruled by *Nichols v United States*, 511 US 738, 746-749 (1994), which held that uncounseled misdemeanors not resulting in imprisonment may be used to enhance a defendant's sentence for a subsequent offense, "even [if] that sentence entails imprisonment." See *People v Reichenbach*, 459 Mich 109, 122-124, 124 n 15 (1998) (questioning the continuing relevance of *Olah* following *Nichols*, 511 US at 747-748, and concluding that there is "no principled reason to divine in [the Michigan] constitution an expansion of the right to counsel that would preclude sentence enhancement based on . . . uncounseled misdemeanors[]").

D. Evidence and Right of Confrontation[31]

"Probation is a matter of grace, not of right," and "when a judge imposes probation, it is 'revocable on the basis of a judge's findings of fact at an informal hearing, and largely at the judge's discretion.'" *Breeding*, 284 Mich App at 479-480, quoting *Harper*, 479 Mich at 626.

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[30] MCR 6.610 governs misdemeanor cases in district court. See MCR 6.001(B).

[31] See Section 4.12(C) for additional discussion of the presentation of evidence at a violation hearing.

"'Probation violation hearings are summary and informal and are not subject to the rules of evidence or of pleading applicable in a criminal trial. The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach.'" *Breeding*, 284 Mich App at 480, quoting *People v Pillar*, 233 Mich App 267, 269 (1998). Because a probation revocation hearing is not a criminal prosecution, "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Morrissey*, 408 US at 489; see also *Gagnon*, 411 US at 782 n 5 ("we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence[] . . . [or] to foreclose the States . . . from developing other creative solutions to the practical difficulties of the *Morrissey* requirements[]").

"[T]he Sixth Amendment right to confrontation, as defined and applied in *Crawford*[*v Washington*, 541 US 36 (2004)[32]], does not apply to probation revocation proceedings." *Breeding*, 284 Mich App at 482. However, a probationer enjoys a basic due process right "'to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)[.]'" *Gagnon*, 411 US at 786, quoting *Morrissey*, 408 US at 489; see also *Breeding*, 284 Mich App at 484-487 (declining to address the defendant's claim that he was denied the constitutional due process right of confrontation at his probation revocation hearing where he failed to object to alleged hearsay testimony and did not make a request to cross-examine the adverse witnesses).

E. Search and Seizure

1. Warrantless Search of Probationer's Residence

"[A] State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers . . . warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Samson*, 547 US at 853.

The warrantless search of a probationer's home is reasonable under the Fourth Amendment when conducted pursuant to a state regulation allowing a probation officer to search a probationer's home if there are reasonable grounds to believe that the home contains contraband, including any item

[32] The *Crawford* Court held that out-of-court "testimonial" statements are inadmissible unless the declarant is shown to be unavailable and there has been "a prior opportunity for cross-examination." *Crawford*, 541 US at 68.

prohibited under the applicable conditions of probation. *Griffin*, 483 US at 870-871, 880 (declining to address the additional question "whether[] . . . *any* search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present[]").

Additionally, the warrantless search of a probationer's home is constitutionally reasonable, if supported by reasonable suspicion of criminal activity, where one of the conditions of probation is that the probationer will submit to a search at any time. *Knights*, 534 US at 114, 120, 120 n 6, 121-122 (noting that "[t]he probation condition . . . significantly diminished [the probationer's] reasonable expectation of privacy[,]" but declining to address the additional question "whether the probation condition so diminished, or completely eliminated, [his] reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment[]").

Moreover, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee[]" under the authority of a state statute permitting a parole officer or other peace officer to search a parolee at any time, with or without a warrant or cause. *Samson*, 547 US at 846, 850, 852, 857 (noting that "parolees . . . have severely diminished expectations of privacy by virtue of their status alone[]").[33] Presumably, this reasoning would apply equally to probationers. See *Gagnon*, 411 US at 782 n 3 ("[d]espite the undoubted minor differences between probation and parole, . . . revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole[]").

2. Warrantless Arrest

In *Glenn-Powers*, 296 Mich App at 501-503, the Court of Appeals held that "the oath or affirmation requirement generally applicable to warrants does not apply to a warrant for the arrest of a probationer[,]" extending to probationers the rule of *Triplett*, 142 Mich App at 781-783, that the constitutional probable cause and oath or affirmation requirements do not apply to a warrant for the arrest of a parole violator. The *Glenn-Powers* Court, noting that under *Griffin*, 483 US at 876, 880, "the Fourth Amendment does not require a warrant to search a probationer's home,"

[33] See also MCL 791.236(19), providing that a parole order must "require the parolee to provide written consent to submit to a search of his or her person or property upon demand by a peace officer or parole officer."

concluded that "it is [therefore] not unreasonable to conclude that [the Fourth Amendment] does not require a warrant to arrest a probationer." *Glenn-Powers*, 296 Mich App at 503.

3. Applicability of Exclusionary Rule

The United States Supreme Court has held that "the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights." *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998); see also *Gagnon*, 411 US at 782 n 3 ("[d]espite the undoubted minor differences between probation and parole, . . . revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole[]").

However, in Michigan, the exclusionary rule presumably *does* apply, at least to some extent, to bar admission of illegally seized evidence in probation revocation proceedings. In *People v Perry*, 201 Mich App 347, 349, 349 n 1, 350-352 (1993) (lead opinion of Shepherd, J.), the panel rejected the proposition, set out "'parenthetically'" in *People v Hardenbrook*, 68 Mich App 640, 645 (1976), "that the exclusionary rule is inapplicable to probation revocation hearings." However, the three panel members in *Perry* were unable to agree on the particular test to be applied in determining whether illegally seized evidence must be excluded in the probation revocation context. See *Perry*, 201 Mich App at 359-360 (dissenting opinion of Fitzgerald, J.) (exclusionary rule should be applied to full extent); *id.* at 351 (lead opinion of Shepherd, J.) (exclusionary rule should be applied only when "the police knew or had reason to know that they were targeting a probationer[]"); *id.* at 353 (concurring opinion of Griffin, P.J.) (exclusionary rule should be applied where, examining the totality of the circumstances, "(1) the exclusion of the evidence would substantially further the deterrent purpose of the exclusionary rule, and (2) the need for deterrence outweighs the harm to the probation system[]").

4.4 Conduct That Constitutes a Probation Violation

The sentencing court has broad discretion to revoke probation. MCL 771.4 provides, in relevant part:

> "If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke

> probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest."

A. Violation of Mandatory or Discretionary Probation Conditions

MCL 771.3(1) contains probation conditions that *must* be included in a probation order, such as the requirement that the probationer not violate a criminal law, MCL 771.3(1)(a). MCL 771.3(2) contains conditions that the court, in its discretion, *may* include in the order, such as a requirement that the probationer participate in mental health treatment, MCL 771.3(2)(h). MCL 771.3(3) allows the court to "impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper."[34]

If a defendant is sentenced to probation according to a plea agreement, "[the] sentencing court may place conditions on [the] defendant's probation regardless of whether it was covered in the plea agreement[; furthermore,] the failure to inform [the] defendant of these conditions [does not] render[] the plea involuntary or the defendant unknowing of the consequences of the agreement." *People v Johnson (Larry)*, 210 Mich App 630, 634-635 (1995).

1. New Criminal Charges or Convictions

MCL 771.3(1)(a) provides that a sentence of probation must include the following condition:

> "During the term of his or her probation, the probationer shall not violate any criminal law of this state, the United States, or another state or any ordinance of any municipality in this state or another state."

"[P]robation may not be revoked solely on the basis that the probationer was *arrested*[]" for an alleged new criminal offense; rather, "[t]here must be verified facts in the record from which the court can find by a preponderance of the evidence that a violation was committed." *People v Pillar*, 233 Mich App 267, 269-270 (1998) (emphasis supplied); see also *Morrissey v Brewer*, 408 US 471, 483-484 (1972).

[34] See Section 4.4(A) for discussion of "other lawful conditions of probation[.]"

The trial court erred in finding—without holding a hearing as required by MCR 6.445(E)—that the defendant had violated the terms of his probation; "while the court did not state the grounds for such a finding," to the extent it was based on crimes that were committed before the defendant was placed on probation, under MCL 771.3(1)(a), "the defendant could not have violated the terms of his probation for having committed an act amounting to a violation of a criminal law that preceded the imposition of the order of probation[.]" *People v Goss*, ___ Mich ___, ___ (2016).

a. Postponement of Probation Violation Hearing Pending Resolution of Criminal Charge

The court may, but is not required to, postpone probation revocation proceedings pending the outcome of a separate criminal prosecution for the offense that constitutes the alleged probation violation. MCR 6.445(C).[35]

b. Double Jeopardy

A probationer is not twice placed in jeopardy for the same criminal offense where the same criminal activity is the subject of both probation revocation and criminal proceedings. *People v Buelow*, 94 Mich App 46, 47, 49 (1979). Because jeopardy does not attach at a probation revocation hearing, subsequent criminal proceedings do not violate double jeopardy prohibitions. *People v Johnson (Eddie)*, 191 Mich App 222, 226-227 (1991).

c. Effect on Subsequent Proceeding of Acquittal or Finding of No Probation Violation

"Because the standard of proof [in a probation revocation proceeding] is lower than the reasonable doubt standard employed in a criminal trial, probation may be revoked before the trial on the substantive offense, and a decision to revoke probation will be valid even if the defendant is ultimately acquitted of the substantive crime." *People v Tebedo*, 107 Mich App 316, 321 (1981); see also *People v Buckner*, 103 Mich App 301, 303 (1980).[36] Likewise, "the subsequent reversal of a conviction on a criminal offense would not require vacation of a probation revocation

[35] See Section 4.10(D) for additional discussion of MCR 6.445(C).

[36] See Section 4.12(E) for further discussion of the standard of proof in probation revocation hearings.

which was based on that offense if the testimony or the defendant's admissions at the revocation hearing were sufficient to establish by a preponderance of the evidence that the defendant committed the offense." *Tebedo*, 107 Mich App at 321-322 (noting, however, that "[i]f the only thing established at the [probation revocation] hearing is that [the] defendant was *convicted* of the offense, then reversal of that conviction requires reversal of the probation revocation as well[]") (emphasis supplied).

Conversely, a finding that a defendant did not violate probation by committing a new criminal offense does not preclude a criminal trial based on the same criminal conduct. *Johnson (Eddie)*, 191 Mich App at 225-227 (holding that principles of res judicata and double jeopardy did not bar a criminal prosecution on charges that were determined to be unproven at the defendant's probation violation proceeding). The *Johnson (Eddie)* Court explained:

> Because of the limited nature and scope of a probation violation hearing, as a practical matter the prosecutor may not present all the evidence bearing on the commission of the alleged offense. The determination whether one committed an offense for the purpose of a new conviction should be made in a criminal trial, which is the intended forum for such a determination, and not in an informal, summary proceeding. [*Id.* at 226.]

d. Guilty Plea in Criminal Prosecution Following Probation Revocation Proceeding

Holding a probation revocation proceeding before criminal proceedings based on the same conduct does not render a guilty plea in those criminal proceedings involuntary. *People v Baines*, 83 Mich App 570, 573 (1978).

e. Inadmissibility of Probation Revocation Hearing Testimony at Subsequent Criminal Trial

If a probation revocation hearing is conducted prior to a criminal trial involving the same facts, the probationer's testimony at the hearing and any evidence derived from it are inadmissible—except for purposes of impeachment or rebuttal—against the probationer at the subsequent criminal trial, if a timely objection is made at that trial.

People v Rocha, 86 Mich App 497, 512-513 (1978). "[T]he probationer must be advised before he [or she] takes the stand at the revocation hearing that his [or her] testimony and its fruits will not be admissible against him [or her] at a subsequent criminal trial on the underlying offense." *Id.* at 513.[37]

f. SORA Violation

The court *must* revoke probation if the probationer willfully violates the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. MCL 771.4a.

2. Revocation of Probation for Failure to Pay Fines, Costs, or Restitution[38]

Under MCL 771.3(1)(d)-(g), mandatory conditions of probation include the requirements that the probationer pay a probation supervision fee, restitution as provided in MCL 769.1 *et seq*., a crime victim's rights assessment ordered under MCL 780.905, and the minimum state cost prescribed in MCL 769.1j. Additionally, the probationer may be required to pay a fine, MCL 771.3(2)(b); costs incurred in prosecuting or providing legal assistance to and supervision of the probationer, MCL 771.3(2)(c); MCL 771.3(5); any other assessment, MCL 771.3(2)(d); or expenses incurred by the county as provided in MCL 801.81—MCL 801.93, MCL 771.3(2)(p).

MCL 771.3(2)(d) (authorizing the imposition of "any assessment" other than the required crime victim's rights assessment) "does not provide trial courts with the independent authority to impose any assessment as a condition of probation, but rather permits courts to impose only those assessments that are separately authorized by statute." *People v Juntikka*, 310 Mich App 306, 313 (2015) (citing *Cunningham II,* 496 Mich at 147-156, and holding that "the trial court erred in imposing [a] probation

[37] But see *People v Pacholka*, 451 Mich 896, 896 (1996) (statement of Boyle, J.) (opining that the Court of Appeals in *Rocha*, 86 Mich App 497, may have violated separation of powers principles when it declared "'a judicial rule of evidence[]' that in fact constituted the assumption of judicial authority to grant use immunity[]" for testimony at a probation violation hearing).

[38] See Section 4.14 for additional discussion of fines, costs, and restitution ordered as conditions of probation and for discussion of the court's retention of jurisdiction to enforce such financial obligations following termination or revocation of probation. See Chapter 3 for a comprehensive discussion of fines, costs, assessments, and restitution ordered as part of a sentence. Additionally, the Appendix in this Benchbook contains three tables setting out statutory authority for imposing costs. See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Table of Felony Costs and Table of Misdemeanor Costs.

enhancement fee[,]" which "accounted for general operating costs incurred by the probation department[,]" because the "fee was not separately authorized by statute[] and . . . was not a cost 'specifically incurred' in [the] defendant's case [as required] under MCL 771.3(5)[]") (additional citations omitted). Additionally, "[t]hough probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not." *People v Butler-Jackson (Butler-Jackson II)*, ___ Mich ___, ___ (2016) (citing *Cunningham II*, 496 Mich 145 (2014), and *Juntikka*, 310 Mich App 306, and vacating "that part of the Court of Appeals['] judgment[, 307 Mich App 667 (2014),] addressing the propriety of court costs under MCL 771.3(5)[]").[39] However, see also MCL 769.1k(3) (providing that MCL 769.1k(1) and (2), which authorize the imposition of certain fines, costs, and assessments, including court costs, "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation[]").

MCL 769.1k(1)(a) requires a court to impose the minimum state cost as set forth in MCL 769.1j[40] at the time the defendant is sentenced, at the time entry of judgment of guilt is deferred, or at the time sentence is delayed. At the same time, MCL 769.1k(1)(b)[41] and MCL 769.1k(2) allow the court to also impose:

- any fine authorized by the statute under which the defendant entered a plea or was found guilty;

[39] In *People v Butler-Jackson (Butler-Jackson I)*, 307 Mich App 667, 680-681 (2014) (opinion by Cavanagh, J.), vacated in part by *Butler-Jackson II*, ___ Mich at ___, the Court of Appeals held that the trial court was "authorized by MCL 771.3(2)(c) [and MCL 771.3(5)] to impose" court costs in the amount of $1,000 as a condition of probation.

[40] MCL 769.1j(1) requires imposition of the minimum state cost "if the court orders . . . any combination of a fine, costs, or applicable assessments[.]"

[41] Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k in response to the Michigan Supreme Court's holding in *People v Cunningham (Cunningham II)*, 496 Mich 145 (2014), rev'g 301 Mich App 218 (2013) and overruling *People v Sanders (Robert) (After Remand)*, 298 Mich App 105 (2012), and *People v Sanders (Robert)*, 296 Mich App 710 (2012). In *Cunningham II*, the Court held that MCL 769.1k(1)(b)(*ii*)—which, at the time, provided for the imposition of "[a]ny cost in addition to the minimum state cost"—did "not provide courts with the independent authority to impose 'any cost[;]'" rather, it "provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 147, 158 (concluding that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs[]"). 2014 PA 352 added MCL 769.1k(1)(b)(*iii*) to provide for the imposition of "any cost reasonably related to the actual costs incurred by the trial court[.]"

The amendments effectuated by 2014 PA 352 "appl[y] to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." 2014 PA 352, enacting section 1 (emphasis supplied).

- any cost authorized by the statute under which the defendant entered a plea or was found guilty, in addition to the minimum state cost set out in MCL 769.1j(1);
- any cost "reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case[;]"[42]
- the expenses of providing the defendant with legal assistance;
- any assessment authorized by law;
- reimbursement under MCL 769.1f; and
- any additional costs incurred to compel the defendant's appearance.

"Beginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1).] . . . However, the information is not required to include the calculation of the costs involved in a particular case." MCL 769.1k(7).

MCL 769.1k(1) and MCL 769.1k(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3). Accordingly, following revocation or discharge of probation, the court may continue to enforce an unfulfilled financial obligation imposed as a condition of probation.[43]

Incarceration or probation revocation for failure to pay court-ordered financial obligations. The court may revoke probation if the defendant fails to comply with a restitution order or order to pay costs and has not made a good-faith effort to comply with the orders. MCL 769.1a(11); MCL 771.3(8); MCL 780.766(11); MCL 780.826(11). However, ~~"[t]he court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court~~ "[t]he court may not sentence the probationer to prison without

[42] Court costs may be awarded under MCL 769.1k(1)(b)(*iii*), as amended by 2014 PA 352, effective October 17, 2014. *People v Konopka*, 309 Mich App 345, 357 (2015). This provision is applicable "[u]ntil 36 months after [October 17, 2014.]" MCL 769.1k(1)(b)(*iii*). See also 2014 PA 352, enacting section 1 ("[t]his amendatory act applies to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." See Section 3.41(B) for additional discussion of 2014 PA 352 and the imposition of "court costs."

[43] See Section 4.14 for discussion of the court's retention of jurisdiction to enforce such financial obligations following termination or revocation of probation.

having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]." MCR 6.445(G). MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See also MCL 769.1k(10) (providing that "[a] defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so[]"). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

A sentence that exposes an indigent offender to incarceration unless he or she pays fines, costs, or restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on economic status. *Tate v Short*, 401 US 395, 397-400 (1971); *People v Collins (Richard)*, 239 Mich App 125, 135-136 (1999); *People v Baker*, 120 Mich App 89, 99 (1982). Therefore, "the state cannot 'imprison a person solely because he [or she] lacked the resources to pay [a fine or restitution'; r]ather, there must be 'evidence and findings that the defendant was somehow responsible for the failure[.]'" *People v Likine*, 492 Mich 367, 400 (2012), quoting *Bearden v Georgia*, 461 US 660, 665, 667-668 (1983); see also *People v Ford*, 410 Mich 902, 902 (1981); *People v Lemon*, 80 Mich App 737, 741-745 (1978).

MCL 780.766(14) states that "a [felony] 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 [MCL 780.766] 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." MCL 780.826(14) and MCL 780.766(14) contain substantially similar requirements for cases involving misdemeanants and juveniles,[44] respectively. But see MCR 6.931(F)(10), which prohibits a court from committing a juvenile probationer[45] to the

[44] MCL 780.766(11) applies to juveniles sentenced in automatic waiver proceedings. See Section 4.16 for discussion of juvenile probationers.

Department of Corrections for failure to comply with a restitution order.

Before revoking probation for failure to comply with an order to pay costs or restitution, the court must consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. MCL 769.1a(11); MCL 771.3(8); MCL 780.766(11); MCL 780.826(11); see also *Bearden*, 461 US at 668-669, 672 ("a sentencing court must inquire into the reasons for the failure to pay[,]" and "if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his [or her] own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available[]").

If the court determines that restitution is not being paid or has not been paid as ordered, the court may revoke probation or, after considering the hardship to both the probationer and victim, modify the method of payment; in addition, the prosecuting attorney or a person named in the restitution order may begin proceedings to enforce the restitution order. MCL 780.766(12)-(13); MCL 780.766(18); MCL 780.826(12)-(13); MCL 780.826(15). If the court determines that costs are not being paid as ordered, the court may remit all or a part of the amount due or modify the method of payment. MCL 771.3(6)(b). Upon petition by the probationer, the court should conduct a hearing to determine whether the probation order should be modified. *Lemon*, 80 Mich App at 741-745 (sentencing court abused its discretion by refusing to modify or withdraw the restitution condition of a probation order without a hearing where the defendant petitioned for modification of the order).

3. Violation of "Other Lawful Conditions"

MCL 771.3(3) allows the court to "impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper." This "broad language . . . provides wide discretion to a trial judge in setting conditions of probation[.]" *People v Peters*, 191 Mich App 159, 165 (1991). "[T]here is no ultimate catalog of legal or illegal terms [of probation], . . . and the Legislature did not define what constitutes a 'lawful' term of probation[.]" *People v Miller*

[45] MCR 6.931(F)(10) applies to juveniles sentenced to juvenile probation in automatic waiver proceedings. See MCR 6.901(B). See Section 4.16 for discussion of juvenile probationers.

(Loretta), 182 Mich App 711, 713 (1990) (citations omitted). However, in imposing such additional conditions, "a sentencing court must be guided by factors that are lawfully and logically related to the defendant's rehabilitation." *Johnson (Larry)*, 210 Mich App at 634.

Successful completion of a city's "probation enhancement program[,]" including adherence to the program's rules, was appropriately ordered as an "'other lawful condition[] of probation[,]'" *Peters*, 191 Mich App at 160-161, 164-166, as was a condition prohibiting the defendant, who severely beat a child at a religious encampment, from residing at the encampment during the term of probation, *People v Branson*, 138 Mich App 455, 457-459 (1984). A condition prohibiting the probationer from associating with an individual who has a criminal record is "generally . . . considered lawful." *Miller (Loretta)*, 182 Mich App at 714 (amending the trial court's order of a lifetime ban against the defendant's association with a named individual to state that the ban would be in effect "'until further order of the court[]'"). Additionally, a probation condition prohibiting "antisocial conduct" is not impermissibly vague if specific examples of prohibited conduct are set forth in the probation order or explained to the probationer. *People v Bruce*, 102 Mich App 573, 576-580 (1980).

On the other hand, see *People v Gauntlett*, 134 Mich App 737, 744, 746-752 (1984), modified on other grounds 419 Mich 909 (1984) (requirement that the defendant, a sex offender, submit to Depo-Provera treatment [("castration by chemical means")] was not a "lawful condition[]" of probation); *People v Higgins*, 22 Mich App 479, 482 (1970) (condition prohibiting probationer from playing collegiate or professional basketball appeared "more likely to impede rehabilitation than promote it[]" and was therefore "not a 'lawful provision' within the meaning of" MCL 771.3).

If the appellate court determines that a condition of probation is not lawful, the appropriate remedy is to remand for resentencing. *Gauntlett*, 419 Mich 909.

4. Revocation Based on Unstated Conditions

Probation may not be revoked based on non-criminal conduct that is not contemplated in the probation order, *People v Pippin*, 316 Mich 191, 193-196 (1946) (although the defendant "is presumed to know the conditions prescribed by law[, n]o such presumption attaches to such other conditions as existed only in the mind of the judge, unexpressed to the defendant either orally or in the order for probation, and no violation of these warrants

revocation of probation[]"), or based on violations of conditions that were stated orally to the defendant during sentencing but were not included in the written probation order, *People v George*, 318 Mich 329, 332 (1947); see also *People v Hill (Donald)*, 69 Mich App 41, 42-45 (1976). See also MCL 771.2(2) ("[t]he court shall by order, to be filed or entered in the cause as the court may direct by general rule or in each case, fix and determine the period and conditions of probation[]").[46]

5. Violation of Conditions by Incarcerated Probationer

Where the court has properly ordered incarceration as a condition of probation, probation may be revoked for violation of other conditions of probation while the probationer is incarcerated. *People v Smith (Carl)*, 69 Mich App 247, 250 (1976).

B. Conduct That Occurs Before Commencement of Probationary Sentence

No published Michigan appellate decision has determined whether probation may be revoked on the basis of conduct that occurs before commencement of the probationary period.[47]

MCL 771.4 provides that "[i]f *during the probation period the sentencing court determines* that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation." (Emphasis supplied.) Additionally, a probationer "'ha[s] a right to know the conditions with which he [or she is] required to comply.'" *George*, 318 Mich at 332, quoting *Pippin*, 316 Mich at 196. Therefore, the decision to revoke probation may not be based on conduct that is not prohibited by the conditions of probation. *George*, 318 Mich App at 332-333; *People v Elbert*, 21 Mich App 677, 681-682 (1970).

In *People v Fraser*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2012 (Docket No. 305276), slip op pp 1-2, the Court held that the defendant's probation was properly revoked on the basis of criminal conduct that occurred after he was sentenced to probation, but before the order of probation was signed. Noting that the prohibition against violating a criminal law is a mandatory condition of probation under MCL 771.3(1)(a) that, under *George*, 318 Mich at 332, "[the] defendant was presumed to know[,]" the *Fraser*

[46] Note, however, that a "court may amend the order in form or substance at any time." MCL 771.2(2).

[47] See, however, *People v Fraser*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2012 (Docket No. 305276), discussed *infra*. Unpublished opinions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1).

Court concluded that "the trial court did not abuse its discretion when it revoked [the] defendant's probation for a violation of [this] mandatory condition that occurred after sentencing but before the order of probation entered." *Fraser*, unpublished opinion per curiam at 2.

Similarly, the United States Court of Appeals for the Sixth Circuit, applying the federal probation statute,[48] has held that probation may be revoked based on conduct occurring after imposition but before commencement of the probationary sentence. *United States v Williams*, 15 F3d 1356, 1358-1360 (CA 6, 1994) (holding that "[n]othing in the language of [the federal probation] statute limits the authority of a court to revoke probation to conduct occurring within the period of probation[]").[49] However, the Sixth Circuit has held that probation may *not* be revoked on the basis of "conduct which occurs prior to the date on which the defendant was sentenced to probation." *United States v Twitty*, 44 F3d 410, 412-413 (CA 6, 1995) (noting that "[d]ue process requires[] . . . notice or fair warning of what conduct might result in revocation[,]" and concluding that "one can[not] violate a condition of probation before it exists[]").

C. Conduct That Occurs After Expiration of Probationary Sentence

"[T]he decision to revoke [probation under MCL 771.4 must] be based on violations which occur during the probationary period." *People v Ritter*, 186 Mich App 701, 708 (1991).[50]

However, "a defendant's period of probation is tolled when he [or she] absconds from probationary supervision." *Ritter*, 186 Mich App at 710-712 (holding that the defendant's period of probation was tolled from the issuance, during the original probationary period, of a bench warrant for his arrest, until he was returned to the state and arrested). In such a case, the court may amend a probation violation petition *after* the original probationary period has expired in order to allege violations that occurred during the time in which the period of probation is tolled, and due process does not require that the

[48] 18 USC 3565(a) authorizes revocation of probation "[i]f the defendant *violates a condition of probation at any time prior to the expiration or termination of the term of probation*[.]" (Emphasis supplied.) Somewhat differently, MCL 771.4 provides that "[i]f *during the probation period the sentencing court determines* that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation." (Emphasis supplied.)

[49] Though persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

[50] See Section 4.5(A) for discussion of jurisdictional time requirements for commencing probation revocation proceedings.

defendant be served with notice of the probation revocation proceedings within the original period of probation. *Id.* at 709 n 3, 711-712. Moreover, such an amended petition is timely if it is filed during the time in which the period of probation is tolled. *Id*. at 712.

D. Amendment of Probation Order

The sentencing court may amend an order of probation at any time before the expiration of the statutory maximum probation period set out in MCL 771.2 (five years for most felonies and two years for most non-felonies),[51] even after the expiration of the original term of probation. See MCL 771.2(2); *People v Marks*, 340 Mich 495, 498-502 (1954) (court had discretion to extend the defendant's original probationary period for an additional two years and to add a restitution requirement, "even though the conditions of the original order had not been violated and its term had expired[,]" where the alteration was made before expiration of the statutory five-year maximum probation period).

However, "an ex parte order amending probation which orders a conditionally free defendant to be confined is in violation of the due process clause of the Michigan Constitution." *People v Jackson (John)*, 168 Mich App 280, 284 (1988). Before making such an amendment, the court must give the probationer notice of the reason for the proposed amendment and conduct an impartial hearing. *Id.* at 284-285. See also *People v Britt*, 202 Mich App 714, 717 (1993) (because placement of the probationer in an electronic tethering program did not constitute confinement, the court properly entered an ex parte order amending the probation order to require the probationer to comply with the tethering program).

4.5 Time Requirements and Due Diligence[52]

A. Jurisdictional Time Requirements for Commencing Revocation Proceedings

Because the sentencing court loses jurisdiction over the probationer when the probation period ends, proceedings for revocation of

[51] See MCL 771.2a for exceptions to these time periods.

[52] A swift and sure probation supervision program that is funded under the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq*., is subject to stricter requirements for the apprehension and sanctioning of probation violators. For example, an offender participating in such a program must be "closely monitored" and must be "arrested as soon as a violation has been detected[,]" MCL 771A.3(b)-(c), and must be brought before a judge "as soon as possible but within 72 hours after the violation is reported to the court" unless good cause is shown for the delay, MCL 771A.5(1)(c). See Section 4.17 for discussion of the Probation Swift and Sure Sanctions Act.

probation "must occur, or must at least have been commenced, during the probation period." *People v Glass*, 288 Mich App 399, 403, 408 (2010). The sentencing court retains jurisdiction to revoke the probationer's probation if revocation proceedings are commenced within the probation period and are pending when the probation period expires. *People v Hodges*, 231 Mich 656, 660-661 (1925); *People v Ritter*, 186 Mich App 701, 706, 710 (1991).[53]

A probation revocation proceeding is timely "commenced" for purposes of this jurisdictional rule when "both the probation violation and the filing of the petition . . . occur during the probation period." *Ritter*, 186 Mich App at 708 n 2, citing *Hodges*, 231 Mich 656. In *Hodges*, 231 Mich at 657, 660-661, "the filing of [the] petition [to revoke probation] within the period of probation gave the [sentencing] court jurisdiction" to revoke the defendant's probation, even though, due to a "reasonable delay[,]" the revocation hearing was not held until after expiration of the probation period. In *Ritter*, 186 Mich App at 707-708, 708 n 2, the Court of Appeals opined that, notwithstanding the "traditional rule" of *Hodges*, 231 Mich 656, MCL 771.4, coupled with MCR 6.445(A), "require only that *during the probation period the court find that probable cause exists* to believe that the defendant has violated his [or her] probation in order to justify issuance of a petition to revoke probation and a warrant for the defendant's arrest." (Emphasis supplied). Therefore, the *Ritter* Court noted that "a better rule might be to require that the petition to revoke be filed within a reasonable time after the violation is committed, even if the period of probation has expired." *Ritter*, 186 Mich App at 709 n 2.

Other cases suggest that an arrest warrant and/or notice of probation violation, *if* timely issued, may suffice to commence a probation proceeding. See *Glass*, 288 Mich App at 408-409 (where a warrant for the defendant's arrest was neither signed nor filed until several months after the expiration of the probationary period, the court lacked jurisdiction to revoke probation); *People v Wakefield*, 46 Mich App 97, 98-100 (1973) (where a notice of probation violation and warrant were filed three days after expiration of the defendant's

[53] In contrast, the sentencing court may *amend* an order of probation at any time before the expiration of the statutory maximum probation period set out in MCL 771.2(1) (five years for a felony and two years for a non-felony), even after the expiration of the original term of probation. See MCL 771.2(2); *People v Marks*, 340 Mich 495, 498-502 (1954) (court had discretion to extend the defendant's original probationary period for an additional two years and to add a restitution requirement, "even though the conditions of the original order had not been violated and its term had expired[,]" where the alteration was made before expiration of the statutory five-year maximum probation period); *Glass*, 288 Mich App at 401-404 (holding that the rule of *Marks*, 340 Mich 495, concerning *alteration* of a probation order, was inapplicable to probation *revocation*, which "must occur, or must at least have been commenced, during the probation period[]").

probationary period, the court lacked jurisdiction to revoke probation).

There is no requirement that an arrest warrant be executed or that the defendant otherwise receive notice of the revocation proceedings before the probationary period expires in order for the court to retain jurisdiction to revoke probation. *Ritter*, 186 Mich App at 709, 709 n 3.

B. Requirement That Authorities Exercise Due Diligence in Pursuing Probation Violation Proceedings

Due process requires that "due diligence" be exercised to provide a defendant with notice of an alleged probation violation within a reasonable time following the violation. *People v Miller (Buford)*, 77 Mich App 381, 384-385 (1977). Similarly, due process requires that "once a warrant for probation violation has been issued, the probation authorities must exercise due diligence in executing it." *People v Ortman*, 209 Mich App 251, 254 (1995), citing *People v Diamond (Diamond I)*, 59 Mich App 581, 587 (1975).

The "length of delay, reason for delay and prejudice to the defendant[]" are relevant in determining whether due diligence has been exercised. *Miller (Buford)*, 77 Mich App at 384-385 (citing *People v Collins (Harold)*, 388 Mich 680 (1972), and holding that a three-and-one-half-month delay between the defendant's commission of a new criminal offense and issuance of a probation violation notice "was not only reasonable but to [the] defendant's benefit[]" where the revocation proceeding was delayed until after the probable-cause hearing for the new offense and where the defendant "was free on bond during the entire period[]"); see also *Ortman*, 209 Mich App at 254-256 (upholding the trial court's finding that the authorities failed to exercise due diligence where there was an unexplained two-year delay between the issuance of a bench warrant and the defendant's arrest, despite that the defendant "had not changed his name, moved, or otherwise attempted to evade the probation authorities[]").[54]

Failure on the part of the authorities to proceed with due diligence may result in a waiver of the alleged probation violation. *Ortman*, 209 Mich App at 254; *People v Henry*, 66 Mich App 394, 397-399 (1976); *Diamond I*, 59 Mich App at 585-588. Moreover, "a lack of prejudice, in and of itself, is [not] sufficient to defeat a defendant's claim that the probation violation must be waived where there is a finding that the authorities did not exercise due diligence." *Ortman*, 209 Mich App at

[54] MCL 780.131, the statutory "180-day rule," does not apply to probation revocation proceedings. *Diamond I*, 59 Mich App at 583-585. But see *People v Phillips*, 109 Mich App 535, 540 (1981) (addressing the defendant's argument that the delay between his nolo contendere plea and probation violation hearing violated the statute, and concluding that no violation occurred).

255-257 (holding that where "there [was] no showing that [the] defendant was to blame" for the two-year delay between the issuance of a bench warrant and his arrest, and where the delay did not benefit him, the alleged probation violation was waived). See also *Phillips*, 109 Mich App at 540-541 (delay of 108 days between the defendant's nolo contendere plea to a new offense and the date of arraignment for the related probation violation did not constitute a lack of due diligence where the "probation authorities were waiting to see how [the] defendant did on a drug rehabilitation program . . . before commencing probation violation proceedings[,]" and where this delay therefore benefited the defendant).

However, see *Regains*, 477 Mich at 1038, 1038 n 1, 1039 (concurring statement of Corrigan, J.) (citing *People v New*, 427 Mich 482, 491 (1986), and opining that, "assum[ing] . . . that the [due diligence] rule is valid[,]" the defendant's unconditional guilty plea to a probation violation "waive[d] any issue that law enforcement did not exercise due diligence in executing the probation violation warrant[]").

4.6 Notice of Alleged Violation and of Right to Hearing

A probationer has a due process right to written notice of charged violations. *Gagnon v Scarpelli*, 411 US 778, 782, 786 (1973); *People v Miller (Buford)*, 77 Mich App 381, 384-385 (1977). To this end, MCL 771.4 provides that "the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation[.]" MCL 771.4 "places an affirmative obligation on the trial court . . . to provide the probationer with a written copy of the charges constituting the probation violation[.]" *People v Hendrick*, 472 Mich 555, 561-562 (2005). Similarly, MCR 6.445(B)(1) requires the court, at the arraignment, to "ensure that the probationer receives written notice of the alleged violation[.]" "Generally, proper written notice is a prerequisite to valid probation revocation." *People v Hunter*, 106 Mich App 821, 827 (1981), citing *People v Wood*, 2 Mich App 342 (1966).

Additionally, a probationer facing probation revocation has a due process right to a contested hearing, *Gagnon*, 411 US at 786, and to notification of this right, *People v Edwards*, 125 Mich App 831, 833 (1983). MCL 771.4 provides that "the probationer is entitled . . . to a probation revocation hearing[,]" and MCR 6.445(B)(2)(a) requires the court, at arraignment, to advise the probationer that he or she "has a right to contest the charge at a hearing[.]"

A. Written Notice of Alleged Violation

1. Contents of Notice

"The purpose of the notice requirement is to provide a defendant a reasonable opportunity to dispute, with evidence, the claimed violation." *Hunter*, 106 Mich App at 825. "Although a notice of probation violation need not be as specific as an indictment or information, . . . it should allege facts sufficient to give written notice of the claimed violation which, if proved, would constitute a violation of the probation terms and conditions." *Id.* at 826. "Thus, the allegations should indicate the specific probation conditions violated, as well as the dates and events supporting the charges." *Id*. at 825-827 (notice charging the defendant with "being arrested" for two new criminal offenses was inadequate because (1) the conditions of the defendant's probation "did not prohibit him[] . . . from being arrested[,]" and (2) the notice did not include specific information regarding the dates and circumstances of the new criminal offenses); see also *People v Cammon*, 61 Mich App 315, 316-318 (1975) (where the probationer was sentenced to one year in a probation camp as a condition of probation, the notice stating that he was expelled from that camp was adequate).

Probation may be revoked only for violations charged in the notice of probation violation. *People v Hall*, 138 Mich App 86, 93 (1984). In addition, probation may not be revoked based on non-criminal conduct that is not contemplated in the probation order, *People v Pippin*, 316 Mich 191, 193-196 (1946) (although the defendant "is presumed to know the conditions prescribed by law[, n]o such presumption attaches to such other conditions as existed only in the mind of the judge, unexpressed to the defendant either orally or in the order for probation, and no violation of these warrants revocation of probation[]"), or based on violations of conditions that were stated orally to the defendant during sentencing but were not included in the written probation order, *People v George*, 318 Mich 329, 332 (1947); see also *People v Hill (Donald)*, 69 Mich App 41, 42-45 (1976).

2. Timeliness of the Written Notice of Alleged Violation

MCR 6.445(B)(1) requires the court to "ensure that the probationer receives written notice of the alleged violation[]" at the arraignment. However, when the arraignment and revocation hearing are conducted on the same day, the issue of the timeliness of the notice arises. As a matter of procedural due process, "notice 'must be given sufficiently in advance of

scheduled court proceedings so that reasonable opportunity to prepare will be afforded[.]'" *People v Gulley*, 66 Mich App 112, 116 (1975), quoting *In re Gault*, 387 US 1, 33 (1967). Similarly, due process requires that "due diligence" be exercised to provide a defendant with notice of an alleged probation violation within a reasonable time following the violation. *Miller (Buford)*, 77 Mich App at 384-385.

Although providing notice minutes prior to, or at, a revocation hearing has been held untimely, in other cases the timeliness of notice is a function of the existence of a viable defense and the complexity of issues to be addressed at the hearing. See *People v McNeil*, 104 Mich App 24, 28-29 (1981). The following cases illustrate these rules:

- Notice provided to the probationer at the revocation hearing itself is not sufficient. *People v Lawrence*, 90 Mich App 73, 76-77 (1979).

- Notice provided to the probationer 15 minutes before the revocation hearing is not sufficient. *People v Gillman*, 71 Mich App 374, 377-378 (1976).

- Notice provided to the probationer on the same day as the revocation hearing is insufficient where the alleged conduct did not involve conviction of a new crime, and where the charged violation cannot be disputed without gathering witnesses and preparing a substantial defense. See *People v Ojaniemi*, 93 Mich App 200, 202-204 (1979); *People v Radney*, 81 Mich App 303, 306-307 (1978); *People v Bell*, 67 Mich App 351, 354-355 (1976); *Gulley*, 66 Mich App at 117.

- Notice provided to the probationer one day before the revocation hearing is sufficient where the alleged violation is the probationer's conviction of a new crime. *People v Irving*, 116 Mich App 147, 152-153 (1982).

- Notice provided to the probationer one day before the revocation hearing is sufficient where the alleged violation involves simple factual issues, such as failure to report to the probation officer. See *People v Hanson*, 178 Mich App 507, 510-511 (1989) (opinion of Maher, J.); *People v Duncan*, 154 Mich App 652, 654 (1986); *McNeil*, 104 Mich App at 27-29; *People v Broadnax*, 98 Mich App 338, 340 (1980).

3. Waiver of the Right to Timely Notice by Pleading Guilty[55]

Panels of the Court of Appeals have split on the question whether the probationer waives a claim of insufficient notice by pleading guilty to a probation violation. Compare *Broadnax*, 98 Mich App at 340, and *Bell*, 67 Mich App at 354 (guilty plea waives untimely notice), with *Hanson*, 178 Mich App at 509-510 (opinion of Maher, J.), *McNeil*, 104 Mich App at 28, *Ojaniemi*, 93 Mich App at 203-204, and *Lawrence*, 90 Mich App at 76-78 (no automatic waiver based on guilty plea). This issue has not been addressed by any recent published decisions of the Court of Appeals or by the Michigan Supreme Court; however, see *People v Regains*, 477 Mich 1038, 1038 (2007) (concurring statement of Corrigan, J.) (noting that "[i]n *People v New*, 427 Mich 482, 491 (1986), [the Michigan Supreme] Court held that a defendant who pleads guilty waives all claims except those that implicate the very authority of the state to bring the defendant to trial[]" and suggesting that *Hanson*, 178 Mich App at 509-510, was therefore "incorrectly decided[,]" and opining that the defendant's unconditional plea of guilty of a probation violation "waive[d] any issue that law enforcement did not exercise due diligence in executing the probation violation warrant[]"). See also *Duncan*, 154 Mich App at 653-654 (noting that former MCR 6.111(E), now MCR 6.445(F), "specifically provides that a defendant may plead guilty at his [or her] arraignment on a probation violation charge[,]" and holding that one day's notice was sufficient where the factual issue was simple and the defendant was represented by counsel when he pleaded guilty the day following his arraignment).

4. Harmless Error

"Generally, a trial court's decision to revoke probation may be based only on the conduct charged in the notice of probation violation." *Hunter*, 106 Mich App at 824, citing *People v Givens*, 82 Mich App 336, 341 (1978); *People v Elbert*, 21 Mich App 677, 681 (1970); see also *People v Councell*, 194 Mich App 192, 194 (1992). However, a failure to provide proper notice does not necessarily require reversal. See *In re Cobos*, 326 Mich 537, 540 (1950) (reversal not required on the basis of insufficient notice where the charged violation was based on a new criminal conviction and the defendant was represented by counsel, received actual notice of the charged violation by other means, and indicated that he was ready to proceed); *Hunter*, 106 Mich App at 827

[55] See Section 4.11 for discussion of guilty and nolo contendere pleas.

(reversal not required on the basis of insufficient notice where the defendant had actual notice of the criminal charges constituting the charged probation violations and pleaded guilty to those charges the same day as the revocation hearing, and where counsel indicated at the revocation hearing that he and the defendant were prepared to proceed).

Similarly, where the sentencing court revokes probation on the basis of conduct not specified in the notice, reversal is not necessarily required. "[W]here the conduct charged in the notice is clearly established and far outweighs the other grounds for revocation stated by the judge, the statement of the other grounds for revocation of probation is not an error resulting in a denial of due process." *Hunter*, 106 Mich App at 824, citing *People v McDonald*, 97 Mich App 425, 429 (1980), vacated on other grounds 411 Mich 870 (1981).

B. Notice of Right to Contested Hearing

A probationer facing probation revocation is entitled to a hearing. MCL 771.4; *Gagnon*, 411 US at 786. At the arraignment, the court must advise the probationer of his or her "right to contest the charge at a hearing[.]" MCR 6.445(B)(2)(a).

Due process "require[s] the trial court, at the very least, to specifically inform [the] defendant that, as an alternative to pleading guilty, he [or she] has the right to a hearing in which he [or she] will have an opportunity to contest the charges against him [or her]." *Edwards*, 125 Mich App at 833, citing *People v Adams*, 411 Mich 1070 (1981); *People v Ealey*, 411 Mich 987 (1981). "Failure to so inform the defendant requires reversal absent direct and affirmative proof that the defendant was aware that he had such a right and that it would be waived by a plea of guilty." *Edwards*, 125 Mich App at 833, citing *People v Moore*, 121 Mich App 452 (1982); see also *Ealey*, 411 Mich at 987 (remanding for a new probation violation hearing where "[the] record fail[ed] to show that the defendant was notified of his right to a contested hearing[]").

The use of the terms "hearing" or "pending violation hearing" in a notice of violation or bench warrant does not alone sufficiently notify the probationer of the right to a contested hearing; rather, there must be "direct and affirmative proof that [the] defendant read [such a] notice and understood it[.]" *Edwards*, 125 Mich App at 834-835; see also *People v Stallworth*, 107 Mich App 754, 755 (1981) (holding that although "statements in the notice of probation violation or in the bench warrant referring to a 'pending violation hearing' may provide sufficient notice of the right to a contested hearing[,] . . . [where] the record is void of the minimal evidence that these documents were

ever served upon [the] defendant or otherwise brought to [his or] her attention[or that the] . . . defendant was in some manner made aware of the right to a contested hearing," reversal is required). Similarly, the trial court's use of the word "hearing" when informing the probationer of the right to counsel is insufficient notice of the right to a contested hearing. *Moore*, 121 Mich App at 458-460; *People v Gaudett*, 77 Mich App 496, 499-502 (1977) (noting that "the [notice of hearing] requirement is satisfied if a defendant is told that he [or she] has the right to a hearing at which he [or she] may contest the accuracy of the violation charges[]").[56]

4.7 Judges Who May Preside Over Revocation Proceedings

MCL 771.4 states, in relevant part:

> "If during the probation period *the sentencing court determines* that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, *the court may revoke probation.* All probation orders are revocable in any manner *the court that imposed probation* considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest." [Emphasis added.]

The emphasized language in MCL 771.4 requires probation revocation proceedings to be conducted by the same judge who presided over the defendant's original sentencing, or by his or her successor if the original judge is unavailable. See *People v Manser*, 172 Mich App 485, 487 (1988) (citing MCR 2.613(B), which provides that a judgment or order may be set aside or vacated "only by the judge who entered the judgment or order, unless that judge is absent or unable to act[]"); *People v McIntosh*, 124 Mich App 705, 708-710 (1983) (citing former GCR 1963, 529.2 (now MCR 2.613(B)), and concluding that "probation violation proceedings *should* be held, if possible, before the original judge[]"); *People v Clemons*

[56] The Court of Appeals has suggested that notice of the right to a hearing, like notice of the probation violation, must be given at some point sufficiently in advance of a revocation hearing or guilty plea. *Duncan*, 154 Mich App at 653-654 (holding that one day's notice of the right to a contested hearing was sufficient where the defendant was represented by counsel and where the case presented only a "simple factual issue"). However, it appears that the *Duncan* panel may have inadvertently conflated the right to notice of the probation *violation* and notice of the *right to a hearing*; all of the cases cited by the *Duncan* Court concern whether notice of the probation violation was given sufficiently in advance of a scheduled revocation hearing. See *Duncan*, 154 Mich App at 653-654, citing *McNeil*, 104 Mich App at 28-29; *Broadnax*, 98 Mich App 338; *Ojaniemi*, 93 Mich App 200; *Lawrence*, 90 Mich App 73; *Bell*, 67 Mich App 351; *Gulley*, 66 Mich App 112. See Section 4.6(A) for discussion of these cases.

(Alvin), 116 Mich App 601, 603-605 (1981) (citing former GCR 1963, 529.2 (now MCR 2.613(B)), and noting that "revocation [should] be considered by the judge who is most acquainted with the matter[]").[57]

These principles are consistent with the generally applicable rule that the same judge who conducted the original proceedings should conduct the sentencing, if he or she is reasonably available. See, e.g., *People v Clemons (Kenneth)*, 407 Mich 939 (1979) (sentencing following trial); *People v Robinson*, 203 Mich App 196, 197 (1993) (sentencing following plea). A judge is properly considered to be "unavailable" if he or she is no longer assigned to the same court. See *People v Van Auker (After Remand)*, 132 Mich App 394, 399 (1984), rev'd in part on other grounds 419 Mich 918 (1984). See also MCR 6.440(C) ("[i]f, after a verdict is returned or findings of fact and conclusions of law are filed, the trial judge because of disability becomes unable to perform the remaining duties the court must perform, another judge regularly sitting in or assigned to the court may perform those duties[]"). See also MCR 2.630, which contains substantially similar language.

If, however, the defendant fails to object, any error in having a different judge preside over probation revocation proceedings may be deemed harmless. See *People v Williamson*, 413 Mich 895, 895 (1982); *McIntosh*, 124 Mich App at 709-710; see also *Robinson*, 203 Mich App at 197-198 (a defendant generally waives any claim of error by failing to object to being sentenced by a different judge).

Although under *Gagnon v Scarpelli*, 411 US 778, 786 (1973), a probationer is entitled to "'a "neutral and detached" hearing body'" as a matter of due process, a judge is not precluded from conducting revocation proceedings merely because he or she placed the defendant on probation. *People v Nesbitt*, 86 Mich App 128, 139 (1978). "The 'neutral and detached hearing body' requirement is aimed at preventing revocation by one who was directly involved in bringing the charges against the defendant, such as a probation officer, or one who has personal knowledge of an event upon which the charge is based, such as a judge who orders revocation because of a failure to appear before him [or her]." *Id.* at 139.

A probationer is not entitled to a jury trial in a probation revocation proceeding. *United States v Knights*, 534 US 112, 120 (2001); *People v Harper*, 479 Mich 599, 627 (2007).

[57] But see *People v Collins (Malcolm)*, 25 Mich App 609, 612 (1970) (holding that "the term 'sentencing court' [in MCL 771.4] means the forum . . . in which [the] defendant was sentenced to probation; the term court is not a reference to any specific judge[]").

4.8 Procedures for Handling Cases Under the Interstate Compact for Adult Offender Supervision

The Interstate Commission for Adult Offender Supervision, MCL 3.1012, provides uniformity in the transfer of adult offenders from one state to another. All compacting states must comply with the substantive rules issued by the Interstate Commission for Adult Offender Supervision (ICAOS).

For information on the background of the ICAOS, procedures in interstate cases, and liability and immunity considerations for court personnel in interstate cases, see the ICAOS's *Bench Book for Judges & Court Personnel*, available at http://www.interstatecompact.org/Portals/0/library/publications/benchbook.pdf. For additional information on the ICAOS, including training opportunities, best practices, advisory opinions, and interstate forms, see http://www.interstatecompact.org/.

Part B: Probation Revocation Procedure

4.9 Issuance of Arrest Warrant or Summons to Appear

MCR 6.445(A) provides, in relevant part:

> "On finding probable cause to believe that a probationer has violated a condition of probation, the court may
>
> > (1) issue a summons in accordance with MCR 6.103(B) and [MCR 6.103](C) for the probationer to appear for arraignment on the alleged violation, or
> >
> > (2) issue a warrant for the arrest of the probationer."

A. Probable Cause Determination

The issuance of a summons to appear or a warrant for the probationer's arrest under MCR 6.445(A) is justified under MCL 771.4 when, during the period of probation, the sentencing court[58] "find[s] that probable cause exists to believe that the defendant has violated his [or her] probation[.]" *People v Ritter*, 186 Mich App 701, 708 (1991).

[58] See Section 4.7 for discussion of when a judge other than the original sentencing judge may preside over probation revocation proceedings.

The court must exercise its discretion when determining whether probable cause exists to believe that the probationer has violated a condition of probation. *People v Farmer*, 193 Mich App 400, 403 (1992). However, "'the decision whether to proceed with a probation revocation petition on the basis of subsequent criminal conduct, to charge a defendant with that subsequent criminal conduct, or both, lies within the discretion of the prosecuting attorney[, and t]he judiciary has no authority to invade the prosecuting attorney's discretion in this matter beyond its normal roles of probable cause determinations and, at trial, determination of guilt or innocence.'" *Id.* at 402, quoting *People v Williams (Willie)*, 186 Mich App 606, 613 (1990). Accordingly, the trial court may neither require the prosecutor to file separate criminal charges based on subsequent criminal conduct, *Farmer*, 193 Mich App at 402-403, nor require the prosecutor to agree *not* to file separate criminal charges based on that conduct, *Williams (Willie)*, 186 Mich App at 607-609, 613-614, as a condition of proceeding on the prosecutor's probation revocation petition.

B. Summons Requirements

MCR 6.103(B)-(C) govern the form and service requirements of summonses. These rules state as follows:

> **"(B) Form.** A summons must contain the same information as an arrest warrant, except that it should summon the accused to appear before a designated court at a stated time and place.
>
> **(C) Service and Return of Summons.** A summons may be served by
>
> (1) delivering a copy to the named individual; or
>
> (2) leaving a copy with a person of suitable age and discretion at the individual's home or usual place of abode; or
>
> (3) mailing a copy to the individual's last known address.
>
> Service should be made promptly to give the accused adequate notice of the appearance date. The person serving the summons must make a return to the court before which the person is summoned to appear."

MCR 6.445(A)(1) does not require that the summons be issued in accordance with MCR 6.103(A), which states that "[i]f the prosecutor so requests, the court may issue a summons instead of an arrest warrant." Therefore, the court may issue a summons for any

probation violation without a request by the prosecutor. See 1989 Staff Comment to MCR 6.445.

C. Due Diligence Requirement for Executing Arrest Warrant[59]

Due process requires that "once a warrant for probation violation has been issued, the probation authorities must exercise due diligence in executing it." *People v Ortman*, 209 Mich App 251, 254 (1995), citing *People v Diamond (Diamond I)*, 59 Mich App 581, 587 (1975).[60] The "length of delay, reason for delay and prejudice to the defendant[]" are relevant in determining whether due diligence has been exercised. *People v Miller (Buford)*, 77 Mich App 381, 384-385 (1977). Failure on the part of the authorities to proceed with due diligence may result in a waiver of the alleged probation violation. *Ortman*, 209 Mich App at 254; *Diamond I*, 59 Mich App at 585-588.

Additionally, "[a]n arrested probationer must promptly be brought before the court for arraignment on the alleged violation." MCR 6.445(A).[61]

D. Arrest Without a Warrant

A peace officer may arrest a probationer without a warrant when the officer has probable cause to believe that the probationer has violated a probation condition. MCL 764.15(1)(g).

In *People v Glenn-Powers*, 296 Mich App 494, 501-503 (2012), the Court of Appeals held that "the oath or affirmation requirement generally applicable to warrants does not apply to a warrant for the arrest of a probationer[,]" extending to probationers the rule of *Triplett v Deputy Warden, Jackson Prison*, 142 Mich App 774, 782-783 (1985), that the constitutional probable cause and oath or affirmation requirements do not apply to a warrant for the arrest of a parole violator. The *Glenn-Powers* Court, noting that under *Griffin v Wisconsin*, 483 US 868, 880 (1987), "the Fourth Amendment does not require a warrant to search a probationer's home," concluded that "it is [therefore] not unreasonable to conclude that [the Fourth Amendment] does not

[59] See Section 4.5(B) for a more thorough discussion of procedural due diligence.

[60] MCL 780.131, the statutory "180-day rule," does not apply to probation revocation proceedings. *Diamond I*, 59 Mich App at 583-585.

[61] A probationer who is participating in a program of swift and sure probation supervision under the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq*., must be brought before a judge for a probation violation "as soon as possible but within 72 hours after the violation is reported to the court" unless good cause is shown for the delay. MCL 771A.5(1)(c). See Section 4.17 for discussion of the Probation Swift and Sure Sanctions Act.

require a warrant to arrest a probationer." *Glenn-Powers*, 296 Mich App at 503.[62]

4.10 Arraignment

"An arrested probationer must promptly be brought before the court[63] for arraignment on the alleged violation." MCR 6.445(A).[64]

MCR 6.445(B), governing arraignment procedure, provides as follows:

> "At the arraignment on the alleged probation violation, the court must:
>
> (1) ensure that the probationer receives written notice of the alleged violation,
>
> (2) advise the probationer that
>
> (a) the probationer has a right to contest the charge at a hearing, and
>
> (b) the probationer is entitled to a lawyer's assistance at the hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one,
>
> (3) if requested and appropriate, appoint a lawyer,
>
> (4) determine what form of release, if any, is appropriate, and
>
> (5) subject to [MCR 6.445](C), set a reasonably prompt hearing date or postpone the hearing."

A. Notice of Violation[65]

The trial court is required to provide the probationer with a written copy of the charges constituting the probation violation. MCL 771.4;

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[62] See Section 4.3 for additional discussion of probationers' due process rights.

[63] See Section 4.7 for discussion of when a judge other than the original sentencing judge may preside over probation revocation proceedings.

[64] A probationer who is participating in a program of swift and sure probation supervision under the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq*., must be brought before a judge for a probation violation "as soon as possible but within 72 hours after the violation is reported to the court" unless good cause is shown for the delay. MCL 771A.5(1)(c). See Section 4.17 for discussion of the Probation Swift and Sure Sanctions Act.

[65] See Section 4.6(A) for additional discussion of this notice requirement.

People v Hendrick, 472 Mich 555, 561-562 (2005). At arraignment, the court must ensure that written notice has been provided. MCR 6.445(B)(1). Additionally, "notice 'must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded[.]'" *People v Gulley*, 66 Mich App 112, 116 (1975), quoting *In re Gault*, 387 US 1, 33 (1967). This may be an issue if revocation proceedings are to take place on the same day as the arraignment.[66]

Because it is not clear that the notice requirement is waived by a guilty plea, see *People v Regains*, 477 Mich 1038, 1038 (2007) (concurring statement of Corrigan, J.); *People v Hanson*, 178 Mich App 507, 509-510 (1989) (opinion of Maher, J.); *People v Broadnax*, 98 Mich App 338, 340 (1980), sufficient notice should be provided even if a plea is to be entered.

"Generally, a trial court's decision to revoke probation may be based only on the conduct charged in the notice of probation violation." *People v Hunter*, 106 Mich App 821, 824 (1981); see also *People v Councell*, 194 Mich App 192, 194 (1992). The notice "need not be as specific as an indictment or information," but "the allegations should indicate the specific probation conditions violated, as well as the dates and events supporting the charges." *Hunter*, 106 Mich App at 826.

B. Notice of the Right to a Contested Hearing[67]

A probationer facing probation revocation has a due process right to a contested hearing. *Gagnon*, 411 US at 786; see MCL 771.4. At the arraignment, the court must advise the probationer of his or her "right to contest the charge at a hearing[.]" MCR 6.445(B)(2)(a). The court's failure to "specifically inform [the] defendant that, as an alternative to pleading guilty, he [or she] has the right to a hearing in which he [or she] will have an opportunity to contest the charges against him [or her][]" may require reversal. *People v Edwards*, 125 Mich App 831, 833 (1983), citing *People v Adams*, 411 Mich 1070 (1981); *People v Ealey*, 411 Mich 987 (1981).

C. Right to Counsel[68]

At arraignment, the court must instruct the defendant that he or she is entitled to be represented by counsel, either appointed or retained, at the contested hearing and at all subsequent court proceedings. MCR 6.445(B)(2)(b); see also *People v Belanger*, 227 Mich App 637, 645 (1998).

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[66] See Section 4.6(A) for additional discussion of the timeliness of the notice.

[67] See Section 4.6(B) for additional discussion of this notice requirement.

[68] See Section 4.3(C) for a thorough discussion of the right to counsel in probation revocation proceedings.

If the defendant wishes to retain counsel, a reasonable opportunity must be afforded to do so. *Gulley*, 66 Mich App at 117 (allowing a probationer only one day to obtain counsel does not afford a "'reasonable opportunity'").[69]

The court should appoint a lawyer for the defendant at the arraignment "if requested and appropriate[.]" MCR 6.445(B)(3).

D. Release and Scheduling the Violation Hearing

MCR 6.445(B)(4)-(5) require the court to determine if release of the probationer is appropriate and to either set a reasonably prompt hearing date or, if the probationer is being prosecuted for a criminal offense, postpone the violation hearing as provided in MCR 6.445(C).

In turn, MCR 6.445(C) provides:

> "The hearing of a probationer being held in custody for an alleged probation violation must be held within 14 days after the arraignment or the court must order the probationer released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution.

1. Probationer in Custody

MCL 771.4 provides, in relevant part:

> In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good."

If the probationer is held in custody on an alleged probation violation, a violation hearing must be held within 14 days of the arraignment; otherwise, the probationer must be released. MCR 6.445(C).[70]

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[69] See Section 4.3(C) for discussion of waiver of counsel.

[70] See Section 4.3(B) for discussion of due process concerns that may arise from a delay in conducting the revocation hearing.

2. Postponement of Hearing When Violation Is Based on a Criminal Offense

The court may, but is not required to, postpone the violation hearing pending the outcome of a separate criminal prosecution for the offense that constitutes the alleged probation violation. MCR 6.445(C); see also *People v Williams (Willie)*, 186 Mich App 606, 612-613 (1990) (construing former MCR 6.111(D)(2), which contains substantially similar language as MCR 6.445(C)).[71]

E. Plea

"The probationer may, at the arraignment or afterward, plead guilty to the violation." MCR 6.445(F). A probationer may also enter, and the court may accept, a plea of nolo contendere to a probation violation charge. *People v Kreigh*, 165 Mich App 697, 699 (1988) (construing former MCR 6.111(E), which contains substantially similar language as MCR 6.445(C)). See Section 4.11 for discussion of the required procedures for entering a plea.

4.11 Guilty or Nolo Contendere Plea

MCR 6.445(F) provides:

> "The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must
>
> > (1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in [MCR 6.445](B)(2)(b),[72]
> >
> > (2) advise the probationer of the maximum possible jail or prison sentence for the offense,
> >
> > (3) ascertain that the plea is understandingly, voluntarily, and accurately made, and

[71] See Section 4.4(A) for a thorough discussion of probation revocation proceedings based on criminal conduct, including evidentiary issues associated with conducting revocation proceedings before or after a related criminal prosecution.

[72] See Section 4.3(C) for discussion of the right to counsel and waiver of counsel in probation revocation proceedings.

> (4) establish factual support for a finding that the probationer is guilty of the alleged violation."

Although not directly contemplated in the court rule, a probationer may also enter, and the court may accept, a plea of nolo contendere to a probation violation charge. *People v Kreigh*, 165 Mich App 697, 699 (1988) (construing former MCR 6.111(E), which contains substantially similar language as MCR 6.445(C)).

A. Advice of Rights and Understanding, Voluntary, and Knowing Waiver of Rights

The requirements of MCR 6.445(F) "must be met even when the defendant seeks to plead guilty to less than all of the counts pending against him [or her]. While not every deviation from the rule requires reversal, a record sufficient to show that the plea was understanding, voluntary, and knowing must be made." *People v Ison*, 132 Mich App 61, 68-69 (1984) (construing former GCR 1963, 791.5, which contains substantially similar language as MCR 6.445(F)).

1. Advice of Right to Contested Hearing[73]

Before accepting a guilty plea, the court must advise the probationer that by pleading guilty he or she gives up the right to a contested revocation hearing. MCR 6.445(F)(1). The court's failure to "specifically inform [the] defendant that, as an alternative to pleading guilty, he [or she] has the right to a hearing in which he [or she] will have an opportunity to contest the charges against him [or her][]" may require reversal. *People v Edwards*, 125 Mich App 831, 833 (1983) (construing former GCR 1963, 791.5, which contains substantially similar language as MCR 6.445(F)), citing *People v Adams*, 411 Mich 1070 (1981); *People v Ealey*, 411 Mich 987 (1981). Notice of the right to a contested hearing as an alternative to pleading guilty is "especially important" when the probationer has waived the right to counsel. *People v Alame*, 129 Mich App 686, 690 (1983) (construing former GCR 1963, 791.5, which contains substantially similar language as MCR 6.445(F)).

Repeated advice of the right to a contested hearing is not required when the plea proceeding immediately follows an arraignment at which the probationer was fully advised of his or her right to a contested probation revocation hearing and the rights incident thereto. *People v Terrell*, 134 Mich App 19, 23

[73] See Section 4.5(B) for additional discussion of this notice requirement

(1984) (construing former GCR 1963, 791.5, which contains substantially similar language as MCR 6.445(F)).

2. Advice and Waiver of Right to Counsel[74]

Before accepting a plea, the court must advise an unrepresented defendant that he or she "is entitled to a lawyer's assistance . . . and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one[.]" MCR 6.445(B)(2)(b); MCR 6.445(F)(1).

"[D]ue process is satisfied in a probation revocation proceeding if a trial court advises a defendant of his [or her] right to counsel and the appointment of counsel, if he [or she] is indigent, and determines if there is a knowing and intelligent waiver of that right." *People v Belanger*, 227 Mich App 637, 647 (1998). "'Factors to be considered when deciding whether [the] defendant ha[s] made a knowing waiver of his [or her] right to counsel are [the] defendant's age, education, prior criminal experience, mental state, financial condition, and the various factors, pressures or inducements which led him [or her] to admit the allegations against him [or her] without the assistance of counsel.'" *Id.* at 646, quoting *People v Kitley*, 59 Mich App 71, 76 (1975).

3. Advice of Maximum Sentence

The court must advise the probationer of the maximum possible jail or prison sentence for the offense for which the probationer was placed on probation. MCR 6.445(F)(2). The failure to so advise the probationer may require reversal and remanding to allow the defendant to withdraw the plea. See *Alame*, 129 Mich App at 689-690 (construing former GCR 1963, 791.5, which contains substantially similar language as MCR 6.445(F)); *People v Gorzen*, 126 Mich App 464, 467 (1983) (construing former GCR 1963, 791.5, which contains substantially similar language as MCR 6.445(F)).

4. A Plea Must Be Understanding, Voluntary, and Accurate

Before accepting the plea, the court must "ascertain that the plea is understandingly, voluntarily, and accurately made[.]" MCR 6.445(F)(3). Although the court rule does not "require[] rigid, unwavering, ceremonial incantation of its provisions under peril of mandatory reversal, . . .failure to follow the clear mandates of

[74] See Section 4.3(C) for a thorough discussion of the right to counsel in probation revocation proceedings.

[MCR 6.445(F)] . . . cannot produce an understanding, knowing, or voluntary plea." *Alame*, 129 Mich App at 689-690 (construing former GCR 1963, 791, which contains substantially similar language as MCR 6.445(F); under facts of case, trial court failed to comply with any of the requirements set out in former GCR 1963, 791.5).

Committee Tip:

Although not explicitly required under MCR 6.445(F), it is good practice to summarize, on the record, any plea agreement, and to obtain confirmation from the defendant and, if present, the probation officer, the defendant's attorney, and the prosecuting attorney.[75]

When there is a *bona fide* doubt as to a defendant's competency to enter a guilty plea to a probation violation, the court should not accept the plea without first rendering a finding of competence. *People v Whyte*, 165 Mich App 409, 411-414 (1988); *People v Martin*, 61 Mich App 102, 108 (1975).[76]

B. Establishing Factual Support for the Plea

Before accepting the plea, the court must establish support for a finding that the probationer is guilty of the violation charged. MCR 6.445(F)(4). See *Alame*, 129 Mich App at 690 (construing former GCR 1963 791.5, which contains substantially similar language as MCR 6.445(F)); holding that, although the court rule does not "require[] rigid, unwavering, ceremonial incantation of its provisions under peril of mandatory reversal," the defendant was entitled to withdraw his plea where the sentencing court "did not make any finding at all but simply accepted [the] defendant's plea without even stating the charges on the record[]"); *Ison*, 132 Mich App at 68-69 (construing former GCR 1963 791.5, which contains substantially similar language as MCR 6.445(F)); defense counsel's statement that the defendant did not contest one of the charged probation violations could not support the revocation of probation where "no other evidence relevant to this count was introduced[]").

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[75] For example, placing the terms of a plea agreement on the record may forestall a subsequent claim, under *Lafler v Cooper*, 566 US ___ (2012), and *Missouri v Frye*, 566 US ___ (2012), that a defendant was not advised of a potential plea or that his or her counsel gave erroneous advice concerning a plea.

[76] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 8, for more information on establishing competency.

However, the vacation of a defendant's plea of guilty of a probation violation is not necessarily required where the trial court does not comply with MCR 6.445(F)(4). In *People v Hall*, 138 Mich App 86, 89-92 (1984) (construing former GCR 1963 791.5, which contains substantially similar language as MCR 6.445(F)), the Court of Appeals held that a sufficient factual basis for finding the probationer guilty of the charged violation was established, despite the sentencing court's failure to "explicitly make a 'finding' that [the] defendant was guilty of the charged offense[]":

> "[A]s noted in both *Alame*[, 129 Mich App 686,] and *Ison*, [132 Mich App 61,] not every deviation from the [court] rule requires reversal, provided that a record sufficient to show that the plea was understanding, voluntary, and knowing has been made. . . . [S]uch a record was made . . . [where t]he court stated the charge against [the] defendant on the record and twice ascertained that [the] defendant understood the charge. The charge itself was clear-cut and precise—failure to report to [the] defendant's probation officer . . . . [The d]efendant's admission of guilt to the stated charge was sufficient to establish a basis for finding that [the] defendant was guilty."

Additionally, if the appellate court determines that the trial court failed to comply with MCR 6.445(F)(4), a remand may be appropriate to allow the prosecution to establish a factual basis for a plea. See *People v McCullough*, 462 Mich 857, 857 (2000):

> "The trial court did not secure an adequate factual basis to support acceptance of the guilty plea. See MCR 6.445(F)(4). On remand, the trial court is to provide the prosecutor an opportunity to establish a factual basis to support the plea. See *People v Mitchell*, 431 Mich 744, 750 (1988). If the prosecutor establishes a factual basis and no contrary evidence exists, [the] defendant's conviction is to stand. If the prosecutor is unable to establish that [the] defendant violated a condition of probation, the trial court is to vacate the order revoking [the] defendant's probation. If contrary evidence is produced, the trial court is to treat the matter as a motion to withdraw the plea, and decide the matter in the exercise of its discretion."

C. Withdrawal of Guilty Plea

A probationer may move to withdraw a plea of guilty of a probation violation, and failure to do so may result in waiver of issues regarding

the court's compliance with MCR 6.445(F). *People v Baugh*, 127 Mich App 245, 246-247 (1983) (construing former GCR 1963 791.5, which contains substantially similar language as MCR 6.445(F)).

4.12 Violation Hearing[77]

Probation revocation proceedings consist of two "analytically distinct components[]": 1) a factual determination that the violation charged in the notice has occurred (the violation hearing), and 2) a discretionary determination that the proven charge warrants revoking probation (sentencing). *People v Clements*, 72 Mich App 500, 503 (1976), citing *Gagnon v Scarpelli*, 411 US 778, 784 (1973); see also MCR 6.445(E); MCR 6.445(G).

MCL 771.4 provides the general requirements for probation revocation hearings:

> "Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials. . . . The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing."

MCR 6.445(E) sets out the required procedures for probation revocation hearings:

> "(1) *Conduct of the Hearing*. The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has the burden of proving a violation by a preponderance of the evidence.
>
> (2) *Judicial Findings*. At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403."

MCR 6.403 provides, in relevant part, that "[t]he court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." Additionally, "[t]he court must state its findings

[77] See Section 4.11 for discussion of entry of a guilty or nolo contendere plea to a charge of probation violation.

and conclusions on the record or in a written opinion made a part of the record." *Id*.

A probationer is not entitled to the full range of due process rights associated with a criminal trial. Due process requires only an "informal hearing structured to assure that the finding of a . . . violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the [probationer's] behavior." *Morrissey v Brewer*, 408 US 471, 484, 489, 490 (1972); see also *Gagnon*, 411 US at 781-782; *People v Johnson (Eddie)*, 191 Mich App 222, 225-226 (1991).[78] A probationer is not entitled to a jury trial in a probation revocation proceeding. *Samson v California*, 547 US 843, 849 (2006); *United States v Knights*, 534 US 112, 120 (2001); *People v Harper*, 479 Mich 599, 627 (2007), abrogated in part on other grounds by *People v Lockridge*, 498 Mich 358, 364-365 (2015).[79]

A. Timing Requirements[80]

If the probationer is held in custody on an alleged probation violation, a violation hearing must be held within 14 days of the arraignment; otherwise, the probationer must be released. MCR 6.445(C).[81]

The court may, but is not required to, postpone the violation hearing pending the outcome of a separate criminal prosecution for the offense that constitutes the alleged probation violation. MCR 6.445(C).[82]

B. Continuing Duty to Advise of Right to Counsel

"Even [if] a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E)." MCR 6.445(D).[83]

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[78] See Section 4.3 for a thorough discussion of the due process requirements that are applicable in probation revocation proceedings.

[79] See Section 4.7 for discussion of when a judge other than the original sentencing judge may preside over probation revocation proceedings.

[80] See Section 4.10(D) for additional discussion of timing requirements for the violation hearing.

[81] See Section 4.3(B) for discussion of due process concerns that may arise from a delay in conducting the revocation hearing.

[82] See Section 4.4(A) for a thorough discussion of probation revocation proceedings based on criminal conduct, including evidentiary issues associated with conducting revocation proceedings before or after a related criminal prosecution.

[83] See Section 4.3(C) for discussion of waiver of counsel.

C. Presentation of Evidence[84]

"Probation is a matter of grace, not of right," and "when a judge imposes probation, it is 'revocable on the basis of a judge's findings of fact at an informal hearing, and largely at the judge's discretion.'" *People v Breeding*, 284 Mich App 471, 479-480 (2009), quoting *People v Harper*, 479 Mich 599, 626 (2007), abrogated in part on other grounds by *People v Lockridge*, 498 Mich 358, 364-365 (2015).

"'Probation violation hearings are summary and informal and are not subject to the rules of evidence or of pleading applicable in a criminal trial. The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach.'" *Breeding*, 284 Mich App at 480, quoting *People v Pillar*, 233 Mich App 267, 269 (1998). Because a probation revocation hearing is not a criminal prosecution, "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Morrissey*, 408 US at 489; see also *Gagnon*, 411 US at 782 n 5 ("we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence[] . . . [or] to foreclose the States . . . from developing other creative solutions to the practical difficulties of the *Morrissey* requirements[]").

"The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges." MCR 6.445(E)(1). "A trial court's discretionary authority regarding the admission of evidence at a probation revocation hearing is broad." *Breeding*, 284 Mich App at 479, citing MCR 6.445(E)(1); MRE 1101(b)(3).

"So long as there is no evidence of partiality or prejudice, it is not improper for the court to conduct a probation revocation proceeding[]" and to interrogate witnesses. *People v Rocha (After Remand)*, 99 Mich App 654, 656 (1980).[85] However, "where probation proceedings are contested, it is preferable that the interrogation of the defendant be conducted by the prosecutor, so as to avoid the potential or the appearance of bias." *Id.* at 656.

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[84] See Section 4.3(D) for additional discussion of the due process concerns related to the presentation of evidence at violation hearings.

[85] Although *Rocha (After Remand)*, 99 MIch App at 654, predates all probation revocation court rules, nothing in the current court rule, MCR 6.445, specifically prohibits a judge from interrogating a witness during a probation revocation proceeding. It should be noted, however, that MCR 6.445(E)(1) does require "[*t*]*he state* [to] prov[e] a violation by a preponderance of the evidence."

1. Evidence Must Be Relevant to a Charged Violation

"[O]nly evidence relating to the charged probation violation activity may be considered at a violation hearing and only such evidence may provide the basis for a decision to revoke one's probation." *Pillar*, 233 Mich App at 270; see also MCR 6.445(E)(1).

"A defendant who, while on probation, is convicted of a crime in violation of his [or her] probation is not entitled to challenge, at his [or her] probation revocation hearing, the validity of the conviction which forms the basis for the charge of the probation violation." *People v Irving*, 116 Mich App 147, 150 (1982).

2. Hearsay

The court may consider hearsay evidence at probation revocation proceedings. See MCL 771.4; MCR 6.445(E)(1). However, care should be taken to ensure that the defendant's limited due process right of confrontation is not abridged by the admission of hearsay evidence. See *Breeding*, 284 Mich App at 482, 487-489 ("declin[ing the] defendant's invitation to adopt a method for establishing the admissibility of hearsay testimony in a probation revocation hearing[]" where the defendant neither objected nor requested cross-examination, but holding that "a due process standard applies in determining the admissibility of statements made by out-of-court declarants at probation violation proceedings, regardless of whether the statements are testimonial or nontestimonial in nature[]").[86]

D. Probationer's Rights Concerning the Presentation of Evidence

MCR 6.445(E)(1) contains the following rules governing the probationer's rights with respect to the presentation of evidence at probation revocation hearings:

- The evidence against the probationer must be disclosed to him or her.
- The probationer has the right to be present at the hearing.
- The probationer has the right to present evidence.

[86] See Section 4.3(D) and Section 7.11(D)(1) for discussion of the probationer's right of confrontation in probation revocation proceedings.

- The probationer has the right to examine and cross-examine witnesses.

Additionally, a probationer has the right to insist that any witness who testifies against him or her take an oath or affirm to tell the truth. *People v Knox*, 115 Mich App 508, 514 (1982) (applying MCL 600.1432 and MCL 600.1434 to probation revocation proceedings).

1. Probationer's Right to Confront and Cross-Examine Witnesses[87]

Because probation revocation is not a stage of a criminal proceeding, "the Sixth Amendment right to confrontation, as defined and applied in *Crawford*[*v Washington*, 541 US 36 (2004)[88]], does not apply to probation revocation proceedings." *Breeding*, 284 Mich App at 482. However, a probationer enjoys a basic due process right "'to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)[.]'" *Gagnon*, 411 US at 786, quoting *Morrissey*, 408 US at 489; see also *Breeding*, 284 Mich App at 484-487 (declining to address the defendant's claim that he was denied the constitutional right of confrontation at his probation revocation hearing where he failed to object to alleged hearsay testimony and did not make a request to cross-examine the adverse witnesses)."

2. Privilege Against Self-Incrimination

The Michigan Court of Appeals has held that the privilege against self-incrimination contained in the federal and Michigan constitutions applies to probation revocation proceedings, and that a probationer cannot be compelled to testify against himself or herself at a revocation hearing. *People v Manser*, 172 Mich App 485, 488 (1988).

"[E]vidence of a defendant's failure to respond to an accusation of wrongdoing is inadmissible to prove guilt even if the defendant had, prior to his [or her] silence, waived his [or her] right to remain silent." *People v Staley*, 127 Mich App 38, 41-42 (1983) (applying *People v Bobo*, 390 Mich 355 (1973), to probation revocation proceedings).

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[87] See Section 4.3(D) for additional discussion of the probationer's right of confrontation in probation revocation proceedings.

[88] The *Crawford* Court held that out-of-court "testimonial" statements are inadmissible unless the declarant is shown to be unavailable and there has been "a prior opportunity for cross-examination." *Crawford*, 541 US at 68.

Involuntary confessions are inadmissible in probation revocation hearings. *Staley*, 127 Mich App at 43-44. However, voluntary statements made to a probation officer during a noncustodial interview are admissible in revocation or subsequent criminal proceedings, even absent *Miranda* warnings. *Minnesota v Murphy*, 465 US 420, 429-431 (1984); *People v Hardenbrook*, 68 Mich App 640, 644-646 (1976). See also *Fare v Michael C*, 442 US 707, 725 (1979) (juvenile's request to speak with his probation officer did not constitute an invocation of the juvenile's rights to counsel and to remain silent); *People v Anderson (Robert)*, 209 Mich App 527, 530-535 (1995) (juvenile corrections officer is not a law enforcement officer for *Miranda* purposes).

If a probation revocation hearing is conducted prior to a criminal trial involving the same facts, the probationer's testimony at the hearing and any evidence derived from it are inadmissible—except for purposes of impeachment or rebuttal—against the probationer at the subsequent criminal trial, if a timely objection is made at that trial. *People v Rocha*, 86 Mich App 497, 512-513 (1978). "[T]he probationer must be advised before he [or she] takes the stand at the revocation hearing that his [or her] testimony and its fruits will not be admissible against him [or her] at a subsequent criminal trial on the underlying offense." *Id.* at 513.[89]

3. Admission of Evidence Seized in Violation of Fourth Amendment[90]

The United States Supreme Court has held that "the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights." *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998); see also *Gagnon*, 411 US at 782 n 3 ("[d]espite the undoubted minor differences between probation and parole, . . . revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole[]").

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[89] But see *People v Pacholka*, 451 Mich 896, 896 (1996) (statement of Boyle, J.) (opining that the Court of Appeals in *Rocha*, 86 Mich App 497, may have violated separation of powers principles when it declared "'a judicial rule of evidence[]' that in fact constituted the assumption of judicial authority to grant use immunity[]" for testimony at a probation violation hearing). See Section 4.4(A) for a thorough discussion of probation revocation proceedings based on criminal conduct, including evidentiary issues associated with conducting revocation proceedings before or after a related criminal prosecution.

[90] See Section 4.3(E) for additional discussion of the applicability to probationers of the Fourth Amendment's prohibition against unreasonable searches and seizures.

However, in Michigan, the exclusionary rule presumably *may* apply, at least to some extent, to bar admission of illegally seized evidence in probation revocation proceedings. *People v Perry*, 201 Mich App 347, 349, 349 n 1, 350-352 (1993) (lead opinion of Shepherd, J.) (rejecting the proposition, set out "'parenthetically'" in *Hardenbrook*, 68 Mich App at 645, "that the exclusionary rule is inapplicable to probation revocation hearings[,]" but failing to garner a majority vote regarding the appropriate test to apply to determine whether evidence should be excluded).

E. Establishing a Probation Violation[91]

1. Burden of Proof

"The state has the burden of proving a violation by a preponderance of the evidence." MCR 6.445(E)(1).

The evidence is sufficient to sustain a finding if, "viewed in the light most favorable to the prosecution, it would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence." *People v Ison*, 132 Mich App 61, 66 (1984) (construing GCR 1963, 791.4, which contains substantially similar language as MCR 6.445(E)(1)). Credibility of witnesses is a matter for the trier of fact to ascertain. *People v Sexton (After Remand)*, 461 Mich 746, 752 (2000); *People v Vaughn*, 186 Mich App 376, 380 (1990).

If the alleged violation is a criminal offense, each element of that offense must be proven by a preponderance of the evidence. *People v Tebedo*, 107 Mich App 316, 320-321 (1981). "Because the standard of proof [in a probation revocation proceeding] is lower than the reasonable doubt standard employed in a criminal trial, probation may be revoked before the trial on the substantive offense, and a decision to revoke probation will be valid even if the defendant is ultimately acquitted of the substantive crime." *Id.* at 321; see also *People v Buckner*, 103 Mich App 301, 303 (1980).[92]

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[91] See Section 4.4 for discussion of conduct that constitutes a probation violation. See Section 4.11 for discussion of the entry of a guilty or nolo contendere plea.

[92] See Section 4.4(A) for discussion of probation revocation proceedings based on criminal conduct, including evidentiary issues associated with conducting revocation proceedings before or after a related criminal prosecution.

2. Facts on Which Violation May Be Based

"A trial court must base its decision that a probation violation was proven on verified facts in the record." *Breeding*, 284 Mich App at 487, citing *Pillar*, 233 Mich App at 270.

a. Violation Must Be Based on Conditions Contained in Probation Order

Probation may not be revoked based on non-criminal conduct that is not contemplated in the probation order, *Pippin*, 316 Mich at 193-196 (although the defendant "is presumed to know the conditions prescribed by law[, n]o such presumption attaches to such other conditions as existed only in the mind of the judge, unexpressed to the defendant either orally or in the order for probation, and no violation of these warrants revocation of probation[]"), or based on violations of conditions that were stated orally to the defendant during sentencing but were not included in the written probation order, *People v George*, 318 Mich 329, 332 (1947); see also *Pillar*, 233 Mich App at 270 ("[the] defendant's unsupervised visitation with his daughter, which did not violate a term of probation and which was not charged as conduct in violation of a term of probation, was erroneously considered by the judge in her ultimate decision to revoke [the] defendant's probation[]"); *People v Hill (Donald)*, 69 Mich App 41, 42-45 (1976) (court erroneously considered evidence of the defendant's nonpayment of child support in revoking his probation, where payment of support was not a condition of the defendant's probation).

The court may revoke probation if the defendant fails to comply with a restitution order or order to pay costs, but only if he or she has not made a good-faith effort to comply with the orders. MCL 769.1a(11); MCL 771.3(8); MCL 780.766(11); MCL 780.826(11); see also *Tate v Short*, 401 US 395, 397-400 (1971); *People v Collins (Richard)*, 239 Mich App 125, 135-136 (1999); *People v Baker*, 120 Mich App 89, 99 (1982).[93]

[93] A sentence that exposes an indigent offender to incarceration unless he or she pays fines, costs, or restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on economic status. See *Tate*, 401 US at 397-400; *Collins (Richard)*, 239 Mich App at 135-136. See Section 4.4(A) for additional discussion of revocation of probation for failure to pay restitution, costs, or fees.

b. Conduct Must Be Charged in Notice of Violation[94]

Probation may be revoked only for violations charged in the notice of probation violation. *People v Hall*, 138 Mich App 86, 92-93 (1984); see also *People v Banks*, 116 Mich App 446, 448, 451 (1982) (evidence of uncharged conduct, including the probationer's "possible possession of pills, . . . general societal behavior, lack of constructive activity[,] and . . . unemployment[,]" was appropriately considered "for its bearing on [the] defendant's credibility[]" in his explanation for committing the charged conduct); *People v Longmier*, 114 Mich App 351, 352-354 (1982) (court's reference to the defendant's alleged heroin use, which was not charged in the notice of violation, demonstrated that the court "allowed uncharged conduct to taint its decision[]" to revoke probation, requiring vacation of the revocation order).

c. Violative Conduct Must Occur During Probationary Period

"[T]he decision to revoke [probation under MCL 771.4 must] be based on violations which occur during the probationary period." *People v Ritter*, 186 Mich App 701, 708 (1991).[95]

F. Required Findings of Fact and Conclusions of Law

MCR 6.445(E)(2) provides that "[a]t the conclusion of the hearing, the court must make findings in accordance with MCR 6.403."

MCR 6.403, in turn, provides, in relevant part:

> "The court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record."

4.13 Sentencing[96]

MCR 6.445(G) provides:

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[94] See Section 4.6(A) for additional discussion of this notice requirement.

[95] See Section 4.5(A) for discussion of jurisdictional time requirements for commencing probation revocation proceedings.

> "If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. ~~The court may not sentence the probationer to prison without having considered a current presentence report. The court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court~~The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B)[97] and [MCR 6.425](E)."~~98~~

"A trial court has broad latitude in deciding whether to revoke probation." *People v Hendrick*, 472 Mich 555, 563 (2005). If probation is not revoked, the trial court is not required to resentence the defendant for the original offense according to the legislative sentencing guidelines, but instead may "continue[], modif[y], or extend[probation] pursuant to MCR 6.445(G)." *People v Malinowski*, 301 Mich App 182, 186-187 (2013).

A. Time Requirements

> "The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law." MCR 6.425(E)(1); see MCR 6.445(G).

B. Presentation of Circumstances in Mitigation

> Prior to imposing sentence for a probation violation, the trial court must "give the defendant, the defendant's lawyer, the prosecutor, and

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[96] A swift and sure probation supervision program that is funded under the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, is required to "[p]rovide for the immediate imposition of sanctions and remedies approved by the state court administrative office to effectively address probation violations." SCAO-approved sanctions and remedies may include temporary incarceration, extension of the period of supervision, additional reporting and compliance requirements, drug and alcohol testing, mental health treatment, and/or probation revocation. MCL 771A.5(1)(d)(*i*)-(*vi*). See Section 4.17 for discussion of the Probation Swift and Sure Sanctions Act.

[97] See Section 4.13(C) for discussion of the presentence information report requirements set out in MCR 6.425(B).

[98] ~~MCR 6.445(G) does not specifically require the sentencing court to comply with the requirements of MCR 6.425(B) and MCR 6.425(E) unless the probationer is being incarcerated for failure to pay court-ordered financial obligations. However, as a best practice, the trial court may wish to comply with these provisions in *all* probation revocation proceedings in which sentence is imposed following revocation. See Section 4.13(C) for discussion of the sentencing procedures set out in MCR 6.425(E).~~

the victim[99] an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]" MCR 6.425(E)(1)(c); see MCR 6.445(G).

Prior to imposition of sentence, a probationer has a due process right to present circumstances in mitigation suggesting that the violation does not warrant revocation of probation and imposition of a sentence of imprisonment. *People v Clements*, 72 Mich App 500, 504-506 (1976), citing *Gagnon v Scarpelli*, 411 US 778, 782 (1973) (also citing former GCR 1963, 785.8(2), which contains substantially similar language as MCR 6.425(E)(1)(c)). However, a court is not required to state explicitly why it has rejected alternatives to incarceration. *Black v Romano*, 471 US 606, 610-611 (1985).

C. Probation Revocation and Imposition of Sentence

MCL 771.4 provides, in relevant part:

> "If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made."[100]

"A probation violation hearing[] . . . is not a criminal prosecution[,] . . . [and] a determination by a trial court that a probationer has violated the terms of the probation order does not burden the probationer with a new conviction or expose the probationer to punishment other than that to which the probationer was already exposed as a result of the previous conviction for which the probationer was placed on probation." *People v Burks*, 220 Mich App 253, 256 (1996), citing *People v Johnson (Eddie)*, 191 Mich App 222, 226-227 (1991). If the court decides to revoke probation, it must resentence the probationer for the original offense that led to his or her placement on probation, *Johnson v United States*, 529 US 694, 700-701 (2000); *People v Kaczmarek*, 464 Mich 478, 483 (2001), according to the applicable legislative sentencing guidelines, *Hendrick*, 472 Mich at 557, 560. However, if probation is not revoked, the trial court is not required to resentence the defendant for the original offense according to the legislative sentencing guidelines, but instead may "continue[], modif[y], or extend[probation] pursuant to MCR 6.445(G)." *Malinowski*, 301 Mich App at 186-187.

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[99] See Section 4.13(C) for discussion of a victim's rights at sentencing.

[100] See also MCR 6.445(G), which provides, in relevant part, that "the court may . . . revoke probation *and impose a sentence of incarceration*[]" (emphasis supplied). To the extent that MCR 6.445(G) suggests that a sentence of incarceration *must* be imposed if probation is revoked, it is presumably inconsistent with MCL 771.4. See *Hendrick*, 472 Mich at 561-562 ("[w]hile the sentencing court *may* sentence the probationer in the same manner and to the same penalty [as if probation had never been granted], nothing in [MCL 771.4] requires it to do so[]"). See Section 4.13(C) for more information on challenging a PSIR.

1. Determining the Sentence[101]

a. Maximum Sentence

The maximum sentence for a probation violation must be the same as the maximum sentence for the underlying offense. *People v Maxson*, 163 Mich App 467, 470-471 (1987).

b. Sentencing Guidelines[102]

The legislative sentencing guidelines apply to a defendant's sentence of imprisonment following probation revocation when the offense for which the defendant was sentenced to probation was committed on or after January 1, 1999. MCL 769.34(2); *Hendrick*, 472 Mich at 557, 560. Under the mandatory sentencing guidelines, the trial court was required to articulate substantial and compelling reasons for imposing a sentence outside of the guidelines range. *Id.* at 562-563. However, "the holding in *Hendrick*[, 472 Mich at 557,] is not applicable when probation is [not revoked, but is instead] continued, modified, or extended pursuant to MCR 6.445(G)." *Malinowski*, 301 Mich App at 183-184, 186-187 (rejecting the prosecution's assertion that, following the defendant's plea of guilty of a probation violation, the trial court "was . . . required to resentence [the] defendant [on the original sentencing offense] pursuant to the legislative sentencing guidelines[,]" and holding that "[t]he trial court did not abuse its discretion by continuing [the] defendant's probation with additional terms because MCR 6.445(G) specifically permits such action[]").

MCL 771.4 "states that 'if' probation is revoked, the court 'may' sentence the defendant as if probation had never been granted[; thus, w]hile the sentencing court *may* sentence the probationer in the same manner and to the

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[101] See Section 4.13(C) for discussion of requirements concerning the presentence information report (PSIR).

[102] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally 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, emphasis supplied. The *Lockridge* Court did not specifically address intermediate sanctions such as probation. See Section 3.7 for discussion of intermediate sanctions. See also Section 3.4 for discussion of *Lockridge*.

same penalty, nothing in the statute requires it to do so." *Hendrick*, 472 Mich at 561-562. While the court may sentence the defendant to the same penalty that could have been imposed according to the guidelines recommendation as calculated for the sentencing offense at the time of the defendant's initial sentencing, it is also "perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative sentencing guidelines." *Id.* at 557, 562-563. Accordingly, "the acts giving rise to the probation violation [could] provide a substantial and compelling reason to depart[]" from the (then-mandatory) sentencing guidelines range. *People v Church*, 475 Mich 865, 865 (2006), citing *Hendrick*, 472 Mich at 564.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—was considered "objective and verifiable[]" and could constitute a substantial and compelling reason to depart from the (then-mandatory) sentencing guidelines. *People v Schaafsma*, 267 Mich App 184, 185-186 (2005).

c. Consecutive Sentences

Consecutive sentences may be imposed under MCL 768.7b when a person commits a felony while another felony charge is pending. However, once a defendant is placed on probation, the prior felony charge is no longer "pending" for purposes of MCL 768.7b; therefore, consecutive sentences may not be imposed under MCL 768.7b based on a defendant's commission of a felony while on probation for a previous crime. *People v Malone*, 177 Mich App 393, 401-402 (1989); see also *People v Hardy*, 212 Mich App 318 (1995) (although consecutive sentencing not authorized under MCL 768.7b because the defendant was on probation, it was authorized under a different statute).

d. Granting Credit for Time Served[103]

MCR 6.425(E)(1)(d) requires the court to give a defendant credit for time served when imposing a sentence. There are several statutory provisions that mandate credit for time served for all criminal defendants, including the following:

[103] See the Section 3.36 for a thorough discussion of sentence credit.

- time spent in jail prior to sentencing because of "being denied or unable to furnish bond[,]" MCL 769.11b;

- time spent in a juvenile facility prior to sentencing "because of being denied or being unable to furnish bond[,]" MCL 764.27a(5);

- time spent in custody at a mental health facility during competency evaluations and treatment, MCL 330.2042; and

- good-time or disciplinary credits earned while serving a jail sentence as a condition of probation, MCL 800.33; see also *People v Resler*, 210 Mich App 24, 28 (1995).

Sentence credit under MCL 769.11b is limited to jail time served for the offense of which the defendant is convicted; a defendant is not entitled to credit under MCL 769.11b for time served on unrelated charges committed while out on bond, *People v Prieskorn*, 424 Mich 327, 340 (1985), for time "spent in residence in a private drug treatment program as a condition of probation[,]" *People v Whiteside*, 437 Mich 188, 194-198, 202 (1991), or for time served on an unrelated offense before being sentenced for the sentencing offense, *People v Givans*, 227 Mich App 113, 125-126 (1997).

However, even if a sentence credit is not authorized by statute, it may be required under the constitutional protection against double jeopardy. "'[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense.'" *Whiteside*, 437 Mich 198-199, quoting *North Carolina v Pearce*, 395 US 711, 718-719 (1969), overruled in part on other grounds *Alabama v Smith*, 490 US 794, 802-803 (1989). To avoid violating the double jeopardy prohibitions of the state and federal constitutions, Michigan appellate courts have held that a probationer is entitled to sentence credit for time spent in the following facilities:

- in jail for an initial period of incarceration as a condition of probation, *People v Sturdivant*, 412 Mich 92, 96 (1981)

- in a "Special Alternative Incarceration Unit" ("boot camp"), *People v Hite (After Remand)*, 200 Mich App 1, 2-8 (1993)

  "The Double Jeopardy Clauses of the United States and Michigan Constitutions require that a probationer be given credit for time served [only] while *incarcerated* as a condition of probation." *Hite (After Remand)*, 200 Mich App at 4, citing *Sturdivant*, 412 Mich at 96. Thus, credit on the basis of the prohibition against double jeopardy is not required for "time *not* served because of an early release from jail due to overcrowding[]" where that jail time was ordered as a condition of probation. *People v Grazhidani*, 277 Mich App 592, 593, 597-601 (2008) (emphasis supplied). Additionally, neither MCL 769.11b nor the constitutional prohibition against double jeopardy prevent a probationer from being denied credit for time spent in a "tether" program, *People v Reynolds (Michael)*, 195 Mich App 182, 183-184 (1992), or for "participation in a private rehabilitation program[,]" *Whiteside*, 437 Mich at 202.

e. Revocation of Probation Imposed for Uncounseled Conviction[104]

Where probation was imposed against a defendant who was not represented by an attorney and who did not validly waive the right to counsel, the defendant may not be incarcerated as a result of a violation of the probation. See MCR 6.610(F)(3); *Alabama v Shelton*, 535 US 654, 657-659, 662-663 (2002).

2. Presentence Information Report ("PSIR")

a. Requirement of Current PSIR

MCR 6.445(G) provides, in part, that ~~"[t]he court may not sentence the probationer to prison without having considered a current presentence report[] . . . [and] may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court~~"[t]he court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for

[104] See Section 4.3(C) for additional discussion of revocation of probation imposed for uncounseled convictions.

failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B)[.]"[105]

MCR 6.425(B), in turn, provides:

> "The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not 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. 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. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. 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. The court must have the

[105] ~~MCR 6.445(G) does not specifically require the sentencing court to comply with the requirements of MCR 6.425(B) and MCR 6.425(E) unless the probationer is being incarcerated for failure to pay court-ordered financial obligations. However, as a best practice, the trial court may wish to comply with these provisions in *all* probation revocation proceedings in which sentence is imposed following revocation.~~

> information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review."

See also MCL 771.14.

A reasonably updated PSIR must be considered by the court when sentencing a probationer to prison. *People v Crook*, 123 Mich App 500, 503 (1983) (citing *People v Triplett*, 407 Mich 510 (1980), and holding that a five-month-old PSIR was not reasonably updated where several changed circumstances were alleged). "A supplemental [PSIR] can provide the necessary updating." *People v Hart (Leon)*, 129 Mich App 669, 674 (1983). However, an updated PSIR may be unnecessary if the trial court has no sentencing discretion. *People v Foy*, 124 Mich App 107, 110-112 (1983). In addition, "a defendant or the prosecutor may waive the right to a reasonably updated presentence report at *resentencing* where each believes the previously prepared report is accurate." *People v Hemphill*, 439 Mich 576, 582 (1992).

A victim of the probationer's original offense "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[.]" MCL 780.764; see also MCL 780.824 (providing the same right to the victim of a misdemeanor if a PSIR is prepared). The victim may request that his or her written impact statement be included in the PSIR. MCL 771.14(2)(b); MCL 780.764; MCL 780.824; 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 concerning the defendant[]").[106]

b. Challenges to PSIR

MCL 771.14(6) provides:

> "At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court

[106] See Section 4.13(C) for additional discussion of a victim's rights during the sentencing process.

> may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections."

MCR 6.425(E)(2) provides:

> "If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to
>
> > (a) correct or delete the challenged information in the report, whichever is appropriate, and
> >
> > (b) provide [the] defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections."

A defendant is entitled to be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736, 740-741 (1948); *People v Malkowski*, 385 Mich 244, 249 (1971). The sentencing judge must respond to claims of inaccuracy, and failure to do so may require resentencing. *People v Harrison*, 119 Mich App 491, 494-499 (1982). "[H]owever, the court has wide latitude in responding to . . . [a challenge to the accuracy of information contained in a PSIR]." *People v Spanke*, 254 Mich App 642, 648 (2003). "The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information[;] . . . [s]hould the court choose the last option, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence." *Id.* at 648-649. Under MCL 771.14(6), "[w]hen a sentencing court states that it will disregard

information in a presentence report challenged as inaccurate, the defendant is entitled to have the information stricken from the report[]" before it is sent to the Department of Corrections. *People v Britt*, 202 Mich App 714, 718 (1993); see also *Spanke*, 254 Mich App at 649.

3. Sentencing Procedure

MCR 6.445(G) provides, in part, that "[t]he~~ court may not sentence the probationer to prison without having considered a current presentence report[] . . . [and] may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court~~ court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in . . . [MCR 6.425](E)."

MCR 6.425(E), in turn, provides, in part:

> "**(E) Sentencing Procedure.**
>
> (1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:
>
> (a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,[107]
>
> (b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in [MCR 6.425](E)(2),[108]
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any

[107] See Section 4.13(C) for discussion of the presentence information report (PSIR).

[108] See Section 4.13(C) for discussion of resolving challenges to the PSIR.

circumstances they believe the court should consider in imposing sentence,[109]

(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,[110]

(e) if the sentence imposed is not within the guidelines range, articulate the substantial and compelling reasons justifying that specific departure, and[111]

(f) order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate.[112]

(2) Resolution of Challenges. If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. . . .[113]

(3) Incarceration for Nonpayment.

(a) The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply

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[109] See Section 4.13(B) for discussion of the defendant's right to present mitigating circumstances. See Section 4.13(C) for discussion of a victim's rights at sentencing.

[110] See Section 4.13(C) for discussion of determining the appropriate sentence.

[111] MCR 6.425(E)(1)(e) has not yet been amended to conform to *People v Lockridge*, 498 Mich 358, 391 (2015), in which the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)[;]" 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 365, 399 (emphasis supplied; citation omitted). See Section 3.5 for discussion of *Lockridge*. See also Section 4.13(C) for discussion of the legislative sentencing guidelines.

[112] See Section 4.13(C) for discussion of a victim's rights at sentencing.

[113] See Section 4.13(C) for discussion of resolving challenges to the PSIR.

> 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.
>
> (b) Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, 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 of money owed to the extent permitted by law.
>
> (c) Determining manifest hardship. The court 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."

See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

4. Victim's Rights[114]

The victim of an offense, including an offense for which the defendant is sentenced to probation, may register to receive certain notices as provided for in the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*.[115] MCL 780.763a(1) provides:

> "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 the notices provided for under [MCL 780.768b, MCL 780.769, MCL 780.769a, MCL 780.770, or MCL 780.770a].[116] The form shall include the address of the court, the department of corrections, the sheriff, the department of human services, the county juvenile agency, or the hospital or facility, as applicable, to which the form may be sent."

See also MCL 780.791a and MCL 780.828a(2), which contain similar notification requirements for victims of juvenile offenses and serious misdemeanors, respectively.

Additionally, MCL 780.763a(2) provides:

> "If the defendant is sentenced to probation, the department of corrections or the sheriff, as applicable, shall notify the victim if the probation is revoked and the defendant is sentenced to the department of corrections or to jail for more than 90 days. The notice shall include a form the victim may submit to the department of corrections or the sheriff to receive notices under [MCL 780.769, MCL 780.770, or MCL 780.770a]."[117]

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[114] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a thorough discussion of a victim's rights.

[115] For information regarding registering with the Michigan Department of Corrections to receive notifications under the CVRA, see http://www.michigan.gov/corrections/0,4551,7-119-1384---,00.html.

[116] MCL 780.768b provides for victim notification if probation is terminated early; MCL 780.769 provides for victim notification upon a prisoner's release or transfer within the corrections system; MCL 780.769a provides for victim notification concerning the transfer or release of a defendant found not guilty by reason of insanity; MCL 780.770 provides for victim notification upon a defendant's escape; and MCL 780.770a addresses notification to the victim of a juvenile offender's escape.

[117] MCL 780.769 addresses a victim's right to be notified about a prisoner's release or transfer within the corrections system; MCL 780.770 addresses a victim's right to be notified of a defendant's escape; and MCL 780.770a addresses notification to the victim of a juvenile offender's escape.

If the probationer has been sentenced to imprisonment, the sheriff or Department of Corrections must, upon written request,[118] mail the victim of the probationer's original offense notice if the probationer is convicted of a new crime. MCL 780.769(1)(*l*).

In all cases, the victim of the probationer's original offense may request that his or her written impact statement be included in the 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 concerning the defendant[]"). "The victim has the right to submit or make a written or oral impact statement to the probation officer for use by the officer in preparing a presentence investigation report[.]" 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 addition to providing impact information for inclusion in the PSIR, the victim or a person designated by the victim may deliver an oral impact statement to the court at the sentencing hearing. MCL 780.765; MCL 780.793; MCL 780.825; see also MCL 780.756(2) (requiring the prosecuting attorney, upon request, to "give the victim notice of any scheduled court proceedings"); MCL 780.763(1)(f)-(g) (requiring the prosecuting attorney, upon request, to provide notice of "[t]he victim's right to make an impact statement at sentencing[]" and of "[t]he time and place of the sentencing proceeding[,]" respectively). The court must give the victim "an opportunity to advise the court of any circumstances [he or she] believe[s] the court should consider in imposing sentence[.]" MCR 6.425(E)(1)(c). See also *People v Steele*, 173 Mich App 502, 504-505 (1988) (rejecting the defendant's assertion that "the trial court was unduly swayed by the victim's emotional comments at sentencing[]" and holding that "[a]lthough [the victim's] impact statements tended to be emotional, . . . her statements were within her statutorily permitted rights").

MCR 6.425(E)(1)(f) requires the court to "order that the defendant make full restitution as required by law[.]"

[118] For information regarding registering with the Michigan Department of Corrections to receive notifications under the CVRA, see http://www.michigan.gov/corrections/0,4551,7-119-1384---,00.html.

Restitution will have been ordered when the probation order was entered. See MCL 771.3(1)(e). MCL 780.766(19) states that "[i]f a defendant who is ordered to pay restitution under [MCL 780.766] is remanded to the jurisdiction of the department of corrections, the court shall provide a copy of the order of restitution to the department of corrections when the defendant is remanded to the department's jurisdiction." MCL 780.794(19) and MCL 780.826(16) contain substantially similar provisions that require the court to transmit the order of restitution when the court determines that the individual subject to the order has been remanded to the Department of Corrections.[119]

Additionally, in all cases (felony, misdemeanor, and juvenile), when a 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, on request, notify the victim by mail of the early termination. MCL 780.768b; MCL 780.795a; MCL 780.827b.

4.14 Fines, Costs, and Restitution[120]

MCL 769.34(6) provides:

> "As part of [a] sentence, the court may . . . order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law."

MCL 769.1k[121] provides a general statutory basis for a court's authority to impose fines and costs. If a defendant pleads guilty or nolo contendere or is found guilty following a trial, the court must impose the minimum state cost as set forth in MCL 769.1j[122] at the time the defendant is sentenced or at the time entry of judgment or sentence is statutorily delayed or deferred. MCL 769.1k(1)(a). At the same time, MCL 769.1k(1)(b) and MCL 769.1k(2) allow the court to also impose:

- any fine authorized by the statute under which the defendant entered a plea or was found guilty;

[119] See Section 4.4(A) for discussion of when a court may revoke probation based on the probationer's failure to comply with a restitution order.

[120] See Section 4.4(A) for discussion of revocation of probation for failure to make a good-faith effort to comply with financial obligations imposed as conditions of probation. See Chapter 3 for a comprehensive discussion of fines, costs, assessments, and restitution ordered as part of a sentence. Additionally, the Appendix in this Benchbook contains three tables setting out statutory authority for imposing costs. See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Table of Felony Costs and Table of Misdemeanor Costs.

- any cost authorized by the statute under which the defendant entered a plea or was found guilty in addition to the minimum state cost set out in MCL 769.1j;
- any cost "reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case[;]"[123]
- the expenses of providing legal assistance to the defendant;
- any assessment authorized by law;
- reimbursement under MCL 769.1f; and
- any additional costs incurred in compelling the defendant's appearance.

"Beginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1).] . . . However, the information is not required to include the calculation of the costs involved in a particular case." MCL 769.1k(7).

MCL 769.1k(1)-(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3). Moreover, "[t]he court may provide for the amounts imposed under [MCL 769.1k] to be collected at any time." MCL 769.1k(5). Accordingly, the court may enforce any unfulfilled financial obligation imposed as a condition of probation after probation is revoked or otherwise terminated. However, "[a] defendant shall not be imprisoned,

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[121] Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k in response to the Michigan Supreme Court's holding in *People v Cunningham (Cunningham II)*, 496 Mich 145 (2014), rev'g 301 Mich App 218 (2013) and overruling *People v Sanders (Robert) (After Remand)*, 298 Mich App 105 (2012), and *People v Sanders (Robert)*, 296 Mich App 710 (2012). In *Cunningham II*, the Court held that MCL 769.1k(1)(b)(*ii*)—which, at the time, provided for the imposition of "[a]ny cost in addition to the minimum state cost"—did "not provide courts with the independent authority to impose 'any cost[;]'" rather, it "provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 147, 158 (concluding that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs[]"). 2014 PA 352 added MCL 769.1k(1)(b)(*iii*) to provide for the imposition of "any cost reasonably related to the actual costs incurred by the trial court[.]"

The amendments effectuated by 2014 PA 352 "appl[y] to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." 2014 PA 352, enacting section 1 (emphasis supplied).

[122] MCL 769.1j(1) requires imposition of the minimum state cost "if the court orders . . . any combination of a fine, costs, or applicable assessments[.]"

[123] Court costs may be awarded under MCL 769.1k(1)(b)(*iii*), as amended by 2014 PA 352, effective October 17, 2014. *People v Konopka*, 309 Mich App 345, 357 (2015). This provision is applicable "[u]ntil 36 months after [October 17, 2014.]" MCL 769.1k(1)(b)(*iii*). See also 2014 PA 352, enacting section 1 ("[t]his amendatory act applies to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014]." See Section 3.41(B) for additional discussion of 2014 PA 352 and the imposition of "court costs."

jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." MCL 769.1k(10). Additionally, ~~"[t]he court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court~~ "[t]he court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]." MCR 6.445(G). MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

"The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under [MCL 769.1k] by wage assignment." MCL 769.1k(4). "Except as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine, cost, fee, or assessment that the same defendant owes in any other case." MCL 769.1k(6).

In addition to any other penalty, full restitution must be ordered at sentencing, MCL 769.1a(2); MCL 780.766(2); MCR 6.425(E)(1)(f), and the payment of restitution must be ordered as a condition of probation, MCL 771.3(1)(e); MCL 780.766(11). Generally, restitution must be made immediately; however, the court has the discretion to require a defendant to make restitution within a specified period or in installments. MCL 780.766(10). The Department of Corrections may execute a restitution order by withdrawing funds from a prisoner's account, and there is no legal right "to cessation of [] restitution payments while [a defendant] remains incarcerated." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 222, 225 (1999).

The court may initiate contempt proceedings at any time to enforce unfulfilled financial obligations, including an obligation imposed as a condition of probation. MCL 600.1701(e); see also MCL 769.1k(3); MCL 769.1k(5).[124] Additionally, "any fine, cost, restitution, reimbursement, assessment, or other fee . . . may be recovered in the same manner as a civil judgment for money in the same court." MCL 600.4805(2).

Committee Tip:

The probation violation sentencing hearing presents an opportunity to review the defendant's remaining financial obligations. [125]

4.15 Appeal

A. Advice of Right to Appeal or File Application for Leave to Appeal

1. Appeals from Circuit Court

MCR 6.445(H)(1) sets out a probationer's appellate rights when the sentence imposed involves incarceration. MCR 6.445(H) does not apply to criminal cases cognizable in district courts. See MCR 6.001(B).

MCR 6.445(H) states:

> "(1) In a case involving a sentence of incarceration under [MCR 6.445](G), the court must advise the probationer on the record, immediately after imposing sentence, that
>
> > (a) the probationer has a right to appeal, if the underlying conviction occurred as a result of a trial, or
> >
> > (b) the probationer is entitled to file an application for leave to appeal, if the underlying conviction was the result of a plea of guilty or nolo contendere.
>
> (2) In a case that involves a sentence other than incarceration under [MCR 6.445](G), the court

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[124] However, a sentence that exposes an indigent offender to incarceration unless he or she pays fines, costs, or restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on economic status. See *Tate v Short*, 401 US 395, 397-400 (1971); *People v Collins (Richard)*, 239 Mich App 125, 135-136 (1999). In contempt proceedings, the court may not sentence a person to a term of incarceration for nonpayment of court-imposed financial obligations unless the court complies with MCR 6.425(E)(3) (requiring that the court make a finding that the person is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply). MCR 3.606(F). See Section 3.39 for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

[125] For information concerning collections, see SCAO's Circuit Court Fee and Assessments Table, District Court Fee and Assessments Table, and Trial Court Collections Model Debt Inactivation Policy.

> must advise the probationer on the record, immediately after imposing sentence, that the probationer is entitled to file an application for leave to appeal."

2. Appeals from District Court

MCR 6.625(A) provides that an appeal from a probation revocation in a misdemeanor case is governed by MCR subchapter 7.100. As with felony-based probation revocation appeals, the nature of an appeal from a misdemeanor-based probation revocation is determined by the manner in which the underlying misdemeanor conviction was entered, and not by whether a probation violation hearing was held or waived by the defendant. If the defendant was convicted of the underlying misdemeanor crime through a plea of guilty or nolo contendere, any subsequent probation revocation appeals arising from that conviction must be brought to the circuit court by way of an application for leave to appeal. See MCR 7.103(A)(1); MCR 7.103(B)(1)(a). If the defendant was convicted of the underlying misdemeanor as a result of a trial, any subsequent probation revocation appeals arising from that conviction may be brought to the circuit court by way of an appeal of right. MCR 7.103(A)(1).

B. Scope of Appeal

A defendant may appeal "both after the original conviction and the granting of probation and also after determination of violation of probation and imposition of [a prison sentence]." *People v Pickett*, 391 Mich 305, 308, 316 (1974), superseded on other grounds by constitutional amendment as stated in *People v Kaczmarek*, 464 Mich 478, 482 (2001). However, an appeal following revocation of probation "is limited in scope[. . . and] encompasses only those issues that . . . could not have [been] raised in an appeal from [the original] conviction." *Kaczmarek*, 464 Mich at 485, citing *Pickett*, 391 Mich at 316-318. The defendant may not use the appeal to attack prior proceedings; rather, the appeal is "limited to the matters surrounding the immediate violation involved, *i.e.*, . . . to those matters relating to the probation violation[]" and to "the hearing thereon." *Pickett*, 391 Mich at 308, 316.

Additionally, "[a] defendant's plea of guilty on the allegation that he [or she] violated his [or her] probation subsumes any factual question whether the probation was violated." *Kaczmarek*, 464 Mich at 485, citing *People v New*, 427 Mich 482, 488-491 (1986).

A juvenile defendant in an automatic waiver proceeding "may appeal as of right from the imposition of a sentence of incarceration after a finding of juvenile probation violation." MCR 6.933(D). However, in a juvenile delinquency case, the juvenile may not attack the order of disposition at a probation revocation hearing, and appeals following revocation of probation are limited to matters related to the revocation hearing. *In re Madison*, 142 Mich App 216, 219 (1985).[126]

C. Standards of Review

"'The decision to revoke probation is a matter within the sentencing court's discretion.'" *People v Breeding*, 284 Mich App 471, 479 (2009), quoting *People v Ritter*, 186 Mich App 701, 706 (1991). Similarly, "[a] trial court's discretionary authority regarding the admission of evidence at a probation revocation hearing is broad[, and] . . . [its] decision to admit or exclude evidence [is reviewed] for an abuse of discretion." *Breeding*, 284 Mich App at 479. "Under this standard, '[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.'" *Id.*, quoting *Woodard v Custer*, 476 Mich 545, 557 (2006); see also *People v Babcock*, 469 Mich 247, 269 (2003).

If probation was revoked on the basis of a violation of a condition of probation that the appellate court determines is not lawful, the appropriate remedy is to remand for resentencing. *People v Gauntlett*, 419 Mich 909, 909 (1984).

4.16 Juveniles[127]

The rules and procedures discussed throughout this chapter apply equally to juveniles who are tried as adults following traditional waiver proceedings, as well as to juveniles who are tried as adults in designated or automatic waiver proceedings when an *adult sentence* is imposed.

However, different rules apply to revocation of *juvenile* probation, which may be imposed in delinquency, designated, and automatic waiver proceedings. Rules applicable to juvenile probation imposed in these types of proceedings are briefly discussed in this section. For additional discussion of the revocation of probation in cases involving juveniles, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

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[126] See Section 4.16 for discussion of juvenile probation.

[127] For thorough discussion of probation imposed against juveniles in different types of juvenile proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

A. Traditional Waiver Proceedings

A juvenile who has been tried as an adult following traditional waiver to the court of general criminal jurisdiction under MCL 712A.4 must be sentenced as an adult. *People v Veling*, 443 Mich 23, 39 (1993), citing *People v Cosby*, 189 Mich App 461, 464 (1991); MCR 6.901(B) (providing that the court rules applicable to juveniles subject to automatic waiver for specified offenses, including the requirement of a juvenile sentencing hearing ("waiver back"), do not apply to cases in which the Family Division waived jurisdiction under MCL 712A.4); see also *People v Williams (Walter)*, 245 Mich App 427, 433-434 (2001). Accordingly, a juvenile who is sentenced to probation following conviction in a traditional waiver proceeding is subject to the rules governing adult probation, as discussed throughout this chapter. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 14, for discussion of traditional waiver proceedings.

B. Automatic Waiver Proceedings[128]

Following conviction in automatic waiver proceedings, a juvenile may be sentenced as an adult or placed on juvenile probation and committed to the Department of Human Services (DHS) as a public ward. MCL 769.1(3)-(4); MCR 6.931(C). MCR 6.931(F)(1)-(11) limit the court's authority to impose certain probation conditions on the juvenile that may be imposed in a case involving an adult.

When a juvenile in an automatic waiver case is alleged to have violated juvenile probation, the court must proceed according to MCR 6.445(A)-(F), which governs probation revocation in adult criminal proceedings. See MCR 6.933(A).

1. Mandatory Revocation of Juvenile Probation

In automatic waiver proceedings, the court must revoke juvenile probation and impose a sentence of imprisonment if the juvenile is convicted of a felony or a misdemeanor punishable by imprisonment for more than one year. MCL 771.7(1); MCR 6.933(B)(1)(a). However, "[t]he court may not revoke probation and impose sentence under [MCR 6.933(B)(1)] unless at the original sentencing the court gave the advice, as required by MCR 6.931(F)(2), that subsequent conviction of a felony or a misdemeanor punishable by more than one year's imprisonment would result in the revocation of juvenile probation and in the imposition of a sentence of imprisonment." MCR 6.933(B)(1)(b).

[128] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16, for a thorough discussion of probation revocation proceedings in automatic waiver cases.

"If the court revokes juvenile probation pursuant to [MCR 6.933(B)(1)], the court must receive an updated presentence report and comply with MCR 6.445(G)[129] before it imposes a prison sentence on the juvenile." MCR 6.933(B)(3).

2. Other Probation Violations

In automatic waiver proceedings, if the juvenile violates probation in some way other than by committing a felony or a misdemeanor punishable by more than one year's imprisonment, the court may impose sentence or may order any of the following for the juvenile:

- a change of placement;
- restitution;
- community service;
- substance abuse counseling;
- mental health counseling;
- participation in a vocational-technical education program;
- incarceration in a county jail, in a room or ward out of sight and sound from adult prisoners for juveniles under the age of 17, for not more than 30 days; and
- other participation or performance as the court considers necessary. See MCL 771.7(2); MCR 6.933(B)(2).

3. Sentence Following Probation Revocation

In automatic waiver proceedings, a sentence imposed following probation revocation must be "for a *term of years* that does not exceed the penalty that could have been imposed for the offense

[129] MCR 6.445(G) provides, in part, that ~~"[t]he court may not sentence the probationer to prison without having considered a current presentence report. The court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court~~ "[t]he court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [governing presentence report disclosure before sentencing] and [MCR 6.425](E) [governing sentencing procedure]." MCR 6.425(E)(3)(a) requires the court to determine the defendant's ability to pay without manifest hardship before sentencing him or her to incarceration, or revoking probation, for failure to comply with court-ordered financial obligations. MCR 6.425(E)(3)(c) requires the court to consider certain criteria in determining manifest hardship. See Section 4.13 for discussion of imposition of sentence following probation revocation.

for which the juvenile was originally convicted and placed on probation." MCL 771.7(1) (emphasis supplied). MCR 6.933(B)(1)(a) contains substantially similar language. See *People v Valentin*, 457 Mich 1, 13-14 (1998) (term of life imprisonment may not be imposed under MCL 771.7(1)).

If a sentence of imprisonment is imposed upon a juvenile whose probation is revoked, the juvenile must receive credit for the time served on probation. MCL 771.7(1); MCR 6.933(B)(1)(a).

"If the court determines to place the juvenile in jail for up to 30 days, and the juvenile is under 17 years of age, the juvenile must be placed separately from adult prisoners as required by law." MCR 6.933(B)(2).

"A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 6.933(E).[130]

C. Designated Proceedings Involving Delayed Imposition of Sentence[131]

Under MCL 712A.18(1)(m), following conviction in a designated proceeding, the court may (1) enter a juvenile disposition,[132] (2) impose an adult sentence,[133] or (3) enter an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate.

1. Probation Violation Hearing

In designated proceedings in which a delayed imposition of sentence has been ordered, probation violation hearings must be conducted pursuant to MCR 3.944(C), which governs probation violation hearings in juvenile delinquency proceedings. MCR 3.956(B)(3). MCR 3.944(C) provides:

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[130] See MCR 6.425(E)(3) (governing incarceration for nonpayment in adult criminal and contempt cases) for guidance in determining whether a juvenile or parent has the ability to pay court-ordered financial obligations. See Section 3.39 for discussion of MCR 6.425(E)(3).

[131] For additional discussion of juvenile probation in designated cases in which sentencing was delayed, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 15.

[132] For discussion of the revocation of juvenile probation in a designated case in which a juvenile disposition was ordered, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 11.

[133] In a case in which an adult sentence was imposed in a designated proceeding, the rules applicable to adult probation revocation proceedings apply.

> "(1) At the probation violation hearing, the juvenile has the following rights:
>
> (a) the right to be present at the hearing,
>
> (b) the right to an attorney pursuant to MCR 3.915(A)(1),[134]
>
> (c) the right to have the petitioner prove the probation violation by a preponderance of the evidence,
>
> (d) the right to have the court order any witnesses to appear at the hearing,
>
> (e) the right to question witnesses against the juvenile,
>
> (f) the right to remain silent and not have that silence used against the juvenile, and
>
> (g) the right to testify at the hearing, if the juvenile wants to testify.
>
> (2) At the probation violation hearing, the Michigan Rules of Evidence do not apply, other than those with respect to privileges. There is no right to a jury.
>
> (3) If it is alleged that the juvenile violated probation by having been found, pursuant to MCR 3.941 [(governing pleas of admission or no contest in delinquency proceedings)] or MCR 3.942[] [(governing trial in delinquency proceedings)], to have committed an offense, the juvenile may then be found to have violated probation pursuant to this rule."

2. Mandatory Probation Revocation

In a designated proceeding, "[i]f a juvenile placed on probation under an order of disposition delaying imposition of sentence is found by the court to have violated probation by being convicted of a felony or a misdemeanor punishable by imprisonment for more than 1 year, or adjudicated as

[134] "If the juvenile is not represented by an attorney, the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar, including trial, plea of admission, and disposition." MCR 3.915(A)(1). See MCR 3.951(A)(2)(b)(*i*) and MCR 3.951(B)(2)(b)(*i*), which state that MCR 3.915(A)(1) is applicable to designated proceedings.

responsible for an offense that if committed by an adult would be a felony or a misdemeanor punishable by imprisonment for more than 1 year, the court shall revoke probation and sentence the juvenile to imprisonment for a term that does not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation." MCL 712A.18i(9); see also MCR 3.956(B)(1).

3. Other Probation Violations

If the juvenile violates probation in some way other than by being convicted of a felony or a misdemeanor punishable by more than one year's imprisonment or by being adjudicated as responsible for an offense that if committed by an adult would be a felony or a misdemeanor punishable by imprisonment for more than one year, the court may impose sentence or may order any of the following for the juvenile:

- a change in placement;
- community service;
- substance abuse counseling;
- mental health counseling;
- participation in a vocational-technical education program;
- incarceration in a county jail for not more than 30 days if:
  - the present county jail facility would meet all requirements under federal law and regulations for housing juveniles, and
  - the court has consulted with the sheriff to determine when the sentence will begin to ensure that space will be available for the juvenile. If the juvenile is under 17 years of age, the juvenile must be placed in a room or ward out of sight and sound from adult prisoners; and
- other participation or performance as the court considers necessary. MCR 3.956(B)(2); see also MCL 712A.18i(10).

4. Sentence Following Probation Revocation

In a designated proceeding, a sentence of imprisonment imposed following probation revocation must be "for a term that does not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation." MCL 712A.18i(9); MCR 3.956(B)(1). Furthermore, the juvenile must receive credit for the time served on probation. MCL 712A.18i(11); MCR 3.956(B)(4).

"A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 3.956(C).[135]

D. Imposition of Juvenile Disposition in Delinquency and Designated Proceedings

Special rules apply regarding probation violation proceedings and probation revocation following the imposition of a juvenile disposition in a delinquency or designated proceeding. These rules are beyond the scope of this benchbook. For discussion of the revocation of juvenile probation in a delinquency case or in a designated proceeding in which a juvenile disposition was entered, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 11.

4.17 Probation Swift and Sure Sanctions Act

Effective January 9, 2013, 2012 PA 616 added the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq*., establishing a voluntary, grant-funded "state swift and sure sanctions program" for the supervision of participating offenders who have been placed on probation for committing a felony. MCL 771A.3; see also MCL 771A.2(b). Under the Probation Swift and Sure Sanctions Act, a circuit court may apply to the State Court Administrative Office (SCAO) for a grant to fund a swift and sure probation supervision program. MCL 771A.4(2).[136] A probationer participating in such a program is subject to close monitoring and to prompt arrest and the immediate imposition of sanctions following a probation violation. See MCL 771A.3; MCL 771A.5(1).

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[135] See MCR 6.425(E)(3) (governing incarceration for nonpayment in adult criminal and contempt cases) for guidance in determining whether a juvenile or parent has the ability to pay court-ordered financial obligations. See Section 3.39 for discussion of MCR 6.425(E)(3).

[136] "The funding of all grants under [Chapter XIA of the code of criminal procedure] is subject to appropriation." MCL 771A.4(2).

A. Objectives

MCL 771A.3 sets out the objectives of the state swift and sure sanctions program:

> "It is the intent of the legislature to create a voluntary state program to fund swift and sure probation supervision at the local level based upon the immediate detection of probation violations and prompt the [sic] imposition of sanctions and remedies to address those violations. In furtherance of this intent, the state swift and sure sanctions program is created with the following objectives:
>
> > (a) Probationers are to be sentenced with prescribed terms of probation meeting the objectives of [Chapter XIA of the code of criminal procedure]. Probationers are to be aware of their probation terms as well as the consequences for violating the terms of their probation.
> >
> > (b) Probationers are to be closely monitored and every detected violation is to be promptly addressed by the court.
> >
> > (c) Probationers are to be arrested as soon as a violation has been detected and are to be promptly taken before a judge for a hearing on the violation.
> >
> > (d) Continued violations are to be addressed by increasing sanctions and remedies as necessary to achieve results.
> >
> > (e) To the extent possible and considering local resources, probationers subject to swift and sure probation under [Chapter XIA] shall be treated uniformly throughout the state."

B. Swift and Sure Probation Supervision Program Requirements

MCL 771A.5(1) provides that a probation supervision program funded under the Probation Swift and Sure Sanctions Act must do all of the following:

> "(a) Require the court to inform the probationer in person of the requirements of his or her probation and the sanctions and remedies that may apply to probation violations.

(b) Require the probationer to initially meet in person with a probation agent or probation officer and as otherwise required by the court.

(c) Provide for an appearance before the judge for any probation violation as soon as possible but within 72 hours after the violation is reported to the court unless a departure from the 72-hour requirement is authorized for good cause as determined by criteria established by [SCAO].

(d) Provide for the immediate imposition of sanctions and remedies approved by [SCAO][137] to effectively address probation violations. The sanctions and remedies approved under this subdivision may include, but need not be limited to, 1 or more of the following:

(*i*) Temporary incarceration in a jail or other facility authorized by law to hold probation violators.

(*ii*) Extension of the period of supervision within the period provided by law.

(*iii*) Additional reporting and compliance requirements.

(*iv*) Testing for the use of drugs and alcohol.

(*v*) Counseling and treatment for emotional or other mental health problems, including for substance abuse.

(*vi*) Probation revocation."

SCAO is required to annually review all grant-funded swift and sure probation supervision programs "for effectiveness and for compliance with the requirements of [Chapter XIA]." MCL 771A.7. In

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[137] MCL 771A.5(2) authorizes SCAO to "do any of the following" with respect to swift and sure probation supervision programs:

"(a) Establish general eligibility requirements for offender participation.

(b) Require courts and offenders to enter into written participation agreements.

(c) Create recommended and mandatory sanctions and remedies for use by participating courts.

(d) Establish criteria for deviating from recommended and mandatory sanctions and remedies when necessary to address special circumstances.

(e) Establish a system for determining sanctions and remedies that should or may be imposed under [MCL 771A.5(2)(c)] and for alternative sanctions and remedies under [MCL 771A.5(2)(d)]."

See http://courts.mi.gov/administration/admin/op/problem-solving-courts/pages/swift-and-sure-sanctions-probation-program.aspx for current SCAO requirements, including participant eligibility guidelines and application materials.

addition, all swift and sure probation supervision programs are subject to audit by SCAO. MCL 771A.8.

Chapter 5: Postappeal Relief

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Part A: Motion for Relief From Judgment

5.1 Authority for Relief

Within the first six months after entry of sentence, a defendant has the right to file other posttrial motions, such as a motion for a new trial, MCR 6.431(A)(4), a motion to withdraw a plea, MCR 6.310(C), and a motion to correct an invalid sentence, MCR 6.429(B)(4). MCR 7.205(G)(4).[1] Thereafter, he or she may only seek trial court relief under MCR 6.500 *et seq*.

MCR 6.500 concerns postappeal relief and sets out the procedure for postappeal proceedings challenging criminal convictions. Bringing a motion for relief from judgment under MCR 6.502 is the only way to challenge convictions in Michigan courts for a defendant who has exhausted the appellate process, i.e., appealed by right or by leave, unsuccessfully sought leave to appeal, or was unable to file an application for leave to appeal to the Court of Appeals because six months passed since the judgment of conviction was entered. MCR 6.501, 1989 Staff Comment. See MCR 7.205(G)(3).

A petition for habeas corpus[2] cannot be used to obtain review of a conviction in Michigan. MCL 600.4310(3) ("[a]n action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of . . . [p]ersons convicted, or in execution, upon legal process, civil or criminal . . ..").

Federal habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 USC 2254.

5.2 Preliminary Matters

"A motion for relief from judgment must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge." MCR 6.502(A).

A motion for relief from judgment may only seek relief from one judgment. MCR 6.502(B). Multiple convictions resulting from a single trial or plea proceeding count as a single judgment for purposes of the rule. *Id*.

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[1] See Chapter 1 for more information.

[2] Habeas corpus is discussed in Chapter 6.

A motion for relief from judgment may not be noticed for hearing. MCR 6.502(C).

The requirements for a motion for relief from judgment are specified in MCR 6.502(C):

- Must be typed or legibly handwritten.
- Must include a verification by the defendant or defense counsel in compliance with MCR 2.114.
- The combined length of the motion and any memorandum of law in support of the motion may not exceed 50 pages, double-spaced (excluding attachments and exhibits), unless otherwise ordered by the court.
- If the court enters an order increasing the page limit for the motion, the same order must indicate that the page limit for the prosecutor's response (MCR 6.506(A)) is increased by the same amount.
- The defendant may attach to the motion any affidavit, document, or evidence to support the requested relief. MCR 6.502(E).
- Must be substantially in the form approved by the State Court Administrative Office (SCAO).[3]
- Must include the following information:
  - Defendant's name. MCR 6.502(C)(1).
  - The name of the court in which the defendant was convicted and the file number of the defendant's case. MCR 6.502(C)(2).
  - The place where the defendant is confined, or the defendant's address if he or she is not confined. MCR 6.502(C)(3).
  - The offenses for which the defendant was convicted and sentenced. MCR 6.502(C)(4).
  - The defendant's sentencing date. MCR 6.502(C)(5).

[3] See SCAO Form CC 257, *Motion for Relief from Judgment*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/felonycriminal/cc257.pdf.

- The manner in which the defendant was convicted (jury trial, bench trial, guilty plea, guilty but mentally ill plea, nolo contendere plea). MCR 6.502(C)(6).

- The type of sentence imposed (probation, fine, and/or imprisonment), the sentence length, and whether the defendant is currently serving the sentence. MCR 6.502(C)(7).

- The name of the judge who presided at trial and imposed sentence. MCR 6.502(C)(8).

- The court, title, and file number of any proceedings (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed. MCR 6.502(C)(9).

- The name of each attorney who represented the defendant at any time after arrest, and the stage of the case at which each attorney represented the defendant. MCR 6.502(C)(10).

- The relief requested. MCR 6.502(C)(11).

- The grounds for the relief requested. MCR 6.502(C)(12).

- The facts supporting each ground for relief requested, stated in summary form. MCR 6.502(C)(13).

- Whether any of the grounds for the relief requested were raised earlier; if so, at what stage of the case, and, if not, the reasons why they were not raised. MCR 6.502(C)(14).

- Whether the defendant requests appointed counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointed counsel. MCR 6.502(C)(15).

If a motion for relief from judgment is not submitted on a form approved by SCAO, or does not substantially comply with the requirements listed in MCR 6.502(C), the court must direct that it be returned to the defendant with a statement of the reasons for its return, or adjudicate the motion under the provisions of MCR 6.500. MCR 6.502(D).

The court may allow a defendant to amend or supplement a motion for relief from judgment at any time. MCR 6.502(F).

"Under MCR 6.502(G)(1), a criminal defendant may file one motion for relief from judgment after August 1, 1995, notwithstanding the defendant's having filed one or more such motions before that date."

Ambrose v Recorder's Court Judge, 459 Mich 884 (1998). A second or subsequent motion for relief from judgment may be filed regarding a conviction, if the motion raises a claim of newly discovered evidence, or a retroactive change in the law. MCR 6.502(G)(2).[4]

A defendant seeking relief under MCR 6.500 *et seq*. is required to file a motion and a copy of the motion with the clerk of the court in which he or she was convicted and sentenced. MCR 6.503(A)(1). After receiving the motion, the clerk must file it under the same number as the original conviction. MCR 6.503(A)(2). The defendant is required to serve a copy of the motion and notice of its filing on the prosecuting attorney. MCR 6.503(B). The filing and service of the motion does not require a response by the prosecutor unless ordered by the court. *Id*.

A motion for relief from judgment must be presented to the judge to whom the case was assigned at the time of the defendant's conviction. MCR 6.504(A). If that judge is unavailable, the motion must be assigned to another judge according to the court's case reassignment procedure. *Id*. The chief judge is permitted to reassign cases to correct docket control problems arising from the requirements of MCR 6.504(A). *Id*.

The court is required to promptly examine a motion for relief from judgment, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. MCR 6.504(B)(1). The court is permitted to request from the prosecutor copies of transcripts, briefs, or other records. *Id*.

If it plainly appears from the face of the materials that the defendant is not entitled to relief, the court is required to deny the motion without directing further proceedings. MCR 6.504(B)(2). The order must include a concise statement of the reasons for the denial. *Id*. The court is allowed to dismiss some requests for relief or grounds for relief while directing a response or further proceedings with respect to other specified grounds. *Id*. If the motion is summarily dismissed, the defendant has 21 days in which to move for reconsideration. MCR 6.504(B)(3).

If the court does not dismiss the motion for relief from judgment in its entirety, the court must order the prosecuting attorney to file a response as provided in MCR 6.506. MCR 6.504(B)(4). If the court does not dismiss the motion, it may direct the parties to expand the record by including any additional materials (including letters, affidavits, documents,

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[4] *People v Cress*, 468 Mich 678 (2003), which sets out a test that must be satisfied in order for a defendant to be entitled to a new trial on the basis of newly discovered evidence, does not apply "to an analysis of a successive motion filed pursuant to MCR 6.502(G)(2)[;] *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." *People v Swain*, ___ Mich ___, ___ (2016). See Section 1.3(B)(4) for discussion of *Cress*, 468 Mich 678.

exhibits, and answers under oath to interrogatories propounded by the court) it deems relevant to the decision on the merits of the motion. MCR 6.507(A). If a party submits items to expand the record, the party is required to serve copies of the items on the opposing party, and the court must give the opposing party an opportunity to admit or deny the correctness of the items. MCR 6.507(B). The court may require any item expanding the record to be authenticated. MCR 6.507(C).

If the rules in MCR 6.500 *et seq*. do not prescribe the applicable procedure, the court may proceed in any lawful manner, and may apply the rules applicable to civil or criminal proceedings, as it deems appropriate. MCR 6.508(A).

The court must determine whether an evidentiary hearing is required after reviewing the motion, response, and the record (and the expanded record, if any). MCR 6.508(B).

If the court decides that an evidentiary hearing is not required, it may rule on the motion or give the parties an opportunity for oral argument. MCR 6.508(B).

If the court decides that an evidentiary hearing is required, it must schedule and conduct the hearing as promptly as practicable. MCR 6.508(C). The rules of evidence (other than those with respect to privilege) are inapplicable. *Id*. The court is required to assure that a verbatim record of the hearing is made. *Id*.

"[W]hen expansion of the record is necessary to resolve a defendant's motion for relief from judgment under MCR Subchapter 6.500, it can only do so within the constraints set out in MCR 6.507(A)." *People v Sanders (Sam)*, 497 Mich 978, 978-979 (2015). A procedural error was committed where the court "did not direct the parties to expand the record, but rather acted *sua sponte* to conduct an evidentiary hearing at which the defendant's trial counsel was questioned directly by the court . . . [and t]he defendant . . . was not represented by counsel." *Id*. at 979. "When [a] circuit court determines that an evidentiary hearing is required to resolve an issue, . . . it must comply with MCR 6.508(C), and it must appoint counsel for an indigent defendant, as required by MCR 6.505(A)." *Sanders (Sam)*, 497 Mich at 979.

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1); see also MCR 1.111(A)(1).[5]

[5] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

5.3 Right to Counsel

The court may appoint counsel for the defendant at any time during the proceedings for a motion for relief from judgment, if the defendant has requested counsel and the court has determined that the defendant is indigent. MCR 6.505(A). If the court directs that oral argument or an evidentiary hearing be held, counsel must be appointed. *Id*. If counsel is appointed, he or she is entitled to 56 days (or longer, on a showing that a necessary transcript or record is not available to counsel) to amend or supplement the motion for relief from judgment. MCR 6.505(B).

Because a defendant does not have the right to counsel in proceedings under MCR 6.500 *et seq*., he or she cannot claim constitutionally ineffective assistance of counsel in postconviction proceedings. *People v Walters (David)*, 463 Mich 717, 718, 721 (2001).

5.4 Decision

The defendant has the burden of establishing that he or she is entitled to the relief requested. MCR 6.508(D). Under MCR 6.508(D), the court may not grant relief under four circumstances.

- The court may not grant relief when the defendant seeks relief from a judgment of conviction and sentence that is still subject to challenge on appeal under MCR 7.200 or MCR 7.300. MCR 6.508(D)(1).

- The court may not grant relief when the defendant alleges grounds for relief that were decided against the defendant in a prior appeal or proceeding under MCR 6.500 *et seq*., unless the defendant establishes that a retroactive change in the law has undermined the earlier decision. MCR 6.508(D)(2).

- The court may not grant relief when the defendant alleges grounds for relief (other than jurisdictional defects, *People v Carpentier*, 446 Mich 19, 23 (1994)) that could have been raised on appeal from the conviction and sentence, or in an earlier motion for relief from judgment, unless the defendant demonstrates good cause for failure to raise those grounds on appeal *and* actual prejudice from the alleged irregularities.[6]

- The court may not grant relief in the case of a challenge to the sentence, unless the sentence is invalid. MCR 6.508(D)(3)(b)(*iv*).

The defendant must show good cause for failure to raise those grounds on appeal or in the earlier motion, MCR 6.508(D)(3)(a). A defendant must "show good cause for failure to raise a claim in an appeal if one is filed, or in a prior motion if one is filed, or in both if both are filed." *People v Clark (Paul)*, 274 Mich App 248, 251, 253 (2007).

A defendant is required to fulfill the good cause requirement regardless of whether he or she filed a prior motion *in propria persona* or with representation. *Paul Clark*, 274 Mich App at 254.

The good cause requirement may be waived if the court concludes that there is a significant possibility that the defendant is innocent of the crime. MCR 6.508(D).

The defendant must show actual prejudice from the alleged irregularities that support the claim for relief, MCR 6.508(D)(3)(b). Actual prejudice means:

- In a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(*i*).
- In a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it rendered the plea involuntary to a degree that it would be manifestly unjust to allow the conviction to stand. MCR 6.508(D)(3)(b)(*ii*).
- In any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. MCR 6.508(D)(3)(b)(*iii*).

The court must set out in the record (either orally or in writing) its findings of fact and conclusions of law, and enter an appropriate order disposing of the motion for relief from judgment. MCR 6.508(E).

5.5 Standard of Review

A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681 (2003). A

[6] See *People v Brown (Stanley)*, 491 Mich 914, 914-915 (2012), peremptorily granting the defendant a new trial under MCR 6.508(D) on the ground that the defendant's trial counsel was ineffective in failing to present certain corroboratory evidence and in failing to "effectively cross-examine the sole complainant" about inconsistencies in her testimony; "[b]ecause the defendant's former appellate counsel was ineffective for failing to raise these issues on the defendant's direct appeal, and the defendant was prejudiced thereby, he has met the burden of establishing entitlement to relief under MCR 6.508(D)."

trial court's findings of fact supporting the ruling are reviewed for clear error. *Id.* at 681. A trial court's interpretation of a court rule is a question of law that is reviewed de novo. *Clark (Paul)*, 274 Mich App at 251.

Part B: Setting Aside a Conviction[7]

5.6 General Authority for Setting Aside a Conviction

Subject to certain exceptions discussed below, MCL 780.621(1) allows a person who is convicted of not more than one offense to file an application with the convicting court for entry of an order setting aside that conviction.

Felony offenses. "A person who is convicted of not more than 1 felony offense and not more than 2 misdemeanor offenses may petition the convicting court to set aside the felony offense." MCL 780.621(1)(a).

"'Felony' means either of the following, as applicable:

> (*i*) For purposes of the offense to be set aside, felony means a violation of a penal law of this state that is punishable by imprisonment for more than 1 year or that is designated by law to be a felony.
>
> (*ii*) For purposes of identifying a prior offense, felony means a violation of a penal law of this state, of another state, or of the United States that is punishable by imprisonment for more than 1 year or is designated by law to be a felony." MCL 780.621(16)(c).

Misdemeanor offenses. "Except as provided in [MCL 780.621(1)(c) (governing the setting aside of a conviction for completed or attempted fourth-degree criminal sexual conduct (CSC))[8]], a person who is convicted of not more than 2 misdemeanor offenses and no other felony or misdemeanor offenses may petition the convicting court or the convicting courts to set aside 1 or both of the misdemeanor convictions." MCL 780.621(1)(b).

"'Misdemeanor' means a violation of any of the following:

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[7] For information on statutory amendments affecting applications to set aside convictions (2014 PA 463, effective January 12, 2015), see SCAO's February 5, 2015, memo, *Amendments to Set Aside Conviction Statutes*.

[8] See Section 5.8 for discussion of setting aside a fourth-degree CSC conviction.

> (*i*) A penal law of this state, another state, an Indian tribe,[9] or the United States that is not a felony.
>
> (*ii*) An order, rule, or regulation of a state agency that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, or both.
>
> (*iii*) A local ordinance of a political subdivision of this state substantially corresponding to a crime listed in subparagraph (*i*) or (*ii*) that is not a felony.
>
> (*iv*) A violation of the law of another state or political subdivision of another state substantially corresponding to a crime listed under subparagraph (*i*) or (*ii*) that is not a felony.
>
> (*v*) A violation of the law of the United States substantially corresponding to a crime listed under subparagraph (*i*) or (*ii*) that is not a felony." MCL 780.621(16)(f).

Additionally, MCL 780.621(2) provides that a felony or misdemeanor conviction that was deferred and dismissed under one of the following statutes is "considered a misdemeanor conviction under [MCL 780.621(1)] for purposes of determining whether a person is eligible to have any conviction set aside[:]"

- MCL 436.1703 (purchase, consumption, or possession of alcoholic liquor by minor);
- MCL 600.1070(1)(b)(*i*) (drug treatment court);
- MCL 600.1209 (veterans treatment court);
- MCL 762.13 (Holmes Youthful Trainee Act (HYTA));
- MCL 769.4a (deferral of certain domestic violence and spousal abuse convictions);
- MCL 333.7411 (deferral for certain controlled substance offenses);
- MCL 750.350a (deferral under limited circumstances for parental kidnapping);
- MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance); or

[9] "'Indian tribe' means an Indian tribe, Indian band, or Alaskan native village that is recognized by federal law or formally acknowledged by a state." MCL 780.621(16)(e).

- any other law of this state or a political subdivision similar in nature and applicability to the above, providing for the deferral and dismissal of a felony or misdemeanor charge.

The setting aside of a conviction "is a privilege and conditional and is not a right." MCL 780.621(15).

If a petition to set aside a conviction is denied by the convicting court, "a person shall not file another petition concerning the same conviction or convictions with the convicting court until 3 years after the date the convicting court denies the previous petition, unless the court specifies an earlier date for filing another petition in the order denying the petition." MCL 780.621(6).

5.7 Convictions That May Not Be Set Aside

MCL 780.621(3) provides that "[a] person shall not apply to have set aside, and a judge shall not set aside, a conviction for any of the following:"

- a felony for which the maximum punishment is life imprisonment;
- second-degree child abuse or certain related offenses, MCL 750.136b(3), MCL 750.136d(1)(b), or MCL 750.136d(1)(c);
- persuading, inducing, enticing, coercing, causing, or knowingly allowing child sexually abusive activity for the purpose of producing child sexually abusive material, or arranging for, producing, making, copying, reproducing, or financing child sexually abusive activity or material for personal, distributional, or other purposes, or attempting or preparing or conspiring to do so, MCL 750.145c(2);
- distributing, promoting, or financing the distribution or promotion of child sexually abusive material or child sexually abusive activity, MCL 750.145c(3);
- knowingly possessing or knowingly seeking and accessing any child sexually abusive material, MCL 750.145c(4);
- use of the internet or a computer to make a prohibited communication, MCL 750.145d;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;

- fourth-degree criminal sexual conduct, MCL 750.520e, if the conviction occurred after January 12, 2015[10];
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- an attempt to commit any of the above offenses;
- a traffic offense,[11] including, but not limited to, a conviction for operating while intoxicated[12];
- a felony conviction for domestic violence,[13] if the person has a previous misdemeanor conviction for domestic violence;
- a human trafficking violation, MCL 750.462a *et seq*.; or
- a violation of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*.

5.8 Fourth-Degree Criminal Sexual Conduct (CSC) Convictions[14]

A person convicted of completed or attempted fourth-degree CSC under MCL 750.520e may apply to have the conviction set aside only if he or she was convicted of that offense before January 12, 2015, and only if he or she "has not been convicted of another offense other than not more than 2 minor offenses." MCL 780.621(1)(c). For purposes of applying MCL

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[10] See Section 5.8 for discussion of setting aside a fourth-degree criminal sexual conduct conviction.

[11] "'Traffic offense'" is defined in MCL 780.621a(b) as "a violation of the Michigan [V]ehicle [C]ode, [MCL 257.1 *et seq*.], or a local ordinance substantially corresponding to that act, which violation involves the operation of a vehicle and at the time of the violation is a felony or misdemeanor."

[12] "'Operating while intoxicated' means a violation of" MCL 257.625 or MCL 257.625m, or a substantially corresponding local ordinance, law of an Indian tribe, law of another state, or law of the United States. MCL 780.621(16)(g).

[13] "'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); see MCL 780.621(16)(b).

[14] See 2014 PA 463, effective January 12, 2015.

780.621(1)(c), "'minor offense' means a misdemeanor or ordinance violation to which all of the following apply:

> (*i*) The maximum permissible term of imprisonment does not exceed 90 days.
>
> (*ii*) The maximum permissible fine is not more than $1,000.00.
>
> (*iii*) The person who committed the offense is not more than 21 years old." MCL 780.621(1)(c)(*i*)-(*iii*).

A conviction for completed or attempted fourth-degree CSC may not be set aside if the conviction occurred after January 12, 2015. MCL 780.621(3)(c).

5.9 Prostitution-Related Offenses Committed by Human Trafficking Victims[15]

A person who is convicted of violating MCL 750.448 (accosting/soliciting/inviting another person to commit prostitution or do a lewd/immoral act), MCL 750.449 (admitting another person for purposes of prostitution), or MCL 750.450 (aiding/abetting another person in violating MCL 750.448, MCL 750.449, or MCL 750.449a[16]) "may apply to have that conviction set aside if he or she committed the offense as a direct result of his or her being a victim[17] of a human trafficking violation." MCL 780.621(4). "'Human trafficking violation' means a violation of . . . MCL 750.462a to [MCL] 750.462h." MCL 780.621(16)(d).

In addition to all other general application requirements,[18] a person seeking to have a conviction set aside under MCL 780.621(4) must include in his or her application "a statement that he or she meets the criteria set forth in [MCL 780.621(4)], together with a statement of the facts supporting his or her contention that the conviction was a direct result of his or her being a victim of human trafficking." MCL 780.621(8)(g).

"An application under [MCL 780.621(4)] may be filed at any time following the date of the conviction to be set aside." MCL 780.621(7). Additionally, "[a] person may apply to have more than 1 conviction set aside under [MCL 780.621(4)]." MCL 780.621(7).

---

[15] See 2014 PA 335, effective January 14, 2015.

[16] MCL 750.449a prohibits engaging or offering to engage the services of another person for the purpose of prostitution, lewdness, or assignation.

[17] "'Victim' means that term as defined in [MCL 780.752, MCL 780.781, and MCL 780.811 of the Crime Victim's Rights Act]." MCL 780.621(16)(i).

[18] See Section 5.10.

"For an application under [MCL 780.621(4)], if the applicant proves to the court by a preponderance of the evidence that the conviction was a direct result of his or her being a victim of human trafficking, the court may, subject to the requirements of [MCL 780.621(14)[19]], enter an order setting aside the conviction." MCL 780.621(13).

5.10 Procedure for Application

"An application under [MCL 780.621(1)] shall only be filed 5 or more years after whichever of the following events occurs last:

> (a) Imposition of the sentence for the conviction that the applicant seeks to set aside.
>
> (b) Completion of probation imposed for the conviction that the applicant seeks to set aside.
>
> (c) Discharge from parole imposed for the conviction that the applicant seeks to set aside.
>
> (d) Completion of any term of imprisonment imposed for the conviction that the applicant seeks to set aside." MCL 780.621(5).[20]

MCL 780.621(8) sets out the information necessary for a valid application:

> "An application under [MCL 780.621] is invalid unless it contains the following information and is signed under oath by the person whose conviction is or convictions are to be set aside:
>
> > (a) The full name and current address of the applicant.
> >
> > (b) A certified record of each conviction that is to be set aside.
> >
> > (c) For an application under [MCL 780.621(1)], a statement that the applicant has not been convicted of an offense other than the conviction or convictions sought to be set aside as a result of this application and any nondisqualifying misdemeanor convictions described in [MCL 780.621(1)(a)].

---

[19] See Section 5.13.

[20] However, an application under MCL 780.621(4) to set aside a prostitution offense committed by a human trafficking victim "may be filed at any time following the date of the conviction to be set aside." MCL 780.621(7). See Section 5.9 for more information on setting aside a conviction requirements for human trafficking victims.

> (d) A statement listing all actions enumerated in [MCL 780.621(2)] that were initiated against the applicant and have been dismissed.
>
> (e) A statement as to whether the applicant has previously filed an application to set aside this or other [sic] conviction and, if so, the disposition of the application.
>
> (f) A statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country.
>
> (g) If the person is seeking to have 1 or more convictions set aside under [MCL 780.621(4)], a statement that he or she meets the criteria set forth in [MCL 780.621(4)], together with a statement of the facts supporting his or her contention that the conviction was a direct result of his or her being a victim of human trafficking.[21]
>
> (h) A consent to the use of the nonpublic record created under [MCL 780.623][22] to the extent authorized by [MCL 780.623]."

If a petition to set aside a conviction is denied by the convicting court, "a person shall not file another petition concerning the same conviction or convictions with the convicting court until 3 years after the date the convicting court denies the previous petition, unless the court specifies an earlier date for filing another petition in the order denying the petition." MCL 780.621(6).

5.11 Submission of Application to State Police

The applicant must submit a copy of the application, a $50.00 application fee, and one complete set of fingerprints to the Department of State Police. MCL 780.621(9); MCL 780.621(10). MCL 780.621(9) further provides:

> "The department of state police shall compare [the submitted] fingerprints with the records of the department, including the nonpublic record created under [MCL 780.623], and shall forward an electronic copy of a complete set of fingerprints to the federal bureau of investigation for a

[21] See Section 5.9 for more information on setting aside a conviction requirements for human trafficking victims.

[22] MCL 780.623 requires the Department of State Police to retain a nonpublic record regarding a conviction that is set aside.

comparison with the records available to that agency. The department of state police shall report to the court in which the application is filed the information contained in the department's records with respect to any pending charges against the applicant, any record of conviction of the applicant, and the setting aside of any conviction of the applicant and shall report to the court any similar information obtained from the federal bureau of investigation. The court shall not act upon the application until the department of state police reports the information required by [MCL 780.621(9)] to the court."

5.12 Submission of Application to the Attorney General and Prosecuting Attorney

A copy of the application must 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. MCL 780.621(11). The attorney general and the prosecuting attorney must have the opportunity to contest the application. *Id*.

If a conviction was for an "assaultive crime"[23] or "serious misdemeanor,"[24] the prosecuting attorney must give the victim[25] of that offense written notice, by first-class mail to his or her last known address, of the application pursuant to MCL 780.772a and MCL 780.827a of the Crime Victim's Rights Act.[26] MCL 780.621(11). The victim has a right to appear at any proceeding concerning the setting aside of the conviction and to make a written or oral statement. *Id*.

5.13 Court Action on the Application

"For an application under [MCL 780.621(1)], upon the hearing of the application the court may require the filing of affidavits and the taking of proofs as it considers proper." MCL 780.621(12).

MCL 780.621(14) sets out the general standard for setting aside a conviction:[27]:

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[23] "Assaultive crime," as that term is used in MCL 780.621(11), is defined in MCL 770.9a(3). MCL 780.621(16)(a); see also MCL 780.772a.

[24] "'Serious misdemeanor'" means that term as defined in MCL 780.811(1)(a) of the Crime Victim's Rights Act. MCL 780.621(16)(h).

[25] "'Victim' means that term as defined in [MCL 780.752, MCL 780.781, and MCL 780.811 of the Crime Victim's Rights Act]." MCL 780.621(16)(i).

[26] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a thorough discussion of a victim's rights regarding notification.

> "If the court determines that the circumstances and behavior of an applicant under [MCL 780.621(1) or MCL 780.621(4)], from the date of the applicant's conviction or convictions to the filing of the application warrant setting aside the conviction or convictions, and that setting aside the conviction or convictions is consistent with the public welfare, the court may enter an order setting aside the conviction or convictions."

The setting aside of a conviction "is a privilege and conditional and is not a right." MCL 780.621(15).

If a petition to set aside a conviction is denied by the convicting court, "a person shall not file another petition concerning the same conviction or convictions with the convicting court until 3 years after the date the convicting court denies the previous petition, unless the court specifies an earlier date for filing another petition in the order denying the petition." MCL 780.621(6).

The nature of the offense, standing alone, is insufficient to warrant denial of an application to set aside a conviction; rather, the court must balance the circumstances and behavior of the offender and the public welfare. *People v Rosen*, 201 Mich App 621, 622-624 (1993).

5.14 Effect of Order

Except as provided in MCL 780.622(2)-(6) and MCL 780.623,[28] after entry of an order setting aside a conviction, "the applicant, for purposes of the law, shall be considered not to have been previously convicted[.]" MCL 780.622(1). MCL 780.622(2)-(6) provide:

> "(2) The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside.
>
> (3) If the conviction set aside . . . is for a listed offense as defined in section 2 of the sex offenders registration act[(SORA)], . . . MCL 28.722, the applicant is considered to have been convicted of that offense for purposes of that act.[29]

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[27] A different standard applies to individuals seeking to set aside a conviction under MCL 780.621(4) (governing setting aside of certain prostitution offenses committed by human trafficking victims). See Section 5.9 for more information.

[28] MCL 780.623 requires the Department of State Police to maintain a nonpublic record regarding a conviction that is set aside.

[29] For a detailed discussion of the SORA, see Chapter 10 of the Michigan Judicial Institute's *Sexual Assault Benchbook*.

> (4) [MCL 780.621 *et seq*.] does not affect the right of the applicant to rely upon the conviction to bar subsequent proceedings for the same offense.
>
> (5) [MCL 780.621 *et seq*.] does not affect the right of a victim of a crime to prosecute or defend a civil action for damages.
>
> (6) [MCL 780.621 *et seq*.] does not create a right to commence an action for damages for incarceration under the sentence that the applicant served before the conviction is set aside under [MCL 780.621 *et seq*.]." MCL 780.622(2)-(6).

5.15 Access to Records of Convictions That Have Been Set Aside

"Upon the entry of an order [setting aside a conviction], the court shall send a copy of the order to the arresting agency and the department of state police." MCL 780.623(1).

MCL 780.623(2) provides:

> "The department of state police shall retain a nonpublic record of the order setting aside a conviction and of the record of the arrest, fingerprints, conviction, and sentence of the applicant in the case to which the order applies. Except as provided in [MCL 780.623(3)],[30] this nonpublic record shall be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes:
>
> > (a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.
> >
> > (b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside under [MCL 780.621 *et seq*.].
> >
> > (c) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.[31]

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[30] MCL 780.623(3) permits a person whose conviction is set aside to obtain a copy of the nonpublic record by paying a fee in the same manner as provided in § 4 of the Michigan Freedom of Information Act, MCL 15.234.

[31] See *People v Smith (Ricky)*, 437 Mich 293, 302-304 (1991).

> (d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.
>
> (e) Consideration by the department of corrections or a law enforcement agency if a person whose conviction has been set aside applies for employment with the department of corrections or law enforcement agency.
>
> (f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act[(SORA), MCL 28.721 *et seq*.], has violated that act, or for use in a prosecution for violating that act.[32]"

The nonpublic record is exempt from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. MCL 780.623(4). A copy of the nonpublic record must "be provided to the person whose conviction is set aside . . . upon payment of a fee determined and charged by the department of state police in the same manner as the fee prescribed in" MCL 15.234 of the FOIA. MCL 780.623(3).[33]

MCL 780.623(5) states that, "[e]xcept as provided in [MCL 780.623(2) (governing the nonpublic record retained by the Department of State Police)], a person, other than the applicant or a victim,[34] who knows or should have known that a conviction was set aside . . . and who divulges, uses, or publishes information concerning a conviction set aside . . . 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."

5.16 Standard of Review

Assuming the statutory requirements are met, the decision on an expungement motion is reviewed for an abuse of discretion. *People v Link*, 225 Mich App 211, 216 (1997).

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[32] For a detailed discussion of the SORA, see Chapter 10 of the Michigan Judicial Institute's *Sexual Assault Benchbook*.

[33] Similarly, MCL 712A.18e(14) permits a person whose adjudication is set aside to obtain a copy of the nonpublic record by paying a fee in the same manner as provided in § 4 of the Michigan Freedom of Information Act, MCL 15.234.

[34] "As used in [MCL 780.623], 'victim' means any individual who suffers direct or threatened physical, financial, or emotional harm as the result of the offense that was committed by the applicant." MCL 780.623(6).

Chapter 6: Habeas Corpus

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6.1 Habeas Corpus, Generally

- "The object of the writ of habeas corpus is 'to determine the legality of the restraint under which a person is held.'" *Moses v Dep't of Corrections*, 274 Mich App 481, 485 (2007), quoting *Phillips v Warden, State Prison of Southern Michigan*, 153 Mich App 557, 565 (1986).

- "The writ of habeas corpus deals with radical defects that render a judgment or proceeding absolutely void." *Moses*, 274 Mich App at 485.

6.2 State Habeas Corpus

- "An action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his [or her] liberty within this state under any pretense whatsoever, except as specified in [MCL 600.4310]." MCL 600.4307.

- "Ordinarily, MCL 600.2963 would preclude [a prisoner] from seeking leave to appeal . . . because of a failure to provide the initial partial [filing] fee, as ordered. However, applying that statutory section to bar review of [a prisoner's] original complaint for habeas corpus . . . would violate the Equal Protection Clause of the Fourteenth Amendment." *Mott v Kinross Correctional Facility Warden*, unpublished order of the Michigan Supreme Court, entered December 12, 2013 (Docket No. 147956), citing *Smith v Bennett*, 365 US 708 (1961). See also *Ward v Carson City Correctional Facility*, unpublished order of the Michigan Supreme Court, entered October 2, 2013 (Docket No. 147785), citing *Smith*, 365 US 708, and holding that although "MCL 600.2963(8) would [ordinarily] preclude [a prisoner] from seeking leave to appeal . . . [if he or she has any] outstanding fees he [or she] owes in other civil case filings[,]" application of MCL 600.2963(8) "to bar review of [a prisoner's] original complaint for habeas corpus . . . would violate the Equal Protection Clause"). See, however, *Raar v Kinross Correctional Facility Warden*, unpublished order of the Michigan Supreme Court, entered August 13, 2014 (Docket No. 149532), slip op at p ___ (noting that "[a]lthough [*Smith*, 365 US 708,] precludes a court from refusing to docket and decide a habeas corpus action because of the inability to pay the filing fee, nothing in the decision mandates that there be a complete waiver of court fees[]").

- "In general, MCL 600.4310(3) prohibits habeas corpus relief to '[p]ersons convicted, or in execution, upon legal process, civil or criminal.'" *Moses v Dep't of Corrections*, 274 Mich App 481, 485-486 (2007).

- "The policy behind limiting a habeas corpus proceeding is premised on the concern that such an action may be abused and substituted for normal appellate proceedings." *Walls v Director of Institutional Services*, 84 Mich App 355, 357 (1978).

- However, "relief 'is open to a convicted person in one narrow instance, . . . where the convicting court was without jurisdiction to try the defendant for the crime in question.'" *Moses*, 274 Mich App at 486, quoting *People v Price*, 23 Mich App 663, 669-670 (1970). "[W]hile [a prisoner] may not use a habeas proceeding as a substitute for an appeal or to review the merits of his [or her] criminal conviction, [he or she] may assert a radical defect in the jurisdiction of the court in which his [or her] conviction was obtained." *Moses*, 274 Mich App at 486, citing MCL 600.4310(3); *Price*, 23 Mich App at 669-670.

- "Habeas relief is appropriate only where a habeas petitioner can show a radical defect that renders a proceeding or judgment void." *Kenney v Booker*, 494 Mich 852, 852 (2013), citing *In re Stone*, 295 Mich 207, 209 (1940). See also *Moses*, 274 Mich App at 486 ("to qualify for habeas corpus relief, the jurisdictional defect must be radical, rendering [a] conviction absolutely void[]"). "'A radical defect in jurisdiction contemplates . . . an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission.'" *Moses*, 274 Mich App at 486, quoting *Price*, 23 Mich App at 671. "Nevertheless, habeas relief may be denied in the exercise of a court's discretion where full relief may be obtained in other more appropriate proceedings." *Moses*, 274 Mich App at 486.

- "Habeas corpus does not function as a writ of error, *In re Joseph*, 206 Mich 659, 661-662 (1919), and it 'is not available to test questions of evidence,' *In re Stone*, [295 Mich] at 212." *Kenney*, 494 Mich at 852.

- Examples of instances in which state habeas relief was held to be appropriate:

  - An indigent juvenile was denied the right to counsel at a violation hearing before an administrative law judge or the Youth Parole and Review Board, after which the

juvenile was confined to a correctional institution. *Walls*, 84 Mich App at 357-360. The Court of Appeals found that "[t]o insure that petitioner was accorded his full right to due process of law, the state should have provided him with counsel after [he] and his mother requested counsel." *Id.* at 360. The Court of Appeals held that the juvenile's confinement was improper because it was a result of proceedings in which he was denied fundamental constitutional rights. *Id*. The Court of Appeals ordered a writ of habeas corpus directing the correctional institution to release the juvenile. *Id*.

- The defendant (the petitioner in the habeas corpus action), while incarcerated in a federal corrections facility, was convicted of a crime in Michigan state court. *Cross v Dep't of Corrections*, 103 Mich App 409, 412 (1981). The trial court ordered the defendant's sentence to run concurrently with his federal sentence, and stated that it was unnecessary for the defendant to return to Michigan. *Id.* at 412. When the defendant was paroled from federal prison, the Michigan Department of Corrections took him into custody and incarcerated him in a state prison. *Id*. The Court of Appeals affirmed the trial court's issuance of a writ of habeas corpus where "[t]he sentencing judge made abundantly clear at sentencing that [the defendant] was to spend no time in a Michigan prison and that his state sentence was to be fulfilled at the completion of his Federal sentence." *Id*. at 415-416.

- Examples of instances in which state habeas relief was held to be inappropriate:

  - The defendant (the petitioner in the habeas corpus action) claimed that the recorder's court did not have jurisdiction to enter a conviction because the defendant was allegedly denied the right to counsel at a juvenile waiver hearing. *Price*, 23 Mich App at 670. The Court of Appeals held that "[t]he defect or error asserted . . . did not contravene an express legal requirement in existence either at the time of the waiver hearing or at the time of the release." *Id.* at 671. (At the time of the juvenile's conviction, the presence of counsel was not required at the waiver hearing.) The Court of Appeals concluded that "for purposes of habeas corpus the recorder's court had jurisdiction to convict the defendant and that habeas corpus, after conviction and sentence, was consequently an improper method of review." *Id*. The Court of Appeals vacated the order of discharge and ordered the defendant to be remanded to the custody of the Michigan Department of Corrections. *Id*.

- The defendant (the petitioner in the habeas corpus action) was imprisoned after pleading no contest to a crime. *Moses*, 274 Mich App at 482-483. He alleged that the state of Michigan lacked jurisdiction to prosecute him because he was a member of an Indian tribe at the time of the offense, and because the offense occurred on an Indian reservation. *Id.* at 483. The Court of Appeals held that the defendant's habeas corpus claim failed because the offense actually occurred on swampland that the United States patented to the state of Michigan before the 1855 and 1864 treaties were signed that designated the land "Indian country," and patented lands were excepted from the Indian country at issue here at the time of the offense. *Id*. at 482, 487, 504.

- "The plaintiff['s] . . . challenges [to] the legal standard employed by the Parole Board to revoke his parole and [his] claim[] that the evidence was insufficient to establish an actual violation of parole[] . . . [did] not constitute radical defects that render[ed] void the proceedings of the Parole Board." *Kenney*, 494 Mich at 852.

6.3 Federal Habeas Corpus

A. In General

- Federal habeas corpus is usually the final means of relief available to an incarcerated defendant convicted in state court to challenge his or her conviction and/or sentence.

- "Federal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law." *Wilson v Corcoran*, 562 US 1, 14 (2010) (federal appellate court's grant of habeas corpus relief to a respondent was vacated where the appellate court failed to determine whether the confinement violated federal law).

- AEDPA (Antiterrorism and Effective Death Penalty Act), 28 USC 2254 (enacted in 1996), governs federal habeas corpus.

- The state prisoner must allege a federal constitutional error, which was adjudicated on the merits in state court. "[28 USC]2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington v Richter*, 562 US 86, 785 (2011).

- "Because the requirements of [28 USC 2254(d)] are difficult to meet, it is important whether a federal claim was 'adjudicated on the merits in State court[.]'" *Johnson v Williams*, 568 US ___, ___ (2013). "This issue arises when a defendant convicted in state court attempts to raise a federal claim, either on direct appeal or in a collateral state proceeding, and a state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question." *Id*. at ___. "If this defendant then raises the same claim in a federal habeas proceeding, [] the federal court [should] regard the claim as having been adjudicated on the merits by the state court and apply deference under [28 USC 2254(d).]" *Johnson*, 568 US at ___.

- "[A]bsent some 'indication or [Michigan] procedural principle to the contrary,' [the United States Court of Appeals for the Sixth Circuit] must presume that an unexplained summary order is an adjudication 'on the merits' for AEDPA purposes." *Werth v Bell*, 692 F3d 486, 493 (CA 6, 2012). "There are . . . two avenues by which a petitioner can overcome th[e] presumption." *McClellan v Rapelje*, 703 F3d 344, 349 (CA 6, 2013). "One avenue, whether there is a procedural principle to the contrary, concerns the procedural framework established by the state with respect to postconviction review generally." *Id*. "[N]o Michigan procedural principle by itself allows [the United States Court of Appeals for the Sixth Circuit] to construe the phrase 'for lack of merit in the grounds presented' as a denial on procedural grounds." *Id*. When Michigan appellate courts deny an application for leave to appeal "for lack of merit in the grounds presented," it constitutes a decision on the merits as a matter of Michigan law, and therefore qualifies for AEDPA deference. *Werth*, 692 F3d at 493-494. "[T]he second avenue of relief . . . requires analysis of the procedural history and factual underpinnings of each individual petitioner's case." *McClellan*, 703 F3d at 349.

- Federal courts must "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he [or she] is in custody in violation of the Constitution or law or treaties of the United States." 28 USC 2254(a).

- The ineffectiveness or incompetence of counsel during federal or state collateral postconviction proceedings (i.e., a motion for relief from judgment) is not a ground for federal habeas corpus relief. 28 USC 2254(i).[1]

- "[T]he incompetence of a state prisoner [does not] require[] suspension of the prisoner's federal habeas corpus proceedings." *Ryan v Gonzales*, 568 US ___, ___ (2013). "If a [federal] district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment." *Id*. at ___.

- Generally, a federal court will not review a judgment of a state court if it is based on ***adequate*** and ***independent*** state grounds. *Michigan v Long*, 463 US 1032, 1041 (1983). Exceptions include:[2]

  - Where a substantive state ground is "palpably erroneous[.]" *Phelps v Bd of Ed of Town of West New York et al*., 300 US 319, 323 (1937).

  - Where a substantive state ground is "manifestly wrong." *Hale v Iowa State Bd of Assessment & Review*, 302 US 95, 101 (1937).

  - Where a procedural state rule is "not strictly or regularly followed[.]" *Barr v City of Columbia*, 378 US 146, 149 (1964).

  - Where a procedural state rule is novel. *Nat'l Ass'n for the Advancement of Colored People v State of Alabama, ex rel Patterson*, 357 US 449, 457 (1958).

  - Where a procedural state rule allows the state court to excuse noncompliance. See, e.g., *Sullivan et al. v Little Hunting Park, Inc, et al.*, 396 US 229, 233-234 (1969) (discretionary rule does not bar federal review).

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[1] See, however, *Martinez v Ryan*, 566 US 1, ___, ___ (2012) (carving out a "narrow exception[]" to the general rule that "an attorney's errors in a postconviction proceeding do not qualify as cause for a default[]" and holding that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective[]"); see also *Trevino v Thaler*, 569 US , (2013) (extending the holding of *Martinez*, 566 US , to a case in which "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal[]").

[2] See Roosevelt, *Light From Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 Colum L Rev 1888, 1889–1890 (2003).

  - Where a procedural state rule imposes an undue burden on the assertion of federal rights. See, e.g., *Douglas v State of Alabama*, 380 US 415, 422-423 (1965).

- "For reasons of finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."'" *Davis v Ayala*, 576 US ___, ___ (2015) (quoting *Brecht v Abrahamson*, 507 US 619, 637 (1993), and concluding that "[t]he exclusion of [the habeas petitioner's] attorney from part of the [petitioner's] *Batson*[3] hearing was harmless error[because t]here [was] no basis for finding that [the petitioner] suffered actual prejudice[]") (internal citation omitted).[4]

B. Exhaustion of Remedies

- A federal court cannot grant a writ of habeas corpus unless the state prisoner has exhausted the remedies available in state court, unless the state has no available process to exhaust, or unless circumstances exist that make the state corrective process ineffective to protect the applicant's rights. 28 USC 2254(b)(1).

- Exhaustion means that the state court must have had the "opportunity to pass upon and correct" alleged violations of a prisoner's federal rights. *Baldwin v Reese*, 541 US 27, 29 (2004). To give the state that opportunity, the prisoner must have "fairly present[ed]" the legal and factual bases of his or her federal constitutional claims in state court. *Id.* at 29. Raising an analogous state law claim does not exhaust a claim for federal review. *Id*. at 33.

- "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he [or she] has the right under the law of the State to raise, by any available procedure, the question presented." 28 USC 2254(c). Accordingly, exhaustion requires raising federal constitutional issues on direct appeal through every level of the state court system, or by raising such issues in a motion for relief from judgment, if available.

- Even though relief cannot be granted on an unexhausted claim, relief may be denied on the merits of an unexhausted claim. 28 USC 2254(b)(2).

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[3] *Batson v Kentucky*, 476 US 79 (1986).

[4] See Section 6.3(G) for discussion of harmless error.

- A state cannot be seen as waiving the exhaustion requirement unless it does so specifically. 28 USC 2254(b)(3).

- A conditional writ of habeas corpus represents a habeas court's holding that an infirmity justifies the prisoner's release, and provides the state a window of time in which to correct the error. *Satterlee v Wolfenbarger*, 453 F3d 362, 369 (CA 6, 2006). When a state fails to comply with the conditions of a conditional writ of habeas corpus, the prisoner must be released from custody. *Id.* at 369.

C. Statute of Limitations

28 USC 2244(d) provides:

> "(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

- "[A] State post-conviction motion [remains] 'pending' for purposes of tolling the limitations period[]" under 28

> USC 2244(d)(2) "during the entire period for appeal[]" to the State's highest court from a lower court ruling denying a motion for post-conviction relief, including "the period in which [the petitioner] could have, but did not, appeal the . . . denial of his [or her] motion for post-conviction relief." *Holbrook v Curtin*, ___ F3d ___, ___ (CA 6, 2016) (noting that under MCR 7.215(F)(1)(a), "a Michigan court would likely toll the statute of limitations on [the petitioner's] habeas corpus petition until . . . the last day for appeal to the [Michigan] Supreme Court, rather than . . . the date of the [Michigan] Court of Appeals decision[]" denying his motion for relief from judgment) (citations omitted).

D. Granting a Writ of Habeas Corpus

"[S]ubject to two exceptions, [28 USC 2254(d)] bars the relitigation of claims that were 'adjudicated on the merits in State court proceedings.'" *Rice v White*, 660 F3d 242, 250 (CA 6, 2011), quoting 28 USC 2254(d) and citing *Harrington*, 562 US at ___.

"Under the two exceptions set forth in [28 USC 2254(d)(1) and 28 USC 2254(d)(2)], a federal court may permit relitigation of a claim adjudicated on the merits in state court if the state adjudication of the claim either:

> "'(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Rice*, 660 F3d at 250, quoting 28 USC 2254(d)(1); 28 USC 2254(d)(2).

The federal court "review[s] *de novo* a claim adjudicated on the merits in state court if the petitioner shows, by virtue of one of its exceptions, that the relitigation bar of [28 USC 2254(d)] does not apply." *Rice*, 660 F3d at 252.

- **Contrary to, or unreasonable application of, clearly established Federal law**
  - A petition for habeas corpus may be granted if the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law. 28 USC 2254(d)(1).

- "The starting point for cases subject to [28 USC 2254(d)(1)] is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's claims." *Marshall v Rodgers*, 569 US ___, ___ (2013) (citations omitted). See also *Coleman v Bergh*, 804 F3d 816, 817, 819 (CA 6, 2015) (citing *Marshall*, 569 US at ___, and holding that because "the [United States] Supreme Court has never held that a hearing on a motion for a new trial is a critical stage of a criminal proceeding[,]" the habeas petitioner was not entitled to relief on the basis that his "'appellate counsel was constitutionally ineffective for failing to argue that [the petitioner] had a right to counsel at his pre-appeal evidentiary hearing on his motion for a new trial'") (additional citations omitted).

- "'[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Bell v Howes*, 703 F3d 848, 852 (CA 6, 2012), quoting *Williams v Taylor*, 529 US 362, 410 (2000). Thus, "habeas relief is unavailable 'so long as "fairminded jurists could disagree" on the correctness of the state court's decision.'" *Bell*, 703 F3d at 852, quoting *Harrington v Richter*, 562 US 86, ___ (2011), quoting *Yarborough v Alvarado*, 541 US 652, 664 (2004). "A final part of the equation in determining unreasonable application is that the rule's specificity must be considered." *Bell*, 703 F3d at 852. "'"[T]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."'" *Id.*, quoting *Harrington*, 562 US at ___, quoting *Yarborough*, 541 US at 664.

- 28 USC 2254(d)(1) "provides a remedy for instances in which a state court unreasonably *applies* [United States Supreme Court] precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v Woodall*, 572 US ___, ___ (2014) (quoting *Harrington*, 562 US at ___, and noting that "relief is available under . . . [the] unreasonable-application clause [of 28 USC 2254(d)(1)] if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question[]") (additional citation omitted).

- "[F]or a [28 USC]2254(d)(1) inquiry . . . review is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v Pinholster*, 563 US 170, 181 (2011).

- "[C]learly established Federal law" under 28 USC 2254(d)(1) does not include "decisions of [the United States Supreme] Court that are announced after the last adjudication of the merits in state court but before the defendant's conviction becomes final." *Greene v Fisher*, 565 US ___, ___ (2011).

- AEDPA "proscribes[] 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Parker v Matthews*, 567 US ___, ___ (2012) (quoting *Renico v Lett*, 559 US 766, 779 (2010), and holding that the Sixth Circuit Court of Appeals erred in failing to accord proper deference to the state court's rejection of the respondent's challenge to the sufficiency of the evidence and in "consulting its own precedents, rather than those of [the United States Supreme] Court, in assessing the reasonableness" of the state court's decision).

- "State court decisions are to 'be given the benefit of the doubt' and the standard for evaluating decisions is 'highly deferential.'" *Bell*, 703 F3d at 854, quoting *Cullen*, 563 US at ___. "There must be 'no reasonable basis for the state court to deny relief' before a petition is granted." *Bell*, 703 F3d at 854, quoting *Harrington*, 562 US at ___. "And 'even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.'" *Bell*, 703 F3d at 854, quoting *Harrington*, 562 US at ___.

- "When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, . . . the federal court [must] use a '"doubly deferential"' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v Titlow*, 571 US ___, ___, ___ (2013) (quoting *Cullen*, 563 US at ___, and holding that "there was no factual or legal justification for overturning the [Michigan Court of Appeals'] decision[]" that defense counsel's advice to the respondent to withdraw his guilty plea was reasonable "in light of [the respondent's] protestations of innocence[,]" and that the Sixth Circuit Court of Appeals "turned [the] presumption of [effective assistance] on its head[]" when it granted habeas relief based on an "absence of [record] evidence" demonstrating that counsel "gave constitutionally adequate advice on whether to withdraw the guilty plea[]"); see also *McGowan v Burt*, 788 F3d 510, 519 (CA 6, 2015) (because "the Michigan Court of Appeals' ruling[] . . . addressed [the defendant's] ineffective-assistance claim directly

and reasonably evaluated it under the *Strickland*[5] standard[,] . . . the [federal] district court, consistent with *Titlow*, [571 US ___,] was obliged to deny habeas relief on [the] ineffective-assistance claim despite its disagreement with the state court's interpretation of the record[]").

- "'[W]hether the trial judge was right or wrong is not the pertinent question under AEDPA[,]' *Renico*[, 559 US at 778;] . . . [rather, t]he question is whether the last state court's decision was 'objectively unreasonable[,]' *Williams* [*v Taylor*, 529 US 362, 409 (2000)]." *Gagne v Booker*, 680 F3d 493, 496-506, 516-517 (CA 6, 2012) (en banc plurality opinion reversing the federal district court's grant of habeas relief and holding that "[t]he Michigan Court of Appeals properly weighed the competing interests, as [United States] Supreme Court precedent requires, and did not misidentify or misapply any clearly established federal law[]" in rejecting the petitioner's constitutional challenge to the trial court's exclusion of evidence under Michigan's rape-shield statute, MCL 750.520j). See also *Shimel v Warren*, 838 F3d 685, 696 (CA 6, 2016) (rejecting the petitioner's contention that the Sixth Circuit Court of Appeals "should review the decision of the trial court and ignore the factual findings and legal conclusions of the Michigan Court of Appeals[,]" and holding that "the Michigan Court of Appeals 'is the last state court to adjudicate the claim on the merits' and its opinion is therefore '[t]he relevant state court decision[]'") (citation omitted; second alteration in original).

- "'Under *Jackson* [*v Virginia*, 443 US 307, 319 (1979)], habeas corpus relief is appropriate based on insufficient evidence only where the court finds, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Nali v Phillips*, 681 F3d 837, 841, 850-851 (CA 6, 2012) (quoting *Parker v Renico*, 506 F3d 444, 448 (CA 6, 2007), and holding that, "[i]n granting [the petitioner's] application for a writ of habeas corpus, the [federal] district court [improperly] substituted its judgment for the jury's finding that his guilt was proven beyond a reasonable doubt").

[5] *Strickland v Washington*, 466 US 668, 687-688 (1984).

- Where the Michigan Court of Appeals "fail[ed] to apply *Strickland* [*v Washington*, 466 US 668 (1984),] to assess [an] ineffective-assistance-of-counsel claim . . . , the [Court's] adjudication was contrary to clearly established federal law[,]" and the respondent was entitled to pursue habeas review under AEDPA. *Lafler v Cooper*, 566 US ___, ___ (2012),[6] citing *Panetti v Quarterman*, 551 US 930, 948 (2007).

- The Michigan state courts' retroactive application of *People v Carpenter (James)*, 464 Mich 223, 237 (2001), holding that diminished capacity is not a cognizable defense, did not constitute an unreasonable application of United States Supreme Court precedent. *Metrish v Lancaster*, 569 US , (2013), reversing *Lancaster v Metrish*, 683 F3d 740, 742, 744-754 (CA 6, 2012). "[T]he Michigan Supreme Court [in *Carpenter (James)*] rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature[;]" accordingly, "[f]airminded jurists could conclude that [*Carpenter (James)* was] not 'unexpected and indefensible by reference to [existing] law.'" *Lancaster*, 569 US at ___, ___ (citation omitted).

- "[T]he Michigan Supreme Court did not unreasonably apply clearly established federal law" in holding, in *People v Hill (Thomas)*, 485 Mich 912, 912 (2009), that the habeas petitioner's "right to self-representation was not violated because his request was untimely and disruptive." *Hill v Curtin*, 792 F3d 670, 675, 679 (CA 6, 2015) (noting that, under *Faretta v California*, 422 US 806, 807, 819-820 (1975), and other federal precedent, "the right to self-representation is 'not absolute' and . . . may be forfeited if not asserted 'in a timely manner[]'") (additional citations omitted). "[D]enying a self-representation request because of timing can be based on the nature of the *federal* right[under *Faretta*, 422 US 806], not on the *state* procedure[;] . . . Michigan courts accordingly did not need a previously announced state procedure to deny [the habeas petitioner's request][.]" *Jones (Garry) v Bell*, 801 F3d 556, 559, 564-567 (CA 6, 2015) (holding that, even if the petitioner's claim was not procedurally defaulted, he could not prevail on the

[6] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Cooper*[, 566 US (2012), did not] create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

merits because "the state courts' denial of his day-of-trial request to represent himself [was not] an unreasonable application of *Faretta*[, 422 US 806][]") (additional citations omitted).

- **Unreasonable determination of the facts**

  - A petition for habeas corpus may be granted if the state court decision was based on an unreasonable determination of the facts. 28 USC 2254(d)(2).

  - "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v Allen*, 558 US 290, 301 (2010), citation omitted. "[E]ven if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id*., quoting *Rice v Collins*, 546 US 333, 341-342 (2006).

  - "[I]t is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice*, 660 F3d at 250, quoting 28 USC 2254(d)(2) and citing *Byrd v Workman*, 645 F3d 1159, 1172 (CA 10, 2011).

  - A state court's factual determination is presumed to be correct. 28 USC 2254(e)(1).

  - The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 USC 2254(e)(1).

  - The presumption of correctness in 28 USC 2254(e)(1) "speaks only to the factual determinations made by a 'State court'—it does not differentiate between state trial and state appellate courts[;]" accordingly, it applies to the findings of "'the last state court to adjudicate the claim on the merits[.]'" *Shimel*, 838 F3d at 696-697 (holding that "[i]t would be an inappropriate exercise of federal habeas review to ignore the factual and legal conclusions of the Michigan Court of Appeals and instead look to the state trial court's findings[,]" and applying the presumption in 28 USC 2254(e)(1) "to the factual findings of the Michigan Court of Appeals") (citation omitted).

- If the petitioner has failed to develop the factual basis of a claim in state court, the federal court cannot hold an evidentiary hearing on the claim unless the petitioner shows that

  - the claim relies on

    - a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable; or

    - a factual predicate that could not have been previously discovered through the exercise of due diligence; and

    - the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for a constitutional error, no reasonable fact-finder would have found the petitioner guilty of the underlying offense. 28 USC 2254(e)(2).

- "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the [petitioner] or the [petitioner's] counsel[,]" *Williams v Taylor*, 529 US 420, 432 (2000), e.g., if the petitioner requested, and was denied, a hearing in state court. *Mason (Maurice) v Mitchell (Betty)*, 320 F3d 604, 621 n 6 (CA 6, 2003).

- The Sixth Circuit Court of Appeals erred in granting habeas corpus relief based on an "absence of [record] evidence" demonstrating that counsel "gave constitutionally adequate advice [to the respondent] on whether to withdraw [his] guilty plea[,]" because "the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Titlow*, 571 US at ___, ___ (quoting *Strickland*, 466 US at 689, and holding that "there was no factual or legal justification for overturning the [Michigan Court of Appeals'] decision[]" that defense counsel's advice to the respondent to withdraw his guilty plea was constitutionally reasonable "in light of [the respondent's] protestations of innocence[]").

- "[A] trial court's decision to refuse to give a proffered jury instruction is a legal decision and not a factual determination to which [28 USC 2254(d)(2)] would apply." *McMullan v Booker*, 761 F3d 662, 671, 672 (CA

6, 2014) (noting that "[such a] decision is similar to an evidentiary one—the proper domain of the trial court[]").

- The Michigan Supreme Court's decision in *People v Hill (Thomas)*, 485 Mich 912, 912 (2009), upholding the trial court's denial of the defendant's self-representation request "as 'not timely[,]'" did not constitute "an unreasonable determination of the facts" justifying habeas relief; "because the state court's interpretation of the record was debatable, and therefore not unreasonable, habeas relief [was] not permissible." *Hill v Curtin*, 792 F3d 670, 681 (CA 6, 2015) (citations omitted).

E. Claim Must Not Be Procedurally Defaulted

- A federal court generally cannot review constitutional issues that were procedurally defaulted, e.g., not preserved, in state court. Exceptions include:

- **Plain statement**

  - A federal court is required to address the merits of a petitioner's federal constitutional claim if the last state court to address the issue did not make a "plain statement" that the claim was procedurally defaulted. *Harris v Reed*, 489 US 255, 257, 266 (1989).

  - Because "citations to a defendant's failure to meet the burden of establishing entitlement to relief [under MCR 6.508(D)] can refer to a defendant's failure to meet that burden on the merits[,]" "[b]rief orders citing [MCR] 6.508(D) are not explained orders invoking a procedural bar" to a defendant's petition for federal habeas corpus relief. *Guilmette v Howes*, 624 F3d 286, 289, 291 (CA 6, 2010). "In such cases, . . . [the federal court] must look to the last *reasoned* state court opinion to determine the basis for rejection." *Peoples v Lafler*, 734 F3d 503, 511 (CA 6, 2013), citing *Guilmette*, 624 F3d at 291.

  - "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Cone v Bell*, 556 US 449, 466 (2009). Accordingly, where the last reasoned state court order indicated that the petitioner's claims had been previously rejected in his appeal of right to the Michigan Court of Appeals, his "claims of prosecutorial misconduct

and insufficiency of the evidence [had] not been procedurally defaulted." *Peoples*, 734 F3d at 512.

- **Cause and Prejudice**

  - "Procedural default is not[] . . . an absolute bar to habeas relief." *Etherton v Rivard*, 800 F3d 737, 748 (CA 6, 2015) (citation omitted). If a petitioner demonstrates ***cause*** for the procedural default and ***prejudice*** due to the inability to raise his or her claim, failure to comply with a state procedural rule may be excused. *Wainwright v Sykes*, 433 US 72, 87 (1977).

    - Cause may be demonstrated where the factual basis for a claim was not reasonably available to, or actually known by, a party. *Ambrose v Booker (Ambrose I)*, 684 F3d 638, 641, 645-649 (CA 6, 2012) (where a computer programming error resulted in the unintentional exclusion of many African Americans from potential jury pools, the petitioners' failure to object to the jury venires at their trials was excused because "the factual basis for the claim—the computer glitch—was not reasonably available to counsel, and [the] petitioners could not have known that minorities were underrepresented in the *jury pool* by looking at the *venire panel*[]").

    - "[A] petitioner[] must show actual prejudice to excuse [a] default, even if the error is structural." *Ambrose*, 684 F3d at 649-652 (holding that the "actual prejudice standard" of *Strickland v Washington*, 466 US 668, 687-688 (1984), should be applied in determining whether the petitioners were entitled to habeas corpus relief on their procedurally defaulted fair cross-section claims); see also *Ambrose v Booker (After Remand) (Ambrose II)*, 801 F3d 567, 580 (CA 6, 2015) (opinion of Rogers, J.) (holding that the petitioner "failed to show actual prejudice to excuse his procedural default[] . . . [because there was no] reasonable probability that a different jury would have reached a different result, a probability sufficient to undermine confidence in the outcome[]") (citations omitted); *Garcia-Dorantes v Warren*, 801 F3d 584, 588, 591, 598-599 (CA 6, 2015) (holding, on the other hand, that the petitioner, who had "raised a Sixth Amendment fair-cross-section claim on direct appeal based on the [same] computer glitch[]" that was at issue in *Ambrose I*, 684 F3d 638, and *Ambrose II*, 801 F3d 567, *did* show "actual prejudice to excuse his procedural default[]

. . . [b]ecause there [was] a reasonable probability that a different jury—faced with the same ['hardly overwhelming[]'] evidence presented at [his] trial—would have returned a verdict on one of the alternative charges or acquitted [him] based on self-defense[]") (citations omitted).

- "'Ineffective assistance of counsel can supply the cause that, together with prejudice, would excuse a procedural default.'" *Etherton*, 800 F3d at 748 (citations omitted). However, "actual prejudice to excuse a habeas petitioner's procedural default requires more than the prejudice prong under *Strickland*[*v Washington*, 466 US 668 (1984);] . . . [rather, t]he 'most important aspect to the inquiry is the strength of the case against the defendant' and whether a trial without errors would still have resulted in *conviction*." *Jones (Garry) v Bell*, 801 F3d 556, 563-564 (CA 6, 2015) (quoting *Ambrose I*, 684 F3d at 652, and holding that because there was no "evidence of actual prejudice," the petitioner had "not made the requisite showing to excuse his procedural default, even if *Strickland* were met[]").

- "When a federal court grants a petition under [28 USC 2254] for ineffective assistance of appellate counsel, the petitioner is entitled only to have the opportunity for the state courts to review the merits of the claims that appellate counsel ineffectively failed to raise, consistent with the substantive and procedural rules of the state and the requirements of the United States Constitution[;] . . . '[t]his remedy avoids unnecessarily interfering with [the State's] interest in correcting its own errors.'" *Etherton*, 800 F3d at 749, 751-756 (holding that the habeas petitioner's "appellate counsel was constitutionally ineffective for failing to argue that his confrontation rights were violated[by t]he admission of the content of an anonymous tip" and that, because "there [was] a reasonable probability that Michigan appellate courts would have found plain error [under *People v Carines*, 460 Mich 750, 763-764 (1999),] had the issue been raised[,]" the issue was not "forfeited under Michigan's procedural forfeiture rules[;]" accordingly, the petitioner was "entitled to have Michigan courts consider the issues that, absent the ineffective assistance of appellate counsel, would have been raised on direct appeal[]") (citations omitted).

- The cause and prejudice exception to the procedural default bar is not applicable "if the state court did not rely upon the petitioner's failure to comply with the state procedural rule," but instead reached the merits of the petitioner's claim. *Shepard v Foltz*, 771 F2d 962, 964 (CA 6, 1985).

- **Actual innocence**

  - "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar[] . . . or[] . . . expiration of the statute of limitations[applicable to the filing of a federal habeas petition, 28 USC 2244(d)(1)(D)]." *McQuiggin v Perkins*, 569 US , (2013). "[H]owever, . . . tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he [or she] persuades the district court that, in light of . . . new evidence, no juror, acting reasonably, would have voted to find him [or her] guilty beyond a reasonable doubt[,]' . . . [a]nd . . . 'the timing of the [petition]' is a factor bearing on the 'reliability of th[e] evidence' purporting to show actual innocence." *Id*. at , quoting *Schlup v Delo*, 513 US 298, 329, 332 (1995).

F. Fourth Amendment Exclusionary Rule Claims

"[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his [or her] trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force." *Stone v Powell*, 428 US 465, 494-495 (1976).

The requirement of *Powell*, 428 US at 486, that a prisoner receive "'the opportunity for full and fair consideration'" of his or her claim in state court "means an available avenue for the prisoner to present his [or her] claim to the state courts, not an inquiry into the adequacy of the procedure actually used to resolve that particular claim[,]" and "[i]n the absence of a sham proceeding, there is no need to ask whether the state court conducted an evidentiary hearing or to inquire otherwise into the rigor of the state judiciary's procedures for resolving the claim." *Good v Berghuis*, 729 F3d 636, 639 (CA 6, 2013).

G. Harmless Error

"For reasons of finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."'" *Davis v Ayala*, 576 US ___, ___ (2015), quoting *Brecht v Abrahamson*, 507 US 619, 637 (1993) (internal citation omitted). "Under this test, relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."'" *Ayala*, 576 US at ___, quoting *O'Neal v McAninch*, 513 US 432, 436 (1995). "There must be more than a 'reasonable possibility' that the error was harmful." *Ayala*, 576 US at ___, quoting *Brecht*, 507 US at 637 (internal quotation marks omitted). This standard "reflects the view that a 'State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was *actually prejudiced by the error*.'" *Ayala*, 576 US at ___ (citation omitted; emphasis supplied).

A petitioner seeking federal habeas corpus relief "must meet the *Brecht* standard," but *Brecht* does not "abrogate[] the limitation on federal habeas relief that [28 USC 2254(d)] plainly sets out[;]" rather, "the *Brecht* standard 'subsumes' the requirements that [28 USC 2254(d)] imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*[*v California*, 386 US 18, 24 (1967),] . . . [and] AEDPA . . . 'sets forth a precondition to the grant of habeas relief.'" *Ayala*, 576 US at ___, quoting *Fry v Pliler*, 551 US 112, 119-120 (2007). Therefore, "a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, [507 US at 637,] and if the state court adjudicated his [or her] claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Ayala*, 576 US at ___, citing *Fry*, 551 US at 119-120.

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Constitutional Authority

Michigan Constitutional Authority

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