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1.1 Criminal Sexual Conduct and Michigan Law

In Michigan, criminal sexual conduct is generally punished by the detailed statutory scheme of the Criminal Sexual Conduct Act (CSC Act), MCL 750.520a et seq. The CSC Act prohibits a broad range of sexual misconduct. The CSC Act is gender neutral; the Act penalizes criminal sexual conduct against both male and female victims and by both male and female perpetrators. The CSC Act prohibits criminal sexual conduct against individuals with mental disabilities and those who are physically helpless. The CSC Act also includes marital rape and criminal sexual conduct involving a child, regardless of the child’s age (with graduated punishment levels based on age categories). The CSC Act distinguishes criminal sexual conduct by the type and degree of force or coercion, as well as many different circumstances.

The Michigan Legislature also enacted other sex crimes, such as gross indecency, indecent exposure, sexual delinquency, and sexual intercourse involving AIDS/HIV, etc. However, these crimes do not punish what is normally understood to be sexually assaultive behavior, even though the facts underlying such behavior may involve assaultive conduct. If the underlying facts involve assaultive conduct, that conduct may be punishable under the CSC Act as an assault with intent to commit sexual penetration, MCL 750.520g(1), as an assault with intent to commit CSC-II, MCL 750.520g(2), or, depending upon the circumstances, as criminal sexual conduct under one or more of its four degrees.

1.2 Summary of Benchbook Contents

The benchbook contains comprehensive coverage of criminal sexual conduct and related subject matter. Where no other Michigan Judicial Institute (MJI) publication addresses a topic, a complete discussion of the topic is provided. Where, however, another of the Michigan Judicial Institute’s publications contains a detailed discussion of the same topic, this benchbook summarizes the topic and then refers the reader to the MJI publication where the topic is discussed in detail.

Chapters 2 and 3 of the benchbook discuss offenses involving criminal sexual misconduct.

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1 See Chapter 3 for discussion of Michigan sex crimes outside of the CSC Act.

2 See Michigan Incident Crime Reporting (MICR), Crimes At A Glance, at http://www.michigan.gov/documents/msp/Aa-Introduction_GroupA_B_305552_7.pdf. Sex offense categories reflected in this document include the number of reported first-degree criminal sexual conduct (CSC-I) and third-degree criminal sexual conduct (CSC-III) penetration offenses (by penis/vagina, oral/anal, and object), nonforcible sexual penetration (by blood/affinity and other), forcible second-degree criminal sexual conduct (CSC-II) and fourth-degree criminal sexual conduct (CSC-IV) contact offenses, obscenity, commercialized sex prostitution, assisting/promoting commercialized sex prostitution, and sex offenses (other).
• **Chapter 2** focuses on the offenses found in the CSC Act, and includes the definitions of the terms used in the CSC Act as well as case law interpreting the definitions in actual practice. Chapter 2 also includes a brief discussion of the fines, costs, and crime victim assessment applicable to convictions under the CSC Act. Finally, Chapter 2 touches on lesser included offenses under the CSC Act.

• **Chapter 3** discusses the many other sex-related offenses not found in the CSC Act, from accosting a child for an immoral purpose to vulnerable adult abuse. Chapter 3 includes the statutory language defining each offense as well as case law addressing the offenses, where case law exists. Several of the offenses have likely outlived their utility and case law interpreting those offenses is sparse or nonexistent. Other offenses are relatively new and case law has not yet been published addressing those offenses.

Chapters 4 and 5 contain information specific to defendants involved in cases of criminal sexual conduct or other sex-related offenses.

• **Chapter 4** discusses the defenses an offender may raise to mitigate or eliminate liability for his or her conduct. A few of the defenses discussed in Chapter 4 are consent, duress, mistake of fact, and any applicable statutes of limitation. Defenses involving the offender himself or herself—mental status and voluntary intoxication, for example—are also contained in Chapter 4.

• **Chapter 5** contains information related to an offender’s pretrial release, including bond, interim bond, release on the offender’s own recognizance, and conditions a court may place on an offender’s pretrial release. Also included in Chapter 5 are discussions about notifying the victim of a crime when an offender is arrested and released pending trial. Pretrial discovery is addressed in Chapter 5 as well as personal protection orders specific to sexual assault victims.

Chapters 6, 7, and 8 concern trial matters, including measures that can be taken to make the courtroom a less threatening environment for victims, proper and improper witness testimony, and expert testimony regarding scientific evidence.

• **Chapter 6** discusses topics such as closing the courtroom to the public and assigning separate waiting areas for crime victims. The chapter also addresses the use of audio and video technology to conduct trial proceedings. In addition, the chapter discusses a defendant’s right of self-representation and
special protections that may be employed for victims and witnesses in such cases. For more information on the crime victim at trial, see the Michigan Judicial Institute’s *Crime Victim Rights Benchbook*.

- **Chapter 7** focuses on evidentiary issues at trial. The chapter discusses the Rape Shield Act and the admission of a defendant’s other crimes, wrongs, or acts. Hearsay and testimonial evidence are also addressed in Chapter 7, as are witness competency, corroboration, and unavailable witnesses. For more detailed information on evidentiary issues, see the Michigan Judicial Institute’s *Evidence Benchbook*.

- **Chapter 8** includes discussions of expert testimony by physicians and sexual assault nurse examiners. The chapter also includes brief discussions about the admissibility of scientific evidence such as DNA evidence, bite mark evidence, and hair samples. A comprehensive treatment of these specialized scientific areas is beyond the scope of this benchbook.

Chapter 9 discusses postconviction matters.

- **Chapter 9** contains a comprehensive overview of posttrial matters beginning with postconviction bail and the sentencing hearing and continuing through to parole and electronic monitoring and setting aside a conviction. The chapter discusses crime victims’ statements, restitution, probation, concurrent and consecutive sentencing, deferred adjudication, and delayed sentencing. For a comprehensive discussion of these topics, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*.

Chapter 10 focuses solely on the Sex Offenders Registration Act (SORA).

- **Chapter 10** contains a detailed and comprehensive discussion of Michigan’s Sex Offenders Registration Act. Chapter 10 discusses in depth the SORA’s registration, verification, and notification requirements. Also addressed in detail are the law enforcement’s database of offenders and the public website database of offenders. Offenses subject to registration under the SORA are addressed, as are the penalties for an offender’s failure to comply with the SORA.

### 1.3 Sexual Assault Victim’s Access to Justice Act (SAVAJA)

The Sexual Assault Victim’s Access to Justice Act (SAVAJA), MCL 752.951 *et seq.*, requires the investigating law enforcement agency to provide
certain information to a sexual assault victim. For purposes of the SAVAJA, sexual assault victim is “an individual subjected to a sexual assault offense[4] and, for the purposes of making communications and receiving notices under [the SAVAJA], a person designated by the sexual assault victim under [MCL 752.954].” MCL 752.952(f).

Note: The SAVAJA “does not create a cause of action for monetary damages against the state, a county, a municipality, or any of their agencies, instrumentalities, or employees.” MCL 752.957.

The SAVAJA requires “[w]ithin 24 hours after the initial contact between a sexual assault victim and the investigating law enforcement agency, that investigating law enforcement agency shall give the sexual assault victim a written copy of, or access to, the following information:

(a) Contact information for a local community-based sexual assault services program, if available.

(b) Notice that he or she can have a sexual assault evidence kit[6] administered and that he or she cannot be billed for this examination as provided in . . . MCL 18.355a.

(c) Notice that he or she may choose to have a sexual assault evidence kit administered without being required to participate in the criminal justice system or cooperate with law enforcement as provided in . . . MCL 18.355a.

(d) Notice of the right to request information under [MCL 752.955] and [MCL 752.956].[7]

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3 MCL 752.952(b) defines the term investigating law enforcement agency as “the local, county, or state law enforcement agency with the primary responsibility for investigating an alleged sexual assault offense case and includes the employees of that agency[, and] . . . includes a law enforcement agency of a community college or university if that law enforcement agency of a community college or university is responsible for collecting sexual assault evidence. ‘Law enforcement agency’ means the local, county, or state law enforcement agency and includes the employees of that agency[, and] . . . includes a law enforcement agency of a community college or university.” MCL 752.952(c).

4 “Sexual assault offense’ means a violation or attempted violation of . . . MCL 750.520b to [MCL 750.520g.” MCL 752.952(e).

5 MCL 752.954(3) provides that “[a] sexual assault victim may designate an alternative person to receive the information requested by the sexual assault victim, and the law enforcement agency shall then direct any information to that designated person.”

6 “Sexual assault evidence kit’ means that term as defined in . . . MCL 333.21527.” MCL 752.952(d).

7 MCL 752.955 and MCL 752.956 require the investigating law enforcement agency to provide to the sexual assault victim, at the victim’s request, certain information regarding the status of the case and DNA testing results, “if available and if the disclosure does not impede or compromise an ongoing investigation[.]”
(e) Notice of the right to request a personal protection order as provided in . . . MCL 600.2950 [or MCL] 600.2950a. MCL 752.953(1).

A. Manner of Providing Requested Information

“When a sexual assault victim requests information from an investigating law enforcement officer under [MCL 752.955] or [MCL 752.956], the law enforcement agency shall respond by telephone, in writing mailed to the sexual assault victim, or by electronic mail, as specified by the sexual assault victim. If the victim does not specify, the law enforcement agency may respond using any of the methods described in this subsection.” MCL 752.954(1). “A sexual assault victim may designate an alternative person to receive the information requested by the sexual assault victim, and the law enforcement agency shall then direct any information to that designated person.” MCL 752.954(3).

Note: The law enforcement agency is not required to “communicate with the sexual assault victim regarding information [provided under MCL 752.954][,] if he or she does not specifically make a request to the law enforcement agency.” MCL 752.954(2).

In order to receive information under MCL 752.954, “the sexual assault victim shall provide the law enforcement agency with the name, address, telephone number, and electronic mail address of the person to whom the information should be provided.” MCL 752.954(4). The law enforcement agency may also “require [the] sexual assault victim’s request for information under [MCL 752.954] to be in writing.” MCL 752.954(5).

“If new or updated information becomes available after a response is given to a sexual assault victim’s request, the law enforcement agency may, but is not required to, provide the new or updated information to the sexual assault victim in the absence of a new request from him or her.” MCL 752.954(1). “If a sexual assault victim has submitted a written request for information, subsequent requests for updated information are not required to be in writing.” MCL 752.954(5).

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8 For additional information on personal protection orders under MCL 600.2950 and MCL 600.2950a, see the Michigan Judicial Institute’s Domestic Violence Benchbook, Chapter 5.

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

10 See Section 1.3(B) for information requested under MCL 752.955.

11 See Section 1.3(C) for information requested under MCL 752.956.
B. Providing Requested Information Regarding Status of Case

“Upon request by a sexual assault victim to the investigating law enforcement agency, the sexual assault victim shall be provided with the following information if available and if the disclosure does not impede or compromise an ongoing investigation:

(a) The contact information for the officer investigating the case.

(b) The current status of the case.

(c) Whether the case has been submitted to the office of the prosecuting attorney for review.

(d) If the case has been closed and the documented reason for closure.” MCL 752.955.

C. Providing Requested Information Regarding DNA Testing Results

“Upon request by a sexual assault victim to the investigating law enforcement agency for information about DNA testing results, the sexual assault victim shall be provided with the following information if available and if the disclosure does not impede or compromise an ongoing investigation:

(a) When the sexual assault evidence kit was submitted to the forensic laboratory.[12]

(b) Whether a DNA profile of a suspect was obtained from the processing of evidence in the sexual assault case.

(c) Whether a DNA profile of a suspect has been entered into any data bank designed or intended to be used for the retention or comparison of case evidence.

(d) Whether there is a match between the DNA profile of a suspect obtained in the sexual assault case to any DNA profile contained in any data bank designed or intended to be used for the retention or comparison of case evidence.”13 MCL 752.956(1).

12 MCL 752.952(a) defines forensic laboratory as “a DNA laboratory that has received formal recognition that it meets or exceeds a list of standards, including the FBI director’s quality assurance standards, to perform specific tests, established by a nonprofit professional association of persons actively involved in forensic science that is nationally recognized within the forensic community in accordance with the provisions of the federal DNA identification act, 42 USC 14132, or subsequent laws.”
1.4 Statewide Agencies That Address Sexual Assault

There is broad consensus that the most effective response to sexual violence, like domestic violence, is a coordinated community response, in which the court’s efforts are part of a continuum of services offered by both the justice system and social services communities. Courts best function as part of a coordinated community response when they are aware of the variety of specialized services provided by sexual violence agencies. This section details information about such agencies at the state and local levels.

The Michigan Domestic Violence Prevention and Treatment Board, the Michigan Coalition Against Domestic and Sexual Violence, and the Michigan Resource Center on Domestic and Sexual Violence are organizations operating at the statewide level to address the prevention and treatment of sexual violence from the perspective of victims. These agencies, although they do not provide direct assistance to victims subjected to sexual violence, provide local referrals, information about sexual violence, training resources, and technical assistance to courts. However, these agencies are not authorized to provide such assistance to sex offenders. See Section 9.17 for a list of programs for sex offenders.

A. Michigan Domestic Violence Prevention and Treatment Board

“The Michigan Domestic Violence Prevention and Treatment Board (MDVPTB) was established in 1978 by state legislation that created a Governor-appointed Board responsible for focusing state activity on domestic violence. The Board offices are administratively housed within the Michigan Department of Health and Human Services... The Board develops and recommends policy; develops and provides technical assistance and training to the criminal justice, child welfare, etc; and administers state and federal funding for domestic and sexual violence services.”

For more information, see http://www.michigan.gov/mdhhs/0,5885,7-339-71548_7261---,00.html.

• Contact information:

13 MCL 752.956(3) requires “[n]o later than September 30, 2015, the Michigan domestic and sexual violence prevention and treatment board, in consultation with the department of state police, [to] develop an informational handout for sexual assault victims that explains the meaning of possible forensic testing results", and that "the informational handout . . . be made available electronically to Michigan law enforcement agencies." Once available, "a sexual assault victim [who] is provided with information about forensic testing results . . . shall also be provided with a copy of, or access to, the information handout described in MCL 752.956(3)].” MCL 752.956(2).

14 Domestic violence may involve sexual violence or criminal sexual misconduct. The MDVPTB also assists victims of nondomestic violence.
B. Michigan Coalition to End Domestic and Sexual Violence

“[The Michigan Coalition to End Domestic and Sexual Violence] MCEDSV is a statewide membership organization whose members represent a network of over 70 domestic and sexual violence programs and over 200 allied organizations and individuals. We have provided leadership as the statewide voice for survivors of domestic and sexual violence and the programs that serve them since 1978.” www.mcedsv.org.

“MCEDSV is Michigan's catalyst for creating empowered and transformed individuals, communities, and societies committed to building a lasting legacy of equality, peace and social justice, where domestic and sexual violence no longer exists.” www.mcedsv.org.

For more information, see www.mcedsv.org.

• Contact information:

3893 Okemos Rd., Suite B2,
Okemos, MI 48864
Phone: (517) 347-7000
Fax: (517) 347-1377
TTY: (517) 381-8470

C. Michigan Resource Center on Domestic and Sexual Violence

“The Michigan Resource Center on Domestic and Sexual Violence enhances the capacity of individuals and organizations to prevent violence against women and strengthen service delivery for survivors. This unique collection of books, videos, journals and other media promotes awareness and increases accessibility of educational information and resources for the state of Michigan. These materials are useful for training, counseling, education, research, nonprofit business management, program development and activism.” www.resourcecenter.info.

For more information, see www.resourcecenter.info.
1.5 Community-Based Efforts That Address Sexual Assault

Michigan sexual assault service agencies provide victims of sexual assault with help and support in surviving sexual assault. They typically base their approach on a philosophy of self-determination and empowerment, providing information and advocacy, but also encouraging sexual assault victims to make their own decisions and enhance their own support systems to help them get past the sexual assault. Empowerment philosophy introduces to a victim of sexual assault that healing occurs when he or she realizes that they can decide what is best for themselves, that they are not alone, and that they are not to blame for the sexual assault. It further assumes that healing can happen when sexual assault victims reach out and provide support to other sexual assault victims. Empowerment philosophy intends to counteract the helplessness and immobility that often accompanies a life crisis and to put the possibility and authority for ongoing change into the hands of the sexual assault victim. By encouraging a sexual assault victim to look inward and assess his or her own needs and the resources possessed to fulfill them, a sense of autonomy can be restored.

Sexual assault service agencies provide shelter, as well as many other forms of assistance to victims of sexual assaults. The types of services provided are not uniform statewide. However, some common services are as follows:

- 24-hour telephone crisis lines.
- Individual and group counseling.
- Transportation assistance.
- Safety planning.
- Childcare services.
- Information and education about sexual violence.
- Assistance in finding temporary or permanent housing, if needed.
- Assistance to victim’s family members and friends.
- Assistance and advocacy with social service agencies.
- Assistance and advocacy with medical and other health care.

15 For a list of resources and shelters, see http://www.mceds.org/help/find-help-in-michigan.html.
• Assistance and advocacy with the legal system.
• Assistance with personal protection orders

1.6 Additional Sexual Assault Resource

Legal Momentum and the National Judicial Education Program (NJEP) developed the publication Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case from a nationwide survey of judges who participated in NJEP's Understanding Sexual Violence programs. The publication covers twenty-five points ranging from basic information about the prevalence and impact of sexual assault to pro se defendants seeking to cross-examine their alleged victims.

For additional information on NJEP and Legal Momentum, see www.legalmomentum.org/what-we-do/courts-justice-system-and-women.

Chapter 2: The Criminal Sexual Conduct Act

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2.1 Introduction to the Criminal Sexual Conduct (CSC) Act

The purpose of the CSC Act is “to codify, consolidate, define, and prescribe punishment for a number of sexually assaultive crimes under one heading.” People v Cash, 419 Mich 230, 234 n 1 (1984). The Act contains six substantive criminal offenses, as well as procedural and evidentiary laws.

A. Criminal Sexual Conduct Offenses

Regarding the six offenses, there are four “degrees” of criminal sexual conduct and two types of assault with intent to commit criminal sexual conduct:

1. First-Degree Criminal Sexual Conduct (CSC-I)

First-degree criminal sexual conduct (CSC-I), MCL 750.520b, is a felony offense subject to different penalties depending on the circumstances under which the criminal sexual conduct occurred.

- A violation committed by an individual age 17 or older against an individual under the age of 13 is punishable by life imprisonment or imprisonment for any term of years, but not less than 25 years. MCL 750.520b(2)(b).

- A violation committed by an individual age 18 or older against an individual under the age of 13 when the perpetrator has a prior conviction for violating MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g (or a violation of the law of the United States, or of another state or political subdivision, substantially corresponding to MCL
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2. Second-Degree Criminal Sexual Conduct (CSC-II)

Second-degree criminal sexual conduct (CSC-II), MCL 750.520c, is a felony offense punishable by imprisonment for not more than 15 years. MCL 750.520c(2)(a). CSC-II is a probationable offense for adult offenders. MCL 771.1(1).

3. Third-Degree Criminal Sexual Conduct (CSC-III)

Third-degree criminal sexual conduct (CSC-III), MCL 750.520d, is a felony offense punishable by imprisonment for not more than 15 years. MCL 750.520d(2). CSC-III is a nonprobationable offense for adult offenders. MCL 771.1(1).

4. Fourth-Degree Criminal Sexual Conduct (CSC-IV)

Fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e, is a misdemeanor offense punishable by

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5 Note that MCL 750.520b(2)(c), which previously prescribed a mandatory sentence of life imprisonment without the possibility of parole for certain repeat CSC offenders 17 years of age or older against a victim less than 13 years of age, has been amended by 2014 PA 23, effective March 4, 2014, to apply only to offenders 18 years of age or older. A mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon a nonhomicide offender who was under the age of 18 at the time of the sentencing offense. Graham v Florida, 560 US 48, 75 (2010). For additional discussion of Graham v Florida, 560 US 48 (2010), see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 19.

Additionally, “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).

6 See Section 2.4(A) for a detailed discussion of CSC-II.

7 See Section 2.3(B) for a detailed discussion of CSC-III.

8 See Section 2.4(B) for a detailed discussion of CSC-IV.
imprisonment for not more than 2 years, a fine of not more than $500, or both. MCL 750.520e(2). CSC-IV is a **probationable offense** for adult offenders. MCL 771.1(1).

5. **Assault With Intent To Commit CSC Involving Penetration**

Assault with intent to commit CSC involving penetration, MCL 750.520g(1), is a **felony offense** punishable by imprisonment for not more than 10 years. Assault with intent to commit CSC involving penetration is a **probationable offense** for adult offenders. MCL 771.1(1).

6. **Assault With Intent To Commit CSC—Second Degree**

Assault with intent to commit CSC—second degree, MCL 750.520g(2), is a **felony offense** punishable by imprisonment for not more than 5 years. Assault with intent to commit CSC-II is a **probationable offense** for adult offenders. MCL 771.1(1).

B. **Procedural Considerations**

The “degrees” differentiate the elements of the various CSC crimes according to the presence or absence of certain statutory circumstances. The degrees do not refer to a sentence enhancement scheme based on prior convictions. CSC offenders who have previous convictions may be subject to sentence enhancements under the CSC Act itself, MCL 750.520f (second or subsequent offenses), and under the habitual offender provisions in the Code of Criminal Procedure, MCL 769.10 et seq. (subsequent felony offenses by a person convicted of one or more prior felonies).11

Procedurally, the CSC Act contains rules and provisions governing the following:

- **Sentence enhancements for subsequent offenders.** MCL 750.520f establishes a mandatory minimum sentence of 5 years of imprisonment when a defendant is convicted of CSC-I, CSC-II, or CSC-III, and has a prior conviction of CSC-I, CSC-II, or CSC-III under the Michigan Penal Code or any similar statute of another jurisdiction (federal or state) for a criminal sexual offense including rape, carnal

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9 See Section 2.5(A) for a detailed discussion of Assault With Intent to Commit CSC Involving Penetration.
10 See Section 2.5(B) for a detailed discussion of Assault With Intent to Commit CSC-II.
11 See People v Wilcox (Larry II), 486 Mich 60 (2010), where the defendant was charged both with being a repeat offender under MCL 750.520f and with being a habitual offender under MCL 769.10.
knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense.

- **Corroboration of victim testimony.** MCL 750.520h. A victim’s testimony need not be corroborated in any CSC prosecution.

- **Victim resistance.** MCL 750.520i. A victim of criminal sexual conduct need not resist the actor.

- **Admissibility of a victim’s past sexual conduct.** MCL 750.520j. Evidence of a victim’s sexual conduct is generally inadmissible in all CSC prosecutions, unless, and then only to the extent that, (1) the evidence is material to a fact at issue; (2) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (3) the evidence involves either the victim’s past sexual conduct with the actor or specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. See also MRE 404(a)(3).

- **Suppression of a victim’s name and of details of the alleged offense.** MCL 750.520k. In all CSC prosecutions, if the victim, defendant, or counsel requests, the name of the victim, the name of the actor, and the details of the alleged offense must be suppressed by the magistrate until arraignment, dismissal of the charge, or the case is otherwise concluded—whichever occurs first.¹²

- **Abolition of spousal immunity.** MCL 750.520l. A person may be convicted of any CSC crime, even though the victim is the person’s legal spouse. “However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16, mentally incapable, or mentally incapacitated.” Id.

- **DNA identification profiling, chemical testing, and blood and saliva samples.** MCL 750.520m. A person must provide a blood, saliva, or tissue sample for chemical testing for DNA identification profiling (or a determination of the sample’s genetic markers) if the person is “arrested for committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult[,]” MCL 750.520m(1)(a), or “convicted of, or found responsible for, a felony or attempted felony, or . . . [certain] misdemeanors” listed in MCL 750.520m(1)(b) (including substantially similar local ordinances).

¹² MCL 750.520k was found unconstitutional by WXYZ, Inc v Hand, 658 F2d 420 (CA 6, 1981). However, no change has been made to the statutory language in MCL 750.520k.
• **Lifetime electronic monitoring.** MCL 750.520n. “[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.” 14

  *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.” 15

  *People v Johnson (Todd)*, 298 Mich App 128, 136 (2012) (“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”).

**C. Nature of the Sexual Conduct and the Accompanying Circumstances**

The CSC Act analyzes two components of sexual assaults: the nature of the sexual conduct itself and the accompanying circumstances.

**1. Nature of the Sexual Conduct**

The CSC Act distinguishes between assaults that affect or are intended to affect body cavities and those that affect or are intended to affect body surfaces. *People v Bristol*, 115 Mich App 236, 238 (1982). Sexual conduct affecting the body cavities is known as a *penetration* offense (CSC-I and CSC-III), and sexual conduct affecting body surfaces is known as a *contact* offense (CSC-II and CSC-IV). See Section 2.3 for detailed discussion of

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13 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.”

14 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.” *Cole (David)*, supra at 337.
penetration offenses and Section 2.4 for detailed discussion of contact offenses.

2. Circumstances

Listed in each of the four degrees of CSC offenses are various circumstances. See MCL 750.520b to MCL 750.520e. To be charged with or convicted of CSC-I, CSC-II, CSC-III, or CSC-IV, a sexual penetration or contact must be accompanied by at least one statutory circumstance. These circumstances are detailed in the statutory language describing each offense.

D. Aggravating Circumstances, Aggravating Factors, and the Elevation Process

Michigan courts commonly refer to the Act’s circumstances as aggravating circumstances or aggravating factors. These phrases are typically used in one of two ways. One way is to refer to them as an “elevation process.” A sexual penetration or contact may be elevated from CSC-III to CSC-I, and from CSC-IV to CSC-II, respectively, when the penetration or contact involves one or more aggravating circumstances in CSC-I or CSC-II. Specific examples are the “force or coercion” and “personal injury” elements: when the aggravating circumstance of personal injury exists with force or coercion, a sexual penetration or contact may be lawfully charged as CSC-I or CSC-II, respectively, whereas a sexual penetration or contact with force or coercion alone may only be lawfully charged as CSC-III or CSC-IV, respectively.

15 In Brantley, 296 Mich App at 556-557, the Court of Appeals rejected the defendant’s contention that, under MCL 750.520n(1) (requiring lifetime electronic monitoring for a defendant “convicted under [MCL 750.]520b or [MCL 750.]520c for criminal sexual conduct committed by an individual 17 years of age or older against an individual less than 13 years of age”) and MCL 750.520b(2)(d) (requiring that a defendant convicted of CSC-I be “sentence[d] . . . to lifetime electronic monitoring under [MCL 750.]520n”), a person convicted of either CSC-I or CSC-II could be sentenced to lifetime electronic monitoring only if he or she was at least 17 years of age and the victim was less than 13 years of age. The Court, applying the “last antecedent rule,” concluded “that the Legislature intended the modifying phrase ‘for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age’ [in MCL 750.520n(1)] to apply to convictions of second-degree criminal sexual conduct (CSC-[II] under MCL 750.520c only, and not to convictions of CSC-[II] under MCL 750.520b.” Brantley, supra at 557.

See also People v King (Raymond), 297 Mich App 465, 468 (2012) (indicating disagreement with Brantley, 296 Mich App at 556-557, and requesting that a conflict panel be convened under MCR 7.215(j) to determine whether MCL 750.520n(1) conflicts with MCL 750.520b(2)(d) and whether, when read in pari materia, MCL 750.520n(1) and MCL 750.520b(2)(d) require lifetime electronic monitoring for defendants convicted of either CSC-I or CSC-II only when the defendant is at least 17 years of age and the victim is less than 13 years of age. The Court of Appeals subsequently “order[ed] that a special panel shall not be convened . . . to resolve the conflict between [King (Raymond), supra,] and [Brantley, supra].” People v King (Raymond), unpublished order of the Court of Appeals, entered August 20, 2012 (Docket No. 301793).

Note: When referring to the CSC Act’s elements, this benchbook will only use the term circumstances, as opposed to aggravating circumstances or aggravating factors—except when directly quoting case opinions or other sources that use those specific terms.

E. Other Remedies for Victims of Sexual Assault

Although criminal prosecution may succeed in holding offenders accountable under the criminal justice system, appropriately penalize them for their unlawful conduct, and result in the award of restitution to the victim(s) of an offender’s criminal conduct, a victim may wish to pursue a civil action against the offender with the possibility of better compensating him or her for the immediate and long-term physical and psychological injuries caused by the offender’s conduct. For the period of limitations on commencement of an action to recover damages sustained because of criminal sexual conduct, see MCL 600.5805(6) (in general) and MCL 600.5851b (minor victim). MCL 600.5805(6) and MCL 600.5851b do not require “that a criminal prosecution or other proceeding have been brought as a result of the conduct or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication.” MCL 600.5805(6); MCL 600.5851b(2). For additional discussion on civil actions filed by crime victims, including victims of criminal sexual conduct, see the Michigan Judicial Institute’s Crime Victim Rights Benchbook, Chapter 10.

Administrative remedies may also be available to victims through the Crime Victim Services Commission (CVSC). For additional discussion on administrative remedies available through the CVSC, see the Michigan Judicial Institute’s Crime Victim Rights Benchbook, Chapter 9.

2.2 Calculation of Age

“[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

17 For purposes of MCL 600.5805 and MCL 600.5851b, criminal sexual conduct is “conduct prohibited under . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, and [MCL] 750.520g.” MCL 600.5805(16)(b); MCL 600.5851b(5)(b).
and killed the victim on the day before the defendant’s eighteenth birthday, “was not yet eighteen years of age when the shooting occurred[1]”) (emphasis supplied; citations omitted).

2.3 Penetration Offenses: CSC-I and CSC-III

A. Criminal Sexual Conduct—First Degree

CSC-I is not only the most serious penetration offense, it is also the most serious CSC offense. It involves sexual penetration coupled with any one of the circumstances described in the statute, MCL 750.520b.

1. Statutory Authority

MCL 750.520b provides:

“(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age. 18

(b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related to the victim by blood or affinity to the fourth degree.

(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

18 “[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[1]”) (emphasis supplied; citations omitted).

(iv) The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled.

(v) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(vi) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual penetration occurs during the period of that other person's residency. As used in this subparagraph, 'child care organization', 'foster family home', and 'foster family group home' mean those terms as defined in . . . MCL 722.111.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (f).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

   (i) When the actor overcomes the victim through the actual application of physical force or physical violence.

   (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

   (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

   (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

   (v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.”

2. **Intent**


3. **No Temporal Requirement**

“The plain language of [MCL 750.520d(1)(e)(i)-(ii)] does not contain any temporal requirement regarding the timing of the sexual penetration[,] . . . [r]ather, it refers to the occupation of the actor.” *People v Lewis*, 302 Mich App 338, 345-346 (2013). Regardless of when the act occurred, “if the actor’s occupation as a substitute teacher [or contract service provider] allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct.” *Id.* at 341, 347 (holding that prohibited conduct occurring during summer break was punishable). The Court’s holding in *Lewis*, supra, could arguably extend to MCL 750.520b(1)(b)(iv)-(v), which contain substantially similar provisions as found in MCL 750.520d(1)(e)(i)-(ii), except that they apply to situations involving younger victims.

**Note:** MCL 750.520d(1)(e)(i)-(ii), the specific provisions discussed in *Lewis*, supra, also contemplate sexual penetration by individuals holding various other occupations. See also MCL 750.520b(1)(b)(iv)-(v). Although the defendant in *Lewis*, supra, did not fit into any of these occupational categories, the holding presumably applies to those occupations as well.

4. **Sufficiency of Evidence**

“[A] complainant’s testimony regarding a defendant’s commission of sexual acts is sufficient evidence to support a conviction for CSC I: ‘[T]he question is not whether there was conflicting evidence, but rather whether there was evidence that the jury, sitting as the trier of fact, could choose to believe
and, if it did so believe that evidence, that the evidence would justify convicting defendant.” 20 People v Bailey (Ryan), 310 Mich App 703, 714 (2015) (finding that the defendant’s convictions of four counts of CSC-I were supported by sufficient evidence where “[e]ach complainant testified that [the] defendant penetrated her vagina with his fingers, and the jury was free to believe their testimony despite the delay in reporting [the] defendant’s conduct[, and] . . . [e]ach victim offered an explanation for why they did not report [the] defendant’s conduct when it occurred[]”), quoting People v Smith (Jeffrey), 205 Mich App 69, 71 (1994).

“In criminal sexual conduct cases, a victim’s testimony may be sufficient to support a defendant’s conviction and need not be corroborated.” People v Solloway, 316 Mich App 174, 181 (2016) (finding that the defendant’s conviction of CSC-I was supported by sufficient evidence where the victim “testified in great detail as to the sexual assault[,] [the victim] testified that he woke up to [the] defendant on top of him, ‘shaking up and down[,]’ . . . that [the] defendant then flipped him over and ‘put his [penis] in [the victim’s] butt[,]’ and [the victim] explained that he could feel [the] defendant’s [penis] in his body[]”).

5. Great Weight of the Evidence

“A verdict is against the great weight of the evidence and a new trial should be granted when ‘the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.’” People v Solloway, 316 Mich App 174, 182-183 (2016), quoting People v Brantley, 296 Mich App 546, 553 (2012). “Generally, a verdict may only be vacated when the verdict is not reasonably supported by the evidence, but rather it ‘is more likely attributable to factors outside the record, such as passion, prejudice, sympathy, or other extraneous considerations.’” Solloway, 316 Mich App at 183, quoting People v Plummer, 229 Mich App 293, 306 (1998). In Solloway, the Court found that “[t]he verdict was not against the great weight of the evidence[]” when “[the] defendant failed to establish that the evidence ‘preponderate[d] heavily’ against the trial court’s verdict[,]” and “[e]ach of the trial court’s findings [were] supported by the evidence.” Solloway, 316 Mich App at 183.

20 “[T]he prosecutor is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury “in the face of whatever contradictory evidence the defendant may provide.”” Bailey (Ryan), 310 Mich App at 713 (citations omitted). “Further, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”” Bailey (Ryan), 310 Mich App at 713 (citations omitted).
“The trial court found that [the victim] was less than 13 years old when [the] defendant entered his bedroom at night, got on top of him, and eventually inserted his penis into [the victim’s] anal opening[,] . . . [the victim’s] testimony of [the sexual assault] was ‘very clear and very credible[,]’ . . . [the sexual assault nurse examiner (SANE) who examined the victim at the hospital provided] testimony of the victim’s injuries [that] was consistent with the victim’s account of the sexual assault[, and . . . the trial court noted [the SANE’s] testimony that the victim’s injuries, as a whole, were ‘inconsistent with difficult bowel movements’ as [the] defendant attempted to claim.” *Id.*

“Questions regarding credibility are not sufficient grounds for relief *unless* the ‘testimony contradicts indisputable facts or laws,’ the ‘testimony is patently incredible or defies physical realities,’ the ‘testimony is material and . . . so inherently implausible that it could not be believed by a reasonable juror,’ or the ‘testimony has been seriously impeached and the case is marked by uncertainties and discrepancies.’” *People v Solloway*, 316 Mich App 174, 183 (2016) (noting that “witness credibility [in general] is a question for the factfinder, and this Court does not interfere with the factfinder’s role[]”), quoting *People v Lemmon*, 456 Mich 625, 643-644 (1998).

6. **Statute of Limitations**

A defendant may be indicted for CSC-I at any time.21 *MCL 767.24(1)(a).*

7. **Imprisonment**

“Criminal sexual conduct in the first degree is a felony punishable as follows:

(a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.

(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age22 by imprisonment for life or any term of years, but not less than 25 years.23

(c) For a violation that is committed by an individual 18 years of age or older against an individual 17 years of age or older against an

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21 Within a certain period of time, a victim of criminal sexual conduct may file a civil action separate from the CSC-I indictment to recover damages sustained because of the criminal sexual conduct. See *MCL 600.5805(6)* and *MCL 600.5851b.*
individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.” MCL 750.520b(2).24

The phrase for life or for any term of years requires the imposition of a fixed sentence of life imprisonment or an indeterminate sentence in state prison; incarceration in the county jail is not authorized, even if the imprisonment imposed is one year or less. People v Austin, 191 Mich App 468, 469-470 (1991) (armed robbery is “punishable by imprisonment in state prison for life or any term of years” [emphasis added]; because armed robbery is not a probationable offense, the offender must receive a prison sentence). The phrase for life or for any term of years does not establish a mandatory minimum sentence. People v Luke, 115 Mich App 223, 224-225 (1982), aff’d 417 Mich 430 (1983) (defendant’s sentence of six months to four years was affirmed).25

MCL 750.520b(2) sets out the minimum statutorily authorized punishment a defendant is to serve for a CSC-I offense, and a “trial court is without authority to impose[]” a punishment against the defendant that is less than the statutorily required

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22 “[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).

23 This “‘mandatory minimum’ sentence . . . is a flat 25-year term for purposes of MCL 769.34(2)(a)(ii) (governing sentence departures).” See People v Payne (Jarrud), 304 Mich App 667, 672 (2014). See Section 9.4(A) for more information.

24 Note that MCL 750.520b(2)(c), which previously prescribed a mandatory sentence of life imprisonment without the possibility of parole for certain repeat CSC offenders 17 years of age or older against a victim less than 13 years of age, has been amended by 2014 PA 23, effective March 4, 2014, to apply only to offenders 18 years of age or older. A mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon a nonhomicide offender who was under the age of 18 at the time of the sentencing offense. Graham v Florida, 560 US 48, 75 (2010). For additional discussion of Graham v Florida, 560 US 48 (2010), see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 19.

minimum. See *People v Kreiner*, 497 Mich 1024, 1024-1025 (2015) (finding error and remanding to the Court of Appeals to address the appropriate remedy where the trial court “ordered the prosecutor to re-offer [a] plea[]’” agreement offering a ten-year minimum sentence in exchange for a guilty plea to CSC-I because the trial court was “without authority to impose” that sentence).

For information on scoring CSC-I offenses under the Michigan’s statutory sentencing guidelines, see Section 9.4(B).

8. Mandatory Minimum Sentence for Certain CSC–I Offenders Not Cruel and/or Unusual Punishment

“[T]he 25-year mandatory minimum [sentence] prescribed by MCL 750.520b(2)(b) [for first-degree criminal sexual conduct committed by a defendant who is 17 years of age or older against a victim who is less than 13 years of age] is [not] cruel or unusual when applied to a [17-year-old] juvenile offender[,]” because the mandatory sentence “provides ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ for juvenile offenders.” *People v Payne (Jarrud)*, 304 Mich App 667, 675-676 (2014)26 (quoting *Graham v Florida*, 560 US 48, 75 (2010), and noting that “[a]lthough a minimum sentence of 25 years is unquestionably substantial, it is simply not comparable to the sentences of death and life without parole found unconstitutional when applied to juveniles in *Miller* [v *Alabama*, 567 US 460 (2012)], *Graham*, [560 US 48], and *Roper* [v *Simmons*, 543 US 551 (2005)]”).27

9. Double Jeopardy

“Because CSC-I and CSC-II each require proof of a fact that the other does not, [a] defendant’s convictions of both on the same facts does not violate double jeopardy.” *People v Duenaz*, 306 Mich App 85, 115 (2014). “‘Sexual penetration’ is an element of

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26 The *Payne (Jarrud)* Court additionally rejected as irrelevant the defendant’s assertion that “although his chronological age was 17½ years at the time of the offense, he lacked the mental maturity of a 17½-year-old because of his developmental delays, intellectual difficulties, and premature birth.” *Payne (Jarrud)*, 304 Mich App at 676 n 3 (quoting *United States v Marshall*, 736 F3d 492, 498 (CA 6, 2013), and noting that “[u]nder the [United States] Supreme Court’s jurisprudence concerning juveniles and the Eighth Amendment, the only type of ‘age’ that matters is chronological age[]”).

27 Note that MCL 750.520b(2)(c), which previously prescribed a mandatory sentence of life imprisonment without the possibility of parole for certain repeat CSC offenders 17 years of age or older against a victim less than 13 years of age, has been amended by 2014 PA 23, effective March 4, 2014, to apply only to offenders 18 years of age or older. MCL 750.520b(2)(b), which does not impose a life-without-parole sentence, has not been amended.
CSC-I but not CSC-II[,]” while “CSC[-]II requires that ‘sexual contact’ be done for a ‘sexual purpose,’ an element not included in CSC[-]I.” Id. at 107.

Convicting and sentencing a defendant for two counts of CSC-I and two counts of CSC-III where there were only two acts of penetration did not violate the multiple punishments strand of the Double Jeopardy Clause. People v Garland (Edward), 286 Mich App 1, 5-6 (2009). In Garland, supra at 5, “the prosecution alleged two acts of sexual penetration: sexual intercourse and cunnilingus. For each act, [the] defendant was charged, tried, and convicted of two criminal offenses: CSC[-]I on the theory that a sexual penetration had occurred during a home invasion [], and CSC[-]III on the theory that the victim was physically helpless[].” One element required to prove CSC-I, but not required to prove CSC-III, is that the sexual penetration occurred “under circumstances involving the commission of any other felony.” MCL 750.520b(1)(c). One element required to prove CSC-III, but not required to prove CSC-I, is that the sexual penetration was accompanied by the actor knowing or having “reason to know that the victim [was] . . . physically helpless.” MCL 750.520d(1)(c). “[U]nder the Blockburger test, because each offense contains an element that the other does not, CSC[-]I and CSC[-]III are separate offenses for which [the] defendant was properly convicted and sentenced . . . .” Garland, supra at 6.

When the defendant’s convictions of CSC-II were vacated (he was charged with CSC-I, and the jury convicted him of the cognate lesser offense of CSC-II),28 double jeopardy principles did not bar the prosecution from charging the defendant with, and retrying the defendant for, CSC-II, where the defendant successfully appealed his conviction and the reversal was not based on insufficient evidence. People v Nyx (Maurice), 480 Mich 1204 (2007) (Corrigan, J., concurring).

10. Probation

CSC-I is a nonprobationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute’s Juvenile Justice Benchbook.

11. Fines, Costs, and Assessments

See Section 2.7.

12. Lifetime Electronic Monitoring\textsuperscript{29}

a. Mandatory Lifetime Electronic Monitoring for Violation of MCL 750.520b

In addition to any other penalty imposed for violating MCL 750.520b, the court must sentence the offender to lifetime electronic monitoring.\textsuperscript{30} MCL 750.520b(2)(d); MCL 750.520n(1); see also People v Brantley, 296 Mich App 546, 558-559 (2012). Because under MCL 750.520n(1), lifetime electronic monitoring is “part of the sentence itself for CSC-I[,]” a “sentence [that does] not include electronic monitoring[] . . . [is] properly considered invalid[,]” People v Comer (Comer I), 312 Mich App 538, 544 (2015), aff’d in part and rev’d in part by 500 Mich 278, 292, 296 (2017) (Comer II).\textsuperscript{31}

“[A] person convicted under [MCL 750.520b], regardless of the ages [of the parties] involved, is to be sentenced to lifetime electronic monitoring[.]” People v Johnson (Todd), 298 Mich App 128, 136 (2012) (“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”).\textsuperscript{32} Note that “a person convicted under [MCL 750.520c] is to be sentenced to lifetime [electronic] monitoring only if the defendant was 17 or older at the time of the crime and the victim was less than 13.”\textsuperscript{33}

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

\textsuperscript{29} 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.”

\textsuperscript{30} 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.” Cole (David), supra at 337.

\textsuperscript{31} Effective September 1, 2018, Comer II was superseded in part by ADM File No. 2015-04, which amended MCR 6.429(A) to provide “trial courts with authority to sua sponte address erroneous judgments of sentence.” Staff Comment to ADM File No. 2015-04.
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.”34 People v Hallak, 310 Mich App 555, 576-577 (2015), rev’d in part on other grounds 499 Mich 879 (2016)35 (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.”36 Hallak, 310 Mich App at 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

32 In Brantley, 296 Mich App at 556-557, the Court of Appeals rejected the defendant’s contention that, under MCL 750.520n(1) (requiring lifetime electronic monitoring for a defendant “convicted under [MCL 750.]520b or [MCL 750.]520c for criminal sexual conduct committed by an individual 17 years of age or older against an individual less than 13 years of age”) and MCL 750.520b(2)(d) (requiring that a defendant convicted of CSC-I be “sentence[d] . . . to lifetime electronic monitoring under [MCL 750.]520n[ ]”), a person convicted of either CSC-I or CSC-II could be sentenced to lifetime electronic monitoring only if he or she was at least 17 years of age and the victim was less than 13 years of age. The Court, applying the “last antecedent rule,” concluded “that the Legislature intended the modifying phrase ‘for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age’ [in MCL 750.520n(1)] to apply to convictions of second-degree criminal sexual conduct (CSC[-II] under MCL 750.520c only, and not to convictions of CSC[-I] under MCL 750.520b.” Brantley, supra at 557.

See also People v King (Raymond), 297 Mich App 465, 468 (2012) (indicating disagreement with Brantley, 296 Mich App at 556-557, and requesting that a conflict panel be convened under MCR 7.215(J) to determine whether MCL 750.520n(1) conflicts with MCL 750.520b(2)(d) and whether, when read in pari materia, MCL 750.520n(1) and MCL 750.520b(2)(d) require lifetime electronic monitoring for defendants convicted of either CSC-I or CSC-II only when the defendant is at least 17 years of age and the victim is less than 13 years of age). The Court of Appeals subsequently “order[ed] that a special panel shall not be convened . . . to resolve the conflict between [King (Raymond), supra,] and [Brantley, supra].” People v King (Raymond), unpublished order of the Court of Appeals, entered August 20, 2012 (Docket No. 301793).

33 See Section 2.4(A) for a discussion of MCL 750.520c.

34 Presumably, this reasoning would apply equally to CSC-I convictions.
[CSC-II] against a child under the age of 13 outweighs any minimal impact of [the] defendant’s reduced privacy interest.”\textsuperscript{37} Hallak, 310 Mich App at 579, 581.

13. Consecutive Sentencing Authorized

“The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.” MCL 750.520b(3).\textsuperscript{38} “Although consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense[,]” and neither Apprendi v New Jersey, 530 US 466 (2000), Alleyne v United States, 570 US 99 (2013), nor People v Lockridge, 498 Mich 358 (2015), “compels the conclusion that consecutive sentencing in Michigan violates a defendant’s Sixth Amendment protections.” People v Deleon, 317 Mich App 714, 723, 726 (2016). Further, “the Sixth Amendment does not prohibit the use of judicial fact-finding to impose consecutive sentencing.” \textit{Id.} at 723, citing Oregon v Ice, 555 US 160, 164 (2009).

In \textit{Deleon}, although the jury’s verdict “did not necessarily incorporate a finding that [the defendant’s] CSC-I conviction ‘ar[o]se from the same transaction’ as did his CSC-II conviction, . . . [the] defendant ha[d] 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, 317 Mich App at 726.

“[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, 723, 725 (2015) (citing People v Brown (Tommy), 495 Mich 962, 963 (2014), and People v Ryan (Sean), 295 Mich App

\textsuperscript{35} A prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.

\textsuperscript{36} Presumably, this reasoning would apply equally to CSC-I convictions.

\textsuperscript{37} Presumably, this reasoning would apply equally to CSC-I convictions.

\textsuperscript{38} See the Michigan Judicial Institute’s \textit{Criminal Proceedings Benchbook, Vol. 2}, Chapter 3, for more information on consecutive sentencing.
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 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[;]”).

14. Sex Offender Registration

CSC-I is a tier III listed offense under the Sex Offenders Registration Act (SORA), unless the court determines that the victim consented to conduct constituting the offense, that the victim was at least age 13 but under age 16 at the time of the offense, and that the actor is not more than four years older than the victim. See MCL 28.722(w)(iv).

For more information on the SORA’s registration requirements, see Chapter 10.

39 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
15. Student Offender

“As part of its adjudication order, order of disposition, judgment of sentence, or order of probation a court shall order that an individual who is convicted of or, a juvenile who is adjudicated for, a violation of [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] and who is a student at a school in this state is prohibited from doing either of the following:

(a) Attending the same school building that is attended by the victim of the violation.

(b) Utilizing a school bus for transportation to and from any school if the individual or juvenile will have contact with the victim during use of the school bus.” MCL 750.520o(1).

MCL 750.520o(2)(a) defines school as “a public school as that term is defined in . . . the revised school code, 1976 PA 451, MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12.”

MCL 750.520o(2)(b) defines school bus as “every motor vehicle, except station wagons, with a manufacturers’ rated seating capacity of 16 or more passengers, including the driver, owned by a public, private, or governmental agency and operated for the transportation of children to or from school, or privately owned and operated for compensation for the transportation of children to and from school.”

B. Criminal Sexual Conduct—Third Degree

CSC-III involves sexual penetration coupled with any one of the circumstances described in the statute, MCL 750.520d.

1. Statutory Authority

MCL 750.520d provides:

“(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age and under 16 years of age.
(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(e) That other person is at least 16 years of age but less than 18 years of age and a student at a public school or nonpublic school, and either of the following applies:

(i) The actor is a teacher, substitute teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district. This subparagraph does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

(ii) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic
school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(f) That other person is at least 16 years old but less than 26 years of age and is receiving special education services, and either of the following applies:

   (i) The actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of the public school, nonpublic school, school district, or intermediate school district from which that other person receives the special education services. This subparagraph does not apply if both persons are lawfully married to each other at the time of the alleged violation.

   (ii) The actor is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(g) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home, in which that other person is a resident, that other person is at least 16 years of age, and the sexual penetration occurs during that other person’s residency. As used in this subdivision, ‘child care organization’, ‘foster family home’, and ‘foster family group home’ mean those terms as defined in . . . MCL 722.111.”
2. Intent


3. No Temporal Requirement

“The plain language of [MCL 750.520d(1)(e)(i)-(ii)] does not contain any temporal requirement regarding the timing of the sexual penetration[;] . . . [r]ather, it refers to the occupation of the actor.” People v Lewis, 302 Mich App 338, 345-346 (2013). Regardless of when the act occurred, “if the actor’s occupation as a substitute teacher [or contract service provider] allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct.” Id. at 341, 347 (holding that prohibited conduct occurring during summer break was punishable). The Court’s holding in Lewis, supra, could arguably extend to MCL 750.520b(1)(b)(iv)-(v), which contain substantially similar provisions as found in MCL 750.520d(1)(e)(i)-(ii), except that they apply to situations involving younger victims.

Note: MCL 750.520d(1)(e)(i)-(ii), the specific provisions discussed in Lewis, supra, also contemplate sexual penetration by individuals holding various other occupations. See also MCL 750.520b(1)(b)(iv)-(v). Although the defendant in Lewis, supra, did not fit into any of these occupational categories, the holding presumably applies to those occupations as well.

4. Statute of Limitations

In general and except as provided in MCL 767.24(4) where the victim is under the age of 18, an indictment for a violation or attempted violation of CSC-III may be filed within 10 years after the offense or by the alleged victim’s 21st birthday, whichever is later. MCL 767.24(3)(a). However, if evidence of the offense contains the DNA of an unidentified individual, that individual, once identified, may be indicted for the offense at any time after commission of the offense but no later than 10 years after identification or by the alleged victim’s 21st birthday, whichever is later. MCL 767.24(3)(b).

Under MCL 767.24(4)(a), an indictment for a violation of CSC-III where the alleged victim is under the age of 18 may be filed within 15 years after the offense or by the alleged victim’s 28th birthday, whichever is later. However, if evidence of the
offense contains the DNA of an unidentified individual, that individual, once identified, may be indicted for the offense at any time after commission of the offense but no later than 15 years after identification or by the alleged victim’s 28th birthday, whichever is later. MCL 767.24(4)(b).

“As used in [MCL 767.24(3)] and [MCL 767.24(4)]:

(a) ‘DNA’ means human deoxyribonucleic acid.

(b) ‘Identified’ means the individual’s legal name is known and he or she has been determined to be the source of the DNA.” MCL 767.24(5).

Within a certain period of time, a victim of criminal sexual conduct may file a civil action separate from the CSC-III indictment to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6) and MCL 600.5851b.

5. **Imprisonment**

CSC-III is a felony punishable by not more than 15 years of imprisonment. MCL 750.520d(2).

Under the statutory scheme of the sentencing guidelines, a defendant convicted of CSC-III with a date of offense on or after January 1, 1999, may be sentenced to a jail term if the offense falls in an intermediate sanction cell. MCL 769.31(b); MCL 769.34(4)(c).

For information on scoring CSC-III offenses under the Michigan’s statutory sentencing guidelines, see Section 9.4(B).

6. **Double Jeopardy**

Convicting and sentencing a defendant for two counts of CSC-I and two counts of CSC-III where there were only two acts of penetration did not violate the multiple punishments strand of the Double Jeopardy Clause. *People v Garland (Edward)*, 286 Mich App 1, 5-6 (2009). In *Garland, supra* at 5, “the prosecution alleged two acts of sexual penetration: sexual intercourse and cunnilingus. For each act, [the] defendant was charged, tried, and convicted of two criminal offenses: CSC[-]I on the theory that a sexual penetration had occurred during a home invasion [], and CSC[-]III on the theory that the victim was physically helpless[].” One element required to prove CSC-I, but not required to prove CSC-III, is that the sexual penetration occurred “under circumstances involving the commission of
any other felony.”  MCL 750.520b(1)(c). One element required to prove CSC-III, but not required to prove CSC-I, is that the sexual penetration was accompanied by the actor knowing or having “reason to know that the victim [was] . . . physically helpless.”  MCL 750.520d(1)(c). “[U]nder the Blockburger[40] test, because each offense contains an element that the other does not, CSC[-]I and CSC[-]III are separate offenses for which [the] defendant was properly convicted and sentenced . . . .” Garland, supra at 6.

7. Probation

CSC-III is a nonprobationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute’s Juvenile Justice Benchbook.

8. Fines, Costs, and Assessments

See Section 2.7.

9. Sex Offender Registration

CSC-III is a tier I listed offense under the Sex Offenders Registration Act (SORA), unless the court determines that the victim consented to conduct constituting the offense, that the victim was at least age 13 but under age 16 at the time of the offense, and that the actor is not more than four years older than the victim. See MCL 28.722(w)(iv).

MCL 750.520d does not conflict with MCL 28.722(w)(iv). In re Tiemann, 297 Mich App 250, 261 (2012) (rejecting the 15-year-old respondent’s assertion “that it would be irreconcilable if a defendant did not have to register under SORA after a finding of consent but would nonetheless remain convicted of consensual statutory rape[]”).

For more information on the SORA’s registration requirements, see Chapter 10.

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40 Blockburger v United States, 284 US 299, 304 (1932).

41 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
10. Pertinent Case Law—Alternative Charges

A person can be convicted of incest under CSC-III (affinity) only if the sexual penetration “occurs under circumstances not otherwise prohibited by this chapter.” MCL 750.520d(1)(d). According to People v Goold, 241 Mich App 333, 342-343 (2000), this means that a person cannot be convicted of both CSC-III (affinity) and CSC-III (force or coercion) involving the same conduct with the same victim, although a prosecutor may charge these offenses alternatively in a single count.

11. Student Offender

“As part of its adjudication order, order of disposition, judgment of sentence, or order of probation a court shall order that an individual who is convicted of or, a juvenile who is adjudicated for, a violation of [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] and who is a student at a school in this state is prohibited from doing either of the following:

(a) Attending the same school building that is attended by the victim of the violation.

(b) Utilizing a school bus for transportation to and from any school if the individual or juvenile will have contact with the victim during use of the school bus.” MCL 750.520o(1).

MCL 750.520o(2)(a) defines school as “a public school as that term is defined in . . . the revised school code, 1976 PA 451, MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12.”

MCL 750.520o(2)(b) defines school bus as “every motor vehicle, except station wagons, with a manufacturers’ rated seating capacity of 16 or more passengers, including the driver, owned by a public, private, or governmental agency and operated for the transportation of children to or from school, or privately owned and operated for compensation for the transportation of children to and from school.”
2.4 Contact Offenses: CSC-II and CSC-IV

A. Criminal Sexual Conduct—Second Degree

CSC-II is the most serious of the contact offenses. It involves sexual contact coupled with any one of the circumstances described in the statute, MCL 750.520c(1).

1. Statutory Authority

MCL 750.520c provides:

“(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related by blood or affinity to the fourth degree to the victim.

(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

(iv) The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled.

(v) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic
school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(vi) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident and the sexual contact occurs during the period of that other person’s residency. As used in this subdivision, ‘child care organization’, ‘foster family home’, and ‘foster family group home’ mean those terms as defined in . . . MCL 722.111.

(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f).

(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f).

(g) The actor causes personal injury to the victim and the actor knows or has reason to
know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(i) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections.

(j) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, a private vendor that operates a youth correctional facility under MCL 791.220g, who knows that the other person is under the jurisdiction of the department of corrections.

(k) That other person is a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor is an employee or a contractual employee of or a volunteer with the county or the department of corrections who knows that the other person is under the county’s jurisdiction.

(l) The actor knows or has reason to know that a court has detained the victim in a facility while the victim is awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor is an employee or contractual employee of, or a volunteer with, the facility in which
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2. Intent

CSC-II is a general intent crime. *People v Brewer*, 101 Mich App 194, 195 (1980). “‘[B]ecause it can be difficult to prove a defendant’s state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all the evidence presented.’” *People v Hallak*, 310 Mich App 555, 565 (2015), rev’d in part on other grounds 499 Mich 879 (2016),42 quoting *People v Kanaan*, 278 Mich App 594, 622 (2008).

3. Sufficiency of the Evidence

“[W]hen determining whether touching could be reasonably construed as being for a sexual purpose, the conduct should be ‘viewed objectively’ under a “‘reasonable person” standard.’” *People v Deleon*, 317 Mich App 714, 719-720 (2016), quoting *People v Piper*, 233 Mich App 642, 647, 650 (1997).

There was sufficient evidence to convict the defendant of CSC-II based on sexual contact with a person under the age of 13 where the minor-victim “testified to multiple instances in which [the] defendant used his hands and fingers to touch her ‘from [her] vagina to [her] butt’ before penetrating her with his penis[,] . . . a rational jury could objectively find that [the] defendant’s touching of the victim’s intimate parts with his hand or fingers was both intentional and ‘for the purpose of sexual arousal or gratification[;]’” further, “[s]he described [the] defendant intentionally using his penis to touch her genital area at the [family’s] Grand Manor home and her buttck at [the defendant’s] apartment[,] [s]he also described [the] defendant intentionally touching either her genital area or buttock with his penis when her cousins spent the night at the [family’s] Marsh Drive home[,] [s]he further reported that [the] defendant had some contact with her genital area when she was in her mother’s bed at the [family’s] Marsh Drive home[,] and she stated that [the] defendant touched her ‘inner thigh’ with his stomach and then touched her genital area with

42[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.

“[T]here was sufficient evidence to convict [the] defendant of CSC-II based on sexual contact with a person under the age of 13” where “the evidence was sufficient to allow a jury to conclude that [the] defendant did more than just touch [the minor-victim’s] breast during a medical examination, and that it was for a sexual purpose[,] . . . [the minor-victim’s] testimony that [the] defendant ‘cupped’ her breast, coupled with [the minor-victim’s mother’s] witnessing of the event and [the prosecution expert’s] testimony that it would not be medically ethical or acceptable to touch a patient’s breast while examining her throat, was sufficient for the jury to conclude that the touching was not for a legitimate medical purpose[; and thus,] . . . the ‘cupping’ was sufficient to give rise to an inference that it was for a sexual purpose, particularly in light of [the] defendant’s various explanations for the situation when confronted by [the minor-victim’s mother]. People v Hallak, 310 Mich App 555, 565 (2015), rev’d in part on other grounds 499 Mich 879 (2016).43

4. No Temporal Requirement

“The plain language of [MCL 750.520d(1)(e)(i)-(ii)] does not contain any temporal requirement regarding the timing of the sexual penetration[;] . . . [r]ather, it refers to the occupation of the actor.” People v Lewis, 302 Mich App 338, 345-346 (2013). Regardless of when the act occurred, “if the actor’s occupation as a substitute teacher [or contract service provider] allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct.” Id. at 341, 347 (holding that prohibited conduct occurring during summer break was punishable). The Court’s holding in Lewis, supra, could arguably extend to MCL 750.520b(1)(b)(iv)-(v), which contain substantially similar provisions as found in MCL 750.520d(1)(e)(i)-(ii), except that they apply to situations involving younger victims.

Note: MCL 750.520d(1)(e)(i)-(ii), the specific provisions discussed in Lewis, supra, also contemplate sexual penetration by individuals

43[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.
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holding various other occupations. See also MCL 750.520b(1)(b)(iv)-(v). Although the defendant in Lewis, supra, did not fit into any of these occupational categories, the holding presumably applies to those occupations as well.

5. Statute of Limitations

In general and except as provided in MCL 767.24(4) where the alleged victim is under the age of 18, an indictment for a violation or attempted violation of CSC-II may be filed within 10 years after the offense or by the alleged victim’s 21st birthday, whichever is later. MCL 767.24(3)(a). However, if evidence of the offense contains the DNA of an unidentified individual, that individual, once identified, may be indicted for the offense at any time after commission of the offense but no later than 10 years after identification or by the alleged victim’s 21st birthday, whichever is later. MCL 767.24(3)(b).

Under MCL 767.24(4)(a), an indictment for a violation of CSC-II where the alleged victim is under the age of 18 may be filed within 15 years after the offense or by the victim’s 28th birthday, whichever is later. However, if evidence of the offense contains the DNA of an unidentified individual, that individual, once identified, may be indicted for the offense at any time after commission of the offense but no later than 15 years after identification or by the alleged victim’s 28th birthday, whichever is later. MCL 767.24(4)(b).

“As used in [MCL 767.24(3)] and [MCL 767.24(4)]:

(a) ‘DNA’ means human deoxyribonucleic acid.

(b) ‘Identified’ means the individual’s legal name is known and he or she has been determined to be the source of the DNA.” MCL 767.24(5).

Within a certain period of time, a victim of criminal sexual conduct may file a civil action separate from the CSC-II indictment to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6) and MCL 600.5851b.

6. Imprisonment

CSC-II is a felony punishable by not more than 15 years of imprisonment. MCL 750.520c(2)(a). For information on scoring CSC-II offenses under the Michigan’s statutory sentencing
guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

7. **Double Jeopardy**

“Because CSC-I and CSC-II each require proof of a fact that the other does not, [a] defendant’s convictions of both on the same facts do not violate double jeopardy.” *People v Duenaz*, 306 Mich App 85, 115 (2014). “‘Sexual penetration’ is an element of CSC-I but not CSC-II[,]” while “CSC[-]II requires that ‘sexual contact’ be done for a ‘sexual purpose,’ an element not included in CSC-I.” *Id.* at 107.

When the defendant’s convictions of CSC-II were vacated (he was charged with CSC-I, and the jury convicted him of the cognate lesser offense of CSC-II), double jeopardy principles did not bar the prosecution from charging the defendant with, and retrying the defendant for, CSC-II, where the defendant successfully appealed his conviction and the reversal was not based on insufficient evidence. *People v Nyx (Maurice)*, 480 Mich 1204 (2007) (Corrigan, J., concurring).

8. **Probation**

CSC-II is a probationable offense for adult offenders. *MCL 771.1(1)*. A defendant convicted of CSC-II is not eligible for reduced probation under *MCL 771.2(2)*. *MCL 771.2(4)*.

For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute’s *Juvenile Justice Benchbook*.

9. **Fines, Costs, and Assessments**

See *Section 2.7*.

10. **Lifetime Electronic Monitoring\(^{45}\)**

    a. **Mandatory Lifetime Electronic Monitoring for Violation of MCL 750.520c**

    In addition to any other penalty imposed for violating *MCL 750.520c*, when a CSC-II conviction involves an

\(^{44}\) *People v Nyx (Maurice)*, 479 Mich 112, 134, 136 (2007).

\(^{45}\) 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.”
offender aged 17 or older and a victim under the age of 13, the court must sentence the offender to lifetime electronic monitoring.46 MCL 750.520c(2)(b); MCL 750.520n(1); People v Johnson (Todd), 298 Mich App 128, 136 (2012) (holding that “a person convicted under [MCL 750.520c] is to be sentenced to lifetime [electronic] monitoring only if the defendant was 17 or older at the time of the crime and the victim was less than 13”).47

See also People v Brantley, 296 Mich App 546, 558-559 (2012) (holding that “the 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[”]).

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, 576-577 (2015), rev’d in part on other grounds 499 Mich 879 (2016)48 (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).

46 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.” Cole (David), supra at 337.

47 Note that “a person convicted under [MCL 750.520b], regardless of the ages [of the parties] involved, is to be sentenced to lifetime electronic monitoring[.]” People v Johnson (Todd), 298 Mich App at 136 (“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”). See Section 2.3(A) for a discussion of MCL 750.520b.
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 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 of [the] defendant’s reduced privacy interest.” Hallak, 310 Mich App at 581.

11. Sex Offender Registration

CSC-II is a tier II listed offense under the Sex Offenders Registration Act (SORA), when the victim is at least age 13 but less than age 18. See MCL 28.722(u)(x).

CSC-II is a tier II listed offense under the SORA when the victim is over age 18. See MCL 28.722(u)(xi).

CSC-II is a tier III listed offense under the SORA when the victim is under the age of 13. See MCL 28.722(w)(v).

For more information on the SORA’s registration requirements, see Chapter 10.

48[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.

49 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
12. Student Offender

“As part of its adjudication order, order of disposition, judgment of sentence, or order of probation a court shall order that an individual who is convicted of or, a juvenile who is adjudicated for, a violation of [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] and who is a student at a school in this state is prohibited from doing either of the following:

(a) Attending the same school building that is attended by the victim of the violation.

(b) Utilizing a school bus for transportation to and from any school if the individual or juvenile will have contact with the victim during use of the school bus.” MCL 750.520o(1).

MCL 750.520o(2)(a) defines school as “a public school as that term is defined in . . . the revised school code, 1976 PA 451, MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12.”

MCL 750.520o(2)(b) defines school bus as “every motor vehicle, except station wagons, with a manufacturers’ rated seating capacity of 16 or more passengers, including the driver, owned by a public, private, or governmental agency and operated for the transportation of children to or from school, or privately owned and operated for compensation for the transportation of children to and from school.”

B. Criminal Sexual Conduct—Fourth Degree

CSC-IV involves sexual contact coupled with any one of the circumstances described in the statute, MCL 750.520e(1).

1. Statutory Authority

MCL 750.520e provides:

“(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.
(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor achieves the sexual contact through concealment or by the element of surprise.

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons
are lawfully married to each other at the time of the alleged violation.

(e) The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.

(f) That other person is at least 16 years of age but less than 18 years of age and a student at a public school or nonpublic school, and either of the following applies:

(i) The actor is a teacher, substitute teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district. This subparagraph does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

(ii) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(g) That other person is at least 16 years old but less than 26 years of age and is receiving special education services, and either of the following applies:
(i) The actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of the public school, nonpublic school, school district, or intermediate school district from which that other person receives the special education services. This subparagraph does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(ii) The actor is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(h) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home, in which that other person is a resident, that other person is at least 16 years of age, and the sexual contact occurs during that other person’s residency. As used in this subdivision, ‘child care organization’, ‘foster family home’, and ‘foster family group home’ mean those terms as defined in . . . MCL 722.111.”

2. Intent


3. No Temporal Requirement

Regardless of when the act occurred, “if the actor’s occupation as a substitute teacher [or contract service provider] allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct.” *Id.* at 341, 347 (holding that prohibited conduct occurring during summer break was punishable). The Court’s holding in *Lewis, supra,* could arguably extend to MCL 750.520b(1)(b)(iv)-(v), which contain substantially similar provisions as found in MCL 750.520d(1)(e)(i)-(ii), except that they apply to situations involving younger victims.

**Note:** MCL 750.520d(1)(e)(i)-(ii), the specific provisions discussed in *Lewis, supra,* also contemplate sexual penetration by individuals holding various other occupations. See also MCL 750.520b(1)(b)(iv)-(v). Although the defendant in *Lewis, supra,* did not fit into any of these occupational categories, the holding presumably applies to those occupations as well.

4. **Statute of Limitations**

Generally, an indictment for a violation or attempted violation of CSC-IV may be filed within 10 years after the offense or by the victim’s 21st birthday, whichever is later. MCL 767.24(3)(a). However, if evidence of the offense contains the DNA of an unidentified individual, that individual, once identified, may be indicted for the offense at any time after commission of the offense but no later than 10 years after identification or by the victim’s 21st birthday, whichever is later. MCL 767.24(3)(b).

5. **Imprisonment**

CSC-IV is a misdemeanor punishable by not more than 2 years of imprisonment, a fine of not more than $500, or both. MCL 750.520e(2). For information on scoring CSC-IV offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2,* Chapter 3.

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50 For purposes of MCL 767.24(3), “‘DNA’ means human deoxyribonucleic acid.” MCL 767.24(5)(a).

51 For purposes of MCL 767.24(3), “‘[i]dentified’ means the individual’s legal name is known and he or she has been determined to be the source of the DNA.” MCL 767.24(5)(b).

52 Within a certain period of time, a victim of criminal sexual conduct may file a civil action separate from the CSC-IV indictment to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6); MCL 600.5851b.
6. **Probation**

CSC-IV is a probatable offense for adult offenders. MCL 771.1(1). A defendant convicted of CSC-IV is not eligible for reduced probation under MCL 771.2(2), MCL 771.2(4).

For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute’s *Juvenile Justice Benchbook*.

7. **Fines, Costs, and Assessments**

See Section 2.7.

8. **Sex Offender Registration**

CSC-IV is a tier I *listed offense* under the Sex Offenders Registration Act (SORA) if the victim is age 18 or older. See MCL 28.722(s)(v).

CSC-IV is a tier II *listed offense* under the SORA when the victim is at least age 13 but under age 18. See MCL 28.722(u)(x).

CSC-IV is a tier III *listed offense* under the SORA, if the victim is under age 13 and the actor is age 17 or older. See MCL 28.722(w)(vi).

For more information on the SORA’s registration requirements, see Chapter 10.

9. **Pertinent Case Law**

In *People v Russell (Darwin)*, 266 Mich App 307, 310-311 (2005), the Court of Appeals upheld the constitutionality of the CSC-IV statute. In *Russell (Darwin)*, *supra* at 309-310, the defendant argued that MCL 750.520e(1)(d) “is unconstitutionally vague because it ‘appears to absolutely preclude any sexual contact between . . . two consenting adults related by marriage only.’” The Court of Appeals rejected the defendant’s argument, finding that the term *affinity* is not unconstitutionally vague, and that the statute does not give “the trier of fact unstructured and unlimited discretion to determine whether an offense has

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53 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
been committed” because sexual contact is clearly defined. Russell (Darwin), supra at 311.

10. Student Offender

“As part of its adjudication order, order of disposition, judgment of sentence, or order of probation a court shall order that an individual who is convicted of or, a juvenile who is adjudicated for, a violation of [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] and who is a student at a school in this state is prohibited from doing either of the following:

(a) Attending the same school building that is attended by the victim of the violation.

(b) Utilizing a school bus for transportation to and from any school if the individual or juvenile will have contact with the victim during use of the school bus.” MCL 750.520o(1).

MCL 750.520o(2)(a) defines school as “a public school as that term is defined in . . . the revised school code, 1976 PA 451, MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12.”

MCL 750.520o(2)(b) defines school bus as “every motor vehicle, except station wagons, with a manufacturers’ rated seating capacity of 16 or more passengers, including the driver, owned by a public, private, or governmental agency and operated for the transportation of children to or from school, or privately owned and operated for compensation for the transportation of children to and from school.”

2.5 Assault Offenses

Crimes of sexual violence do not always culminate in the actual sexual penetration of, or contact with, a victim. In some cases, the perpetrator may be thwarted from carrying out a sexual penetration or contact despite having the intent to do so. To protect victims in these circumstances, the CSC Act enacted two crimes:

- Assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1).
- Assault with intent to commit CSC-II (contact), MCL 750.520g(2).
Note: An assault is an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of an immediate battery. People v Johnson (Joeseype), 407 Mich 196, 210 (1979). The jury should be instructed that an assault requires an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery. Johnson (Joeseype), supra at 210.

It is important to distinguish between the CSC Act’s assault offenses and attempted offenses under the general attempt statute, MCL 750.92. An attempt to commit criminal sexual conduct is not necessarily the same as “assault with intent to commit criminal sexual conduct.” For example, a perpetrator may commit an overt act beyond “mere preparation” but never actually assault the victim. In these circumstances, an attempt to commit CSC-I to CSC-IV may be the proper charge. See People v Stapf, 155 Mich App 491, 494 (1986) (“[t]o prove the crime of attempt, the evidence must show (1) the specific intent to commit a crime and (2) an overt act going beyond mere preparation toward committing the crime”). Additionally, an assault committed with the intention of accomplishing CSC-IV is not a crime under the CSC assault offenses, but may be the crime of attempted CSC-IV under MCL 750.92. For more information on attempted crimes, see Section 3.7.

A. Assault With Intent to Commit Criminal Sexual Conduct Involving Penetration

1. Elements of Offense

The elements of assault with intent to commit criminal sexual conduct involving penetration are as follows:

- The defendant committed an assault; and
- The defendant had the intent to commit criminal sexual conduct involving penetration. People v Nickens, 470 Mich 622, 627 (2004).

2. Intent

Assault with intent to commit CSC involving penetration is a specific intent crime. Nickens, 470 Mich at 631.

To be convicted of this crime, a “defendant must have intended an act involving some sexually improper intent or purpose.” People v Snell, 118 Mich App 750, 755 (1982), overruled on other grounds by People v Grissom, 492 Mich 296 (2012). There is no need to prove that a sexual act was started or completed. Snell, 118 Mich App at 755. Also, there is no need to prove the actual
existence of a circumstance, such as force or coercion, because the crime’s assault element suffices: “[W]hen coupled with the intent to commit sexual penetration, proof of the assault necessarily establishes the intent to commit the kind of criminal sexual conduct prohibited by MCL 750.520d [CSC-III].” People v Love, 91 Mich App 495, 498, 503 (1979) (the defendant “jumped on the complainant’s bed, grabbed her wrists, and stated his intention to engage in sexual intercourse with her”).

In People v McFall, 224 Mich App 403, 412 (1997), the defendant was charged with assault with intent to commit sexual conduct involving penetration, and the Court of Appeals found the following evidence sufficient to satisfy an intent to sexually penetrate the victim:

“[T]he complainant testified that after defendant had touched her genitalia, he choked her and told her to take her pants all the way down. She also testified that, at one point, [the] defendant ‘was fumbling with his hand down by his pants.’ This evidence, viewed in a light most favorable to the prosecution, is sufficient to permit a reasonable factfinder to conclude that [the] defendant intended to sexually penetrate the complainant.”

3. Statute of Limitations

Generally, an indictment for a violation or attempted violation of MCL 750.520g(1) may be filed within 10 years after the offense or by the victim’s 21st birthday, whichever is later. MCL 767.24(3)(a). However, if evidence of the offense contains the DNA of an unidentified individual, that individual, once identified, may be indicted for the offense at any time after commission of the offense but no later than 10 years after identification or by the victim’s 21st birthday, whichever is later. MCL 767.24(3)(b).

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54[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.


56 For purposes of MCL 767.24(3), “[i]dentified means the individual’s legal name is known and he or she has been determined to be the source of the DNA.” MCL 767.24(5)(b).

57 Within a certain period of time, a victim of criminal sexual conduct may file a civil action separate from the indictment for violation or attempted violation of MCL 750.520g(1) to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6) and MCL 600.5851b.
4. **Imprisonment**

A violation of **MCL 750.520g(1)** is a felony punishable by imprisonment for not more than 10 years. For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

5. **Probation**

Assault with intent to commit CSC involving penetration is a probationable offense for adult offenders. **MCL 771.1(1)**. For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute’s *Juvenile Justice Benchbook*.

6. **Fines, Costs, and Assessments**

See Section 2.7.

7. **Sex Offender Registration**

Assault with intent to commit CSC—Penetration is a tier III listed offense under the Sex Offenders Registration Act (SORA), unless the court determines that the victim consented to the conduct constituting the offense, that the victim was at least age 13 but less than age 16 at the time of the offense, and that the actor is not more than four years older than the victim. See **MCL 28.722(w)(iv)**.

For more information on the SORA’s registration requirements, see Chapter 10.

8. **Pertinent Case Law—Affirmative Defenses**

Consent is not an affirmative defense to assault with intent to commit CSC if the victim is under the age of 16 because the victim is too young to consent. *People v Starks*, 473 Mich 227, 229-230 (2005). For more information on the consent defense, see Section 4.7.

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58 The listed offenses formerly described in **MCL 28.722(e)** were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov.smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov.smart/pdfs/final_sornaguidelines.pdf).
B. Assault With Intent to Commit CSC-II

1. Elements of Offense

_People v Snell_, 118 Mich App 750, 754-755 (1982), overruled on other grounds by _People v Grissom_, 492 Mich 296 (2012), \(^{59}\) sets out the elements of MCL 750.520g(2):

- The defendant committed an assault;
- The defendant intended the assault for the purpose of sexual arousal or sexual gratification;
- The defendant specifically intended to touch the victim’s genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, or the defendant specifically intended to have the victim touch such an area on him or her (actual contact is _not_ required); and
- There must exist the intent to engage in some action that would constitute a statutory circumstance, e.g., the use of force or coercion.

2. Intent

Assault with intent to commit CSC-II is a specific intent crime. _People v Snell_, 118 Mich App 750, 755 (1982), overruled on other grounds by _People v Grissom_, 492 Mich 296 (2012).\(^{60}\)

A statutory circumstance need not actually exist to establish a violation of MCL 750.520g(2). Instead, only an intention to do an act that would create a _circumstance_ need be proven. In _People v Lasky_, 157 Mich App 265, 270-271 (1987), the Court of Appeals stated:

“[W]e do not believe that an aggravating circumstance must actually exist in every case in order to convict an accused of ‘assault with intent

\(^{59}\) [A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” _Dunn v Detroit Auto Inter-Ins Exch_, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally _Dunn_, 254 Mich App at 263-266.

\(^{60}\) [A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” _Dunn v Detroit Auto Inter-Ins Exch_, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally _Dunn_, 254 Mich App at 263-266.
to commit criminal sexual conduct in the second degree,’ as opposed to ‘criminal sexual conduct in the second degree.’ Depending upon the particular aggravating circumstances involved, it may be sufficient to establish that the accused intended to do some act which would have given rise to an aggravating circumstance.”

3. **Statute of Limitations**

Generally, an indictment for a violation or attempted violation of MCL 750.520g(2) may be filed within 10 years after the offense or by the victim’s 21st birthday, whichever is later. MCL 767.24(3)(a). However, if evidence of the offense contains the DNA of an unidentified individual, that individual, once identified, may be indicted for the offense at any time after commission of the offense but no later than 10 years after identification or by the victim’s 21st birthday, whichever is later. MCL 767.24(3)(b).

4. **Imprisonment**

A violation of MCL 750.520g(2) is a felony punishable by imprisonment for not more than 5 years. For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

5. **Probation**

Assault with intent to commit CSC-II is a probationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute’s *Juvenile Justice Benchbook*.

6. **Fines, Costs, and Assessments**

See Section 2.7.

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61 For purposes of MCL 767.24(3), “‘DNA’ means human deoxyribonucleic acid.” MCL 767.24(5)(a).

62 For purposes of MCL 767.24(3), “‘[i]dentified’ means the individual’s legal name is known and he or she has been determined to be the source of the DNA.” MCL 767.24(5)(b).

63 Within a certain period of time, a victim of criminal sexual conduct may file a civil action separate from the indictment for violation or attempted violation of MCL 750.520g(2) to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6) and MCL 600.5851b.
7. **Sex Offender Registration**

Assault with intent to commit CSC-II—Contact is a tier I listed offense under the Sex Offenders Registration Act (SORA), if the victim is at least age 18. See MCL 28.722(s)(v).

Assault with intent to commit CSC-II—Contact is a tier II listed offense under the SORA if the victim is at least age 13 but under age 18. See MCL 28.722(u)(x).

Assault with intent to commit CSC-II—Contact is a tier III listed offense under the SORA if the victim is under age 13. See MCL 28.722(w)(v).

For more information on the SORA’s registration requirements, see Chapter 10.

8. **Pertinent Case Law—Affirmative Defenses**

Consent is not an affirmative defense to assault with intent to commit CSC if the victim is under the age of 16 because the victim is too young to consent. *People v Starks*, 473 Mich 227, 229-230 (2005). For more information on the consent defense, see Section 4.7.

C. **Student Offender**

“As part of its adjudication order, order of disposition, judgment of sentence, or order of probation a court shall order that an individual who is convicted of or, a juvenile who is adjudicated for, a violation of [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] and who is a student at a school in this state is prohibited from doing either of the following:

(a) Attending the same school building that is attended by the victim of the violation.

(b) Utilizing a school bus for transportation to and from any school if the individual or juvenile will have contact with the victim during use of the school bus.” MCL 750.520o(1).

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64 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/].
MCL 750.520o(2)(a) defines *school* as “a public school as that term is defined in . . . the revised school code, 1976 PA 451, MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12.”

MCL 750.520o(2)(b) defines *school bus* as “every motor vehicle, except station wagons, with a manufacturers’ rated seating capacity of 16 or more passengers, including the driver, owned by a public, private, or governmental agency and operated for the transportation of children to or from school, or privately owned and operated for compensation for the transportation of children to and from school.”

### 2.6 Terms Used in the CSC Act

#### A. Actor

An *actor* is “a person accused of criminal sexual conduct.” MCL 750.520a(a).

#### B. Age

The CSC Act criminalizes the sexual penetration of, or contact with, minors under 16 years of age.65 The Act created the following age groups for minor victims:

- **Under 13 years of age.** MCL 750.520b(1)(a) (CSC-I); MCL 750.520c(1)(a) (CSC-II).
- **At least 13 but less than 16 years of age.** MCL 750.520b(1)(b) (CSC-I); MCL 750.520c(1)(b) (CSC-II); MCL 750.520d(1)(a) (CSC-III).
- **At least 13 but less than 16 years of age, and the actor is five or more years older than the victim.** MCL 750.520e(1)(a) (CSC-IV).

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65 “[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).
The CSC Act’s age offenses are strict liability crimes. The reasonable-mistake-of-age defense does not apply to the CSC Act. *People v Cash*, 419 Mich 230, 246 (1984) (15-year-old victim claimed she was 17; 30-year-old defendant’s mistake-of-age defense did not preclude his conviction). (Although *Cash* was decided under the CSC-III statute, the rationale of the opinion presumably applies to all other CSC offenses and to both age groups. *Cash*, *supra* at 234 n 1, 242.) The consent of victims under age 16 is legally ineffective under CSC-I to CSC-IV. *People v Worrell*, 417 Mich 617, 623 (1983), overruled on other grounds by *People v Starks*, 473 Mich 227 (2005) (*Starks* overruled Worrell’s broad conclusion that consent was always a defense to CSC assault crimes). Similarly, the consent of victims under age 16 is legally ineffective for the CSC assault offenses. *Starks*, 473 Mich at 229-230.

**C. Aided or Abetted by 1 or More Other Persons**

Sexual violence involving multiple participants “increases the potential danger to the victim as well as decreases the [victim’s] possibility of escape.” *People v Hurst*, 132 Mich App 148, 152 (1984). To deter such violence by multiple participants, CSC-I and CSC-II prohibit actors from engaging in sexual penetration or contact when “aided or abetted by 1 or more other persons” in the following circumstances:

- **When the actor knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(d)(i) (CSC-I); MCL 750.520c(1)(d)(i) (CSC-II).

- **When the actor uses force or coercion.** MCL 750.520b(1)(d)(ii) (CSC-I); MCL 750.520c(1)(d)(ii) (CSC-II).

For purposes of the provisions on aiding and abetting, force or coercion is defined in MCL 750.520b(1)(f)(i) to MCL 750.520b(1)(f)(v). Note that force or coercion, as used in the aiding and abetting provisions, does not incorporate the personal injury requirement of MCL 750.520b(1)(f) (CSC-I) and MCL 750.520c(1)(f) (CSC-II). *People v Rogers (William)*, 142 Mich App 88, 91 (1985).

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66 See *In re Hildebrant*, 216 Mich App 384, 386, 389 (1996) (statute may be applied to prosecute individuals involved in the prohibited conduct even when the individuals fall within the statutory age range the statute is intended to protect).

67 This subsection uses the term actor to signify the principal participant who is being aided and abetted by others.
1. **Definition of Aiding and Abetting**

The Michigan Supreme Court, in *People v Palmer (John)*, 392 Mich 370, 378 (1974), defined *aiding and abetting* as follows:

“In criminal law the phrase ‘aiding and abetting’ is used to describe *all forms of assistance* rendered to the perpetrator of a crime. This term comprehends *all words or deeds which may support, encourage or incite the commission of a crime*. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary. . . . The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime.” (Emphases added and internal citations omitted).

2. **Mere Presence Not Enough**

Mere presence is not enough to make a person an aider or abettor, even if that person has knowledge of the crime being committed. See *People v Rockwell (Hal)*, 188 Mich App 405, 412 (1991) (conspiracy to commit murder and assault with intent to commit murder); *People v Killingsworth*, 80 Mich App 45, 50 (1977) (welfare fraud). A caveat to the *mere presence rule* is the *mutual reassurance doctrine*, enunciated in *People v Smock*, 399 Mich 282, 285 (1976) (arson). “An exception to the ‘mere presence’ rule exists when a parent has a legal duty to prevent the commission of a crime.” *People v Wilson (Carolyn)*, 196 Mich App 604, 615 n 7 (1992) (CSC-I).

3. **Actor Must Engage in Sexual Penetration or Contact**

The references to “aided or abetted by 1 or more persons” in the CSC-I and CSC-II statutes apply only to an actor who *engages in* sexual penetration or contact and who is aided or abetted by one or more persons. *Hurst*, 132 Mich App at 153; MCL 750.520b(1); MCL 750.520c(1). They do not apply to the common circumstance of persons who do not engage in sexual penetration or contact but who aid, encourage, or facilitate others to commit the sexual penetration or contact. This does not mean, however, that aiders and abettors who themselves do not engage in sexual penetration or contact escape criminal

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68 For more information on the general aiding and abetting statute, see Section 3.5.

69 See Section 3.5(F) for a discussion of this doctrine.
responsibility. Such aiders and abetters can be charged under the general aiding and abetting statute in the Code of Criminal Procedure, MCL 767.39,\(^{70}\) which can be used in conjunction with the CSC Act. *People v Pollard*, 140 Mich App 216, 219-221 (1985) (defendants could be charged under MCL 767.39 even though the CSC aiding and abetting provision was more recently enacted than the general aiding and abetting statute; according to the Court, the Legislature was presumed to know about the general aiding and abetting statute when it enacted the CSC aiding and abetting provision and could have indicated whether the CSC provision rendered the general statute exempt).

4. **General Intent Crimes**

It is possible to aid and abet general intent crimes, such as CSC-I to CSC-IV. *People v Turner (Clarence)*, 125 Mich App 8, 11-12 (1983) (defendant was properly convicted of aiding and abetting involuntary manslaughter, a general intent crime).

5. **Conviction for Each Penetration or Contact**

A defendant charged under the CSC Act’s aiding and abetting provisions may be convicted of each penetration or contact committed by the principals, as long as the defendant aided or abetted each specific penetration or contact. *Rogers (William)*, 142 Mich App at 92.

D. **Armed with a Weapon**

The presence of a weapon in a sexual assault makes the assault “more reprehensible, increases the victim’s danger, and lessens the victim’s chances of escape.” *People v Proveaux*, 157 Mich App 357, 362-363 (1987). To deter the use of weapons in sexual assaults, the CSC Act imposes harsher punishment when the perpetrator “is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.” MCL 750.520b(1)(e) (CSC-I); MCL 750.520c(1)(e) (CSC-II).

The CSC Act does not define *armed* or *weapon* or any article used or fashioned as a weapon. However, a number of appellate opinions have defined the meaning of possession, armed, and dangerous weapon.

\(^{70}\) “Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.” MCL 767.39.
1. Possession

The term possession connotes dominion or right of control over an article with knowledge of its presence and character, and it encompasses both actual and constructive possession. People v Rutledge, 250 Mich App 1, 6 (2002) (minor in possession of alcohol). Constructive possession means a person has “‘proximity to the article together with indicia of control.’” Rutledge, supra at 6, quoting People v Hill (Rodney), 433 Mich 464, 470 (1989) (defendants properly charged with possession of a firearm where each possessed a component of a single shotgun).

2. Armed

A defendant need not actually hold the weapon to be deemed armed under the CSC Act. People v Davis (Dennis), 101 Mich App 198, 201-203 (1980). In Davis (Dennis), supra at 200, the defendant’s rifle was six feet away from where he raped the victim. The Court of Appeals held that defendant was armed within the meaning of the CSC-I statute because he had constructive possession of the rifle. Id. at 203. The Court stated that a perpetrator need not have the weapon in hand while committing the sexual assault, so long as the weapon is reasonably accessible to the perpetrator and the perpetrator “has knowledge of the weapon’s location.” Id.

However, another panel of the Court of Appeals concluded that a person may be considered armed under the CSC Act when the offender first threatened the victim with a weapon even when the weapon is inaccessible and its exact location is unknown at the time of the actual sexual assault. In Proveaux, 157 Mich App at 362-363, the Court stated:

“...We believe . . . that [the] defendant was armed with a weapon within the statute’s meaning so as to make the crime first-degree criminal sexual conduct. . . . It is enough that [the] defendant began the assault with a knife, putting the victim in fear and traumatizing her. The sexual penetration was part of a continuing event beginning with the armed assault. . . . A rule requiring actual or constructive possession of the weapon through the course of the sexual assault would mean that a defendant could first subdue the victim with a weapon and then discard it before actual penetration. Such a rule would mean that the
victim’s actions in defending herself lessened the crime’s seriousness.”

A perpetrator is not armed under the CSC Act if the weapon is possessed by another person acting in concert with the perpetrator because although the defendant was in proximity to the weapon, he did not exercise control over it. *People v Benard*, 138 Mich App 408, 411 (1984) (offender who engaged in the criminal sexual conduct was not in possession of a weapon where the weapon was “actually in the hands” of the actor’s accomplice).

3. **Weapon or Dangerous Weapon**

Michigan appellate opinions have construed the term *dangerous weapon* as used in other assault statutes, such as the armed robbery statute, MCL 750.529, and the felonious assault statute, MCL 750.82. Although these statutes use the term *dangerous weapon* instead of *weapon* as used in the CSC Act, they can be analogized to the CSC Act based on the established definition of *dangerous weapon* set out below. See *People v Lange*, 251 Mich App 247, 255 (2002) (“The Legislature’s silence when using terms previously interpreted by the courts suggests agreement with the courts’ construction”). Moreover, the armed robbery statute’s language concerning the use of any other “article” is nearly identical to the CSC Act’s language. In a case involving armed robbery and CSC-I (armed with a weapon), the Michigan Supreme Court noted that “[w]hat we have said about the armed element in the robbery statute has equal application to the first-degree criminal sexual conduct charge as brought herein.” *People v Parker (Gregory)*, 417 Mich 556, 566 (1983).

CSC-I and CSC-II state, in part:

“(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.” MCL 750.520b(1)(e) (CSC-I); MCL 750.520c(1)(e) (CSC-II).

The armed robbery statute states, in part:

“. . . and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or
she is in possession of a dangerous weapon . . .” MCL 750.529 (emphasis added).

The felonious assault statute states, in part:

“. . . a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon . . .” MCL 750.82 (emphasis added).

A dangerous weapon is defined as either:

(1) a weapon designed to be dangerous and is capable of causing death or serious injury; or

(2) an object that, although not designed to be a dangerous weapon, is used as a weapon and, when employed, is capable of causing death or serious injury. People v Norris, 236 Mich App 411, 415 (1999); People v Barkley, 151 Mich App 234, 238 (1986).

In applying the definition of dangerous weapon above, the Court of Appeals, in Barkley, 151 Mich App at 238, gave an example of a weapon that would qualify under each of the subparagraphs: a “loaded gun” would satisfy the first subparagraph, and a “screwdriver used as a knife” would satisfy the second subparagraph. See also Lange, 251 Mich App at 252, 255-256 (a glass mug with which the defendant repeatedly struck the victim, who later died from the injuries, was a weapon for purposes of Offense Variable 1 of the legislative sentencing guidelines, MCL 777.31).

“‘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 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) (trial court erred in finding that an “ordinary type of jackknife” was a dangerous
weapon under MCL 750.227 because “whether or not such articles [not specifically designated in the statutory language] are dangerous weapons, within the meaning of that term as used in MCL 750.227, would depend upon the use which the carrier made of them”).

A person may be considered armed under the armed robbery statute (and, accordingly, under the CSC-I and CSC-II statutes) even when the person is not in possession of a dangerous weapon as defined above. For example, in Barkley, 151 Mich App at 238 n 2, the Court noted that a toy gun would not be a dangerous weapon under either subparagraph of the dangerous weapon definition, but it could satisfy the second portion of the being armed element of the armed robbery statute, which requires that a defendant be armed with “an object fashioned or used in a manner which leads the victim to reasonably believe that the object is a dangerous weapon.”

Whether an instrument or object is used as a dangerous weapon is a question of fact. Barkley, 151 Mich App at 238 n 1.

Whether a defendant is armed with a weapon or with an article used or fashioned as a weapon is a question of fact. Parker (Gregory), 417 Mich at 565-566.

E. By Blood or Affinity

The CSC Act punishes incest, as it is commonly known, regardless of the parties’ consent. People v Goold, 241 Mich App 333, 335 n 1 (2000) (the defendant was charged with CSC-I based on sexual penetration between persons related within three degrees of affinity for the defendant’s conduct with his 21-year-old stepdaughter). But instead of using the term incest to describe the relationship between the perpetrator and victim, the Act uses the phrase by blood or affinity followed by a degree of relation.

CSC-I and CSC-II prohibit the sexual penetration of, or contact with, a victim related to the perpetrator by blood or affinity to the fourth degree in the following circumstances:

- **When the victim is at least 13 but less than 16 years of age.** MCL 750.520b(1)(b)(ii) (CSC-I); MCL 750.520c(1)(b)(ii) (CSC-II).

- **When the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(h)(i) (CSC-I); MCL 750.520c(1)(h)(i) (CSC-II).
CSC-III and CSC-IV prohibit the sexual penetration of, or contact with, a victim related to the perpetrator by blood or affinity to the third degree in the following circumstance:

- **When the sexual penetration or contact “occurs under circumstances not otherwise prohibited” in the CSC chapter.**

MCL 750.520d(1)(d) (CSC-III); MCL 750.520e(1)(d) (CSC-IV).

### 1. Degrees of Relationships


The commentary to **M Crim JI 20.4 (Complainant Between Thirteen and Sixteen Years of Age)** provides a Table of Consanguinity. Also contained within this commentary are the familial relationships for the first four degrees of affinity, as follows:

- First-degree relationships (parents, children)
- Second-degree relationships (grandparents, brothers, sisters, grandchildren)
- Third-degree relationships (great-grandparents, uncles, aunts, nephews, nieces, great-grandchildren)
- Fourth-degree relationships (great-great-grandparents, great-uncles, great-aunts, first cousins, grand-nephews, grand-nieces, great-great-grandchildren)

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71 See, e.g., *People v Moore (Timothy)*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 267663) (victim under the age of 13 related by adoption). **Note:** Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

72 It is an affirmative defense to a violation of MCL 750.520d(1)(d) and MCL 750.520e(1)(d) if the other person used his or her authority over the defendant to coerce the defendant to commit the offense. MCL 750.520d(1)(d); MCL 750.520e(1)(d).

73“A prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
2. “By Blood”


A relationship by blood to the fourth degree cannot be established in the face of undisputed DNA evidence indicating that the defendant is not biologically related to the victim. Zajaczkowski II, 493 Mich at 16. In Zajaczkowski II, 493 Mich at 6, the Court “conclude[d] that the prosecution [did not] establish a blood relationship between [the] defendant and the victim when the undisputed evidence indicate[d] that [the] defendant [wa]s not biologically related to the victim[, and] the presumption of legitimacy cannot be substituted for a blood relationship in order to fill this element of the crime charged.”

Specifically,

“Under the statutory language, the third element of MCL 750.520b(1)(b)(ii) can only be met if [the] defendant is related to the victim in one of two ways—by blood or by affinity. The conclusive DNA evidence establishes that the victim’s father is not [the] defendant’s biological father. [The] [d]efendant and the victim simply do not share a relationship arising by descent from a common ancestor, and they are not related by birth. Accordingly, [the] defendant is not related to the victim by blood to the fourth degree. Therefore, when interpreting the language of the statute in light of its ordinary meaning and the context in which it is used, we conclude that the prosecution cannot establish the relationship element of MCL 750.520b(1)(b)(ii).

While the Court of Appeals [in Zajaczkowski I, 293 Mich App 370 (2011),] acknowledged the ordinary meaning of a relationship ‘by blood or affinity,’ it then applied the civil presumption concerning the legitimacy of a child in order to conclude that [the] defendant and the victim are related by blood as a matter of law. However, nothing in the language of MCL 750.520b(1)(b)(ii) indicates that a relationship by blood can be established through this presumption. In reaching its conclusion, the Court
of Appeals went beyond the statute’s language and changed the ordinary meaning of the statute’s terms by adding language that the Legislature did not include.

Given that this case does not involve an action to establish paternity, challenge child custody arrangements, or dispute intestacy issues, we find it unnecessary to stray from this criminal statute’s plain and unambiguous language. The question whether the relationship element of the statute can be established does not require a determination of whether [the] defendant is deemed ‘legitimate’ for any of the stated civil-law purposes or contexts in which the presumption of legitimacy has been implicated. Moreover, we decline to conclude as a matter of law that [the] defendant shares a common ancestor with the victim and is thereby related to the victim by blood merely because [the] defendant may be considered the issue of his mother’s marriage to the victim’s father for legitimacy purposes. Such a conclusion would require this Court to extend the civil presumption of legitimacy to this criminal statute when the Legislature clearly has not done so.” Zajaczkowski II, 493 Mich at 14-16.

3. **Affinity**

The term *by blood or affinity* is not defined in the CSC Act. *People v Zajaczkowski (Zajaczkowski II)*, 493 Mich 6, 13 (2012), vacating *People v Zajaczkowski (Zajaczkowski I)*, 293 Mich App 370 (2011). However, *affinity* is defined in *People v Denmark*, 74 Mich App 402, 408 (1977), quoting *Bliss v Caille Bros Co*, 149 Mich 601, 608 (1907), as follows:

“‘Affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of

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74The Michigan Supreme Court noted in *Zajaczkowski II*, 493 Mich at 15 n 20, that it did not hold “that evidence indicating that a person was born during a marriage may never be admissible in a criminal prosecution to show that the person is the natural child of his legal parents. We acknowledge that when the prosecution alleges that the defendant and the victim are related by blood because they have the same father, evidence that the defendant was born during the marriage of his legal parents would make the existence of a blood relationship between the defendant and the victim more probable. See MRE 401; MRE 402. Thus, while the civil presumption of legitimacy cannot be used in a criminal case to conclusively establish a blood relationship, in the absence of a determinative DNA test, the prosecution may use evidence that a person was born during a marriage that the defendant is related to the victim by blood to the fourth degree.”
affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all blood relatives of the husband.”

“Thus, the accepted meaning of affinity is a relationship that originates through marriage.” Zajaczkowski I, 293 Mich App at 375.

It is important to note that, while helpful, the Table of Consanguinity accompanying M Crim JI 20.4 is not all encompassing. It does not, for instance, include “step” or “in-law” relationships. However, some Court of Appeals opinions have construed affinity as applying to relationships between a brother-in-law and sister-in-law and between a stepbrother and stepsister.

• **People v Denmark**, 74 Mich App 402 (1977):

In the first appellate opinion to decide the constitutionality of the CSC-I (affinity) statute, the Court of Appeals held that affinity includes the relationship between brother-in-law and sister-in-law.

• **People v Armstrong (Douglas)**, 212 Mich App 121 (1995):

In holding that affinity encompasses relationships between stepbrothers and stepsisters, the Court of Appeals turned to principles of statutory construction. It construed affinity according to its “common and approved usage.” Armstrong (Douglas), 212 Mich App at 127. The Court, using the *Random House College Dictionary* (rev ed), noted that the common and ordinary meaning of affinity is marriage: “relationship by marriage or by ties other than those of blood.” Armstrong (Douglas), supra at 128. The Court used the same dictionary to define the word “step”: “a prefix used in kinship terms denoting members of a family related by the remarriage of a parent and not by blood.” Id. Taken together, the Court concluded that the “defendant and the victim were related by affinity because they were family members related by marriage.” Id.

4. **Adoption**

The CSC Act is silent on whether adopted children are related by blood or affinity to their parents or stepparents or to other extended family members. In appellate cases of CSC involving
adopted children, the issue of the child’s adoptive status has not been raised. Failure to raise the issue may be an implicit recognition of a child’s adoptive status as equivalent to a child’s status as a defendant’s relative by blood or affinity. In some cases where the victim’s adoptive status was not raised, the defendant was convicted based on circumstances not related to any distinction between the status of the victim as a biological or adopted relative. See, e.g., People v Swain (On Remand), 288 Mich App 609, 612-613 (2010) (defendant’s conviction for engaging in fellatio with her adopted son was based on MCL 750.520b(1)(a)—victim under the age of 13); People v Camp (Douglas) (On Remand), unpublished opinion per curiam of the Court of Appeals, issued August 17, 2010 (Docket No. 285101)\(^75\) (defendant’s CSC convictions for conduct involving his adopted nephew were based MCL 750.520b(1)(a) and MCL 750.520c(1)(a)—victim under the age of 13); People v Doers, unpublished opinion per curiam of the Court of Appeals, issued June 29, 2010 (Docket No. 288514) (defendant’s conviction under MCL 750.520b(1)(b) for conduct involving his adoptive daughter was based on “multiple variables”—case did not specify whether conviction was based on victim between 13 and 16 years of age and member of the same household, or defendant related to victim by blood or affinity to the fourth degree, or defendant in position of authority).

Certain portions of the adoption code provide support for the conclusion that no distinction should be made between an adopted child and a biological child. The Adoption Code expressly indicates that an adopted person is to be considered as having been born to the adopting parents, making the adopting parents liable for all duties and entitling them to all rights of the natural parents. MCL 710.60(1)-(2) state as follows:

“(1) After the entry of an order of adoption, if the adoptee’s name is changed, the adoptee shall be known and called by the new name. The person or persons adopting the adoptee then become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents.

(2) After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons, and the adopted person

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\(^75\) Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
becomes an heir at law of the adopting parent or parents and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, except as provided in . . . MCL 700.2114, an adopted child is no longer an heir at law of a parent whose rights have been terminated under [the Adoption Code] or [the Juvenile Code] or the lineal or collateral kindred of that parent, nor is an adopted adult an heir at law of a person who was his or her parent at the time the order of adoption was entered or the lineal or collateral kindred of that person, except that a right, title, or interest that has vested before entry of the final order of adoption is not divested by that order.” (Emphasis added.)

F. Child Care Organization

“[A]n employee, contractual service provider, or volunteer of a child care organization” who engages in sexual penetration or sexual contact with a person at least 13 but less than 16 years of age who is under the care of that child care organization commits CSC-I (penetration) or CSC-II (contact).76 MCL 750.520b(1)(b)(vi); MCL 750.520c(1)(b)(vi).

“[A]n employee, contractual service provider, or volunteer of a child care organization” who engages in sexual penetration or sexual contact with a person at least 16 but less than 18 years of age who is under the care of that child care organization commits CSC-III (penetration) or CSC-IV (contact).77 MCL 750.520d(1)(g); MCL 750.520e(1)(h).

MCL 722.111(b) defines child care organization as “a governmental or nongovernmental organization having as its principal function receiving minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. Child care organization includes organizations commonly described as child caring institutions, child placing agencies, children’s camps, children’s campsites, children’s therapeutic group homes, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or child care homes. Child care organization does not include a governmental or nongovernmental organization that does either of the following:

76 If the victim is under age 13, the actor’s title or position, and the victim’s status with respect to the child care organization is irrelevant.

77 Note that other circumstances may be present such as age, relationship, or use of force that would make irrelevant the actor’s title or position, or the victim’s status with respect to the child care organization.
(i) Provides care exclusively to minors who have been emancipated by court order under . . . MCL 722.4.

(ii) Provides care exclusively to persons who are 18 years of age or older and to minors who have been emancipated by court order under . . . MCL 722.4, at the same location.” See MCL 750.520b(1)(b)(vi); MCL 750.520c(1)(b)(vi); MCL 750.520d(1)(g); MCL 750.520e(1)(h).

G. Circumstances

For criminal liability under the CSC Act, a sexual penetration or contact must be accompanied by one or more circumstances. Michigan courts typically refer to these circumstances as either aggravating circumstances or aggravating factors.

A single act of sexual penetration (or contact), even when accompanied by multiple aggravating circumstances, “may give rise to only one criminal charge for purposes of trial, conviction, and sentencing.” People v Johnson (Willie), 406 Mich 320, 331 (1979) (defendant could only be charged with a single count of CSC-I based on multiple circumstances: commission of another felony; being aided and abetted by one or more persons; while armed with a weapon; or using force causing personal injury).

Multiple aggravating circumstances constitute alternative means of proving a single act of sexual penetration (or contact). People v Gadomski, 232 Mich App 24, 29, 31 (1998) (defendant could be found guilty of a single count of CSC-I based on any of the following circumstances: act occurred during commission of another crime (home invasion); act involved aiding and abetting and force or coercion; or act caused personal injury and involved force or coercion). Jury unanimity is not required for each alternate theory or aggravating circumstance when the alternative means of committing the offense “do not constitute separate and distinct offenses[.]” Gadomski, supra at 31.

When a defendant is charged with a single offense and the prosecution presents evidence of multiple acts, each of which could constitute the actus reus of the charged offense, the trial court must instruct the jury that its verdict must be unanimous with regard to the specific act committed, “if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant’s guilt.” People v Cooks, 446 Mich 503, 530 (1994). However, a specific jury unanimity instruction is not always required; a general jury unanimity instruction will suffice “where materially identical evidence is presented with
respect to each act, and there is no juror confusion[.]” *Cooks, supra* at 512-513. “The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others.” *Id.* at 512. In *Cooks, supra* at 506-507, the same material evidence was presented to support each alleged incident: the defendant approached the complainant, fondled her breasts and vagina, attempted to kiss her, forced her against a wall, after which the complainant believed that the defendant penetrated her anus from behind.

**H. Commission of Any Other Felony**

Similar in concept to the felony-murder statute (MCL 750.316), the CSC Act contains provisions that elevate the charges when another felony is committed. However, the felony-murder statute specifically delineates its predicate felonies, and the CSC Act does not. Instead, the CSC Act allows elevation of charges when the sexual penetration or contact occurs under circumstances involving the commission of any other felony. MCL 750.520b(1)(c) (CSC-I); MCL 750.520c(1)(c) (CSC-II).

The affirmative defense of consent applies to situations in which penetration or contact occurs under circumstances involving the commission of any other felony. *People v Thompson (Charles)*, 117 Mich App 522, 525-526 (1982) (consent was a defense to CSC-I based on the commission of a felony where consent was a defense to the felony on which the CSC-I charge was based). Consent is defined as a noncoerced and nonforced sexual act.78 *People v Jansson*, 116 Mich App 674, 682 (1982).

**1. Construing the Term Felony**

For purposes of the CSC Act, the term *felony* is defined as follows:

“The term ‘felony’ when used in [the Penal Code], shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison.” See MCL 750.7 (defining felony for purposes of the Penal Code, of which the CSC Act is a part).

However, the Code of Criminal Procedure, which governs sentencing, defines felony as follows:

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78 For more information on consent, including its definition and applicability, see *Section 4.7*. 
“‘Felony’ means a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.” MCL 761.1(f).

Although most criminal offenses are easily identified as misdemeanors or felonies, some are not. For example, the Legislature created the commonly known “high court,” “circuit court,” or “two-year” misdemeanors, which are offenses expressly labeled as misdemeanors even though they authorize imprisonment for not more than two years. See, e.g., MCL 750.520e (CSC-IV), and MCL 750.414 (joyriding).

For purposes of the Code of Criminal Procedure, misdemeanors punishable by more than one year (“two-year misdemeanors”) are felonies for purposes of consecutive sentencing. People v Smith (Timothy), 423 Mich 427, 434-435 (1985) (prior convictions as bases for habitual offender charge included joyriding, MCL 750.414, and resisting and obstructing, MCL 750.479, both designated as misdemeanors punishable by imprisonment for a maximum of two years). See also People v Washington, 501 Mich 342, 484 (2018) (stating, in the context of determining whether a prior misdemeanor conviction under the Public Health Code constituted a felony for purposes of serving as a predicate felony for the defendant’s felony-firearm conviction under the Penal Code, that “an offense expressly labeled a misdemeanor in one code does not necessarily mean the same offense is a misdemeanor for purposes of interpreting and applying a different code”).

2. Construing the Meaning of Any Other Felony

The any other felony element is satisfied if the circumstances surrounding the charged sexual penetration or contact involve proof of any felony other than the sexual penetration or contact serving as the basis of the charge(s) against the defendant. People v Pettway, 94 Mich App 812, 817-818 (1980) (“felony, as construed in [MCL 750.520b(1)(c)’s statutory] phrase ‘any other felony’, refers to any felony other than the criminal sexual conduct, . . . [and] the language of the statute, ‘any other felony’, is satisfied by proof of the felony[;]” thus, proof of the felony breaking and entering with intent to commit CSC under MCL 750.110 satisfied the any other felony requirement of MCL 750.520b(1)(c)).

“[C]riminal sexual conduct upon a second person can be the ‘other felony’ supporting first degree criminal sexual conduct under MCL 750.520b(1)(c)[.]” People v White (Carl), 168 Mich
App 596, 604 (1988) (“read[ing] ‘any other felony’ [under MCL 750.520b(1)(c)] as meaning a felony other than the one committed,” and finding that “the prohibition against double jeopardy does not bar the use of evidence of criminal sexual conduct upon another victim as the ‘other felony’ which elevates the criminal sexual conduct committed upon the first person to first degree.”).

3. **Victim Must be Impacted by Commission of Other Felony**

“[T]he ‘circumstances involving the commission of [the] other felony’ [must] directly impact a ‘victim’, or recipient, of the sexual penetration[]” in order for the penetration to constitute CSC-I under MCL 750.520b(1)(c). *People v Lockett*, 295 Mich App 165, 178 (2012). In *Lockett*, *supra* at 171-172, 181, the two defendants “knew that [a 12-year-old girl] was present in [a] van when each of them disrobed and engaged in sexual intercourse with [the girl’s 17-year-old sister][” in the back of the van. The defendants were convicted of CSC-I under MCL 750.520b(1)(c), “where the [underlying] felony was disseminating sexually explicit matter to [the 12-year-old girl], a minor who was in plain view, under MCL 722.675(1)(b).” *Lockett*, *supra* at 173. The Court of Appeals reversed the defendants’ CSC-I convictions, holding that “MCL 750.520b(1)(c) unconstitutionally invites arbitrary and abusive enforcement when it is applied to situations where . . . engaging in consensual, legal sexual penetration is elevated to CSC-I solely because a minor was present and the ‘victim’ of the penetration was not impacted by the additional felony.” *Lockett*, *supra* at 177. “Even though the ‘explicit matter’ would not have been disseminated to [the 12-year-old girl] without the sexual penetration of [her sister], [the] Court cannot uphold a conviction of CSC-I when the ‘victim’ of the sexual penetration was not impacted by the circumstances of the underlying felony.” *Id.* at 179-180.

4. **Double Jeopardy Concerns**

“Both the United States and Michigan constitutions prohibit a person from twice being placed in jeopardy for the same offense.” *People v Ford (Elijah)*, 262 Mich App 443, 447 (2004); US Const, Am V; Const 1963, art 1, § 15.

**Same Elements Test.** When multiple charges are brought against a defendant for conduct related to a single criminal transaction, the *same-elements* test is used to determine whether the prohibition against double jeopardy is violated. *People v
Nutt, 469 Mich 565, 567-568 (2004). “Application of the same-elements test, commonly known as the ‘Blockburger’ test, is the well-established method of defining the Fifth Amendment term ‘same offence.’” Nutt, supra at 576; Blockburger v United States, 284 US 299, 304 (1932). The Blockburger test “focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.” Nutt, supra at 576, quoting Iannelli v United States, 420 US 770, 785 n 17 (1975).

The Blockburger test for determining whether the protection against double jeopardy prohibits multiple prosecutions is the appropriate test for determining whether double jeopardy considerations bar multiple punishments. People v Smith (Bobby), 478 Mich 292, 315 (2007). The definition of same offense for purposes of the multiple punishments strand of the prohibition against double jeopardy is the same as the definition of same offense announced by the Court in Nutt, 469 Mich 565, for purposes of the multiple prosecutions strand. Smith (Bobby), supra at 316.

Convicting and sentencing a defendant for four separate counts of CSC where there were only two acts of penetration did not violate the multiple punishments strand of the Double Jeopardy Clause. People v Garland (Edward), 286 Mich App 1, 5-6 (2009). In Garland, supra at 5, “the prosecution alleged two acts of sexual penetration: sexual intercourse and cunnilingus. For each act, [the] defendant was charged, tried, and convicted of two criminal offenses: CSC[-]I on the theory that a sexual penetration had occurred during a home invasion [], and CSC[-]III on the theory that the victim was physically helpless[].” One element required to prove CSC-I, but not required to prove CSC-III, is that the sexual penetration occurred “under circumstances involving the commission of any other felony.” MCL 750.520b(1)(c). One element required to prove CSC-III, but not required to prove CSC-I, is that the sexual penetration was accompanied by the actor knowing or having “reason to know that the victim [was] . . . physically helpless.” MCL 750.520d(1)(c). “[U]nder the Blockburger test, because each offense contains an element that the other does not, CSC[-]I and CSC[-]III are separate offenses for which [the] defendant was properly convicted and sentenced . . . .” Garland, supra at 6.

79 Blockburger v United States, 284 US 299 (1932).
However, “a single act of penetration, even though accompanied by multiple aggravating circumstances, cannot result in multiple CSC convictions . . . because each of the enumerated aggravating factors in MCL 750.520b were ““alternative ways of proving criminal sexual conduct in the first degree”” rather than separate offenses.” Garland, 286 Mich App at 6 (citations omitted).

When the defendant’s convictions of CSC-II were vacated (he was charged with CSC-I, and the jury convicted him of the cognate lesser offense of CSC-II), double jeopardy principles did not bar the prosecution from charging the defendant with, and retrying the defendant for, CSC-II, where the defendant successfully appealed his conviction and the reversal was not based on insufficient evidence. People v Nyx (Maurice), 480 Mich 1204 (2007) (Corrigan, J., concurring).

5. The Sequence or Timing of the Other Felony

No specific sequence or timing of the other felony and the CSC offense is necessary to sustain a CSC conviction based on the other felony when the offenses occur during a continuum of conduct. In People v Jones (Kelvin), 144 Mich App 1, 2-3 (1985), the defendant was convicted of armed robbery and CSC-I and CSC-II based on the commission of another felony. The defendant argued that the robbery of the victim’s purse was independent of the completed sexual acts, because the robbery was not completed until after completion of the sexual acts. Jones (Kelvin), supra at 3. The Court of Appeals disagreed with the defendant’s argument:

“The Legislature . . . did not attempt to narrowly define the coincidence or sequence of the sexual act and the other felony; rather it chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the combination of sexual offenses and other felonies by treating the sexual acts as major offenses when they occur ‘under circumstances involving the commission of any other felony[.]’” Jones (Kelvin), 144 Mich App at 4.

MCL 750.520b(1)(c) requires only that the sexual penetration occur “under circumstances involving the commission of any

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81 The CSC Act uses the phrase under circumstances involving the commission of any other felony; the phrase does not say during the commission of any other felony.
other felony.” The statutory language “does not necessarily demand that the sex act occur during the commission of the felony,” but the statute “does require a direct interrelationship between the felony and the sexual penetration.” People v Waltonen, 272 Mich App 678, 692-693 (2006) (emphasis added). In Waltonen, supra at 680, 683, the defendant claimed that he supplied the victim with drugs in exchange for consensual sex. The defendant argued that MCL 750.520b(1)(c) did not apply because the delivery of drugs did not occur during the sex act. Id. at 680. Citing with approval the reasoning in Jones (Kelvin), 144 Mich App 1, the Waltonen Court noted:

“[T]he statutory language does require a direct interrelationship between the felony and the sexual penetration. Here, the delivery of controlled substances technically occurred after the sexual acts; however, the sexual acts were directly related to the delivery of the drugs because the only reason the victim engaged in sexual penetration was to acquire the drugs. Stated somewhat differently, delivery of the drugs was part and parcel of the act of sexual penetration. Before and during the sexual penetration, the victim and [the] defendant were operating under the knowledge and expectation that drugs would be delivered to the victim after the sexual act and only because of the sexual act. There existed a continuum of interrelated events.” Waltonen, 272 Mich App at 693.

I. Developmental Disability

MCL 750.520a(b) defines developmental disability as:

“an impairment of general intellectual functioning or adaptive behavior that meets all of the following criteria:

(i) It originated before the person became 18 years of age.\[82\]

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\[82\] “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).
(ii) It has continued since its origination or can be expected to continue indefinitely.

(iii) It constitutes a substantial burden to the impaired person’s ability to perform in society.

(iv) It is attributable to 1 or more of the following:

(A) Intellectual disability,[83] cerebral palsy, epilepsy, or autism.

(B) Any other condition of a person that produces a similar impairment or requires treatment and services similar to those required for a person described in this subdivision.”

The term developmental disability is contained within the definition of mentally disabled under MCL 750.520a(i):

“`Mentally disabled’ means that a person has a mental illness, is intellectually disabled, or has a developmental disability.” (Emphasis added.)

Although the term developmental disability is not expressly contained within the substantive CSC offenses, it is still a crime to sexually penetrate or contact a person with a developmental disability because it is a crime to commit such acts against a mentally disabled person. CSC-I and CSC-II prohibit the sexual penetration of, or contact with, a person who is mentally disabled in the following circumstances:

• **When the perpetrator is related to the victim by blood or affinity to the fourth degree.** MCL 750.520b(1)(h)(i) (CSC-I); MCL 750.520c(1)(h)(i) (CSC-II).

• **When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit.** MCL 750.520b(1)(h)(ii) (CSC-I); MCL 750.520c(1)(h)(ii) (CSC-II).

The CSC Act appears to impose criminal liability under the provisions above regardless of whether the perpetrator knew or had reason to know about the victim’s mental disability. The requirement that an actor knows or has reason to know appears in MCL 750.520b(1)(d)(i), MCL 750.520b(1)(g), MCL 750.520c(1)(d)(i), MCL 750.520c(1)(g), MCL 750.520d(1)(c), and MCL 750.520e(1)(c).

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[83] MCL 750.520a(d) defines the term intellectual disability to “mean[] that term as defined in . . . MCL 330.1100b.” For MCL 330.1100b’s definition of the term intellectual disability, see Section 2.6(L).
“A . . . consistent principle of statutory construction is that the express mention in a statute of one thing implies the exclusion of other similar things (expressio unius est exclusio alterius)[.].” People v Jahner, 433 Mich 490, 500 n 3 (1989).

For more discussion on the CSC Act’s mentally disabled element, see Section 2.6(Q).

J. Force or Coercion

The term force or coercion is used in each of the statutes that govern the four degrees of criminal sexual conduct. However, it is defined only in MCL 750.520b(1)(f) (CSC-I), and MCL 750.520e(1)(b) (CSC-IV). The statutes governing CSC-II and CSC-III incorporate by reference the definition of force or coercion found in the CSC-I statute. MCL 750.520c(1)(f) (CSC-II); MCL 750.520d(1)(b) (CSC-III). The CSC-IV statute contains its own definition of force or coercion, which is substantially similar to the CSC-I definition.

MCL 750.520b(1)(f) gives examples of conduct that may constitute force or coercion for purposes of CSC-I, CSC-II, and CSC-III as follows:

“Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.
(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.”

The definition of force or coercion in the CSC-IV statute, MCL 750.520e(1)(b), is substantially similar to the definition in CSC-I. Its principal difference, however, lies in subparagraph (v), which states:

“(v) When the actor achieves the sexual contact through concealment or by the element of surprise.”

Force or coercion includes, but is not limited to, acts of physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise. People v Brown (Ben), 197 Mich App 448, 450 (1992). Appellate courts have consistently held that force or coercion is not limited to these examples, and each case must be examined on its own facts in light of all the circumstances. People v Eisen, 296 Mich App 326, 333 (2012); People v Crippen, 242 Mich App 278, 283 n 2, 284 (2000) (“[the defendant] took advantage of the complainant’s misidentification of him . . . to induce her to submit to his sexual advances [and this] was sufficient to establish the requisite coercion by concealment or surprise”). Knowledge is not required for the element of force or coercion. Brown (Ben), 197 Mich App at 449-450 (the defendant is not required to be “aware of the result of his actions on the victim”).

1. **Actual Application of Physical Force or Physical Violence**

Force or coercion does not include a requirement of overcoming the victim. People v Carlson (Eric), 466 Mich 130, 139-140 (2002).

The Supreme Court has articulated the amount of force needed to sustain a conviction under the CSC-III statute’s force or coercion element:

“To be sure, the ‘force’ contemplated in MCL 750.520d(1)(b) does not mean ‘force’ as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. In other words, the requisite ‘force’ for a violation of MCL 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act
of sexual penetration. Rather, the prohibited ‘force’ encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes.” Carlson (Eric), 466 Mich at 140 (the defendant persisted despite the victim’s repeated refusal to consent).

a. Actual Physical Force

In People v Phelps, 288 Mich App 123, 132-133 (2010), the Court of Appeals found that there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that the defendant penetrated the victim’s vagina through the use of actual physical force under MCL 750.520b(1)(f)(i). “The [victim] testified that [the defendant] was physically on top of her when he penetrated her vagina with his penis, and she explained that when she told [the defendant] no ‘around 5 [times], give or take a few,’ [the defendant] told her ‘no, I’m not done yet’ and kept his penis inside her for approximately ‘[f]ive minutes’ while she was underneath him and telling him no.” Phelps, supra at 134.

The pinching of buttocks is the actual application of physical force because “it requires a person to exert strength or power on another person.” People v Premo, 213 Mich App 406, 409 (1995).

In People v Alter, 255 Mich App 194, 203 (2003), the Court of Appeals found sufficient evidence of the actual application of physical force under CSC-II, where the defendant-therapist, during a therapy session with the victim, unbuttoned the victim’s blouse, fondled her breast, and placed her hand on his penis—all without obtaining consent.

b. Position of Authority

“[T]he element of force or coercion as defined by [MCL 750.520b(1)(f), MCL 750.520c(1)(f), 84 MCL 750.520d(1)(b), and MCL 750.520e(1)(b)]” may be established where “a CPS worker us[es] his [or her] position to coerce a parent

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84 CSC-II was not at issue in this case, but MCL 750.520c contains the same definition of force or coercion as the other CSC statutes. Presumably, the Green (Gabriel) holding would also apply to that offense.
he [or she] is investigating for abuse or neglect into sexual acts.” People v Green (Gabriel), 313 Mich App 526, 538-539, 541-542 (2015) (holding that the defendant’s convictions of CSC III and CSC IV were not against the great weight of the evidence where he “used his position of authority [as a CPS worker] to manipulate and coerce” the victims, whose neglect or abuse cases he was assigned to investigate, to engage in sexual acts with him).

c. Sleeping Victim

Placing a hand on a sleeping person’s genital area, without more, is not the application of “physical force” so as to satisfy the force or coercion element in CSC offenses. People v Patterson (Robert), 428 Mich 502, 510, 525-526 (1987).

Although it recognized that the types of force actionable under the CSC-IV statute are not limited to those examples listed in the statute, the Patterson Court declined to fit the defendant’s conduct within this not limited to language because the victim was asleep at the time of the touching and the statutory examples are “all examples where the victim would be awake.” Patterson (Robert), 428 Mich at 526.

Note: Defendants who sexually penetrate or contact a sleeping victim may be charged under the CSC Act’s physically helpless provisions, as defined in MCL 750.520a(m). Defendants who sexually penetrate or contact an unconscious victim may be charged under the Act’s physically helpless or mentally incapacitated provisions, as defined in MCL 750.520a(m) and MCL 750.520a(k), respectively. For more information on physically helpless, see Section 2.6(U). For more information on mentally incapacitated, see Section 2.6(R).

2. Threatening to Use Force or Violence

In People v Khan, 80 Mich App 605, 607-608 (1978), the defendant drove a group of people (the victim, her sister, her brother, some infant children, and another man) to his garage. The victim witnessed the defendant point a rifle at her brother. Khan, supra at 608. After dropping the rifle in the garage, the defendant threatened to kill the victim’s sister. Id. Later, when
the defendant was alone with the victim in the garage, he began to undo the victim’s pants. *Id.* When she resisted, the defendant slapped her face and neck, then raped her. *Id.* The defendant was convicted of CSC-III (force or coercion). *Id.* at 607. He claimed it was error for the trial court to admit the victim’s testimony concerning his handling of the rifle, because there was no showing that he threatened her with the rifle or that she even noted the rifle’s presence at the time of the assault. *Id.* at 609. The Court of Appeals held that the testimony was relevant and material because there was a threat to use force or violence and the present ability to execute the threat. *Id.* at 609-610.

3. **Threatening to Retaliate in the Future**

Threats of future harm to the victim (or the victim’s family) to deter a victim from reporting a sexual assault may constitute the crime of extortion under MCL 750.213. *People v Trevino*, 155 Mich App 10, 18-19 (1986). For more information on the crime of extortion, see Section 3.16.

4. **Medical Treatment or Examination in a Manner Medically Recognized as Unethical or Unacceptable**

MCL 750.520b(1)(f)(iv) and MCL 750.520e(1)(b)(iv) are intended to “prevent a person in the medical profession from taking such an unconscionable advantage of the patient’s vulnerability and abusing the patient’s trust and unwitting permission of the touching under the belief that it is necessary.”85 *People v Capriccioso*, 207 Mich App 100, 105 (1994), overruled in part on other grounds by *People v Baisden*, 482 Mich 1000 (2008).86

The term *medical treatment* is to be construed broadly and includes other forms of health care beyond those practiced by medical doctors. In *People v Regts*, 219 Mich App 294, 296-298 (1996), the Court of Appeals construed *medical treatment* to include psychotherapy by psychologists. In making this finding, the Court used the definition of *practice of medicine* under the Public Health Code, MCL 333.17001(1)(f):

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85 See also Section 3.30, Sexual Intercourse Under Pretext of Medical Treatment, and MCL 750.90.
86 “[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
“Practice of medicine’ means the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts.”

MCL 750.520b(1)(f)(iv) applies to “situations in which the medical examination or treatment is used as a pretext to secure a patient’s consent to sexual conduct[,]” as well as “situations where nonconsensual sexual conduct is perpetrated during or in the context of medical treatment or examination.” Baisden, 482 Mich at 1000.

Medical testimony is not required in all prosecutions under MCL 750.520b(1)(f)(iv). Baisden, 482 Mich at 1000. The Baisden Court agreed with the trial court that medical testimony was not necessary in that case because “it is common knowledge that penile penetration constitutes an unethical and unacceptable method of ‘medical treatment.’” Id.

MCL 750.520b(1)(f)(iv) is constitutional—it is not unduly vague or overbroad, and does not violate the nondelegation provision of Michigan’s Constitution. People v Bayer, 279 Mich App 49, 51, 63 (2008), vacated in part on other grounds 482 Mich 1000 (2008). According to the Bayer Court, MCL 750.520b(1)(f)(iv) “precludes a medical professional from abusing the setting or status of the medical relationship by using it as a pretext to have sexual contact with a patient.” Bayer, supra at 63. The failure of the statute to list all prohibited conduct does not make the statute unconstitutionally vague. Id. Additionally, the failure of the statute to address the issue of consent does not make the statute unconstitutionally vague or overbroad. Id. at 67-68.

In People v Alter, 255 Mich App 194, 196 (2003), the defendant, in his capacity as a therapist, counseled the victim for approximately ten years. During two therapy sessions, the defendant fondled the victim’s breast and placed her hand on his penis. Alter, supra at 202-203. The therapy sessions

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87 The Court of Appeals has held that this definition is not facially overbroad or vague. People v Rogers (Rebecca), 249 Mich App 77, 105-106 (2001).

88 "[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.
continued but were switched, at the defendant’s request, to the
evenings and at hotels, where during the last four to five years
of therapy the defendant met with the victim once a week to
have sex with her. Id. at 197. The Court of Appeals found
sufficient evidence of coercion because “[the] defendant, as the
victim’s therapist, engaged in sexual contact with the victim
through the use of an unethical or unacceptable manner of
treatment.” Id. at 203.

5. Concealment or Element of Surprise

Although the circumstances surrounding concealment or the
element of surprise cover a wide array of potential factual
scenarios, the law does not expressly criminalize sexual activity
achieved through fraud, misidentification, or impersonation.
Even so, the Court of Appeals, in People v Crippen, 242 Mich
App 278, 283-284 (2000), held that a defendant who employs a
disguise that causes the victim to misidentify him or her has
provided sufficient evidence of concealment, and hence,
coercion, under the CSC Act:

“Applying the plain and ordinary, i.e., dictionary,
meaning of the word ‘conceal’ to the facts of this
case, we conclude that the evidence that [the]
defendant disguised himself, and took advantage
of the complainant’s misidentification of him as her
fiancé to induce her to submit to his sexual
advances, was sufficient to establish the requisite
coercion by concealment or surprise necessary for
bindover.”89

On the issue of consent, the Court of Appeals remarked that
the victim’s consent was the product of defendant’s subterfuge:

“The complainant did not knowingly consent to
performing sexual acts with defendant; only through
[the] defendant’s concealment of his identity was
he able to persuade the victim to submit to his
sexual advances.” Crippen, 242 Mich App at 284.

In People v Phelps, 288 Mich App 123, 133 (2010), the Court of
Appeals found that there was sufficient evidence to allow a
rational trier of fact to conclude beyond a reasonable doubt
that the defendant used force or coercion through the element
of surprise under MCL 750.520b(1)(f)(v):

89 Although the Legislature has not amended the CSC Act to expressly criminalize sexual activity through
misidentification or impersonation, there is a penal code misdemeanor crime governing the wearing of
masks or other devices to perpetrate crimes. See MCL 750.396.
“The [victim] testified that when [the defendant] entered her bedroom the second time, she did not tell him that he could penetrate her vagina with his penis and that she was unaware that [the defendant] removed his pants. She consented only to digital penetration, and she testified that she was surprised when [the defendant] penetrated her vagina with his penis. In addition, the [victim] was visibly upset and crying after the incident.”

6. **Uses of Force or Coercion Not Specified by Statute**

A finding of force or coercion is “not limited to those situations specifically delineated” in the force or coercion definitions of the CSC Act. *People v Cowley*, 174 Mich App 76, 81 (1989). MCL 750.520b(1)(f) (CSC-I) states that “[f]orce or coercion includes, but is not limited to, any of the following circumstances[.]” 90

The Michigan Supreme Court has limited this provision to victims who are awake at the time of the sexual act. *People v Patterson (Robert)*, 428 Mich 502, 526 (1987).

Michigan appellate courts have found coercion under the force or coercion provisions when the defendant’s actions create a “reasonable fear of dangerous consequences.” *People v McGill*, 131 Mich App 465, 474 (1984). In McGill, after driving a 13-year-old girl to a far-away state park, the defendant placed his hand on her leg, on the inside of her underpants, on her breast underneath her underclothes, and up the back of her shirt. The Court concluded, in light of the totality of the circumstances, that the defendant’s actions created a “reasonable fear of dangerous consequences” that, to a trier of fact, could constitute coercion:

“[The defendant] repeatedly and intimately touched the complainant despite her continued requests and orders to defendant to remove his hands from her. The complainant was only 13 years old. [The d]efendant was an older and presumably stronger man. [The d]efendant took the complainant to a state park far from her home. Complainant knew no one who lived nearby and testified that she was frightened. Given the totality

90 The CSC-II and CSC-III statutes incorporate by reference the definitions of force and coercion found in the CSC-I statute at MCL 750.520b(1)(f). See MCL 750.520c(1)(d)(ii) and MCL 750.520d(1)(b). The CSC-IV statute contains substantially similar language. See MCL 750.520e(1)(b).
of these circumstances, it could certainly be inferred that a coercive atmosphere existed and that [the] defendant knew, or should have known, that his actions were coercive. . . .” McGill, 131 Mich App at 474.

“‘[F]orce or coercion’ exists whenever a defendant’s conduct induces a victim to reasonably believe that the victim has no practical choice because of a history of child sexual abuse or for some other similarly valid reason.” People v Eisen, 296 Mich App 326, 333-335 (2012) (where the adolescent victim “did not specifically testify that she was explicitly threatened, [but] she . . . believed the sexual conduct would ‘happen whether [she] wanted it or not[,]’” sufficient evidence of force or coercion was presented, in light of the “long history of [the] defendant sexually abusing the victim and making her comply with his sexual demands[,]” to sustain his conviction of CSC-III).

Where the victim and the perpetrator have an ongoing relationship under circumstances that might ordinarily be considered coercive, there must be a showing of coercion on the specific occasion on which the CSC charge is based. People v Perkins (Mark), 468 Mich 448, 454-455 (2003).

See also People v Kline, 197 Mich App 165, 167 (1992), where the Court of Appeals found force or coercion present when the defendant grabbed his 16-year-old stepdaughter’s breasts, removed her panties, told her not to tell her mother, then sexually penetrated her—without ever threatening her, and only having isolated her from help on one of the sexual penetrations (he had taken her to the basement). The Court also held that a victim’s mental capacity was relevant to a determination of force or coercion under the totality of the circumstances: “evidence [regarding the victim’s mental capacity] was relevant to show that [the victim] may have had a somewhat diminished capacity to consent and to show that such diminished capacity may have made her more susceptible to [the] defendant’s coercion.” Kline, supra at 168.

K. Foster Family Home or Foster Family Group Home

“[A] person licensed to operate a foster family home or foster family group home” who engages in sexual penetration or sexual contact with a person at least 13 but less than 16 years of age who is a resident of that foster family home or foster family group home commits CSC-I (penetration) or CSC-II (contact).91 MCL 750.520b(1)(b)(vi); MCL 750.520c(1)(b)(vi).
“[A] person licensed to operate a foster family home or foster family group home” who engages in sexual penetration or sexual contact with a person at least 16 but less than 18 years of age who is a resident of that foster family home or foster family group home commits CSC-III (penetration) or CSC-IV (contact).\textsuperscript{92} MCL 750.520d(1)(g); MCL 750.520e(1)(h).

MCL 722.111(o)(i) defines foster family home as “a private home in which 1 but not more than 4 minor children, who are not related to an adult member of the household by blood or marriage, or who are not placed in the household under the Michigan adoption code, . . . . MCL 710.21 to [MCL] 710.70, are given care and supervision for 24 hours a day, for 4 or more days a week, for 2 or more consecutive weeks, unattended by a parent, legal guardian, or legal custodian.” See MCL 750.520b(1)(b)(vi); MCL 750.520c(1)(b)(vi); MCL 750.520d(1)(g); MCL 750.520e(1)(h).

MCL 722.111(o)(ii) defines foster family group home as “a private home in which more than 4 but fewer than 7 minor children, who are not related to an adult member of the household by blood or marriage, or who are not placed in the household under the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70, are provided care for 24 hours a day, for 4 or more days a week, for 2 or more consecutive weeks, unattended by a parent, legal guardian, or legal custodian.” See MCL 750.520b(1)(b)(vi); MCL 750.520c(1)(b)(vi); MCL 750.520d(1)(g); MCL 750.520e(1)(h).

L. Intellectual Disability

MCL 750.520a(d) defines intellectual disability as follows:

“'Intellectual disability means that term as defined in . . . MCL 330.1100b.’”

MCL 330.1100b(12) defines intellectual disability as follows:

“'Intellectual disability' means a condition manifesting before the age of 18 years\textsuperscript{93} that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

\textsuperscript{91} If the victim is under age 13, the actor’s title or position, and the victim’s status with respect to the child care organization is irrelevant.

\textsuperscript{92} Note that other circumstances may be present such as age, relationship, or use of force that would make irrelevant the actor’s title or position, or the victim’s status with respect to the child care organization.
(a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.

(b) The existence of limitation in adaptive skills occurs within the context of community environments typical of the individual’s age peers and is indexed to the individual’s particular needs for support.

(c) Specific adaptive skill limitations often coexist with strengths in other adaptive skills or other personal capabilities.

(d) With appropriate supports over a sustained period, the life functioning of the individual with an intellectual disability will generally improve."

The term *intellectually disabled*\(^94\) is contained within the definition of *mentally disabled* under MCL 750.520a(i):

“‘Mentally disabled’ means that a person has a mental illness, is *intellectually disabled*, or has a developmental disability.” (Emphasis added.)

Although the term *intellectual disability* is not expressly contained within the substantive CSC offenses, it is still a crime to sexually penetrate or contact a person who is *intellectually disabled* because it is a crime to commit such acts against a *mentally disabled* person. CSC-I and CSC-II prohibit the sexual penetration of, or contact with, a person who is *mentally disabled* under the circumstances detailed in Section 2.6(Q).

**M. Intimate Parts**

The term *intimate parts* applies only to sexual contact offenses, and not penetration offenses. The statutes governing CSC-II, CSC-IV, and assault with intent to commit CSC-II all involve sexual contact, which by definition involves *intimate parts* or the clothing covering

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\(^{93}\) “[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).

\(^{94}\) For purposes of the Michigan Penal Code, the terms *intellectual disability* and *intellectually disabled* are used interchangeably.
those *intimate parts*. MCL 750.520a(f) defines *intimate parts* as follows:

“‘Intimate parts’ includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.”

MCL 750.520a(q) defines *sexual contact* as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(i) Revenge.

(ii) To inflict humiliation.

(iii) Out of anger.”

It is clear from MCL 750.520a(q) that the sexual contact may involve either the defendant’s or the victim’s intimate parts. While the prosecution must prove that a defendant intended to touch the intimate part, it need not prove a defendant’s specific intent—that is, the prosecution need not prove that the defendant, in fact, sought sexual arousal or gratification, etc. Instead, the prosecution need only prove that the touching can “reasonably be construed as being for a sexual purpose.” *People v Piper*, 223 Mich App 642, 646-647 (1997). See also *People v Fisher (Frederick)*, 77 Mich App 6, 13 (1977), and Section 2.6(X).

**N. Member of the Same Household**

This phrase refers to the living arrangement between a victim and the perpetrator. CSC-I and CSC-II prohibit sexual penetration or contact in the following circumstance:

• **When the victim is at least 13 but less than 16 years of age and is a “member of the same household” as the perpetrator.** MCL 750.520b(1)(b)(i) (CSC-I); MCL 750.520c(1)(b)(i) (CSC-II).

The CSC Act does not define *member of the same household*. However, in *People v Garrison (Dale)*, 128 Mich App 640, 646 (1983), the Court of Appeals considered this phrase in the context of the CSC Act and found that to be deemed a household member, the facts must establish more than a “brief or chance visit.” In *Garrison (Dale)*, *supra* at 642, 645, the defendant appealed his CSC-I conviction, arguing
that the victim, his 13-year-old stepdaughter, should not be deemed a member of the same household because she only had “visitation” with the defendant and her mother during the summer months pursuant to a custody order. (During the school year, the victim lived with her father and stepmother.) The Court of Appeals disagreed:

“We believe the term ‘household’ has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in the statute. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit.” Garrison, 128 Mich App at 646-647.

CSC-I and CSC-II do not require proof of a “coercive authority figure” or a “subordinating relationship” to establish the CSC Act’s household element. People v Phillips (Keith), 251 Mich App 100, 103-104 (2002). Relying on Garrison (Dale), 128 Mich App 640, the defendant specifically argued that there was no evidence of either a subordinating relationship or that he was a coercive authority figure. Phillips (Keith), supra at 103-104. The Court of Appeals held that, under the CSC-I statute, no proof of either phrase is needed to prove the household element, because the two phrases are not elements of the CSC-I offense. Id. at 104-105.

0. Mental Health Professional

MCL 750.520a(g) defines mental health professional as follows:

“‘Mental health professional’ means that term as defined in . . . MCL 330.1100b.”

MCL 330.1100b(16) defines mental health professional as follows:

“‘Mental health professional’ means an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following:

(a) A physician.

(b) A psychologist.

95 The analysis and holding in Phillips applies equally to the CSC-II statute, because that statute contains the same language concerning household. Phillips, 251 Mich App at 105 n 2.
(c) A registered professional nurse licensed or otherwise authorized to engage in the practice of nursing under . . . MCL 333.17201 to [MCL] 333.17242.

(d) A licensed master’s social worker licensed or otherwise authorized to engage in the practice of social work at the master’s level under . . . MCL 333.18501 to [MCL] 333.18518.

(e) A licensed professional counselor licensed or otherwise authorized to engage in the practice of counseling under . . . MCL 333.18101 to [MCL] 333.18117.

(f) A marriage and family therapist licensed or otherwise authorized to engage in the practice of marriage and family therapy under . . . MCL 333.16901 to [MCL 333.16915.”

CSC-IV prohibits a mental health professional from engaging in sexual contact with another person when:

“The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.” MCL 750.520e(1)(e).

P. Mental Illness

MCL 750.520a(h) defines mental illness as follows:

“‘Mental illness’ means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”

In the CSC Act, the term mental illness is important because it is a component of the statutory circumstance of being a mentally disabled person. Although the term mental illness is not expressly stated within the substantive CSC offenses, it is still a crime to sexually penetrate or contact a person with a mental illness because it is a crime to commit such acts against a mentally disabled person.
Q. Mentally Disabled

MCL 750.520a(i) defines \textit{mentally disabled} as follows:

“‘Mentally disabled’ means that a person has a mental illness, is intellectually disabled\textsuperscript{96} or has a developmental disability.”

CSC-I and CSC-II prohibit the sexual penetration of, or contact with, a person who is \textit{mentally disabled} in the following circumstances:

- \textbf{When the perpetrator is related to the victim by blood or affinity to the fourth degree.} MCL 750.520b(1)(h)(i) (CSC-I); MCL 750.520c(1)(h)(i) (CSC-II).

- \textbf{When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit.} MCL 750.520b(1)(h)(ii) (CSC-I); MCL 750.520c(1)(h)(ii) (CSC-II).

The CSC-I and CSC-II statutory provisions contain no language limiting a defendant’s liability to situations in which he or she “knows or has reason to know” of the victim’s mental condition. The absence of this language suggests that a defendant’s knowledge of the victim’s mental condition is irrelevant. Thus, the CSC Act appears to impose criminal liability regardless of whether the perpetrator knew or had reason to know about the victim’s mental disability.

R. Mentally Incapable and Mentally Incapacitated

MCL 750.520a(j) defines \textit{mentally incapable} as follows:

“‘Mentally incapable’ means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.”

MCL 750.520a(k) defines \textit{mentally incapacitated} as follows:

“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any

\textsuperscript{96} MCL 750.520a(d) defines the term \textit{intellectually disabled} as “that term as defined in . . . MCL 330.1100b.” For MCL 330.1100b’s definition of the term \textit{intellectual disability}, see Section 2.6(L).
other act committed upon that person without his or her consent.”

The sexual penetration of, or contact with, a *mentally incapable* or *mentally incapacitated* person is prohibited in each of the statutes governing CSC-I to CSC-IV. CSC-I and CSC-II prohibit sexual penetration or contact in the following circumstances:

- **When the actor is aided and abetted by one or more other persons, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(d)(i) (CSC-I); MCL 750.520c(1)(d)(i) (CSC-II).

- **When the actor causes personal injury to the victim and knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(g) (CSC-I); MCL 750.520c(1)(g) (CSC-II).

- **When the actor is related to the victim by blood or affinity to the fourth degree and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(h)(i) (CSC-I); MCL 750.520c(1)(h)(i) (CSC-II). The actor’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.

- **When the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(h)(ii) (CSC-I); MCL 750.520c(1)(h)(ii) (CSC-II). The actor’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.

CSC-III and CSC-IV prohibit sexual penetration or contact in the following circumstance:

- **When the perpetrator knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.** MCL 750.520d(1)(c) (CSC-III); MCL 750.520e(1)(c) (CSC-IV).

In *People v Breck*, 230 Mich App 450, 453-454 (1998), the Court of Appeals construed the definition of *mentally incapable* and the requirement that a victim be “incapable of appraising the nature of his or her conduct.” In *Breck, supra* at 451-452, 457, the defendant was convicted of CSC-III under MCL 750.520d(1)(c) for repeatedly engaging in anal intercourse with another male whom he knew to be mentally incapable. While the victim understood the physical nature of what the defendant did to him, he could not appreciate the
moral consequences of his actions. *Breck, supra* at 455-456. The defendant argued that the “nature of his or her conduct” should be limited to the *physical nature* of the conduct, but the Court of Appeals disagreed:

“We . . . hold that the statutory language in question is meant to encompass not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act. . . . [I]t is clear to us that the victim was unable to appraise the nature of the sexual activity in this case as either morally right or wrong. Nor did the victim understand that others could not engage in sexual activity with him without his consent. Thus, contrary to [the] defendant’s claim . . . the victim suffered from a mental disease or defect that rendered him incapable of appraising the nature of his conduct.” *Breck*, 230 Mich App at 455-456.

See also *People v Cox (Jeffery)*, 268 Mich App 440, 445-446 (2005) (a victim may be *mentally incapable* of fully understanding the nonphysical factors involved in sexual conduct with a defendant even though the victim demonstrated his comprehension of the physical nature of the sexual relationship between himself and the defendant, as well as an “awareness of the events as they occurred[,]” citing *Breck*, 230 Mich App at 455).

The language used in *MCL 750.520d(1)(c)—knows or has reason to know*—functions only to “eliminate liability where the mental defect is not apparent to reasonable persons.” *Cox (Jeffery)*, 268 Mich App at 446, quoting *People v Davis (Clarence)*, 102 Mich App 403, 407 (1980). For example, in *Cox (Jeffery), supra* at 446:

“[S]everal witnesses testified that the fact that the victim was mentally deficient is readily noticeable after only a short period of interaction. The psychologist opined that a reasonable person could discern within an hour that the victim has a mental defect, because the victim has inarticulate language, difficulty understanding words, and does not make inquiries typical of a seventeen-year-old.”

A trier of fact must employ an objective “reasonable person” standard in determining whether the defendant knew or had reason to know the victim was mentally incapable, mentally incapacitated, or physically helpless. *People v Baker (Thomas)*, 157 Mich App 613, 615 (1986). A defendant’s subjective perception is irrelevant. *Baker (Thomas), supra* at 616.
Intoxication is not a defense to the knows or has reason to know provisions of the statute because there is no “specific intent” or “real knowledge” requirement. Davis (Clarence), 102 Mich App at 407-408.

S. Nonpublic School (See “Schools”)

T. Personal Injury

MCL 750.520a(n), defines personal injury as follows:

“‘Personal injury’ means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.”

Although all sexual violence involves some injury to the victim, the CSC Act imposes more serious penalties when the perpetrator engages in sexual penetration or contact and causes specifically defined personal injury under the following circumstances:

• When the perpetrator uses force or coercion to accomplish the sexual penetration or contact. MCL 750.520b(1)(f) (CSC-I); MCL 750.520c(1)(f) (CSC-II). Force or coercion is defined under MCL 750.520b(1)(f)(i) to MCL 750.520b(1)(f)(v). See Section 2.6(J).

• When the perpetrator knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520b(1)(g) (CSC-I); MCL 750.520c(1)(g) (CSC-II).

Personal injury includes both bodily injury and mental anguish. People v Himmelein, 177 Mich App 365, 376 (1989). See also People v Mackle, 241 Mich App 583, 598-599 (2000) (degree of strangulation reported by victim supported a finding that she suffered bodily injury; victim’s perception that the defendant derived amusement from overpowering her “supported a finding that she suffered humiliation, or suffering of the mind”). A victim’s personal injury need not be permanent or substantial. People v Kraai, 92 Mich App 398, 402-403 (1979) (“bloody nose, a slap in the face, a punch to the stomach, strangulation until [the victim] lost consciousness and mental anguish”).

1. Bodily Injury

The following cases upheld the listed bodily injuries as satisfying the personal injury element of the CSC Act:

• People v Mackle, 241 Mich App 583, 598-600 (2000) (strangling with a necktie, repeated open-hand slaps,
punching in the leg, binding hands so tightly fingers go numb).


- **People v Himmelein,** 177 Mich App 365, 377 (1989) (“bruises, welts, or other marks to [the victim’s] hands, wrists, shoulder, groin and buttocks”).

- **People v Swinford,** 150 Mich App 507, 512 (1986) (choking that left visible handprints and caused muscle spasms in neck, swollen and torn vaginal areas).


- **People v Gwinn,** 111 Mich App 223, 239 (1981) (“scratches on [the victim’s] back,” “bruises on [the victim’s] nose,” “tenderness in [the victim’s] perineal area, particularly around the anus”).

- **People v Kraai,** 92 Mich App 398, 402 (1979) (“bloody nose, a slap in the face, a punch to the stomach, strangulation until [the victim] lost consciousness”).

2. Mental Anguish

The Michigan Supreme Court has defined *mental anguish* as follows:

“[E]xtreme or excruciating pain, distress, or suffering of the mind.” **People v Petrella,** 424 Mich 221, 227 (1985).

The Court also held that *mental anguish* is not limited to “mental suffering which occurs at the time of the assault.” **Petrella,** 424 Mich at 277.

The following is a nonexhaustive list of factors provided by the Supreme Court in **Petrella** to consider when determining whether a victim has suffered mental anguish. The Supreme Court stressed that each case must be decided on its own facts and that “no single factor listed below should be seen as necessary to a finding of mental anguish.” **Petrella,** 424 Mich at 270. The factors are as follows:

- Evidence that the victim was upset, crying, sobbing, or hysterical during or after the assault.
• The victim’s need for psychiatric or psychological care or treatment.

• Interference with the victim’s ability to live a normal life, such as missing work.

• The victim’s fear for his or her life or safety, or the life or safety of a person(s) near the victim.

• The victim’s feelings of anger and humiliation.

• Evidence that medication was prescribed to treat the victim’s anxiety, insomnia, or other symptoms.

• Evidence that the effects of the assault—emotional or psychological—were long-lasting.

• The victim’s lingering fear, anxiety, or apprehension about being vulnerable to another attack.

• The fact that the victim’s assailant was the victim’s biological father. Petrella, 424 Mich at 270-271.

Mental anguish does not require that a victim experience more than the emotional distress experienced by the “average” rape victim. Petrella, 424 Mich at 258. Specifically,

“[W]hile virtually all rape victims may in fact suffer mental anguish, the prosecution is limited by the availability of probative, admissible, and credible evidence of such anguish. In order to support a conviction of first-degree CSC, based on the aggravating factor of mental anguish, the prosecution is required to produce evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the victim experienced extreme or excruciating pain, distress, or suffering of the mind.

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The record must contain either direct evidence of intensified mental suffering, such as specific testimony on the point from the victim, or perhaps circumstantial evidence of such suffering, as an inference properly to be drawn from other facts in the record. While the trier of fact may draw reasonable inferences from facts of record, it may not indulge in inferences wholly unsupported by any evidence, based only upon assumption. . . .” Petrella, 424 Mich at 259, 275.
Evidence sufficient to establish the element of *mental anguish* was found in the following cases:

- **People v Himmelein**, 177 Mich App 365, 376 (1989) (after taping the victim’s hands and eyes and placing the victim’s crying three-year-old daughter in a nearby closet, the defendant raped her; the victim was “terrified and frightened” and “crying” when found by her husband; a physician testified that the victim was “tense and reserved to the point that it was difficult to talk to her”; and the victim would not stay at home by herself for several months following the incident).

- **People v Swinford**, 150 Mich App 507, 511, 514 (1986) (the defendant grabbed the victim, choked her, threatened to kill her, and then raped her in the backseat of a car; after the assault, the victim regularly saw a therapist and experienced marital problems; and because the victim was also fearful of working at night, she gave up her night shift, which resulted in a substantial pay cut).

- **People v Mackle**, 241 Mich App 583, 587-589, 598-600 (2000) (the defendant kidnapped the victim for a week and sexually penetrated her at least eight times in Michigan and “continuously” in Canada; the defendant threatened to deliver the victim to the Mafia in New York; he derived amusement from overpowering her; he conditioned her freedom on performing a sexual act; he tied her up and strapped her to his vehicle, promising to release her if she behaved; and he locked her in a small sauna for 15-20 minutes (on its highest setting), knowing she was claustrophobic).

A stepparent relationship is a proper factor to consider when deciding whether a victim has suffered *mental anguish*, even though the list of nonexhaustive factors in *Petrella* contains only a reference to biological parent. *People v Russell (Richard)*, 182 Mich App 314, 321 (1990), rev’d on other grounds 434 Mich 922 (1990)\(^{97}\) (the defendant the husband of adult victim’s maternal aunt). In reaching its decision, the Court relied on the rationale in *Petrella*, 424 Mich at 273—that “greater mental anguish can be expected in such a situation given the societal

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\(^{97}\)[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.

3. **Timing of Personal Injury**

A perpetrator may inflict a *personal injury* at any point in a sexual assault. The timing of this personal injury, in relation to the sexual penetration or contact, can be important under the CSC Act, particularly in cases involving multiple penetrations or contacts. A personal injury inflicted immediately before a series of sexual penetrations has been deemed sufficient to support each subsequent penetration. *People v Martinez (Alberto)*, 190 Mich App 442, 444-445 (1991). See also *People v Hunt (Therrian)*, 170 Mich App 1 (1988).

In *Hunt (Therrian)*, 170 Mich App at 8-9, the Court of Appeals held that personal injuries inflicted “immediately prior to” a series of sexual penetrations may be used to support not only the initial penetration, but also all subsequent penetrations:

> “The beating visited upon the complainant immediately prior to the series of sexual penetrations is sufficient to supply the element of personal injury with respect to each of the subsequent penetrations so as to support multiple convictions under [CSC-I—force or coercion involving personal injury]. We fail to see any distinction between this beating and an ongoing criminal act such as the use of a deadly weapon during multiple penetrations or, for that matter, any other felony committed in close temporal proximity with the acts of penetration. The evidence in this case shows that the beating inflicted upon the plaintiff, which caused physical injury and was used by the defendant to force or coerce his accomplishment of multiple sexual penetrations, was part of a continuing series of sexual assaults. The physical injury is a common element for each of the assaults under these circumstances. There was never any indication of the defendant’s intention to discontinue the attack during the entire episode.”

In *Martinez (Alberto)*, 190 Mich App at 445, the Court of Appeals, following *Hunt (Therrian)*, 170 Mich App 1, held that injuries inflicted “within ten minutes” of a sexual assault when there was “no indication of the defendant’s intention to discontinue the attack,” were sufficient to support the personal injury element on a subsequent penetration.
In People v Mackle, 241 Mich App 583, 587-589, 598-600 (2000), the defendant kidnapped the victim for a week and sexually penetrated her at least eight times in Michigan and “continuously” in Canada, causing numerous bodily injuries and considerable mental anguish. Because the Court could not determine which injuries were attributable to the sexual penetrations in Michigan, it methodically examined the victim’s testimony regarding each incident—although it was careful to point out, when examining one of the penetrations—that “our reading of Hunt [(Therrian), 170 Mich App 1] and Martinez[, 190 Mich App 442], indicates that we need not consider an act of penetration in isolation.” Mackle, supra at 600. Unlike Hunt (Therrian), 170 Mich App 1, and Martinez, 190 Mich App 442, the Court did not establish exactly when the personal injuries occurred in relation to the sexual penetrations—except to generally say they occurred “before” or “after” the penetrations. Mackle, supra at 597-600.

4. Causation of Personal Injury

A defendant need not be the “sole cause” of the victim’s personal injury. People v Brown (Ben), 197 Mich App 448, 452 (1992). In Brown (Ben), supra at 451, the victim was kidnapped and raped by other men before the defendant assaulted her. The defendant blamed the cause of the victim’s personal injury on the other men who kidnapped and raped her. Id. The Court of Appeals held that the defendant caused at least some of the personal injury to the victim, and that a defendant need not be the sole cause of the victim’s entire injury:

“Although the amount [of injury] may be undetermined or even arguably undeterminable, defendant was the cause of some part of the victim’s total injury. That is sufficient.” Brown (Ben), 197 Mich App at 452.

In addition to finding it sufficient that the defendant caused at least part of the victim’s personal injury, the Court of Appeals explained that a defendant takes a victim as he or she finds the victim. Brown (Ben), 197 Mich App at 451-452. In Brown (Ben), supra at 452, the personal injuries inflicted by the other perpetrators before the defendant raped the victim were not intervening or independent causes that exonerated the defendant. Brown (Ben), 197 Mich App at 451-452.

Relying on Brown (Ben), 197 Mich App 448, the Court of Appeals, in People v Alter, 255 Mich App 194, 196, 203-204 (2003), upheld the following supplemental jury instruction in a CSC-II case where the defendant, as the victim’s therapist,
fondled the victim’s breasts and placed her hands on his penis during therapy sessions:

“[T]he prosecution does not have to show that [the] defendant’s conduct was the only cause of the complainant’s mental anguish. If you find that the complainant was especially susceptible to the injury at issue, the special susceptibility does not constitute an independent cause freeing defendant from guilt. The prosecution has sustained its burden of proof if you find that [the] defendant was the cause of at least part of the victim’s total injury.”

5. Alternate Theories

The two types of personal injuries—bodily injury and mental anguish—are not alternate theories upon which a jury must make independent findings:

“When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory. The same reasoning applies here. Because bodily injury, mental anguish, and the other conditions listed in [MCL 750.520a(k)] are merely different ways of defining the single element of personal injury, we believe they should not be construed to represent alternative theories upon which jury unanimity is required. Accordingly, if the evidence of any one of the listed definitions is sufficient, then the element of personal injury has been proven.” People v Asevedo, 217 Mich App 393, 397 (1996) (internal citations omitted).98

Alternate theories used to support six charged penetrations cannot support 12 convictions; such an outcome violates the defendant’s protection against double jeopardy. Mackle, 241 Mich App at 600-601.

U. Physically Helpless

MCL 750.520a(m) defines physically helpless as follows:

98 See M Crim JI 20.30a for the jury instruction appropriate to cases where a CSC charge is supported by alternate theories.
“‘Physically helpless’ means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.”

The sexual penetration of, or contact with, a physically helpless person is prohibited in each of the four degrees of the CSC Act. CSC-I and CSC-II prohibit sexual penetration and contact in the following circumstances:

- **When the actor is aided and abetted by one or more other persons, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(d)(i) (CSC-I); MCL 750.520c(1)(d)(i) (CSC-II).

- **When the actor causes personal injury to the victim and knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(g) (CSC-I); MCL 750.520c(1)(g) (CSC-II).

- **When the actor is related to the victim by blood or affinity to the fourth degree and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(h)(i) (CSC-I); MCL 750.520c(1)(h)(i) (CSC-II).

- **When the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.** MCL 750.520b(1)(h)(ii) (CSC-I); MCL 750.520c(1)(h)(ii) (CSC-II).

CSC-III and CSC-IV prohibit sexual penetration or contact in the following circumstance:

- **When the perpetrator knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.** MCL 750.520d(1)(c) (CSC-III); MCL 750.520e(1)(c) (CSC-IV).

The touchstone of being physically helpless is the inability to communicate unwillingness to an act, e.g., when the victim is asleep or unconscious. People v Perry (James), 172 Mich App 609, 622 (1988). In Perry (James), 172 Mich App at 622, the victim was not considered physically helpless because “[s]he was [initially asleep when the defendant entered her home, but was] awake when the assault occurred and could physically communicate her unwillingness to the act.” “[A] different result would follow if the victim had been
penetrated by defendant while asleep or had awakened during that process.” *Id.*

A victim too scared and frightened to say anything, or to get away from her assailant, is not *mentally incapable, mentally incapacitated, or physically helpless* as a matter of law—although this does not preclude a finding of force or coercion against the assailant. *People v Makela*, 147 Mich App 674, 678, 680-682 (1985).

A trier of fact must employ an objective *reasonable person* standard in determining whether the defendant knew or had reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless. *People v Baker (Thomas)*, 157 Mich App 613, 615 (1986). Accordingly, a defendant is criminally responsible when a *reasonable person* knows or has reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless at the time of the sexual act, regardless of the defendant’s subjective perception. *People v Davis (Clarence)*, 102 Mich App 403, 407 (1980).

Intoxication is not a defense to the *knows or has reason to know* language of the statute because there is no *specific intent* or *real knowledge* requirement. *Davis (Clarence)*, 102 Mich App at 407-408.

V. Position of Authority

The CSC Act contains provisions that prohibit a perpetrator from using a *position of authority* to coerce a victim to submit to sexual acts. Although the phrase is undefined in the CSC Act, the statutes governing CSC-I and CSC-II expressly prohibit a person from using a *position of authority* to coerce a victim to submit to sexual penetration or contact in the following circumstances:

- **When the victim is at least 13 but less than 16 years of age.**
  - MCL 750.520b(1)(b)(iii) (CSC-I);
  - MCL 750.520c(1)(b)(iii) (CSC-II).

- **When the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.**
  - MCL 750.520b(1)(h)(ii) (CSC-I);
  - MCL 750.520c(1)(h)(ii) (CSC-II).

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99 “[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).
A *position of authority*, if it exists factually, may also be used to establish *coercion* under the *force or coercion* elements in CSC-I, CSC-II, CSC-III, and CSC-IV.\(^{100}\) See, e.g., *People v Regts*, 219 Mich App 294, 295-296 (1996) (a psychotherapist convicted of CSC-IV and attempted CSC-IV is in a position of authority over his patient, and the exploitation of this authority—by manipulating “therapy sessions to establish a relationship that would permit his sexual advances to be accepted without protest”—constituted coercion); and *People v Premo*, 213 Mich App 406, 407, 411 (1995) (a teacher charged with CSC-IV involving force or coercion is in a position of authority over students, and the exploitation of this authority—by pinching the students’ buttocks on school grounds—constituted implied, legal, or constructive coercion under the definition of *force or coercion*).

The following cases illustrate how courts have construed the *position of authority* circumstance under the CSC Act:

*People v Reid*, 233 Mich App 457 (1999):

The defendant, who was not a professional counselor but had previously served as a counselor at church, offered to help the 15-year-old victim with problems he was having in school. *Reid*, 233 Mich App at 460. The victim’s parents entrusted their son to the defendant for “informal” counseling on three or four occasions. *Reid, supra* at 461. On the last occasion, the defendant supplied the victim with alcohol, showed him sexually provocative computer pictures, coaxed him into removing his clothes, performed fellatio on the victim, and had the victim fellate him. *Id.* at 462-465. The defendant argued that there was insufficient evidence to support a conclusion that he was in a position of authority over the victim, or that he used this authority to coerce the victim to submit. The Court of Appeals disagreed:

“From the [evidence], a rational jury could infer . . . that the complainant’s parents placed [the] defendant in a position of authority over the complainant, particularly at times when they allowed the complainant to spend time with [the] defendant outside their presence, and that the complainant was aware of this. Indeed, on the occasion of the first meeting between the complainant and [the] defendant, the complainant’s father delivered the complainant into [the] defendant’s care on a day that the complainant was suspended from school. Further, the testimony of the complainant’s mother indicated

\(^{100}\) On what constitutes *force or coercion*, see Section 2.6(J) and MCL 750.520b(f), which applies to CSC-I, CSC-II, and CSC-III, and MCL 750.520e(b), which applies to CSC-IV.
that she entrusted the complainant to [the] defendant’s care on the night of the alleged incidents.

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Viewing the evidence most favorably to the prosecution in light of all the circumstances . . . [the] defendant used a position of authority over the complainant to engineer a quite elaborate series of events to place the complainant in a confused and disoriented condition and then took advantage of the complainant’s condition to perform fellatio on the complainant and to instruct successfully the complainant to perform fellatio on him. This is sufficient evidence for a rational factfinder to conclude that the complainant was ‘constrained by subjugation,’ and, thus, coerced into submitting to these acts of sexual penetration by [the] defendant through use of his position of authority over the complainant.” Reid, 233 Mich App at 468, 471, quoting People v Premo, 213 Mich App 406, 411 (1995) (internal citations omitted).

The Court also discussed the defendant’s lack of a formal title and the victim’s special vulnerability:

゛[A] reasonable jury could have found that [the] defendant exploited the special vulnerability attendant to his relationship with the complainant to abuse him sexually. While it is true that [the] defendant in this case did not hold a formal position, such as being a school teacher, we find that inconclusive. There certainly was sufficient evidence to support a finding that [the] defendant was placed in a substantially similar position of practical authority over the complainant.” Reid, 233 Mich App at 472.

* People v Knapp, 244 Mich App 361 (2001):

The defendant was a master reiki teacher (an ancient healing art involving various hand positions used to activate “internal healing powers”) and a practitioner with a master’s degree in counseling. Knapp, 244 Mich App at 365. The defendant first instructed the 14-year-old victim’s mother; later, he began instructing the victim. Knapp, supra at 365-366. While alone with the victim in a bedroom, the victim, at defendant’s request, felt defendant’s testicles and put one hand on the defendant’s stomach while the defendant talked about sexual energy. Id. at 367. Later that day, the victim, again at defendant’s request, touched and manipulated the defendant’s testicles while the defendant talked about sexual energy and
masturbated. *Id.* The defendant claimed insufficiency of the evidence to support a finding that he was in a position of authority or that this authority was used to coerce the victim to submit. *Id.* at 368. The Court of Appeals disagreed:

“[The defendant] first gained the trust of complainant’s mother by acting as her therapist and reiki teacher. [The complainant’s] mother testified that she considered [the defendant] a friend, teacher, and counselor and that she often sought his counseling help. As an outgrowth of this relationship, [the] complainant formally asked [the] defendant if he could take one of [the] defendant’s reiki classes and [the] defendant agreed to become [the] complainant’s reiki teacher. [The defendant], as a master reiki teacher and practitioner, instructed his reiki students in an organized class and controlled the information the students learned. This Court has held that a teacher is in a position of authority over a student as a matter of law.

The mere fact that [the] defendant taught in a nontraditional classroom setting does not mean that his position was any less authoritative than in a traditional teacher-student relationship. . . . [T]he characteristic dominant and subordinate roles in any teacher-student relationship places the student in a position of special vulnerability. . . . [The complainant] was the only young adolescent in a class taught and attended by adults. Given his age, the unconventional nature of the ‘curriculum,’ and the trust [the] defendant fostered with [the] complainant’s mother, [the] complainant was highly susceptible to abuse. Under these circumstances, we find that [the] defendant exploited and abused his position of authority to compel an extremely vulnerable youth to engage in sexual contact. This clearly constitutes coercion for purposes of this section of the CSC-I statute.” *Knapp,* 244 Mich App at 371-372, citing *Premo,* 213 Mich App at 411.\(^{101}\)

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\(^{101}\) The Court relied on the analysis in *People v Reid,* 233 Mich App 457 (1999), concerning CSC-I, finding *Reid* “equally applicable” to CSC-II. *Knapp,* 244 Mich App at 369.
W. Public School (See “Schools”)

X. Reasonably Be Construed As Being for the Purpose of Sexual Arousal or Gratification

This phrase is used in the sexual contact element of the CSC Act, MCL 750.520a(q), which states as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(i) Revenge.
(ii) To inflict humiliation.
(iii) Out of anger.” (Emphasis added.)

The language emphasized in MCL 750.520a(q) applies only to sexual contact offenses. People v Bailey (Barry), 103 Mich App 619, 626-627 (1981). Because this language is not contained within the sexual penetration definition of MCL 750.520a(r), it is not an element in offenses involving sexual penetration.

Michigan appellate opinions have established an objective or reasonable person standard when determining whether sexual contact was for the purpose of sexual arousal or gratification. Therefore, while a defendant must intend the sexual touching, his or her subjective or specific intent as to sexual arousal or gratification is irrelevant. See People v Fisher (Frederick), 77 Mich App 6, 13 (1977):

“Under the . . . definition of ‘sexual contact[,]’ . . . the defendant’s specific intent is not an essential element of the crime. The actor must touch a genital area intentionally, but he [or she] need not act with the purpose of sexual gratification. Rather, it suffices if ‘that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification[,]’”

In People v Piper, 223 Mich App 642, 647 (1997), the Court of Appeals affirmed the principle enunciated in Fisher, 77 Mich App 6, but went further and specifically addressed an objective reasonable person standard:

“The statute further requires that the prosecution prove that the intentional touch could ‘reasonably be construed
as being for [a] sexual purpose.’ MCL 750.520a[(q)] (emphasis added). The statute’s language is clear and its inclusion of a reasonable person standard provides a structure to guide the jury’s determination of the purpose of the contact. Consequently, contrary to [the] defendant’s argument, a jury is properly limited to a determination whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose.” (Some internal citations omitted.)

Y. Schools

The CSC Act contains specific provisions that prohibit sexual penetration or sexual contact under certain circumstances when the conduct occurs at any of the following educational facilities or institutions.

1. Definitions

a. Intermediate School District

MCL 750.520a(e) defines intermediate school district as “a corporate body established under . . . the revised school code . . . MCL 380.601 to 380.705.”

b. Nonpublic School

MCL 750.520a(l) defines nonpublic school as “a private, denominational, or parochial elementary or secondary school.”

c. Public School

MCL 750.520a(o) defines public school as “a public elementary or secondary educational entity or agency that is established under the revised school code . . . MCL 380.1 to [MCL] 380.1852.”

The revised school code defines public school as

“a public elementary or secondary educational entity or agency that is established under this act, has as its primary mission the teaching and learning of academic and vocational-technical skills and knowledge, and is operated by a school district, local act school district, special act
school district, intermediate school district, school of excellence, public school academy corporation, strict discipline academy corporation, urban high school academy corporation, or by the department or state board. Public school also includes a laboratory school or other elementary or secondary school that is controlled and operated by a state public university described in section 4, 5, or 6 of article VIII of the state constitution of 1963.” MCL 380.5(6).

d. School District

MCL 750.520a(p) defines school district as “a general powers school district organized under the revised school code . . . MCL 380.1 to [MCL] 380.1852.”

2. CSC Offenses Involving Public and Nonpublic Schools and School Districts

The CSC statutes contain language that prohibits sexual penetration or sexual contact of specified victims when:

- “[t]he actor is a teacher, substitute teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district[,]” or

- “[t]he actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district[,] . . . or is a volunteer who is not a student in any public or nonpublic school, or is a[ ] [local, state, or federal government] employee . . . assigned to provide any service to [the school or school district at issue]” See MCL 750.520b(1)(b)(iv)-(v), MCL 750.520c(1)(b)(iv)-(v), MCL 750.520d(1)(e)(i)-(ii), and MCL 750.520e(1)(f) (emphasis added). See also MCL 750.520e(1)(g), which contains similar language except that it contemplates fewer occupations and applies to victims who are receiving special education services.

This language refers to the “occupation of the actor” and not “to the timing of the sexual penetration.” People v Lewis, 302 Mich App 338, 345-346 (2013) (the case specifically addresses the language found in MCL 750.520d(1)(e)(i)-(ii); presumably, this holding applies to all of the CSC statutes containing substantially similar language). In Lewis, supra at 347, the Court held that “[t]he plain language stating the
various methods of committing third-degree criminal sexual conduct [under MCL 750.520d(1)(e)(i)-(ii)] indicates that the statute was designed to prevent harm to individuals of a certain age or a certain vulnerability from actors with knowledge of the vulnerability or actors that occupy positions of authority or supervision over the individuals[; and] . . . there is no temporal requirement in the plain language of the statute regarding the commission of the sexual penetration[;]” rather, regardless of when the act occurs, “if the actor’s occupation as a substitute teacher [or contract service provider] allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct”.

a. CSC-I and CSC-II Offenses Involving Student Victims at Least 13 But Less Than 16 Years of Age

CSC-I and CSC-II prohibit the sexual penetration of, or sexual contact with, a person at least 13 but less than 16 years of age under the following circumstances involving public schools, nonpublic schools, and school districts:

• “[W]hen the actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled.” MCL 750.520b(1)(b)(iv) (CSC-I); MCL 750.520c(1)(b)(iv) (CSC-II).

• “[W]hen the actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or

\[102\] MCL 750.520d(1)(e)(i)-(ii), the specific provisions discussed in Lewis, supra, also contemplate sexual penetration by other actors of different occupations. Although the defendant in Lewis, supra, did not fit into any of these occupational categories, the holding presumably applies to those occupations as well. See also MCL 750.520b(1)(b)(iv)-(v), MCL 750.520c(1)(b)(iv)-(v), and MCL 750.520e(1)(f)-(g), which contain substantially similar provisions as found in MCL 750.520d, except that they apply to situations involving younger victims, situations involving victims who receive special education services, and/or situations involving sexual contact.
volunteer status to gain access to, or to establish a relationship with, that other person.” MCL 750.520b(1)(b)(v) (CSC-I); MCL 750.520c(1)(b)(v) (CSC-II).

b. **CSC-III and CSC-IV Offenses Involving Student Victims At Least 16 But Less Than 18 Years of Age**

CSC-III and CSC-IV prohibit the sexual penetration of, or sexual contact with, a person at least 16 but less than 18 years of age who is a student at a public or nonpublic school under the following circumstances:

• “[W]hen the actor is a teacher, substitute teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district. This subparagraph does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.” MCL 750.520d(1)(e)(i) (CSC-III); MCL 750.520e(1)(f)(i) (CSC-IV).

• “[W]hen the actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.” MCL 750.520d(1)(e)(ii) (CSC-III); MCL 750.520e(1)(f)(ii) (CSC-IV).

c. **CSC-III and CSC-IV Offenses Involving Students Receiving Special Education Services**

CSC-III and CSC-IV prohibit the sexual penetration of, or sexual contact with, a person at least 16 but less than 26 years of age who is receiving special education services under either of the following circumstances:
• “[When t]he actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of the public school, nonpublic school, school district, or intermediate school district from which that other person receives the special education services. This subparagraph does not apply if both persons are lawfully married to each other at the time of the alleged violation.” MCL 750.520d(1)(f)(i) (CSC-III); MCL 750.520e(1)(g)(i) (CSC-IV).

• “[When t]he actor is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.” MCL 750.520d(1)(f)(ii) (CSC-III); MCL 750.520e(1)(g)(ii) (CSC-IV).

Z. Sexual Contact

MCL 750.520a(q) defines sexual contact as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(i) Revenge.

(ii) To inflict humiliation.

(iii) Out of anger.”

AA. Sexual Penetration

MCL 750.520a(r) defines sexual penetration as follows:

“‘Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body
or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.”

Sexual acts constituting sexual penetration are not defined in the CSC Act. Therefore, sexual conduct, or words and phrases, must be accorded their “plain and ordinary” meaning. People v Crippen, 242 Mich App 278, 283 (2000). Some appellate opinions, after consulting dictionaries, have defined some of this sexual conduct and have, in the case of fellatio and cunnilingus, drawn critical distinctions between them. For instance, while both of these sex acts are deemed sexual penetration by definition in M Crim JI 20.1 and M Crim JI 20.12, only fellatio by its plain and ordinary meaning requires some form of penetration or intrusion. Cunnilingus, by its plain and ordinary meaning, does not. Cunnilingus is satisfied by oral contact alone, despite being deemed sexual penetration under the CSC Act.

Under the CSC Act, the term sexual penetration, in contrast to the term sexual contact, requires no proof of the perpetrator’s sexual purpose.

1. Fellatio

In People v Harris (Robert), 158 Mich App 463, 469 (1987), the Court of Appeals consulted dictionary definitions to assess the meaning of fellatio:

“[Fellatio] is defined in Dorland’s Illustrated Medical Dictionary, 23d ed, as: ‘The act of taking the penis into the mouth.’ Obviously, by definition, fellatio includes the necessity of a penetration. Webster’s New Collegiate Dictionary indicates similarly that the word indicates ‘to suck,’ or ‘oral stimulation of the penis.’”

In People v Johnson (Bruce II), 432 Mich 931 (1989), the Michigan Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals and adopted Judge Michael Kelly’s dissenting opinion in People v Johnson (Bruce I), 164 Mich App 634, 646-649 (1987), in which Judge Kelly rejected the majority’s conclusion that a “kiss of a penis” established sexual penetration under the definition of fellatio: “To do so blurs the distinction between contact and penetration. There is no testimony here or evidence to support any penetration, however slight . . . .” See also People v Reid, 233 Mich App 457, 480 (1999), where the Court of Appeals construed Judge Kelly’s dissent in Johnson (Bruce I) as defining fellatio as the “entry of a penis into another person’s mouth.”
But see People v Waclawski, 286 Mich App 634, 677 (2009), where the Court of Appeals concluded that the definition of *fellatio* (requiring entry of a penis into another person’s mouth) as adopted by Reid, 233 Mich App 457, was contrary to the plain language of MCL 750.520a(r), which does not define *fellatio*. The Court noted that the dictionary definition of *fellatio* included “oral stimulation of the penis” and that contact by a person’s mouth or tongue satisfied the dictionary definition. *Waclawski, supra* at 677. However, the Court was bound by *Reid, supra*, under MCR 7.215(J)(1), and declined to call for a conflict resolution panel because doing so was unnecessary to the disposition of the case. 103 *Waclawski, supra* at 677 n 7.

2. **Cunnilingus**

*Cunnilingus* is satisfied by the placing of a mouth on a woman’s urethral opening, vaginal opening, or labia. People v Legg, 197 Mich App 131, 133 (1992). No actual intrusion or penetration of a person’s vagina 104 or genital organs is necessary to establish cunnilingus. *Harris (Robert)*, 158 Mich App at 470. In *Harris (Robert), supra* at 469, the Court of Appeals relied on dictionary definitions and concluded that by definition, the plain and ordinary meaning of cunnilingus is oral contact with, or the placing of a mouth or tongue upon, a woman’s *external* genital organs:

“*Ballantine’s Law Dictionary, 3d ed*, defines ‘cunnilingus’ as ‘[a]n act committed with the mouth and the female sex organ, or oral-genital contact.’ Returning to *Dorland*[’s *Illustrated Medical Dictionary, 23d ed*], it defines ‘cunnilingus’ as ‘the licking of the vulva or clitoris.’ The vulva is explained to be: ‘The external genital organs of the female, including the *mons pubis* [sic], 105 *labia majora*, 106 and other structures between the *labia*.’”

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103 The evidence in *Waclawski*, 286 Mich App at 677-678, also included two photographs that clearly showed *fellatio* as defined in *Reid*, 233 Mich App at 480 (penetration of a penis into a person’s mouth).

104 *Webster’s New World College Dictionary*, 4th ed (2001), defines *vagina*, in part, as “the canal between the vulva and the uterus.”

105 *Webster’s New World College Dictionary*, 4th ed (2001), defines *mons pubis* as “the fleshy, rounded area at the lower edge of the human, esp. female, abdomen, that becomes covered with pubic hair at puberty.”

106 *Webster’s New World College Dictionary*, 4th ed (2001), defines *labia majora* as “the outer folds of skin of the vulva, one on either side”; it also defines *labia minora* as “the two folds of mucous membrane within the labia majora.”
Using these definitions, the Court upheld a jury instruction that read “Cunnilingus in and of itself is penetration,” stating as follows:

“Accordingly, it is evident that cunnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself [sic], or the mons pubes [sic]. Therefore, there is no requirement, if cunnilingus is performed, that there be something additional in the way of penetration for that sexual act to have been performed. Thus, the trial court correctly indicated that an act of cunnilingus involved by definition an act of sexual penetration.” Harris, 158 Mich App at 467, 470.

Detailed testimony is not required to sustain proof of cunnilingus. People v Lemons, 454 Mich 234, 254-255 (1997). A victim’s general testimony that she was ordered to perform “oral sex on her stepmother” was not too vague to establish the occurrence of cunnilingus. Lemons, supra at 252, 254-255. “[S]pecific testimony indicating some kind of oral sexual act, such as lips or tongue or vaginal area or licking or something to that effect” is not necessary. Id. at 252 n 28.

3. Sexual Intercourse

*Sexual intercourse* is defined in *Webster’s New World College Dictionary*, 4th ed (2001), as “a joining of the sexual organs of a male and a female, in which the erect penis of the male is inserted into the vagina of the female[.]” The Legislature defined *sexual penetration* as including *sexual intercourse* “or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body . . . .” MCL 750.520a(r). “The fact that the Legislature used ‘genital opening’ rather than ‘vagina’ indicates an intent to include the labia.” People v Bristol, 115 Mich App 236, 238 (1981). See also People v Lockett, 295 Mich App 165, 187-188 (2012) (although the 12-year-old victim denied that any penetration occurred, “the jury could have reasonably inferred that [the defendant’s] penis intruded, however slightly, into [the victim’s] vagina or labia majora[]” on the basis of her testimony that she and the defendant “were attempting to have sexual intercourse[,] . . . that [the defendant’s] ‘private’ was touching her ‘private[]’ . . . where she would use tissue while wiping after urination, and that she experienced pain going into her ‘private parts[]’”).
Therefore, to sustain a finding of sexual intercourse under the CSC Act, only penetration of the labia majora by the penis is necessary; no penetration of the vagina is needed. Bristol, 115 Mich App at 238. Stated another way, penetration of the labia majora constitutes penetration of a genital opening within the meaning and intent of the statutory definition of sexual penetration. Bristol, supra at 238.

4. Anal Intercourse

Anal intercourse is undefined in the CSC Act and in the Webster’s New World College Dictionary, 4th ed (2001). However, the common meaning of anal intercourse is the insertion of a male sex organ into the anus or anal opening of another person.

For purposes of establishing penetration, appellate courts have upheld imprecise testimony concerning the entry of a penis into another person’s anus or anal opening. In People v Wrenn, 434 Mich 885 (1990), the Michigan Supreme Court reinstated a CSC-I conviction, finding sufficient evidence of intrusion, however slight, from an 8-year-old victim’s testimony that the defendant “put his private in my butt.” See also People v Zinn, 63 Mich App 204, 206-210 (1975) (the Court of Appeals found sufficient evidence of sexual penetration by drawing inferences from the victim’s inexact testimony that defendant “stuck his penis in my ass”).

5. Any Other Intrusion

The definition of sexual penetration contains a catch-all provision based upon the following language: “or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body." MCL 750.520a(r).

Using a hand or a finger to penetrate a victim’s vagina or anal opening is sexual penetration. People v Callahan, 152 Mich App 29, 31-32 (1986); People v Anderson (Clement), 111 Mich App 671, 678 (1981).

Intrusion by an object (in this case, the defendant’s finger) into a victim’s genital area, even when the genital area is covered by clothing (in this case, the victim’s underwear), is actionable as

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107 Webster’s New World College Dictionary, 4th ed (2001), defines anus as “the opening at the lower end of the alimentary canal.”

“While [the] defendant argues that the complainant’s underwear ‘covered’ her vagina, implying that the underwear was some type of impregnable barrier precluding penetration, the testimony clearly demonstrated that the underwear was forced inward by defendant’s finger. [The d]efendant’s finger, a part of his body, sexually penetrated the complainant’s genital opening; we need not consider whether the underwear being discussed may be considered an ‘object’ within the meaning of the statute.”

**AB. Victim**

MCL 750.520a(s), defines victim as “the person alleging to have been subjected to criminal sexual conduct.”

CSC crimes require a live victim at the time of sexual penetration or contact. People v Hutner, 209 Mich App 280, 283-284 (1995). In Hutner, supra at 281, the defendant sexually penetrated a prostitute after he had killed her. In construing the term victim as used under the CSC Act, the Court held:

“We conclude that the crime of criminal sexual conduct requires a live victim at the time of penetration. . . . A dead body is not a person. It cannot allege anything. A dead body has no will to overcome. It does not have the same potential to suffer physically or mentally as a live or even an unconscious or dying victim.” Hutner, 209 Mich App at 283-284.

**2.7 Fines, Costs, and Assessments**

The authority to impose fines, costs, and assessments on defendants convicted of criminal offenses is governed by statute. Statutory provisions prohibiting criminal conduct often prescribe the fines and/or costs applicable to a conviction of the offense described in the statute.108 See MCL 775.22 for the allocation of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments arising out of the same criminal proceeding.

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108 For example, CSC-IV authorizes the imposition of a fine of not more than $500 for conviction of the offense. However, CSC-I, CSC-II, and CSC-III are silent with regard to the imposition of a fine for conviction of those offenses.
For sentences imposed under the legislative sentencing guidelines, MCL 769.34(6) states 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 provides a court with general statutory authority to impose fines and costs. In addition, if a convicted defendant is ordered “to pay any combination of a fine, costs, or applicable assessments,” the court must impose the minimum state costs as set out in MCL 769.1j. MCL 769.1j(1); MCL 769.1k(1)(a).

“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).

See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for more information on fines, costs, and assessments. See also the Michigan Judicial Institute’s 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 Michigan Judicial Institute’s Table of Felony Costs and Table of Misdemeanor Costs.

A. 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 of guilty or nolo contendere or the court determined that the defendant was guilty.” MCL 769.1k(1)(b)(i). Fines

109 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).

110 The minimum state cost for a felony conviction is $68, for a specified or serious misdemeanor conviction, $53, and for any other misdemeanor conviction, $48. MCL 769.1j(1)(a), MCL 769.1j(1)(b), and MCL 769.1j(1)(c). Although “the costs imposed under MCL 769.1j(1)(a) are . . . a tax[,]” the statute is not unconstitutional. People v Shenoskey, 320 Mich App 80, 83 (2017) (“[f]or the same reasons that [People v Cameron], 319 Mich App 215, 221-229 (2017),] found MCL 769.1k(1)(b)(iii) to be a tax, . . . the costs imposed under MCL 769.1j(1)(a) are also a tax[”]).
authorized by MCL 769.1k(1)(b)(i) apply even if a defendant is placed on probation, a defendant’s probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

B. Costs

MCL 769.1k(1)-(2) provide in part 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.” MCL 769.1k(1)(b)(ii).

Note: 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.

• order a defendant to pay “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:[112]

(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.”[113]

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[111] See People v Johnson (Marion), 314 Mich App 422, 422 (2016) (“the trial court’s imposition of a $200 fine violated MCL 769.1k(1)(b)(i)[]” where the defendant "pleaded no contest to a violation of MCL 750.520g(1)[], assault with the intent to commit sexual penetration]; that statute does not authorize the trial court to impose a fine[]"), citing People v Konopka (On Remand), 309 Mich App 345, 357 (2015); People v Cunningham, 496 Mich 145, 149-151, 154, 157-158 (2014).

[112] This “court costs” provision is applicable “[u]ntil October 17, 2020.[]” MCL 769.1k(1)(b)(ii). See People v Konopka, 309 Mich App 345, 365, 367-70, 376 (2015) (finding that 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).
Note: “MCL 769.1k(1)(b)(iii) 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, 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). The imposition of court costs under MCL 769.1k(1)(b)(iii) is a tax, rather than a governmental fee, and it must therefore comply with the Distinct-Statement Clause and the separation-of-powers doctrine. People v Cameron, 319 Mich App 215, 229, 233 (2017). “[A]lthough it imposes a tax, MCL 769.1k(1)(b)(iii) is not unconstitutional[.]” Cameron, 319 Mich App at 218.114

- order a defendant to pay “[t]he expenses of providing [his or her] legal assistance[.]” MCL 769.1k(1)(b)(iv).

- order a defendant to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2).115

Costs authorized by MCL 769.1k(1)(b)(ii)-(iv) and MCL 769.1k(2) apply even if a defendant is placed on probation, a defendant’s probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

“A defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k(1)(b)(ii)-(iv) and

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113 “If the court imposes any cost under [MCL 769.1k(1)(b)(iii)], no later than March 31 of each year the clerk of the court shall transmit a report to the state court administrative office [[SCAO]] in a manner prescribed by the [SCAO] that contains all of the following information for the previous calendar year: (a) The name of the court[;] (b) The total number of cases in which costs under [MCL 769.1k(1)(b)(ii)] were imposed by that court[;] (c) The total amount of costs that were imposed by that court under [MCL 769.1k(1)(b)(ii)]; (d) The total amount of costs imposed under [MCL 769.1k(1)(b)(iii)] that were collected by that court.” MCL 769.1k(8).

114 For a detailed discussion of the categorization of MCL 769.1k(1)(b)(iii) as a tax and of the application of the Distinct-Statement Clause and separation-of-powers, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol 2, Chapter 9.

115 For specific cost provisions applicable to individual criminal offenses, including offenses to which MCL 769.1f applies and statutes authorizing imposition of costs of prosecution, see the Michigan Judicial Institute’s Table of Felony Costs and Table of Misdemeanor Costs.
MCL 769.1k(2)] 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).

C. Crime Victim Assessment

At the time a defendant is sentenced, at the time sentence is delayed, or at the time of entry of an adjudication of guilt is deferred, MCL 769.1k(1)(b)(v) permits the court to impose “[a]ny assessment authorized by law.” Imposition of a crime victim assessment of $130 is required for all felony convictions. MCL 780.905(1)(a). However, in contrast to the minimum state cost, which must be ordered for each felony conviction arising from a single case, only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

Assessments authorized by MCL 769.1k(1)(b)(v) apply even if a defendant is placed on probation, a defendant’s probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

2.8 Lesser Included Offenses Under the CSC Act

A. Types of Lesser Included Offenses

Two types of lesser included offenses exist: (1) necessarily included lesser offenses; and (2) cognate lesser offenses. A necessarily included lesser offense is one in which all the elements of the lesser offense are contained within the greater offense, and it is impossible to commit the greater offense without also having committed the lesser offense. People v Bearss, 463 Mich 623, 627 (2001). A cognate lesser offense is one that “share[s] some common elements, and [is] of the same class or category as the greater offense, but ha[s] some additional elements not found in the greater offense.” People v Perry (Michael), 460 Mich 55, 61 (1999), quoting People v Hendricks, 446 Mich 435, 443 (1994).

B. Applicable Statute and Three-Part Test

In People v Cornell, 466 Mich 335, 353-354 (2002), overruled in part on other grounds by People v Mendoza, 468 Mich 527 (2003), the Michigan Supreme Court ruled that MCL 768.32(1) must be applied to offenses that are expressly divided into degrees and to offenses in

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116 See the Michigan Judicial Institute’s Crime Victim Rights Benchbook, for more information about crime victim assessments.
which different grades of offenses or degrees of enormity are recognized. In addition, MCL 768.32(1) applies to misdemeanor offenses. Cornell, 466 Mich at 354.118

MCL 768.32(1) provides:

“Except as provided in subsection (2),[119] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.”

Where an offense is divided into degrees, MCL 768.32(1) permits finding a defendant guilty of a lesser degree of the charged offense if the lesser degree is an “inferior” offense as defined in Cornell, 466 Mich at 353-354. The word inferior in MCL 768.32(1) does not include cognate lesser offenses: the statute only authorizes lesser offenses that are either necessarily included in the greater offense or that are attempts to commit the greater offense. Cornell, 466 Mich at 354, 354 n 7. See also People v Pasha, 466 Mich 378, 383 n 9 (2002) (“Following our decision in Cornell, the trier of fact may no longer convict a defendant of a cognate lesser offense”).

Where “a jury could not have convicted [the] defendants on the charged counts of CSC-I under MCL 750.520b(1)(c) [(penetration under circumstances involving another felony)] without determining that [the] defendants also committed the underlying felony [(of disseminating sexually explicit matter to a minor, MCL 722.675[1][b])], the underlying felony [was] a necessarily included lesser offense.” People v Lockett, 295 Mich App 165, 173-182 (2012) (holding that, although the defendants could not, as a matter of law, be convicted as charged of CSC-I, sufficient evidence was presented to support convictions of the underlying felony of disseminating

117”[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.

118 In so holding, the Supreme Court expressly overruled the following cases that permitted instructions on cognate lesser offenses: People v Jones (Ora), 395 Mich 379 (1975); People v Chamblis, 395 Mich 408 (1975); People v Stephens, 416 Mich 252 (1982); and People v Jenkins, 395 Mich 440 (1975). Cornell, 466 Mich at 357-358.

119 MCL 768.32(2) covers lesser included offenses for specified controlled substance offenses, which are not relevant here.
sexually explicit matter to a minor, and remanding for entry of convictions of that felony as a lesser included offense).

The Supreme Court in Cornell established the following rule for determining whether an instruction for a necessarily included lesser offense is proper:

“[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” Cornell, 466 Mich at 357.

To determine whether an instruction on a lesser offense is proper, a trial court must conduct a strict elements test under MCL 768.32(1), and it also must apply the facts of the case to the lesser offense. These requirements are summarized as follows:

• Compare the elements of the greater and lesser offenses to ensure that the requested instruction is for a necessarily included lesser offense and not a cognate lesser offense (i.e., the lesser offense’s elements are all contained within the greater offense, and it is impossible to commit the greater offense without also having committed the lesser);

• Determine whether the distinguishing element is factually disputed; and

• Determine whether the lesser offense is supported by a rational view of the evidence. See Cornell, 466 Mich at 357.

In People v Nickens, 470 Mich 622 (2004), the Supreme Court applied the three-part test outlined in Cornell, 466 Mich 335, and MCL 768.32. In Nickens, 470 Mich at 623, the defendant was charged with CSC-I involving personal injury and the use of force or coercion to accomplish sexual penetration, MCL 750.520b(1)(f). At trial, the court instructed the jury on this charge and on the charge of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). Nickens, 470 Mich at 623. The defendant objected to the latter instruction. Id. The defendant was found guilty of violating MCL 750.520g(1). Nickens, 470 Mich at 625.

The Supreme Court found that the elements of assault with intent to commit criminal sexual conduct involving penetration are (1) an assault and (2) an intent to commit criminal sexual conduct involving sexual penetration. Nickens, 470 Mich at 627. In concluding that assault with intent to commit CSC involving penetration is a necessarily lesser included offense of CSC-I
involving personal injury and the use of force and coercion, the Court explained:

“An assault ‘is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.’” People v Johnson (Joeseype), 407 Mich 196, 210 (1979), quoting People v Sanford, 402 Mich 460, 479 (1978). The first type is referred to as an ‘attempted-battery assault,’ whereas the second is referred to as an ‘apprehension-type’ assault. As such, an assault can occur in one of two ways.

Moreover, a ‘battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.’ Therefore, a battery is the successful accomplishment of an attempted-battery assault. . . . Stated differently, an attempted-battery assault is a necessarily lesser included offense of a completed battery because it is impossible to commit a battery without first committing an attempted-battery assault.” Nickens, 470 Mich at 628 (some internal citations omitted).

The Court concluded that “one cannot commit CSC-I involving personal injury and the use of force or coercion to accomplish sexual penetration without first committing an assault with intent to commit CSC involving sexual penetration[.]” Nickens, 470 Mich at 630. “[T]herefore, MCL 750.520g(1) is a necessarily lesser included offense of MCL 750.520b(1)(f).” Nickens, 470 Mich at 630. The Court explained: “In every instance where an actor commits CSC-I involving personal injury and uses force or coercion to accomplish sexual penetration, the actor first commits an attempted-battery assault with the intent to commit CSC involving sexual penetration.” Nickens, 470 Mich at 630.

The Court summarized its reasoning as follows:

“In sum, nonconsensual sexual penetration is, in and of itself, an attempted-battery assault and a battery. As such, the first prong of MCL 750.520g(1), an assault, is always satisfied when the actor commits CSC-I under MCL 750.520b(1)(f). Moreover, we also believe that the second prong of MCL 750.520g(1), an intent to commit CSC involving sexual penetration, is always satisfied when the actor commits CSC-I under MCL 750.520b(1)(f).” Nickens, 470 Mich at 631.
Consequently, when, in a case where the defendant is charged with CSC-I involving personal injury and the use of force or coercion, and a rational view of the evidence supports the instruction of assault with intent to commit criminal sexual conduct involving penetration, such an instruction should be given. *Nickens*, 470 Mich at 632-633.

In *People v Apgar*, 264 Mich App 321, 327 (2004), overruled in part on other grounds by *People v White (Anthony)*, 501 Mich 160 (2017), the Court of Appeals applied the three-part test outlined in *Cornell*, 466 Mich 335, and MCL 768.32 and determined that CSC-III (victim between the ages of 13 and 16) is not a necessarily included lesser offense of CSC-I:

“The jury convicted [the] defendant of CSC[-]III, sexual penetration of another person at least thirteen years of age and under the age of sixteen, MCL 750.520d(1)(a). Neither of the charged counts of CSC[-]I includes the element of the victim’s age. Thus, it is possible to commit CSC[-]I under MCL 750.520b(1)(d) or [MCL 750.520b](1)(e) without committing the uncharged offense of CSC[-]III, MCL 750.520d(1)(a). Accordingly, under *Cornell[,]* CSC[-]III, MCL 750.520d(1)(a), is not a necessarily included lesser offense of CSC[-]I, MCL 750.520b(1)(d) or [MCL 750.520b](1)(e). Because both offenses require the act of sexual penetration and are of the same category of crimes, CSC[-]III is a cognate lesser offense of CSC[-]I as applied to this case.”

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120[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
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### 3.1 Chapter Overview

This chapter discusses Michigan crimes involving sexual misconduct that fall outside the provisions of the Criminal Sexual Conduct Act (“CSC Act” or “Act”), MCL 750.520a et seq., which are discussed in Chapter 2.

The majority of crimes included in this chapter are sex-related in title or substance. The remaining crimes in this chapter are not sex-related in title or substance. These crimes are included because they often arise before or after a sexual assault. Crimes often occur before the commission of a sexual offense as a means of facilitating the offense. Examples of such crimes include kidnapping, aiding and abetting, and stalking. Crimes that occur after the commission of a sexual offense as a means of maintaining power and control over the victim and potential witnesses include malicious use of a telecommunication device, obstruction of justice, and stalking.

**Note:** Federal crimes relating directly or indirectly to sexual assault are beyond the scope of this benchbook. For federal sex crimes, see 18 USC 1470 (transfer of obscene materials to minors); 18 USC 2241 et seq. (sexual abuse, aggravated sexual abuse, and abusive sexual contact); 18 USC 2251 (sexual exploitation of children); and 18 USC 2421 et seq. (interstate transportation of individuals with the intent that the individuals engage in prostitution or sexual activity). For other related federal crimes, see 18 USC 921 et seq. (firearms); 18 USC 2261 et seq. (interstate domestic violence).

### 3.2 Mens Rea Standard

Effective December 22, 2015, 2015 PA 250 added MCL 8.9 to provide a default mens rea standard applicable to certain crimes committed on or after January 1, 2016. MCL 8.9 also provides that “[i]t is not a defense to a crime that the defendant was, at the time the crime occurred, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound. However, it is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily ingested a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.”

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1 As relevant to this benchbook, MCL 8.9 “does not apply to, and shall not be construed to affect, crimes under . . . [t]he public health code[,] . . . MCL 333.1101 to [MCL] 333.25211[,] . . . [t]he Michigan penal code, . . . MCL 750.1 to [MCL] 750.568[,] and . . . Chapter 752 of the Michigan Compiled Laws.” MCL 8.9(7).
For a more detailed discussion of MCL 8.9, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 10.

3.3 Accosting, Enticing, or Soliciting a Child for an Immoral Purpose

It is a crime to accost, entice, or solicit a child under the age of 16 for the purpose of engaging in any of the following acts:

- An immoral act.
- An act of sexual intercourse.
- An act of gross indecency.3
- Any other act of delinquency or depravity.

A. Statutory Authority

MCL 750.145a states:

“A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both.”4

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2 For additional information on voluntary intoxication, see Section 4.13.
3 See Section 3.17 for more information on gross indecency.
4 See M Crim JI 20.40, Accosting a Child for Immoral Purposes.
B. Penalties

A violation of MCL 750.145a is a felony punishable by imprisonment for not more than four years, or a maximum fine of $4,000, or both.

Under MCL 750.145b(1), a person convicted of violating MCL 750.145a who also has one or more prior convictions\(^5\) is guilty of a felony punishable by imprisonment for not more than ten years, or a maximum fine of $10,000, or both.

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

Under MCL 750.145b(2), a prosecutor who intends to seek an enhanced sentence must include on the complaint and information a statement listing the prior conviction(s). Additionally, the court, without a jury, must determine the existence of the defendant’s prior conviction(s) at sentencing or at a separate hearing before sentencing. \(\textit{Id.}\) Finally, MCL 750.145b(2) states that the existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

\begin{itemize}
  \item \(\text{(a)}\) A copy of the judgment of conviction.
  \item \(\text{(b)}\) A transcript of a prior trial, plea-taking, or sentencing.
  \item \(\text{(c)}\) Information contained in a presentence report.
  \item \(\text{(d)}\) The defendant’s statement.”
\end{itemize}

C. Sex Offender Registration

MCL 750.145a is a tier II listed offense under the Sex Offenders Registration Act (SORA).\(^6\) See MCL 28.722(u)(i).

\(^{5}\) A prior conviction means a violation of MCL 750.145a or a violation of another state’s law substantially corresponding to MCL 750.145a. MCL 750.145b(3).

\(^{6}\) The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see \textit{http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf}.\)
MCL 750.145b is a tier II listed offense under the SORA. See MCL 28.722(u)(ii).

For more information on the SORA’s registration requirements, see Chapter 10.

D. Pertinent Case Law

In People v Kowalski, 489 Mich 488, 499-500 (2011), the Michigan Supreme Court set out the elements of two alternative theories under which a defendant may be convicted of accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act under MCL 750.145a:

“A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act. Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act. Taken as a whole, the statute permits conviction under two alternative theories, one that pertains to certain acts and requires a specific intent and another that pertains to encouragement only and . . . envisions a mens rea consistent with a general criminal intent.”

The defendant in Kowalski, 489 Mich at 491, 510, “engaged in highly sexualized online chats with a person whom he believed to be a 15-year-old girl[,]” but who was actually an undercover police officer. “In doing so, he accosted, enticed, solicited, or encouraged a child to commit an immoral, grossly indecent, delinquent, or depraved act within the meaning of those terms in MCL 750.145a.” Kowalski, supra at 510. Thus, even though the trial court erroneously instructed the jury as to the elements of the offense by “omitt[ing] the actus reus element of the ‘accosts, entices, or solicits’ prong of the offense[,]” the defendant was not entitled to reversal of his conviction because the undisputed evidence “established beyond any reasonable doubt” that the defendant’s conduct “constituted the actus reus under either prong of the offense.” Id. at 502, 507.

The crime of accosting, enticing, or soliciting a child under the age of 16 includes an essential element of “urging or entreating” the child to commit any of the enumerated acts in the statute. People v
Wheat, 55 Mich App 559, 563-564 (1974) (the statutory language does not include “urging or entreating”; the Wheat Court generated the phrase in its effort to determine whether MCL 750.145a was a lesser included offense of MCL 750.336 (improper and indecent liberties with a person under the age of 16), which has since been repealed). This “urging or entreating” was referred to as “suggest[ing]” in People v Riddle, 322 Mich 199, 200-201, 203 (1948).

MCL 750.145a is neither vague nor overbroad on its face because it “provides fair notice to the public of the proscribed conduct[,] . . . does not give a trier of fact unstructured and unlimited discretion to determine whether an offense has been committed[,] . . . [and] does not pose realistic dangers to First Amendment protections.” People v Gaines, 306 Mich App 289, 320-321 (2014).

3.4 Adultery

A. Statutory Authority

“Any person who shall commit adultery shall be guilty of a felony; and when the crime is committed between a married woman and a man who is unmarried, the man shall be guilty of adultery, and liable to the same punishment.” MCL 750.30.

MCL 750.29 defines adultery as “the sexual intercourse of 2 persons, either of whom is married to a third person.”

MCL 750.31 defines the complaint and time of prosecution for adultery:

“No prosecution for adultery, under [MCL 750.30], shall be commenced, but on the complaint of the husband or wife; and no such prosecution shall be commenced after 1 year from the time of committing the offense.”

B. Penalties

MCL 750.29 is silent with regard to punishment for a violation of the statute. When the statute governing a felony is silent on imprisonment and fines, the felony conviction is punishable by imprisonment for not more than four years, or a fine of not more than $5,000, or both. See MCL 750.503 (provides the penalties applicable to felony convictions when no specific penalty is prescribed by any statute governing the felony offense). For

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7 See also Section 2.7 for information about additional monetary penalties and assessments.
information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

C. **Sex Offender Registration**

MCL 750.29 is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information on the SORA’s registration requirements, see Chapter 10.

D. **Pertinent Case Law**

1. **Specific Intent Crime**

Adultery is a specific intent crime. *People v Lipski*, 328 Mich 194, 197 (1950). However, the issue of consent is neither expressly stated nor implied by the statute, and courts should not read such a requirement into the statute. *Lipski*, *supra* at 197. “The controlling factor is the marriage relation, and that exists whether intercourse occurs with or without consent.” *Id.*

2. **Spousal Privilege**

MCL 600.2162(8) prohibits the testimony of one spouse against another in an adultery action: “In an action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife are not competent to testify.”

3.5 **Aiding and Abetting**

A sexual assault may involve multiple actors who, without directly participating in the assault, assist, encourage, or facilitate it. Therefore, the general aiding and abetting statute, MCL 767.39, is often used to prosecute indirect offenders. MCL 767.39 governs aiders or abetters who commit the target offense and those who do not; the statute also abolished the common-law distinction between accomplices and principals, and punishes accomplices as if they had directly committed the target offense.

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8 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
The general aiding and abetting statute, MCL 767.39, applies to criminal sexual conduct offenses even though CSC-I and CSC-II contain an *aided or abetted* provision. *People v Pollard*, 140 Mich App 216, 220-221 (1985); MCL 750.520b(1)(d) (CSC-I); MCL 750.520c(1)(d) (CSC-II). The *aided or abetted* provisions in CSC-I and CSC-II are limited to specific sexual conduct under very specific circumstances.9

**A. Statutory Authority**

MCL 767.39 provides:

“Every person concerned in the commission of an offense, whether he [or she] directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he [or she] had directly committed such offense.”10

**B. Definitions**

The Michigan Supreme Court, in *People v Palmer (John)*, 392 Mich 370, 378 (1974), defined *aiding and abetting* as follows:

“In criminal law the phrase ‘aiding and abetting’ is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary.... The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime.” (Internal citation omitted.)

**C. Elements of the Offense**

The elements of aiding and abetting are:

- The defendant or some other person committed the crime charged;

- The defendant aided or assisted the commission of the crime by performing acts or giving encouragement; and

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9 For information on the CSC Act’s *aided or abetted* element, see Section 2.6(C).

10 See M Crim JI 20.6 for an instruction on aiding and abetting CSC.
• The defendant intended that the crime be committed or knew that the principal intended its commission at the time the defendant gave aid and encouragement. See People v Carines, 460 Mich 750, 757-758 (1999).

D. Penalties

MCL 767.39 states that aiders and abettors “shall be punished as if [they] had directly committed such offense.” Therefore, aiders and abetters are subject to the maximum penalties of the target offense or offenses.

If the target offense is a felony and the statute governing the felony is silent on imprisonment and fines, the felony conviction is punishable by imprisonment for not more than four years, or a fine of not more than $5,000, or both. MCL 750.503 (provides the penalties applicable to felony convictions when no specific penalty is prescribed by any other statute governing the felony offense). For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

If the target offense is a misdemeanor and the statute governing the misdemeanor is silent on imprisonment and fines, the misdemeanor conviction is punishable by imprisonment for not more than 90 days, or a fine of not more than $500, or both. MCL 750.504 (provides the penalties applicable to misdemeanor convictions when no specific penalty is prescribed by any other statute governing the misdemeanor offense).

See also Section 2.7 for information about additional monetary penalties and assessments.

E. Sex Offender Registration

Aiders and abetters who are convicted of a target offense that is a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA)\textsuperscript{11} are subject to the SORA’s registration requirements. See MCL 28.722; MCL 767.39. For more information on the SORA’s registration requirements, see Chapter 10.

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\textsuperscript{11} The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
F. Pertinent Case Law

1. Principal vs. Aider and Abetter

For purposes of being charged, tried, convicted, and punished for violating a criminal statute, Michigan law does not distinguish between a principal and an aider and abetter. MCL 767.39; People v Coomer, 245 Mich App 206, 223 (2001).

2. Specific Intent Crimes

To be held criminally liable as an aider and abetter of a specific intent crime, the defendant must:

- Have had the requisite intent to commit the underlying offense; or
- Have known that the actual perpetrator had the requisite intent. People v Karst, 138 Mich App 413, 415 (1984).

However, “evidence of a shared specific intent to commit the crime of an accomplice is [not] the exclusive way to establish liability under [Michigan’s] aiding and abetting statute.” People v Robinson (Kevin), 475 Mich 1, 7 (2006). The Court explained that the Legislature’s abolition of the common-law distinction between principals and accessories did not eliminate the common-law theory of an accomplice’s liability for the probable consequences of the crime committed. Robinson (Kevin), supra at 8-9. Therefore, a defendant who intends to aid and abet the commission of a crime is liable for that crime and for “the natural and probable consequences of that offense[.]” Id. at 9.12

“An aider and abetter’s knowledge of the principal’s intent can be inferred from the facts and circumstances surrounding an event.” People v Bennett, 290 Mich App 465, 474 (2010) (evidence that the defendant was reluctant to have the principal kill the victim did “not negate the critical element of [the defendant’s] knowledge of [the principal’s] specific intent to kill the victim”).

In certain circumstances, participating with others in a crime that precedes a rape, such as robbery, may be aiding and abetting the rape if the perpetrator knew of the plans to rape

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12 M Crim JI 8.1, the instruction regarding Aiding and Abetting, requires that the aider or abetter intend the commission of the crime or know that the principal intends the commission of the crime. No mention is made of “the natural and probable consequences of that offense,” as noted in Robinson, 475 Mich at 9.
the victim. *People v Gray (Glenn)*, 121 Mich App 788, 791 (1982). According to the Court:

“[The d]efendant’s plea was taken on the basis that he aided and abetted two other men who raped the robbery victim in the course of the robbery. [The d]efendant knew of his cohorts’ plans to rape the victim before they entered her house. [The d]efendant himself went through the house looking for property to take while his accomplices took the victim to the back of her house to rape her. We think that the crime of aiding and abetting CSC[-]-I is clearly made out from these facts. It was reasonable to infer that [the] defendant, knowing of the plan to rape the robbery victim, rendered aid to the principals by his participation in the robbery, the event which rendered the victim helpless against her assailants.” *Gray (Glenn)*, 121 Mich App at 791.

The jury instruction on specific intent should only be given if intent is disputed or if the jury expresses confusion about the intent required to convict. *People v Beaudin*, 417 Mich 570, 574-575 (1983).

3. **Mere Presence Is Not Enough**

The mere presence of a person at the location of a crime is not enough to make that person an aider or abetter, even if that person had knowledge that the crime was being committed. See *People v Rockwell (Hal)*, 188 Mich App 405, 412 (1991). Further, mere mental approval, passive acquiescence, or consent are insufficient to make a person an aider and abetter. *Fuller v Anderson (Charles)*, 662 F2d 420, 424 (CA 6, 1981). “In other words, the accused must take some conscious action designed to make the criminal venture succeed in order to be guilty of aiding and abetting.” *Fuller, supra* at 424.

A person may aid and abet the commission of a crime without saying a word and without engaging in conduct directly related to the crime. See *Sanford v Yukins*, 288 F3d 855, 862-863 (CA 6, 2002). “Th[е] broad definition of [aiding and abetting] easily encompasses situations where the alleged aider and abett[е]r, although silent and not committing acts directly related to the crime, was not ‘merely’ present, but [was] providing emotional encouragement and support.” *Sanford, supra* at 862.
4. **Mutual Reassurance Doctrine**

A caveat to the *mere presence rule* is the *mutual reassurance doctrine*. By voluntarily choosing to join a group intent on committing a crime, an individual can be liable as a principal for contributing to the “psychological underpinnings” that give strength to the group. *People v Smock*, 399 Mich 282, 284-285 (1976). In *Smock, supra* at 283-284, the five defendants were part of “a caravan of 20 to 30 automobiles carrying a total of at least 40 persons” to a school construction site where caravan members started several fires and damaged or destroyed construction equipment and other materials. All five defendants were apprehended at the scene. *Id.* at 284. Two defendants smelled of fuel oil, and one defendant’s fingerprints were found on a beer can located on the site near some burned buildings. *Id.* The Supreme Court stated:

“In the circumstances of this case, nothing more is necessary to ‘connect’ these defendants to the crime. By voluntarily choosing to join a group that was intent on committing the crime of arson, these defendants took action which supported, encouraged and incited its commission. By so joining, they contributed to the psychological underpinnings that give strength to a ‘mob’ through the device of mutual reassurance. They also contributed to the effect of a mob on those who oppose it. In this case, the few employees who were present when the caravan arrived indicated that they felt helpless in the face of so large a group. . . . This is not a case of ‘guilt by association’ or ‘mere presence at the scene[.]’ These defendants chose to cast their lot with others who were bent on arson and by doing so they lent active support to the criminal enterprise. The mere fact that a large number of people was involved in this undertaking cannot shield these defendants.” *Smock*, 399 Mich at 284-285 (internal citations omitted).

5. **Underlying Crime Must Be Committed**

A person cannot be convicted of aiding and abetting unless some underlying crime was committed. While conviction of the principal who committed the underlying crime is not necessary to convict an aider or abetter to that crime, the prosecution must prove beyond a reasonable doubt that the underlying crime was committed by someone and that the
defendant either aided or abetted the commission of that crime or actually committed it. People v Mann (Robert), 395 Mich 472, 478 (1975) (larceny); People v Brown (Jessie), 120 Mich App 765, 770-772 (1982).

6. **Identity of Principal Need Not Be Established**

The identity or specific name of the principal need not be proven. People v Vaughn (Kevin), 186 Mich App 376, 382 (1990). In Vaughn (Kevin), supra at 377-383, the Court of Appeals affirmed the defendant’s CSC-I conviction, MCL 750.520b(1)(d) (aided or abetted by one or more persons), under the general aiding and abetting statute, MCL 767.39, and his CSC-III conviction, MCL 750.520d(1)(b) (force or coercion), for raping a 21-year-old woman and for assisting another person, “a tall, dark, skinny man,” who got “on top of [the woman] and inserted his penis into her vagina.” Although the principal’s identity was never established at trial, the Court of Appeals held:

“[T]he evidence was overwhelming that there was a guilty principal, albeit his name, rank, and social security number remains unknown. . . . This is not a case of a phantom rape or a phantom rapist. Only the rapist’s identity remains unknown. Therefore, we find that the prosecution presented legally sufficient evidence to support defendant’s conviction as an aider and abett[e]r.” Vaughn (Kevin), 186 Mich App at 382-383.

See also People v Wilson (Carolyn), 196 Mich App 604, 610, 611 (1992) (evidence sufficient to support the defendant’s conviction of aiding and abetting CSC-I and CSC-III for allowing various unknown men to commit sexual acts against two minor children where the existence of a guilty principal was proven by the children’s testimony describing the sexual acts perpetrated against them in the defendant’s presence).

7. **Alternative Theories and Jury Unanimity Instructions**

If a prosecutor argues alternative theories of guilt, i.e., the defendant is either guilty as a principal or as an aider and abetter, and there is sufficient evidence to support the defendant’s guilt under either theory, a jury does not have to unanimously decide whether the defendant was a principal or an aider and abetter. People v Burgess, 67 Mich App 214, 219-222 (1976). A general verdict of guilty, without specifying on which
alternative theory the jury relied, does not violate a defendant’s right to a unanimous verdict. People v Smielewski, 235 Mich App 196, 208-209 (1999).

8. Conviction for Each Sexual Penetration or Contact

A defendant charged with aiding and abetting criminal sexual conduct under the general aiding and abetting statute, MCL 767.39, may be convicted of each penetration or contact committed by the principals, as long as the defendant aided or abetted each specific penetration or contact. Pollard, 140 Mich App at 218-220 (three defendants each penetrated the victim once and were also charged with aiding and abetting the other defendants’ penetrations).

3.6 AIDS/HIV and Sexual Penetration

MCL 333.5210 prohibits a person who knows he or she has been diagnosed with AIDS (acquired immunodeficiency syndrome) or AIDS-related complex, or who knows that he or she is infected with HIV, from engaging in sexual penetration with another person without first informing that other person of the diagnosis or infection.

A. Statutory Authority

MCL 333.5210 provides:

“(1) A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.

(2) As used in this section, ‘sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.”

13 This definition of sexual penetration is identical to the CSC Act’s definition. See Section 2.6(AA).
B. Penalties

MCL 333.5210 is silent with regard to punishment for a violation of the statute. When the statute governing a felony is silent on imprisonment and fines, the felony conviction is punishable by imprisonment for not more than four years, or a fine of not more than $5,000, or both.14 See MCL 750.503 (provides the penalties applicable to felony convictions when no specific penalty is prescribed by any statute governing the felony offense).

C. Sex Offender Registration

MCL 333.5210 is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).15 For more information on the SORA’s registration requirements, see Chapter 10.

D. Pertinent Case Law

1. AIDS and HIV Definitions

“AIDS is defined as ‘a syndrome that involves a compromised immune system that renders the [person] highly susceptible to communicable diseases. . . . AIDS occurs ‘when an individual is seropositive for HIV and has one of certain associated illnesses, and . . . when an individual with HIV contracts any one of a multitude of possible opportunistic infections.’” People v Jensen (On Remand), 231 Mich App 439, 443 n 1 (1998), quoting Sanchez v Lagoudakis (After Remand), 458 Mich 704, 709, 709 n 4 (1998).

2. Mens Rea and Consent Defense

MCL 333.5210 is a general intent crime. Jensen (On Remand), 231 Mich App at 454. “[A]lthough MCL 333.5210 contains no express mens rea requirement, we presume that the Legislature intended to require that the prosecution prove that the defendant had a general intent to commit the wrongful act,
i.e., to engage in sexual penetration with another person while failing to disclose that the defendant has AIDS or is HIV infected.” Jensen (On Remand), supra at 454-455.

The defense of consent applies. Jensen (On Remand), 231 Mich App at 455 (“[I]f a defendant admits being HIV infected and the other person consents to the physical contact despite the risks associated with such contact, there is no criminal liability.”).

3. Statute is Constitutional

MCL 333.5210 is neither constitutionally overbroad nor does it violate a defendant’s right to privacy or right against compelled speech. Jensen (On Remand), 231 Mich App at 446-447, 461, 464-465.

“MCL 333.5210 does not prohibit [an infected person] from engaging in sexual penetration but only requires [him or] her to inform [his or] her potential sexual partners, individually and privately, that [he or] she has this communicable disease. The statute does not require or imply that [he or] she need publicize the fact that [he or] she is HIV positive. It merely compels [him or] her to privately divulge this health status to those with whom [he or] she intends to engage in sexual penetration. Hence, we do not agree that the statute requires public disclosure; rather, it requires private disclosure only to those who are immediately in danger of exposure to the virus because they are contemplating the opportunity to engage in sexual penetration with [the infected person].” Jensen (On Remand), 231 Mich App at 464.

3.7 Attempt

The law of attempt is one of three inchoate offenses discussed in this chapter. An inchoate offense is defined as “[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment.” Black’s Law Dictionary (9th ed). The law of attempt in Michigan is defined as the specific intent to commit a crime, coupled with an overt act that goes beyond mere preparation. People v Stapf, 155 Mich App 491, 494 (1986).

16 The other inchoate offenses are conspiracy and solicitation. See Sections 3.9 and 3.33, respectively.
A. Statutory Authority and Penalties

MCL 750.92 provides:

“Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years;[17]

2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year;[18]

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in no case shall the imprisonment exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed.”[19]

B. Elements of Offense

The elements for the crime of attempt are:

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17 No fines or costs are specifically authorized under MCL 750.92(1). See Section 2.7 for information about authorized fines, costs, and assessments.

18 No fines or costs are specifically authorized under MCL 750.92(2). See Section 2.7 for information about authorized fines, costs, and assessments.

19 See Section 2.7 for information about additional monetary penalties and assessments.
• The specific intent to commit a crime; and


A defendant may be convicted of the attempted commission of a crime even if the crime was completed. *People v Jones (Mearl)*, 443 Mich 88, 103-104 (1993).

C. **Penalties**

Any term of imprisonment imposed under the general attempt statute, MCL 750.92, must “[not] exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed.” See *People v Loveday*, 390 Mich 711, 715-716 (1993), where the Court concluded that the language in MCL 750.92(3) limiting a term of imprisonment for an attempt conviction to one-half the maximum term of imprisonment for commission of the attempted offense itself, applies to all sentences imposed under the attempt statute, not just those described in MCL 750.92(3). Accordingly, under MCL 750.92(2), an attempt to commit a five-year felony is a two-and-one-half year felony. *Loveday, supra* at 716.

Probation is a sentence alternative under the attempt statute, even though the offense attempted may be precluded from probation under MCL 771.1(1). *People v McKeown*, 228 Mich App 542, 545 (1998) (“[T]he Legislature did not include the attempt statute in the list of felonies [in the probation statute] for which a defendant could not be given probation. Therefore . . . the Legislature evidenced an intent to include probation as another alternative sentence under the attempt statute”).

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

D. **Sex Offender Registration**

An attempt to commit a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA) is classified as a listed

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20 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov.smart/pdfs/final_sornaguidelines.pdf.
offense under the same tier designation as the crime attempted. See MCL 28.722(s)(ix); MCL 28.722(u)(xii); MCL 28.722(w)(vii).

For more information on the SORA’s registration requirements, see Chapter 10.

E. Pertinent Case Law

1. Application of Attempt Statute

The general attempt statute applies only where no express provision for attempt exists in the statutory language governing the crime charged. MCL 750.92. See also People v Denmark, 74 Mich App 402, 416 (1977).

2. Specific Intent Crime

The crime of attempt is a specific intent crime. Thousand (Thousand II), 465 Mich at 164 n 15. It is a separate, substantive offense punishable under its own statute, and not merely one that modifies the punishment applicable to the completed offense. People v Johnson (Ameal), 195 Mich App 571, 574-575 (1992).

3. Voluntary Abandonment

“[V]oluntary abandonment is an affirmative defense to a prosecution for criminal attempt. The burden is on the defendant to establish by a preponderance of the evidence that he or she has voluntarily and completely abandoned his or her criminal purpose.” People v Kimball, 109 Mich App 273, 286 (1981), mod on other grounds 412 Mich 890 (1981).21

In People v McNeal, 152 Mich App 404, 408 (1986), disagreed with on other grounds by People v Jaffray, 445 Mich 287 (1994),23, 24 the defendant kidnapped a 16-year-old girl on the way to a bus stop and brought her to a house. Once inside the house, the defendant threw her on a couch and began “kissing her on the lips and neck.” McNeal, 152 Mich App at 408-409. “He then rubbed her on the top part of her thighs and on the...

21 For more information on the voluntary abandonment defense, see Section 4.3(A).

22 [A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.

23 Jaffray, 445 Mich at 308, disagreed with McNeal’s explanation of secret confinement.
side of her stomach, but nowhere else.” *Id.* at 409. After doing this, the defendant walked the victim back to the bus stop and apologized. *Id.* In rejecting the defendant’s argument that there was insufficient evidence to support his CSC-II conviction, the Court of Appeals stated, “[b]ecause defendant never touched the victim’s intimate parts, he could not have been convicted of the completed crime of second-degree criminal sexual conduct . . . . However, his actions obviously went beyond mere preparation and planning. His actions constituted direct movement toward the commission of the crime after preparations were made.”25 *Id.* at 414.

4. **Extent or Location of Sexual Contact**

Where the defendant “may have only touched [the victim] just above her breast, at the top of her bra cup, before she pulled away and left[,]” there was sufficient evidence to support a jury instruction on attempt. *People v Leo (Norman)*, 188 Mich App 417, 424 (1991).

5. **Impossibility Defense**

“[T]he common-law defense of impossibility, . . . if proven[,] negates the actus reus of a crime.” *People v Likine*, 492 Mich 367, 392 (2012). “[A] defendant cannot be held criminally liable for failing to perform an act that was impossible for the defendant to perform[, and w]hen it is genuinely impossible for a defendant to discharge a duty imposed by law, the defendant’s failure is excused.” *Likine*, supra at 396, 398 (holding that “genuine impossibility is a defense to [a] charge of [the strict-liability offense of] felony nonsupport under MCL 750.165[”]).

The doctrine of impossibility is not a defense to a prosecution for an attempt to commit an offense. *Thousand (Thousand II)*, 465 Mich at 165-166. In *Thousand*, 465 Mich at 152-154, the Court concluded that the doctrine of impossibility did not apply to a charge of attempted distribution of obscene material to a minor, even when the alleged distribution of obscene material was to an undercover detective who was not, in fact, a

24[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.

25 The Court also rejected the defendant’s voluntary abandonment argument, finding that the abandonment was involuntary: “[W]e hold that a victim’s entreaties or pleadings may constitute ‘unanticipated difficulties’ or ‘unexpected resistance’. . . . Thus, the fact-finder could conclude that the abandonment was not voluntary.” *McNeal*, 152 Mich App at 416-417.
minor. The Court held that “[t]he notion that it would be ‘impossible’ for the defendant to have committed the completed offense is simply irrelevant to the analysis.” *Id.* at 166. The Court reiterated that an attempt to commit an unlawful act requires only proof “that the defendant possessed the requisite specific intent and that he [or she] engaged in some act ‘towards the commission’ of the intended offense.”

3.8 Child Sexually Abusive Activity or Material

“The purpose of [Michigan’s child sexually abusive activity or material] statute is to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography.” *People v Ward (Jonathan)*, 206 Mich App 38, 42-43 (1994).

A. Statutory Authority

1. Production of Child Sexually Abusive Activity or Material

*MCL 750.145c(2)* prohibits the production of child sexually abusive activity or material:

“A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.”

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26 See Section 4.9 for more information on the impossibility defense.

27 See *M Crim JI 20.38, Child Sexually Abusive Activity – Causing or Allowing*, and *M Crim JI 20.38a, Child Sexually Abusive Activity – Producing*. 
“MCL 750.145c(2) applies to three distinct groups of persons[:]

• The first category includes a person ‘who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material.’ This category refers to those who are engaged in the production of pornography.

• The second category includes a person who ‘arranges for, produces, makes, or finances . . . any child sexually abusive activity or child sexually abusive material.’

• The last category is defined to include a person ‘who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce or finance any child sexually abusive activity or child sexually abusive material.’” People v Willis (Kelvin), 322 Mich App 579, 586 (2018) (“reject[ing] defendant’s claim that MCL 750.145c is limited to criminalizing conduct involving the production of child sexually abusive material;” “persons who arrange for or attempt or prepare to arrange for child sexually abusive activity face criminal liability”), quoting MCL 750.145c(2) and People v Adkins, 272 Mich App 37, 40-41 (2006) (citations omitted; alterations in original) (bullets added).

2. Distribution or Promotion of Child Sexually Abusive Material

MCL 750.145c(3) prohibits the distribution or promotion of child sexually abusive material:

“A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to the persons described in . . . MCL 752.367.”
3. Possession of Child Sexually Abusive Material

MCL 750.145c(4) prohibits the possession of child sexually abusive material:

“A person who knowingly possesses or knowingly seeks and accesses any child sexually abusive material is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to any of the following:

(a) A person described in . . . MCL 752.367, a commercial film or photographic print processor acting under subsection (8), or a computer technician acting under subsection (9).

(b) A police officer acting within the scope of his or her duties as a police officer.

(c) An employee or contract agent of the department of social services acting within the scope of his or her duties as an employee or contract agent.

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28 MCL 752.367 exempts the following individuals or institutions from the application of MCL 750.145c(3):
(1) an employee or member of the board of directors of a public or private college, university, or vocational school, or of a state or local or community college library, or of a public or private nonprofit art museum;
(2) an individual who disseminates obscene material in the course of employment and has no discretion regarding that dissemination, or is not part of the employer’s management; (3) any portion of a business regulated by the Federal Communications Commission; and (4) a cable television operator subject to the Federal Communications Act.

29 See M Crim JI 20.38b, Child Sexually Abusive Activity – Distributing.

30 For purposes of MCL 750.145c, “[a]ccess’ means to intentionally cause to be viewed by or transmitted to a person.” MCL 750.145c(1)(a).

31 MCL 752.367 exempts the following individuals or institutions from the application of MCL 750.145c(3):
(1) an employee or member of the board of directors of a public or private college, university, or vocational school, or of a state or local or community college library, or of a public or private nonprofit art museum;
(2) an individual who disseminates obscene material in the course of employment and has no discretion regarding that dissemination, or is not part of the employer’s management; (3) any portion of a business regulated by the Federal Communications Commission; and (4) a cable television operator subject to the Federal Communications Act.

32 MCL 750.145c(8) and MCL 750.145c(9) create immunity from civil liability and protect as confidential the identity of a commercial film or photographic print processor or a computer technician who reports a depiction of a child engaged in a listed sexual act to a law enforcement agency.
(d) A judicial officer or judicial employee acting within the scope of his or her duties as a judicial officer or judicial employee.

(e) A party or witness in a criminal or civil proceeding acting within the scope of that criminal or civil proceeding.

(f) A physician, psychologist, limited license psychologist, professional counselor, or registered nurse licensed under . . . MCL 333.1101 to [MCL] 333.25211, acting within the scope of practice for which he or she is licensed.

(g) A social worker registered in this state under . . . MCL 333.16101 to [MCL] 333.18838, acting within the scope of practice for which he or she is registered.”33

B. Definitions

MCL 750.145c(1) defines many of the terms used in the child sexually abusive material statutes:

• “‘Access’ means to intentionally cause to be viewed by or transmitted to a person.” MCL 750.145c(1)(a).

• “‘Appears to include a child’ means that the depiction appears to include, or conveys the impression that it includes, a person who is less than 18 years of age, and the depiction meets either of the following conditions:

  (i) It was created using a depiction of any part of an actual person under the age of 18.

  (ii) It was not created using a depiction of any part of an actual person under the age of 18, but all of the following apply to that depiction:

    (A) The average individual, applying contemporary community standards, would find the depiction, taken as a whole, appeals to the prurient interest.

    (B) The reasonable person would find the depiction, taken as a whole, lacks serious literary, artistic, political, or scientific value.

33 See M Crim JI 20.38c, Child Sexually Abusive Activity – Possessing or Accessing.
(C) The depiction depicts or describes a listed sexual act in a patently offensive way.” MCL 750.145c(1)(b).

• “‘Child’ means a person who is less than 18 years of age, subject to the affirmative defense created in [MCL 750.145c(6)] regarding persons emancipated by operation of law.” MCL 750.145c(1)(c).

• “‘Child sexually abusive activity’ means a child engaging in a listed sexual act.” MCL 750.145c(1)(n).

• “‘Child sexually abusive material’ means any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.” MCL 750.145c(1)(o).

• “‘Contemporary community standards’ means the customary limits of candor and decency in this state at or near the time of the alleged violation of this section.” MCL 750.145c(1)(f).

• “‘Listed sexual act’ means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.” MCL 750.145c(1)(i).

• “‘Make’ means to bring into existence by copying, shaping, changing, or combining material, and specifically includes, but is not limited to, intentionally creating a reproduction, copy, or print of child sexually abusive material, in whole or part. Make does not include the creation of an identical reproduction or copy of child sexually abusive material within the same digital storage device or the same piece of digital storage media.” MCL 750.145c(1)(j).

• “‘Prurient interest’ means a shameful or morbid interest in nudity, sex, or excretion.” MCL 750.145c(1)(m).
C. Penalties

- Production of child sexually abusive material as described in MCL 750.145c(2) is a felony punishable by imprisonment for not more than 20 years, or a maximum fine of $100,000, or both.

- Distribution/promotion of child sexually abusive material as described in MCL 750.145c(3) is a felony punishable by imprisonment for not more than seven years, or a maximum fine of $50,000, or both.

- Possession/access of child sexually abusive material as described in MCL 750.145c(4) is a felony punishable by imprisonment for not more than four years, or a maximum fine of $10,000, or both.

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

D. Sex Offender Registration

MCL 750.145c(4) is a tier I listed offense under the Sex Offenders Registration Act (SORA).34 See MCL 28.722(s)(i).

MCL 750.145c(2) and MCL 750.145c(3) are tier II listed offenses under the SORA. See MCL 28.722(u)(iii).

For more information on the SORA’s registration requirements, see Chapter 10.

E. Pertinent Case Law

1. Statute is Constitutional

The child sexually abusive activity statute is not unconstitutionally overbroad, and its definition of erotic nudity is narrowly drawn and does not punish protected forms of free speech under the First Amendment of the United

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34 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
The child sexually abusive activity statute, MCL 750.145c(4), is not unconstitutionally vague as applied to the defendant’s conduct because “[t]he distinction between the number of images [of child sexually abusive material] and the number of collections of images [of child sexually abusive material (i.e. disks)] is irrelevant” for purposes of the Michigan’s statutory sentencing guidelines under either OV 12 \(^{37}\) or OV 13, \(^{38}\) when 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.” \(\text{People v Loper, 299 Mich App 451, 461 (2013).}\)

The child sexually abusive activity statute, MCL 750.145c, was not unconstitutionally vague as applied to the defendant because “[o]n the basis of [the] plain and unambiguous statutory language, a person of ordinary intelligence would reasonably know that filming the child[-victim]’s actions [of grinding her genitals against a couch,] . . . [as] specifically depicted in the [defendant’s] videos[,] . . . is prohibited, absent the need to speculate regarding the meaning of ‘masturbation’ as defined in the statute.” \(\text{People v Sardy, 313 Mich App 679, 714 (2015), vacated in part on other grounds 500 Mich 887 (2016).}\)^{39}

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^{35}\text{“Erotic nudity” means the lascivious exhibition of the genital, pubic, or rectal area of any person. As used in this subdivision, “lascivious” means wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions.” MCL 750.145c(1)(h).}

^{36}\text{“When a vagueness challenge does not involve First Amendment freedoms it must be examined on the basis of the facts in the case at hand[,] . . . [i]n other words, when a defendant brings an as-applied vagueness challenge to a statute, the defendant is confined to the facts of the case at bar.” \(\text{People v Loper, 299 Mich App 451, 458 (2013).}\) \[\text{“[A] criminal defendant may not defend on the basis that the charging statute is unconstitutionally vague or overbroad when the defendant’s conduct is fairly within the constitutional scope of the statute.” \(\text{People v Rogers, 249 Mich App 77, 95 (2001).}\)\]}

^{37}\text{OV 12 requires a score of 25 points for “[t]hree or more contemporaneous felonious criminal acts involving crimes against a person[,]” MCL 777.42(1)(a). For more information on OV 12, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.}

^{38}\text{OV 13 requires a score of 25 points where “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). For more information on OV 13, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.}

^{39}\text{[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.}
2. **Double Jeopardy Issues**

Convictions for child sexually abusive activity, and CSC-I or CSC-II based on the commission of child sexually abusive activity, do not violate the Double Jeopardy Clause’s prohibition against multiple punishments. *Ward (Jonathan)*, 206 Mich App at 40, 42-43 (the CSC-I and CSC-II statutes and the child sexually abusive activity statute prohibit conduct that violates distinct social norms; the CSC statutes prohibit sexual assaults of people of all ages, while the child sexually abusive activity statute “focuses on protecting children from sexual exploitation, assaultive or otherwise”).

A defendant’s two convictions for violating MCL 750.145c(2), where only a single videotape existed, did not violate the prohibition against double jeopardy because each conviction was based on the defendant’s conduct toward each of two victims appearing on the videotape. *People v Hack (Christopher)*, 219 Mich App 299, 306-307 (1996). According to the Court:

> “The portion of the statute under which [the] defendant was charged and convicted provides that a person commits a felony when . . . he [or she] induces ‘a child’ to engage in ‘child sexually abusive activities.’ MCL 750.145c(2). We find the language [of MCL 750.145c(2)] to clearly provide that a felony has been committed when a person induces one child to perform prohibited acts. Because it is undisputed that two children were involved in this case, we conclude [that the] defendant was properly charged with and convicted of two counts of this crime.” *Hack (Christopher)*, 219 Mich App at 306.

In deciding *Hack (Christopher)*, the Court of Appeals recognized and distinguished one of its earlier cases, *People v Smith (Jeffrey)*, 205 Mich App 69 (1994), by noting that the defendant in *Smith (Jeffrey)* allegedly took multiple photographs of a single victim on at least one occasion, while the facts in *Hack (Christopher)* involved multiple victims and a single videotape. *Hack (Christopher)*, 219 Mich App at 306-307. However, the Court’s decision in *Smith (Jeffrey)* (where only one of the defendant’s four convictions was upheld) was based on the prosecution’s failure to prove that the defendant took photographs of the victim engaged in a listed sexual act on more than one occasion or that the defendant took more than one photograph on one occasion; the Court did not address whether multiple photographs taken on a single occasion
could support multiple charges or convictions. *Smith (Jeffrey)*, 205 Mich App at 72-73.

In *People v Harmon (Douglas)*, 248 Mich App 522, 524-528 (2001), the Court of Appeals clarified its decisions in *Hack (Christopher)*, 219 Mich App 299, and *Smith (Jeffrey)*, 205 Mich App 69, and found that the number of photographs and the number of victims—not the number of photographic sessions—are the relevant factors in determining the proper number of convictions supported by the evidence. In *Harmon (Douglas)*, *supra* at 524, the evidence established that on one occasion the defendant took four nude photographs of two 15-year-old girls (he took two photographs of each girl). The defendant, based on *Smith (Jeffrey)*, argued that he could not be convicted for taking multiple photographs of a single victim on a single occasion. *Harmon (Douglas)*, *supra* at 526. The Court disagreed and addressed its prior opinions in *Hack (Christopher)*, and *Smith (Jeffrey)*:

“[W]e do not believe that *Hack* set forth the correct interpretation of *Smith*. Contrary to the assertion in *Hack*, the *Smith* Court did not explicitly state that a ‘defendant could only be convicted once for multiple photographs taken of the same victim at one time.’ Indeed, in vacating three of the defendant’s convictions in *Smith*, this Court was swayed by the lack of evidentiary specificity with regard to the number of photographs. The *Smith* panel may have been concerned, for example, that less than four photographs were taken or that certain of the photographs were not sufficiently lascivious to support a conviction under MCL 750.145c(2). In the instant case, by contrast, the prosecutor presented four photographs that the trial court specifically concluded were lascivious. In light of this evidence, we can discern no reason why [the] defendant could not be convicted of four counts of ‘mak[ing] . . . child sexually abusive material’ under MCL 750.145c(2). Indeed, [the] defendant made four ‘photograph[s]’ under MCL 750.145c(1)(o)40 and therefore could be convicted of four counts under the plain language of the relevant statutes.” *Harmon (Douglas)*, 248 Mich App at 527-528 (internal citations omitted).

40Formerly MCL 750.145c(1)(i).
3. Sufficiency of the Evidence

The evidence supported a conviction under the child sexually abusive activity statute, MCL 750.145c, because “a rational juror could find that the prosecution proved beyond a reasonable doubt that [the] defendant knowingly videotaped the child[-victim] while she was engaged in a listed sexual act,[41] i.e., masturbation[,]”[42] where the evidence included videos of the child-victim grinding her genitals against a couch, the defendant asking the child-victim in the videos “why she was engaging in the act . . . [and] why it was comfortable[,]” the child-victim responding in the videos that she was engaged in the act “‘because it’s comfortable[,]’ . . . [and] it felt good[,]” the detective’s characterization that “the child[-victim]’s act [in the videos] entailed manual manipulation of the genitals[,]” seizure of a CD from the defendant’s home depicted “nude images of the child[-victim] in the bathtub and bathroom[,]” the child-victim’s mother’s testimony “to having once observed the child[-victim] with ‘her hands between her legs and . . . gyrating on the bed,’” and “expert testimony about normal sexual behavior by children.” People v Sardy, 313 Mich App 679, 689-690, 715 (2015), vacated in part on other grounds 500 Mich 887 (2016).[43]

The evidence supported a conviction under MCL 750.145c(2) because “a rational trier of fact [could] find that the essential elements of child sexually abusive activity were proven beyond a reasonable doubt” where “the evidence was factually sufficient to show that defendant arranged for, or attempted to arrange or prepare for, child sexually abusive activity with [a] 16-year-old victim. The evidence showed that the 52-year-old defendant invited the 16-year-old victim into his apartment, showed the victim a pornographic video of two men engaging in sexual intercourse, offered the victim $25 to allow defendant to insert his fingers into the victim’s anus while he

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[41] For purposes of the child sexually abusive activity statute, masturbation is “the real or simulated touching, rubbing, or otherwise stimulating of a person’s own clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, either by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.” MCL 750.145c(1)(k).

[42] For purposes of the child sexually abusive activity statute, listed sexual act is “sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.” MCL 750.145c(1)(j).

[43] Prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.
masturbated, and later offered the victim $100 to engage in sexual intercourse.” People v Willis (Kelvin), 322 Mich App 579, 586 (2018) (rejecting the defendant’s claim that there was insufficient evidence to support his conviction for child sexually abusive activity, and holding that “the prosecution was not required to prove that defendant’s conduct involved the production of child sexually abusive material”).

4. **Statute Not Limited to a Class of Offenders**

The prohibited conduct in MCL 750.145c(2) is not restricted to a class of offenders responsible for the care of the child. People v Pitts (Kevin), 216 Mich App 229, 231-234 (1996).

5. **Produces Child Sexually Abusive Material**

“Produces” under MCL 750.145c(2) means “to create” or to “bring into existence.” Hack (Christopher), 219 Mich App at 305, referring to Random House College Dictionary, Revised Edition (1984). Accordingly, the mere creation of a videotape of child sexually abusive material, by itself, is actionable under the statute; no proof of an intent to distribute is required under MCL 750.145c(2). Hack (Christopher), 219 Mich App at 305-306.

6. **Possesses Child Sexually Abusive Material**

MCL 750.145c(4) and MCL 752.796, the statute governing use of a computer to commit a crime, are not in pari materia where “[the] defendant’s possession of child sexually abusive material, as accomplished by downloading the material, was criminalized by MCL 750.145c(4)[, and] [the] [d]efendant’s use of a computer to download the child sexually abusive material was separately criminalized by MCL 752.796(1).” People v Loper, 299 Mich App 451, 459, 465-467 (2013) (“[B]y the plain language of the statutory text, the subject of MCL 750.145c(4) is the possession of child sexually abusive material, and its purpose is to criminalize the possession of child sexually abusive material in a variety of formats [including, but not limited to “‘a book, magazine, computer, computer storage device, or other visual or print or printable medium’”45] while “[t]he plain language of MCL 752.796(1) reveals that the statute’s subject is the use of a computer to commit a crime, and its purpose is to criminalize such use.”).

44 “Statutes that address the same subject or share a common purpose are in pari materia and must be read together as a whole.” Loper, 299 Mich App at 464, quoting People v Harper, 479 Mich 599, 621 (2007).

45 See MCL 750.145c(1)(o).
7. **Conduct That Constitutes “Making” Child Sexually Abusive Activity**

**Downloading and copying electronic images.** “While simply viewing an image on the Internet does not amount to ‘making’ content because the individual has not actually copied the image yet, copying an image that is either stored on a computer hard drive or burned to a CD-ROM or other digital media storage device is considered ‘making’ content.” *People v Seadorf*, 322 Mich App 105, 111 (2017) (quoting *People v Flick*, 487 Mich 1, 30 n 7 (2010) and disagreeing with the “[d]efendant’s argument that the term ‘makes,’ as used in MCL 750.145c(2) (the child sexually abusive activity statute), does not include downloading an image[,]” and finding that “[b]ecause defendant saved new images and videos into folders[ on his phone and computer], he created new copies of the content; thus, defendant ‘made’ content[; a]lthough the term download has multiple meanings, ‘[i]t is often used to refer to actively saving a copy of a file to a computer’s hard drive[]’”) (seventh alteration in original).

**Editing videotape.** “[T]he act of editing a videotape of otherwise nonoffensive child nudity can give rise to the creation of ‘child sexually abusive activity[,]” *People v Riggs*, 237 Mich App 584, 588 (1999). In Riggs, the defendant videotaped several hours of children’s “innocuous behavior” as they played and interacted with each other. *Id.* at 586. However, on one tape of 10-year-old twin girls, “[t]he camera [wa]s focused exclusively on the girls’ crotch areas; their faces [could not] be seen.” *Id.* at 587. During the taping, one of the girls exposed her vaginal area and the defendant allegedly “edited the tape to focus on, slow down, and replay this scene. The image of the girl’s genital area was depicted on the screen for over two minutes.” *Id.* On another of the defendant’s videotapes there appeared “full body” shots of two sisters, ages eight and ten, watching themselves on a television monitor. *Id.* One girl pulled up her shirt and later exposed her vaginal area. *Id.* The defendant edited this tape so that this scene replayed an additional two times at regular speed. *Id.*

The prosecution asserted that the defendant violated MCL 750.145c(2) because his edited version of the videotape “turned apparently innocent child play into images depicting erotic nudity.” *Riggs*, 237 Mich App at 588. The defendant contended that he did not violate the statute “because the children were not engaged in sexual activity at the time the original videotape was made[.]” *Id.* at 588.

The Court of Appeals disagreed:
“[T]he use of an otherwise benign image of a child exhibiting ordinary nudity to create what would fall within the definition of erotic nudity, is conduct proscribed by [MCL 750.145c(2)]. Contrary to [the] defendant’s position, the statute does not require that the children actually be engaging in sexual activity at the time the activity is memorialized on tape. Rather, the statute prohibits the making of a visual image that is a likeness or representation of a child engaging in one of the listed sexual acts.” Riggs, 237 Mich App at 590-591.

The Court of Appeals concluded that the defendant’s actions involving the first videotape, if proved, constituted a violation of MCL 750.145c(2):

“There was sufficient evidence on which to conclude that [the] defendant focused a video camera on the crotch area of a child and videotaped that child’s otherwise innocent behavior of exposing her genital area. The evidence supported the conclusion that [the] defendant edited the tape to slow down and stop the taped images to display a closeup scene of the child’s nude genital area, keeping the scene displayed on the edited tape for over two minutes and then repeating the scene twice more in slow motion. Such conduct, if proved, would constitute the making of images depicting erotic nudity of a child, in violation of MCL 750.145c(2).” Riggs, 237 Mich App at 592.

However, the Court concluded that the defendant’s actions involving the second videotape did not constitute a violation of the statute:

“No images on that tape constitute child sexually abusive material. This tape merely shows innocent child nudity. While [the] defendant allegedly edited the tape to display the nudity three times, the replay is at normal speed and the camera was not focused exclusively on the child’s genital area. Such child nudity does not constitute the display of ‘erotic nudity,’ as that term is statutorily defined.” Riggs, 237 Mich App at 593.

The Riggs Court expressly cautioned that “[its] opinion should not be construed as holding that the repeated display of child
nudity as a matter of law can never constitute a violation of MCL 750.145c.” Riggs, 237 Mich App at 593 n 3.

8. Prepares for Child Sexually Abusive Activity or Material

“[A] person may violate [MCL 750.145c(2)] by preparing for any child sexually abusive activity.” People v Thousand (Thousand I), 241 Mich App 102, 115 (2000), aff’d in part, rev’d in part on other grounds by People v Thousand (Thousand II), 465 Mich 149 (2001). Therefore, preparing via the Internet to engage in sexually abusive activity with a child, even when the “child” is actually an undercover police officer pretending to be a child, is actionable under MCL 750.145c(2). Therefore, preparing via the Internet to engage in sexually abusive activity with a child, even when the “child” is actually an undercover police officer pretending to be a child, is actionable under MCL 750.145c(2). Thousand I, 241 Mich App at 115-117. See People v Adkins (Lowell), 272 Mich App 37, 38 (2006), where the defendant was properly convicted of violating MCL 750.145c(2) when he communicated via the Internet with a law enforcement officer posing as a minor. The conduct prohibited under MCL 750.145c(2) includes the mere preparation to engage in child sexually abusive activity, and in Adkins (Lowell), 272 Mich App at 47-49, the evidence established that the defendant’s communication with the perceived minor was in preparation for child sexually abusive activity.

“MCL 750.145c(2) only requires that a defendant prepare for child sexually abusive activity and “‘does not require that those preparations actually proceed to the point of involving a child.’”” People v Willis (Kelvin), 322 Mich App 579, 587 (2018) (defendant was properly convicted of violating MCL 750.145c(2) when he “invited [a] 16-year-old victim into his apartment, showed the victim a pornographic video of two men engaging in sexual intercourse, and then offered the victim $25 to allow defendant to insert his fingers into the victim’s anus while he masturbated, and later offered the victim $100 to engage in sexual intercourse”), citing People v Aspy, 92 Mich App 36, 43 (2011).

46 A prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.

47 See M Crim JI 35.10 for an instruction on Use of a Computer to Commit Specified Crimes.
9. Distributes or Promotes Child Sexually Abusive Material

A conviction for distribution or promotion of child sexually abusive material under MCL 750.145c(3) requires proof that the defendant had a criminal intent to distribute or promote the material. People v Tombs, 472 Mich 446, 448-450 (2005) (when the defendant returned his former employer’s laptop computer, the employer discovered that the laptop contained child sexually abusive material; the defendant did not intend to distribute the material—in fact, he believed that the laptop’s hard drive would be erased without his employer ever knowing that it contained the prohibited material). According to the Tombs Court:

“No mens rea with respect to distribution or promotion is explicitly required in MCL 750.145c(3). Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature’s intent not to eliminate mens rea in MCL 750.145c(3).” Tombs, 472 Mich at 456-457.

The Court clarified the elements of distribution or promotion of child sexually abusive material under MCL 750.145c(3):

“(1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal intent. . . . [T]he mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3).” Tombs, 472 Mich at 465.

F. Defenses

MCL 750.145c(6) provides an affirmative defense to the crime of child sexually abusive activity under MCL 750.145c if “the alleged child is a person who is emancipated by operation of law under . . . MCL 722.4, as proven by a preponderance of the evidence.”

A defendant intending to offer evidence to establish that a depiction is not, in fact, an actual person under age 18 must provide notice of his or her intent to raise that defense. MCL 750.145c(7).
“If a defendant in a prosecution under [MCL 750.145c] proposes to offer in his or her defense evidence to establish that a depiction that appears to include a child was not, in fact, created using a depiction of any part of an actual person under the age of 18, the defendant shall at the time of the arraignment on the information or within 15 days after arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney of record a notice in writing of his or her intention to offer that defense. The notice shall contain, as particularly as is known to the defendant or the defendant’s attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant’s notice shall include specific information as to the facts that establish that the depiction was not, in fact, created using a depiction of any part of an actual person under the age of 18. Failure to file a timely notice in conformance with this subsection precludes a defendant from offering this defense.” MCL 750.145c(7) (emphasis added).

3.9 Conspiracy

Conspiracy is an inchoate offense.48 An inchoate offense is defined as “[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment.” Black’s Law Dictionary (9th ed).

Conspiracies involving Michigan’s criminal sexual conduct offenses, or any other sex-related crime, are proscribed under the general conspiracy statute in the Michigan Penal Code, MCL 750.157a.49

A. Statutory Authority

MCL 750.157a states:

“Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . .”

48 Other inchoate offenses discussed in this chapter are attempt and solicitation. See Sections 3.7 and 3.33, respectively.

49 See M Crim JI 10.1 for an instruction on Conspiracy.
B. Elements of Offense

The elements of conspiracy are:

(1) an agreement between two or more persons

(2) to commit an illegal act or to commit a legal act in an illegal manner. People v Ayoub, 150 Mich App 150, 153 (1985).

C. Penalties

MCL 750.157a provides two penalties for conspiracy offenses involving criminal sexual conduct or other sex-related crimes:

- If the target offense is punishable by imprisonment for one year or more, the penalty for conspiracy shall be the same as the penalty that would be imposed for commission of the target offense. MCL 750.157a(a). Additionally, the court may in its discretion impose a fine of $10,000. Id.

- If the target offense is punishable by imprisonment for less than one year, the penalty for conspiracy shall be imprisonment for not more than one year, or a maximum fine of $1,000, or both. MCL 750.157a(c).

See Section 2.7 for information about additional monetary penalties and assessments.

D. Sex Offender Registration

Conspiracy to commit a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA)\textsuperscript{50} is classified as a listed offense under the same tier designation as the crime that is the object of the conspiracy. See MCL 28.722(s)(ix); MCL 28.722(u)(xii); MCL 28.722(w)(vii).

For more information on the SORA’s registration requirements, see Chapter 10.

\textsuperscript{50} The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
E. Pertinent Case Law

1. Specific Intent Crime

Conspiracy is a specific intent crime that requires both the intent to combine with others and the intent to accomplish the illegal objective. People v Blume, 443 Mich 476, 481 (1993).

2. Common Attributes of Conspiracy

The Michigan Supreme Court made the following statements about conspiracy in People v Carter, 415 Mich 558, 567-570 (1982):

- Conspiracy is an express or implied agreement or understanding between two or more persons to commit an unlawful act or to accomplish a lawful act by unlawful means.

- The gravamen of conspiracy is an agreement with another to commit a crime.

- Direct proof of an agreement is not required, and it is not necessary to prove that a formal agreement exists. A conspiracy may be proved by circumstantial evidence.

- The crime of conspiracy is complete once the parties have formed the agreement, and no overt act in furtherance of the conspiracy is necessary.

- A conspirator’s guilt or innocence does not depend on whether the goals of the conspiracy were accomplished.

- Conspiracy is a crime that is separate and distinct from the underlying crime. Therefore, a defendant may be convicted of and punished for the underlying crime and the conspiracy to commit that crime.

- Conspiracy is prosecuted as a separate offense because the dangers of conspiracy are not confined to the target offense. Conspiracy recognizes the increased and special danger to society presented by a group of persons acting in concert. Such concerted action increases the likelihood that the criminal object will succeed and decreases the possibility that the conspirators will depart from their criminal designs. Group association facilitates the attainment of more complex criminal purposes than could be achieved by a single person.
3. **Knowledge of All Conspirators or Conspiracy’s Ramifications Not Necessary**

A conspirator need not have knowledge of all the people involved in the conspiracy or the extent of the conspiracy’s objectives; instead, a conspirator need only have knowledge of the general object of the conspiracy. *People v Grant (Dennis)*, 455 Mich 221, 236 n 20 (1997); *People v Meredith (On Remand)*, 209 Mich App 403, 412 (1995).

4. **Withdrawal From Conspiracy**

Withdrawal is not a defense to the crime of conspiracy under MCL 750.157a, because “[t]he crime of conspiracy is complete upon formation of the agreement.” *People v Cotton*, 191 Mich App 377, 393 (1991). “[W]ithdrawal from the conspiracy is ineffective because the heart of the offense is the participation in the unlawful agreement.” *Cotton, supra* at 393.

3.10 **Crime Against Nature (Sodomy/Bestiality)**

MCL 750.158 proscribes conduct commonly known as *sodomy* and *bestiality*. Although those two terms do not appear in the statute, the phrase that does appear—“abominable and detestable crime[s] against nature”—embraces both sodomy and bestiality. *People v Haynes (Jeffrey)*, 281 Mich App 27, 30 (2008).

A. **Statutory Authority**

MCL 750.158 states:

“Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.”

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51 However, under federal law, “[a] defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution.” *Smith v United States*, 568 US 106, 107 (2013) (holding that “[a]llocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause”). See also *People v Denio*, 454 Mich 691, 710 (1997), noting, in dicta, that “[t]he crime of conspiracy is a continuing offense; it is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy” (internal quotation marks and citation omitted).
1. Sodomy

Sodomy is defined at common law as “carnal copulation between human beings in an unnatural manner.” People v Askar, 8 Mich App 95, 99 (1967). Sodomy is more commonly known as anal intercourse. See People v Dexter (Harvey), 6 Mich App 247, 250 (1967).

Sexual penetration, for purposes of MCL 750.158, is defined in MCL 750.159:

“In any prosecution for sodomy, it shall not be necessary to prove emission, and any sexual penetration, however slight, shall be deemed sufficient to complete the crime specified in the next preceding section.”

Michigan’s sodomy law is not likely to withstand a substantive due process challenge to its constitutionality following the United States Supreme Court’s decision in Lawrence v Texas, 539 US 558 (2003). In Lawrence, supra at 562-563, 579, the Court struck down a Texas statute prohibiting “deviate sexual intercourse” between members of the same sex. In doing so, the Court rejected its decision in Bowers v Hardwick, 478 US 186 (1986), in which the majority upheld the constitutionality of a Georgia statute similar to Michigan’s statute. Lawrence, supra at 578.

At the time Bowers was decided, Georgia law, like Michigan’s current statute, prohibited sodomy between same-sex and different-sex couples. Lawrence, 539 US at 566. The Texas law at issue in Lawrence, supra at 563, 566, however, prohibited only members of the same sex from engaging in “deviate sexual intercourse.” The Court in Lawrence prefaced its decision to overrule Bowers by stating that the laws at issue in both cases do more than prohibit a particular sexual act:

“The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within

52 See Section 3.31 for a definition of sexually delinquent person.
the liberty of persons to choose without being punished as criminals.

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When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.” Lawrence, 539 US at 567.

After conducting a comprehensive examination of relevant case law and treatises, the Court observed that a decision in Lawrence based on Equal Protection could be relatively ineffective. Lawrence, 539 US at 574-575. The Court reasoned that its decision in Bowers left open the possibility that Texas lawmakers would simply rephrase the prohibition against deviate sexual conduct to include such conduct between different-sex participants. Lawrence, supra at 575. The Court preempted this result by overruling Bowers:

“If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” Lawrence, 539 US at 575.

2. Bestiality

Bestiality is any act of “sexual connection” between a human being and an animal; it is not limited to acts of anal intercourse or fellatio. People v Carrier (Michael), 74 Mich App 161, 166 (1977).

B. Penalties

MCL 750.158 provides two penalties for a violation of the statute:

• Imprisonment for not more than 15 years; or

• If the defendant was a sexually delinquent person at the time of the offense, imprisonment for an indeterminate
term, “the minimum of which shall be 1 day and the maximum of which shall be life.”

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.

C. Sex Offender Registration

MCL 750.158 is a tier II listed offense under the Sex Offenders Registration Act (SORA), when the offense is committed against a minor. See MCL 28.722(u)(v).

A defendant is not required to register under the SORA where the violation of MCL 750.158 involved an animal, not a human being under the age of 18. Haynes (Jeffrey), 281 Mich App at 32. An animal is not a victim for purposes of MCL 28.722(e)(ii), and therefore, a conviction for a violation of MCL 750.158 involving an animal is not a listed offense for purposes of the SORA. Haynes (Jeffrey), supra at 32.

3.11 Cyberstalking (Unlawful Use of Electronic Medium of Communication)

A sexual assault perpetrator may use an electronic medium of communication to stalk, threaten, or otherwise harass a victim (cyberstalking) before or after an assault or attempted assault. Offenders may also use an electronic medium of communication to threaten or harass a victim’s family members or any other individual living in the victim’s household. As with stalking, MCL 750.411h, and aggravated stalking, MCL 750.411i, cyberstalking most commonly occurs in cases involving domestic violence. MCL 600.2950a(1) specifically addresses cyberstalking in the context of personal protection orders. The discussion

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53 See Section 3.31 for a definition of sexually delinquent person.

54 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

55 Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov_smart/pdfs/final_sornaguidelines.pdf.

56 There are specific exceptions to violations of MCL 750.158 involving a minor victim. Effective July 1, 2011, 2011 PA 17 created a “Romeo & Juliet” exception to select listed offenses. See, e.g., MCL 28.722(u)(v)(A)-(B). See also Chapter 10 for a detailed discussion of the Romeo & Juliet exception as it applies to select offenses.

57 See Section 3.34 for information on stalking and aggravated stalking.
of cyberstalking in this section is limited to a statutory overview of the offense.57

A. Statutory Authority

“(1) A person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim’s consent, if all of the following apply:

(a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.

(b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” MCL 750.411s(1).

B. Definitions

• “‘Computer’ means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.” MCL 750.411s(8)(a).

• “‘Computer network’ means the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.” MCL 750.411s(8)(b).

57 For more information, see the Michigan Judicial Institute’s Domestic Violence Benchbook, Chapter 2.
“‘Computer program’ means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.” MCL 750.411s(8)(c).

“‘Computer system’ means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.” MCL 750.411s(8)(d).

“‘Credible threat’ means a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual.” MCL 750.411s(8)(e).

“‘Device’ includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.” MCL 750.411s(8)(f).

“‘Emotional distress’ means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.” MCL 750.411s(8)(g).

“‘Internet’ means that term as defined in . . . 47 U.S.C. 230 [(‘the international computer network of both Federal and non-Federal interoperable packet switched data networks’)].” MCL 750.411s(8)(h).

“‘Post a message’ means transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, whether truthful or untruthful, about the victim.” MCL 750.411s(8)(i).

“‘Unconsented contact’ means any contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or discontinued. Unconsented contact includes any of the following:

(i) Following or appearing within sight of the victim.

(ii) Approaching or confronting the victim in a public place or on private property.
(iii) Appearing at the victim’s workplace or residence.

(iv) Entering onto or remaining on property owned, leased, or occupied by the victim.

(v) Contacting the victim by telephone.

(vi) Sending mail or electronic communications to the victim through the use of any medium, including the internet or a computer, computer program, computer system, or computer network.

(vii) Placing an object on, or delivering or having delivered an object to, property owned, leased, or occupied by the victim.” MCL 750.411s(8)(j).

- “‘Victim’ means the individual who is the target of the conduct elicited by the posted message or a member of that individual’s immediate family.” MCL 750.411s(8)(k).

C. Penalties

Except as provided in MCL 750.411s(2)(b) (aggravating circumstances that increase the penalty for a violation), a violation of MCL 750.411s(1) is a felony punishable by imprisonment for not more than two years, or a maximum fine of $5,000, or both. MCL 750.411s(2)(a).

According to MCL 750.411s(2)(b), the offender is guilty of a felony punishable by imprisonment for not more than five years, or a maximum fine of $10,000, or both, if the violation of MCL 750.411s(1) involves any of the following:

“(i) Posting the message is in violation of a restraining order and the person has received actual notice of that restraining order or posting the message is in violation of an injunction or preliminary injunction.

(ii) Posting the message is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

(iii) Posting the message results in a credible threat being communicated to the victim, a member of the victim’s family, or another individual living in the same household as the victim.

(iv) The person has been previously convicted of violating this section or [MCL 750.]145d, [MCL
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750.411h, or [MCL 750.]411i, or . . . MCL 752.796 [(use of computer program, computer, computer system, or computer network to commit crime), or a substantially similar law of another state, a political subdivision of another state, or of the United States.

(v) The victim is less than 18 years of age when the violation is committed and the person committing the violation is 5 or more years older than the victim.” MCL 750.411s(2)(b).

An offender convicted of violating MCL 750.411s may be ordered to reimburse the state or local unit of government for any expenses incurred in relation to the offense “in the same manner that expenses may be ordered to be reimbursed under . . . MCL 769.1f.” MCL 750.411s(4). 58

“[A] person [may be] charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate [MCL 750.411s].” MCL 750.411s(5).

For information on scoring these offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

D. Jurisdiction

Prosecution in this state for a violation or attempted violation of MCL 750.411s requires one or more of the following:

“(a) The person posts the message while in this state.

(b) Conduct arising from posting the message occurs in this state.

(c) The victim is present in this state at the time the offense or any element of the offense occurs.

(d) The person posting the message knows that the victim resides in this state.” MCL 750.411s(7).

E. Exceptions

“[MCL 750.411s] does not apply to an internet or computer network service provider who in good faith, and without knowledge of the specific nature of the message posted, provides the medium for

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58 See Section 2.7 for information about additional authorized fines, costs, and assessments.
disseminating information or communication between persons.” MCL 750.411s(3).

 “[MCL 750.411s] does not prohibit constitutionally protected speech or activity.” MCL 750.411s(6).

F. Sex Offender Registration

MCL 750.411s is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information on the SORA’s registration requirements, see Chapter 10.

3.12 Disorderly Person (Common Prostitute/Window Peeper/Indecent or Obscene Conduct)

A. Statutory Authority

A “disorderly person” is defined, in part, as any of the following:

• A common prostitute, MCL 750.167(1)(b).

• A window peeper, MCL 750.167(1)(c).

• A person engaged in indecent or obscene conduct in a public place, MCL 750.167(1)(f).

• A person “loitering in a house of ill fame or prostitution or place where prostitution or lewdness is practiced, encouraged, or allowed[,]” MCL 750.167(1)(i).60

B. Penalties

A violation of MCL 750.167 is a misdemeanor punishable by imprisonment for not more than 90 days, or a maximum fine of $500, or both. MCL 750.168(1).61

59 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

60 “A mother’s breastfeeding of a child or expressing breast milk does not constitute indecent or obscene conduct under [MCL 750.167(1)] regardless of whether or not her areola or nipple is visible during or incidental to the breastfeeding or expressing of breast milk.” MCL 750.167(3).

61 See Section 2.7 for information about additional monetary penalties and assessments.
C. Sex Offender Registration

MCL 750.167 is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information on the SORA’s registration requirements, see Chapter 10.

D. Pertinent Case Law

A defendant’s indecent exposure of his person to a 13-year-old neighbor girl on the front porch of his city dwelling is actionable under the disorderly person provision in MCL 750.167 as indecent or obscene conduct in a “public place.” *People v DeVine*, 271 Mich 635, 640 (1935).

Case law interpreting the state disorderly conduct statute can be helpful in interpreting a local ordinance with identical language. *City of Westland v Okopski*, 208 Mich App 66, 74 (1994).

3.13 Dissemination, Exhibition, and Display of Sexually Explicit Matter to Minors

MCL 722.675 and MCL 722.677 prohibit the dissemination and display of sexually explicit materials to minors.

A. Disseminating and Exhibiting Sexually Explicit Matter to Minors

1. Statutory Authority

A person is guilty of disseminating or exhibiting sexually explicit matter to a minor under MCL 722.675(1) if that person does either of the following:

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62 The listed offenses described in MCL 28.722(e)(iv) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) in 2011 PA 17, effective July 1, 2011. The reorganized structure of listed offenses eliminated a third or subsequent violation of any combination of MCL 750.167 (disorderly person descriptions), MCL 750.335a(2)(a) (open or indecent exposure), or a substantially corresponding local ordinance of a municipality. See Chapter 10 for a complete history of listed offenses from the time when the SORA was enacted.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).

63 For purposes of this offense, a minor is a person under age 18. MCL 722.671(d).
“(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors[; or]

(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.”

2. **Statutory Exceptions**

MCL 722.675 does not apply to the dissemination of sexually explicit matter to a minor by any of the following:

“(a) A parent or guardian who disseminates sexually explicit matter to his or her child or ward unless the dissemination is for the sexual gratification of the parent or guardian.

(b) A teacher or administrator at a public or private elementary or secondary school that complies with the revised school code, . . . MCL 380.1 to [MCL] 380.1852, and who disseminates sexually explicit matter to a student as part of a school program permitted by law.

(c) A licensed physician or licensed psychologist who disseminates sexually explicit matter in the treatment of a patient.

(d) A librarian employed by a library of a public or private elementary or secondary school that complies with the revised school code, . . . MCL 380.1 to [MCL] 380.1852, or employed by a public library, who disseminates sexually explicit matter in the course of that person’s employment.

(e) Any public or private college or university or any other person who disseminates sexually explicit matter for a legitimate medical, scientific, governmental, or judicial purpose.

(f) A person who disseminates sexually explicit matter that is a public document, publication, record, or other material issued by a state, local, or federal official, department, board, commission, agency, or other governmental entity, or an accurate republication of such a public document, publication, record, or other material.” MCL 722.676.

MCL 722.682a also contains exceptions:
“This part does not apply to any of the following:

(a) A medium of communication to the extent regulated by the federal communications commission.

(b) An internet service provider or computer network service provider that is not selling the sexually explicit matter being communicated but that provides the medium for communication of the matter. As used in this section, ‘internet service provider’ means a person who provides a service that enables users to access content, information, electronic mail, or other services offered over the internet or a computer network.

(c) A person providing a subscription multichannel video service under terms of service that require the subscriber to meet both of the following conditions:

(i) The subscriber is not less than 18 years of age at the time of the subscription.

(ii) The subscriber proves that he or she is not less than 18 years of age through the use of a credit card, through the presentation of government-issued identification, or by other reasonable means of verifying the subscriber’s age.”

3. Mens Rea

“Knowingly disseminates” means that the person “knows both the nature of the matter and the status of the minor to whom the matter is disseminated.” MCL 722.675(2).

“A person knows the nature of matter if the person either is aware of its character and content or recklessly disregards circumstances suggesting its character and content.” MCL 722.675(3).

“A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.” MCL 722.675(4).
4. **Pertinent Case Law**

Sufficient evidence was presented to support a finding that the defendants disseminated sexually explicit matter to a minor under MCL 722.675(1)(b) where the defendants “knew that [the 12-year-old victim] was present in [a] van when each of them disrobed and engaged in sexual intercourse with [the victim’s 17-year-old sister]” in the van; “given the age of [the victim] and her close proximity to the sexual acts, a jury could have reasonably inferred that . . . even though [the] defendants and [the 17-year-old] moved to the back of the van, they were still exhibiting to a minor a sexually explicit performance that was harmful to the minor.” *People v Lockett*, 295 Mich App 165, 180-181 (2012).

**B. Displaying Sexually Explicit Matter to Minors**

1. **Statutory Authority**

A person is guilty of displaying sexually explicit matter to a minor under MCL 722.677(1) if that person has managerial responsibility for a business enterprise selling sexually explicit visual material that visually depicts sexual intercourse or sadomasochistic abuse and is harmful to minors, and does either of the following:

   “(a) Knowingly permits a minor who is not accompanied by a parent or guardian to view that matter; or]

   (b) Displays that matter knowing its nature, unless the person does so in a restricted area.”

2. **Mens Rea**

   “Knowingly permits” means that “the person knows both the nature of the matter and the status of the minor permitted to examine the matter.” MCL 722.677(2).

   “A person knows the nature of the matter if the person either is aware of its character and content or recklessly disregards circumstances suggesting its character and content.” MCL 722.677(3).

   “A person knows the status of a minor if the person either is aware that the person who is permitted to view the matter is

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64 For purposes of this offense, a minor is a person under age 18. MCL 722.671(d).
under 18 years of age or recklessly disregards a substantial risk that the person who is permitted to view the matter is under 18 years of age.” MCL 722.677(4).

C. Definitions

- “Display’ means to put or set out to view or to make visible.” MCL 722.671(a).

- “Disseminate’ means to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same.” MCL 722.671(b).

- “‘Erotic fondling’ means touching a person’s clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, for the purpose of sexual gratification or stimulation.” MCL 722.672(c).

- “‘Exhibit’ means to do 1 or more of the following:

  (i) Present a performance.

  (ii) Sell, give, or offer to agree to sell or give a ticket to a performance.

  (iii) Admit a minor to premises where a performance is being presented or is about to be presented.” MCL 722.671(c).

- “‘Harmful to minors’ means sexually explicit matter that meets all of the following criteria:

  (i) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.

  (ii) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.

  (iii) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.” MCL 722.674(a).

- “‘Local community’ means the county in which the matter was disseminated.” MCL 722.674(b).

- “‘Nudity’ means the lewd display of the human male or female genitals or pubic area.” MCL 722.672(a).
• “‘Prurient interest’ means a lustful interest sexual stimulation or gratification. In determining whether sexually explicit matter appeals to the prurient interest, the matter shall be judged with reference to average 17-year-old minors. If it appears from the character of the matter that it is designed to appeal to the prurient interest of a particular group of persons, including, but not limited to, homosexuals or sadomasochists, then the matter shall be judged with reference to average 17-year-old minors within the particular group for which it appears to be designed.” MCL 722.674(c).

• “‘Restricted area’ means any of the following:

  (i) An area where sexually explicit matter is displayed only in a manner that prevents public view of the lower 2/3 of the matter’s cover or exterior.

  (ii) A building, or a distinct and enclosed area or room within a building, if access by minors is prohibited, notice of the prohibition is prominently displayed, and access is monitored to prevent minors from entering.

  (iii) An area with at least 75% of its perimeter surrounded by walls or solid, nontransparent dividers that are sufficiently high to prevent a minor in a nonrestricted area from viewing sexually explicit matter within the perimeter if the point of access provides prominent notice that access to minors is prohibited.” MCL 722.671(e).

• “‘Sadomasochistic abuse’ means either of the following:

  (i) Flagellation, or torture, for sexual stimulation or gratification, by or upon a person who is nude or clad only in undergarments or in a revealing or bizarre costume.

  (ii) The condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification, of a person who is nude or clad only in undergarments or in a revealing or bizarre costume.” MCL 722.672(d).

• “‘Sexual excitement’ means the condition of human male or female genitals when in a state of sexual stimulation or arousal.” MCL 722.672(b).

• “‘Sexual intercourse’ means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-
anal, whether between persons of the same or opposite sex or between a human and an animal.” MCL 722.672(e).

- “‘Sexually explicit matter’ means sexually explicit visual material, sexually explicit verbal material, or sexually explicit performance.” MCL 722.673(f).

- “‘Sexually explicit performance’ means a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse.” MCL 722.673(g).

D. Penalties

Disseminating sexually explicit matter to a minor is a felony punishable by imprisonment for not more than two years, or a maximum fine of $10,000, or both.65 MCL 722.675(5). When imposing the fine, the court must consider the scope of the defendant’s commercial activity in the dissemination or exhibition of sexually explicit matter to minors. Id.

Displaying sexually explicit matter in violation of MCL 722.677(1) is a misdemeanor punishable by imprisonment for not more than 93 days, or a maximum fine of $5,000, or both.66 MCL 722.677(5).

E. Sex Offender Registration

MCL 722.675 and MCL 722.677 are not designated as tier I, tier II, or tier III listed offenses under the Sex Offenders Registration Act (SORA).67 For more information on the SORA’s registration requirements, see Chapter 10.

65 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

66 See Section 2.7 for information about additional monetary penalties and assessments.

67 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
3.14 Drug-Facilitated Criminal Sexual Conduct

This section addresses the provision of the Controlled Substances Act that expressly penalizes drug-facilitated criminal sexual conduct. “Drug facilitated sexual assault involves the administration of an anesthetia-type drug to render a victim physically incapacitated or helpless and thus incapable of giving or withholding consent.” MCL 333.7401a punishes a person who, without another individual’s consent, delivers or causes to be delivered a controlled substance or GBL (gamma-butyrolactone) to that individual to enable the person to commit or attempt to commit any of the following criminal sexual conduct offenses against the individual: CSC-I (MCL 750.520b); CSC-II (MCL 750.520c); CSC-III (MCL 750.520d); CSC-IV (MCL 750.520e); or assault with intent to commit criminal sexual conduct (MCL 750.520g).

Alcohol is the most commonly used substance to facilitate sexual assault. In addition to GBL/GHB, other substances such as Rohypnol (a benzodiazepine), and ketamine are also used. Other benzodiazepines and sedative hypnotics may also be used to facilitate a sexual assault. The effects of these drugs, which often cause a victim to lose consciousness, are intensified and take less time to affect the victim when taken with alcohol.

Some common characteristics of drug-facilitated sexual assault are:

- Many victims of drug-facilitated sexual assault do not report the assault.
- Some drug facilitators may cause a victim to lose consciousness during all or part of the sexual assault, and even when a victim regains consciousness, anterograde amnesia may prevent him or her from remembering events that occurred while under the drug’s influence.
- The drugs most often involved in a drug-facilitated sexual assault are rapidly absorbed and metabolized by the body so that the drugs are not detected in routine urine and blood screening.

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68 For more information, see Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study (July 2007), at https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf.

69 See the Michigan Judicial Institute’s Controlled Substances Benchbook for more information on the Controlled Substances Act.


71 See https://www.rainn.org/articles/drug-facilitated-sexual-assault.

A. Statutory Authority

MCL 333.7401a states:

“(1) A person who, without an individual’s consent, delivers a controlled substance or a substance described in [MCL 333.7401b][73] or causes a controlled substance or a substance described in [MCL 333.7401b] to be delivered to that individual to commit or attempt to commit [CSC-I, CSC-II, CSC-III, CSC-IV, or assault with intent to commit CSC], against that individual is guilty of a felony punishable by imprisonment for not more than 20 years.

(2) A conviction or sentence under this section does not prohibit a conviction or sentence for any other crime arising out of the same transaction.

(3) This section applies regardless of whether the person is convicted of a violation or attempted violation of [CSC-I, CSC-II, CSC-III, CSC-IV, or assault with intent to commit CSC].”

B. Definitions

“Deliver’ means the actual, constructive, or attempted transfer from 1 person to another of [GBL] or any material, compound, mixture, or preparation containing [GBL], whether or not there is an agency relationship.” MCL 333.7401b(4)(b).

C. Common Drug Facilitators74

This subsection discusses various drugs used to facilitate sexual assaults. Each drug listed is identified by its common title, other names by which the drug is known, and the drug’s pharmacological effects. When appropriate, the applicable Michigan controlled substance schedule in which the drug appears is also noted.

• Rohypnol (flunitrazepam)
  • Also known as: Circles, Forget Pill, LA Rochas, Lunch Money, Mexican Valium, Mind Erasers, Poor Man’s Quaalude, R-2, Rib, Roach, Roach-2, Roches,

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73 MCL 333.7401b prohibits the manufacture, delivery, or possession with intent to manufacture or deliver GBL (or any material, compound, mixture, or preparation containing GBL), and the knowing or intentional possession of GBL (or any material, compound, mixture, or preparation containing GBL).

Roofies, Roopies, Rope, Rophies, Ruffies, Trip-and-Fall, and Whiteys.

- **Effects:** memory impairment, muscle relaxation or loss of muscle control, drowsiness, visual disturbances or problems seeing, dizziness, sleepiness, stomach problems, confusion, problems talking, unconsciousness, nausea, death, increased blood pressure (according to the RAINN source in the footnote below), and lower blood pressure (according to the U.S. government source in the footnote below).

- **Schedule 4 controlled substance:** MCL 333.7218(1)(a).

- **GHB** (gamma-hydroxybutyrate)
  
  - **Also known as:** Grievous Bodily Harm (GBH), Liquid X, Liquid Ecstasy, Liquid E, G, Georgia Home Boys, Easy Lay, Cherry Meth, Soap, PM, Salt Water, Vita G, G-Juice, Great Hormones, Somatomax, Bedtime Scoop, Gook, Gamma 10, Energy Drink, and Goop.
  
  - **Effects:** sedation, relaxation, intense drowsiness, hampered mobility, verbal incoherence, slowed heart rate, problems seeing, nausea, headache, respiratory failure or problems breathing, unconsciousness, tremors, vomiting, seizure-like activity, and coma or death.

- **Schedule 1 controlled substance:** MCL 333.7212(1)(f).

- **GBL** (gamma-butyrolactone)
  
  - **Effects:** severe amnesia, nausea, lethargy, confusion, hypothermia, respiratory arrest, seizures, agitation, loss of bowel control, and coma or death.

  - GBL is not listed as a controlled substance in Michigan’s controlled substance schedules. However, GHB is listed in MCL 333.7212(1)(f) as a **schedule 1 controlled substance**. Both GBL and GHB have the same effect on the human body and are used in the same manner. House Legislative Analysis, HB 5556 and HB 5557, October 9, 2000. See MCL 333.7104(3), governing controlled substance analogues, and MCL 333.7401b, governing the manufacture, delivery, and possession of GBL.

- **Ecstasy** (3, 4-methylenedioxymethamphetamine)
• **Also known as:** E, X, X-TC, M&Ms, Adam, CK, Clarity, Hug Drug, Lover’s Speed, and MDMA.

• **Effects:** increased blood pressure, pulse, and body temperature, nausea, blurred vision, loss of consciousness, hallucinations, chills, sweating, tremors, strokes, seizures, hypothermia, heat stroke, and heart failure.

• **Schedule 1 controlled substance:** MCL 333.7212(1)(g).

• Ketamine

• **Also known as:** Black Hole, Bump, Cat Valium, Green, Jet, K, K-Hole, Kit Kat, Psychedelic Heroin, Purple, Special K, and Super Acid.

• **Effects:** dizziness, confusion, hallucinations, agitation, disorientation, impaired motor skills, high blood pressure, loss of consciousness, depression, potentially fatal respiratory failure, distorted perceptions of sight and sound, lost sense of time and identity, out of body experiences, convulsions, vomiting, numbness, memory problems, slurred speech, and aggressive or violent behavior.

• **Schedule 3 controlled substance:** MCL 333.7216(1)(h).

• **Other controlled substances used in drug-facilitated sexual assaults** include benzodiazepines (in addition to Rohypnol), amphetamines, and LSD.

**D. Penalties**

A violation of MCL 333.7401a is a felony punishable by imprisonment for not more than 20 years. MCL 333.7401a(1).

**E. Sex Offender Registration**

MCL 333.7401a is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information about the SORA’s registration requirements, see Chapter 10.

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75 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See Section 2.7 for information about authorized fines, costs, and assessments.
3.15 Taking Away or Enticing a Minor Under Age 16

MCL 750.13 proscribes the taking away or enticement of a minor under the age of 16, without the consent of the minor’s parent, guardian, or other person having legal charge over the minor, for the purpose of prostitution, concubinage, sexual intercourse, or marriage.

A. Statutory Authority

MCL 750.13 states:

“A person who takes or entices away a minor under the age of 16 years from the minor’s father, mother, guardian, or other person having the legal charge of the minor, without their consent, for the purpose of prostitution, concubinage, sexual intercourse, or marriage is guilty of a felony punishable by imprisonment for not more than 10 years.”

B. Definitions

The statutory terms concubinage and prostitution\(^\text{77}\) have no common-law meaning, but are “intended to cover all cases of lewd intercourse.” People v Cummons, 56 Mich 544, 545 (1885). Specifically, the Michigan Supreme Court found:

“The statute[, MCL 750.13,] which names as illegal purposes of such enticement of [minors\(^\text{78}\)] under the age of consent, includes marriage, concubinage, and prostitution. The last two were evidently intended to cover all cases of lewd intercourse. Neither of these words has any common-law meaning, but both are popular phrases, either of which might be made to cover the crime here shown without any change from general usage.” Cummons, 56 Mich at 545.

\(^{76}\) The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

\(^{77}\) For a definition of prostitution, see Section 3.29.

\(^{78}\) Effective March 14, 2016, 2015 PA 210 amended MCL 750.13 to make it a felony to take or entice away any minor under 16 years of age (rather than a female under 16 years of age) for the purpose of prostitution, concubinage, sexual intercourse, or marriage.
“Concubinage has been defined as any form of illicit [(illegal)] intercourse.” People v Fleming (William), 267 Mich 584, 586 (1934).

C. Statute of Limitations

An indictment for a violation or attempted violation of MCL 750.13 may be found and filed within 25 years after the offense is committed. MCL 767.24(2).79

D. Penalties

A violation of MCL 750.13 is a felony punishable by imprisonment for not more than 10 years.80

E. Sex Offender Registration

MCL 750.13 is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).81 For more information about the SORA’s registration requirements, see Chapter 10.

F. Pertinent Case Law

1. Specific Intent Crime

Child enticement is a specific intent crime; it requires a prosecutor to prove not only the act of enticement but also the intent or “the particular purpose” for the enticement—i.e., prostitution, concubinage, sexual intercourse, or marriage. Fleming (William), 267 Mich at 586-588.

2. Construction of “Guardian” or “Other Person Having Legal Charge of the Person”

The statute’s reference to a guardian or other person having the legal charge of the child is broad and not limited to a child’s

79 MCL 767.24(2) is known as “Theresa Flore’s Law.”

80 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.

81 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.
Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
“legal relation.” *People v Carrier (Orange)*, 46 Mich 442, 445-446 (1881) (“[The child enticement statute] plainly contemplate[s] that there may be a legal charge in one who is neither parent nor guardian, but who under the facts of the case stands in the place of one or the other. It is the actual state of things and not the existence of a legal relation that the statute contemplates . . . . The protection was meant to be general . . . .”).

3. Construction of “Enticement”

*Enticement* encompasses both direct and indirect propositions of a child. *Carrier (Orange)*, 46 Mich at 447. “A [person] cannot be suffered to evade the statute by artfully avoiding a direct proposition that [the minor] go off with him[ or her], when his [or her] conduct is equivalent to such a proposition, and not only suggests it to the [minor], but is calculated and designed to induce [the minor] to go.” *Id.* at 447.

3.16 Extortion

Michigan’s extortion statute creates two types of extortion: (1) threats of harm, and (2) threats to accuse another of a crime. MCL 750.213. Extortion punishes coercive behavior directed against individuals, without regard to whether it interferes with the orderly administration of justice. *People v Peña*, 224 Mich App 650, 658 (1997), mod in part on other grounds 457 Mich 885 (1998).83

Threats of extortion, if they coerce the victim to submit to a sexual penetration or contact, fall under the *force or coercion* provisions of the CSC Act (threats of extortion are specifically designated as *force or coercion* under the CSC Act).84 See MCL 750.520b(1)(f)(iii) (CSC-I),85 MCL 750.520e(1)(b)(iii) (CSC-IV).

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82 Effective March 14, 2016, 2015 PA 210 amended MCL 750.13 to make it a felony to take or entice away any minor under 16 years of age (rather than a female under 16 years of age) for the purpose of prostitution, concubinage, sexual intercourse, or marriage.

83[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value . . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.

84 See Section 2.6(J) for a detailed discussion of *force or coercion*.

85 CSC-II and CSC-III incorporate by reference CSC-I’s *force or coercion* provision. See MCL 750.520c(1)(d)(i); MCL 750.520c(1)(f); MCL 750.520d(1)(b).
A. Statutory Authority

MCL 750.213 states:

“Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars.”

B. Elements of Offense

In People v Harris (James), 495 Mich 120, 128-129 (2014), the Michigan Supreme Court clarified the elements for the crime of extortion under MCL 750.213:

“[T]he crime of extortion is complete when a defendant (1) either orally or by a written or printed communication, maliciously threatens (2) to accuse another of any crime or offense, or to injure the person or property or mother, father, spouse or child of another (3) with the intent to extort money or any pecuniary advantage whatever, or with the intent to compel the person threatened to do or refrain from doing any act against his or her will.”

MCL 750.213 “contains no requirement whatsoever that the act demanded must be of serious consequence to the victim in order to convict a defendant.” Harris (James), 495 Mich at 131, 139, overruling People v Fobb, 145 Mich App 786 (1985) and People v Hubbard (After Remand), 217 Mich App 459 (1996) to the extent that they required otherwise.

C. Penalty

A violation of MCL 750.213 is a felony punishable by imprisonment for not more than 20 years, or a maximum fine of $10,000, or both."
D. Sex Offender Registration

MCL 750.213 is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information about the SORA’s registration requirements, see Chapter 10.

E. Pertinent Case Law

1. “Threats”

The crime of extortion occurs “when a defendant maliciously threatens to injure another person with the intent to compel that person to do any act against his [or her] will, without regard to the significance or seriousness of the compelled act.” People v Harris (James), 495 Mich 120, 123 (2014) (overruling People v Hubbard (Arthur) (After Remand), 217 Mich App 459 (1996), and People v Fobb, 145 Mich App 786 (1985), “to the extent that those decisions require[d] that the act or omission compelled by the defendant be of serious consequence to the victim”).

However, “the Legislature did not intend to punish every minor threat,” and “the plain language of the extortion statute . . . clearly provides that the Legislature intended punishment [only] for those who ‘maliciously threaten’ others.” Harris (James), 495 Mich at 135, quoting MCL 750.213. “Therefore, only those threats made with the intent to commit a wrongful act without justification or excuse, or made in reckless disregard of the law or of a person’s legal rights, rise to the level necessary to support an extortion conviction.” Harris (James), 495 Mich at 136.

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87 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

88 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

89 The Harris (James) Court rejected the defendant’s vagueness challenge to the extortion statute, holding that “MCL 750.213 [does not] confer[] unlimited discretion on the trier of fact to determine whether extortion [has been committed];” rather, it “provides the trier of fact with sufficient guidance regarding the nature of the threat required for a conviction[,]” In addition, it is not vague for failing to provide adequate notice because MCL 750.213 specifically requires “that the defendant ‘maliciously’ threaten another[]’” thus, it “provides a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, so that he or she may act accordingly.” Harris (James), 495 Mich at 135-136, 139 quoting MCL 750.213 (emphasis supplied).
2. “Immediate, Continuing, or Future Harm”

“[T]hreats of imminent injury or of continuation of injury presently being inflicted will support a conviction for extortion.” People v Fobb, 145 Mich App 786, 790 (1985), overruled on other grounds by People v Harris (James), 495 Mich 120 (2014). To convict a defendant of extortion for compelling a victim’s action or omission, the prosecutor must prove the existence of a threat of immediate, continuing, or future harm. People v Peña, 224 Mich App 650, 656 (1997), mod in part on other grounds 457 Mich 885 (1998).

3. Double Jeopardy Concerns


“[P]unishments for extortion and obstruction of justice address different societal norms, although they arise from the same events. . . . The extortion statute, MCL 750.213, punishes coercive behavior directed against individuals, regardless of whether such behavior occurs in the context of interfering in the orderly administration of justice. The crime of obstruction of justice, on the other hand, is concerned with interference in the orderly administration of justice, and is a crime against the public in general.” Peña, 224 Mich App at 658.
3.17 Gross Indecency—Between Males, Between Females, and Between Members of the Opposite Sex

A. Statutory Authority and Penalties

The three gross indecency statutory provisions are distinguished by the gender of the participants: (1) gross indecency between males; (2) gross indecency between females; and (3) gross indecency between members of the opposite sex.

Each of the three statutes also contains language that proscribes procuring or attempting to procure the commission of an act of gross indecency by another person. Procuring or attempting to procure an act of gross indecency applies to a defendant who facilitates or attempts to facilitate an act of gross indecency between two other persons, and not involving the defendant himself or herself. *People v Masten*, 414 Mich 16, 18-20 (1982).

1. Gross Indecency Between Males

MCL 750.338 states:

“Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person,[95] may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.”[96]

2. Gross Indecency Between Females

MCL 750.338a states:

“Any female person who, in public or in private, commits or is a party to the commission of, or any
person who procures or attempts to procure the commission by any female person of any act of gross indecency with another female person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person,[97] may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.”[98]

3. Gross Indecency Between Members of the Opposite Sex

MCL 750.338b states:

“Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section. Any female person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a male person shall be guilty of a felony punishable as provided in this section. Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section. Any person convicted of a felony as provided in this section shall be punished by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person,[99] may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.”[100]

[97] See Section 3.31 for a definition of sexually delinquent person.

[98] For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

[99] See Section 3.31 for a definition of sexually delinquent person.
B. Sex Offender Registration

MCL 750.338, MCL 750.338a, and MCL 750.338b are tier II listed offenses under the Sex Offenders Registration Act (SORA) if the victim is at least age 13 but under age 18.102

MCL 750.338, MCL 750.338a, and MCL 750.338b are tier III listed offenses under the SORA when the victim is under age 13. See MCL 28.722(w)(i).

For more information about the SORA’s registration requirements, see Chapter 10.

C. Pertinent Case Law

1. Nature of the Sexual Act

Michigan case law does not require that an act of gross indecency involve penetration, fellatio, or cunnilingus. People v Bono (On Remand), 249 Mich App 115, 123 (2002). In Bono, supra at 118, 122, the Court found that a masturbatory act between consenting adult males in a store bathroom could be grossly indecent.

To be actionable under Michigan’s gross indecency statute, a person’s behavior must involve some type of overt sexual activity. People v Drake, 246 Mich App 637, 641 (2001). An overt act is one that is “open and perceivable.” Drake, supra at 642. Although the act or activity must be “sexual in nature,” it need not result in actual sexual penetration or sexual contact. Id. In determining whether certain activity is grossly indecent, or in determining whether the motivation for the behavior was sexual in nature, the trier of fact may take into account the totality of the circumstances. Id.; People v Jones (John Riley), 222 Mich App 595, 602-604 (1997).

100 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

101 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

102 There are specific exceptions to violations of MCL 750.338, MCL 750.338a, and MCL 750.338b involving a victim at least age 13 but under age 18. Effective July 1, 2011, 2011 PA 17 created a “Romeo & Juliet” exception to select listed offenses. See, e.g., MCL 28.722(u)(vi)(A)-(B). See also Chapter 10 for a detailed discussion of the Romeo & Juliet exception as it applies to select offenses.
2. “Public” or “Private” Place

Determining whether the conduct at issue under MCL 750.338, MCL 750.338a, and MCL 750.338b was committed in a public place is a question of fact. See People v Williams (Eugene II), 462 Mich 861 (2000), where the Michigan Supreme Court vacated in part the decision of the Court of Appeals in People v Williams (Eugene I), 237 Mich App 413, 417 (1999), in which the Court of Appeals decided “as a matter of law that the attorney interview room was a public place to the extent that certain members of the public with access to this area of the jail could possibly have been exposed to defendant’s sexual act with his client.” (Emphasis added.) The Michigan Supreme Court specifically vacated the part of the Court of Appeals opinion that concluded, as a matter of law, that an attorney interview room was a public place, and cautioned that whether a location was a public place still required “evidence to establish that the act occurred in public as an element of the crime[.]” Williams (Eugene II), 462 Mich at 861. See also People v Brown (Carolyn) (After Remand), 222 Mich App 586, 591 (1997), where the Court of Appeals stated that “the key issue in determining whether an act of oral sexual conduct was performed in a ‘public place’ is not so much the exact location of the act, but whether there is the possibility that the unsuspecting public could be exposed to or view the act.”

Although the statutory language of the gross indecency statutes, MCL 750.338, MCL 750.338a, and MCL 750.338b, expressly include conduct committed in either a public or a private place, Michigan appellate courts have stated that some conduct, such as oral sexual conduct between adults and consensual sexual intercourse between a husband and a wife, is not actionable under the gross indecency statutes when the conduct occurs in a private place. See Brown (Carolyn) (After Remand), 222 Mich App at 591, citing People v Lino, 447 Mich 567, 578 (1994), where the Court of Appeals stated: “[O]ral sexual conduct [between adults] in-and-of-itself is [not] grossly indecent . . . , but [] an act of oral sexual conduct performed in a public place violates the [gross indecency statutes].” In deciding the consolidated cases in Lino, the Supreme Court expressly held that “[f]ellatio performed in a public place clearly falls within the ambit of [MCL 750.338] . . . [and p]rocuring or attempting to procure an act of gross indecency with a person under the age of consent can support a conviction under MCL 750.338, regardless of whether the conduct is performed in public.”
3. Appellate Court Determinations of Gross Indecency

The following cases illustrate situations in which Michigan appellate courts have determined that the conduct at issue constituted (or could constitute) gross indecency:

• *People v Lino*, 447 Mich 567, 572, 578 (1994) (male-male oral sex in car in overflow parking lot of restaurant was grossly indecent).

• *People v Brashier*, 447 Mich 567, 573-574, 578 (1994) (procuring or attempting to procure a person under the age of consent to physically and verbally abuse another person, and to vomit, urinate, and pour syrup on that person in a hotel room while the person masturbates to climax could constitute gross indecency if the circumstances as alleged are supported by sufficient evidence, even if the conduct did not occur in public).

• *People v Bono (On Remand)*, 249 Mich App 115, 118, 122 (2002) (male-male masturbation between stalls of a store restroom may be grossly indecent if the alleged conduct is established by sufficient evidence).

• *People v Drake*, 246 Mich App 637, 638-639, 643 (2001) (evidence that an adult male liked and got “high off” of the alleged conduct of minor girls who were encouraged to beat him, spit on him and his food, and provide him with urine, feces, and used tampons was sufficient to constitute the crime of gross indecency). In *Drake, supra* at 642, the Court noted “that behavior can be considered sexual activity within the context of the gross indecency statute even if it does not involve sexual intercourse, oral sexual stimulation, masturbation, or the touching of another person’s genitals or anus. Experience has shown that people can derive sexual gratification from a variety of acts, without ever engaging in any of the mentioned activities.”

• *People v Jones (John Riley)*, 222 Mich App 595, 596, 604 (1997) (consensual sexual intercourse between husband and wife in a crowded prison public visiting room, if sufficient evidence establishes that the conduct occurred as alleged, constitutes an act of gross indecency).

• *People v Brown (Carolyn) (After Remand)*, 222 Mich App 586, 588, 592-593 (1997) (female-female oral sex in closed room of massage parlor may be grossly indecent if specific facts establish that the room is a
“public place,” i.e., that “an unsuspecting member of the public who accepted the parlor’s general invitation to do business could have been exposed to or viewed the conduct”).

- *People v Kalchik*, 160 Mich App 40, 43, 46 (1987) (male-male oral sex and masturbation that occurred under partitions in a public bathroom was grossly indecent).

### 3.18 Human Trafficking

*Human trafficking* crimes include a number of separate statutes penalizing specific conduct involved in crimes related to forced labor or services. The definition of *services* in MCL 750.462a(l) “means an ongoing relationship between a person and an individual in which the individual performs activities under the supervision of or for the benefit of the person, including, but not limited to, commercial sexual activity and sexually explicit performances.” (Emphasis added.) Because, for purposes of human trafficking, *services* includes unlawful sexual conduct, all of the offenses described in the Human Trafficking chapter of the Michigan Compiled Laws are discussed with the detail necessary to the content of this benchbook.


#### A. Human Trafficking Offenses

1. **Human Trafficking: Forced Labor or Services**

   a. **Statutory Authority**

   “A person shall not knowingly recruit, entice, harbor, transport, provide, or obtain an individual for forced labor or services.” MCL 750.462b.

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b. Penalties

Except as otherwise provided in MCL 750.462f, a person who violates MCL 750.462b is guilty of:

“(a) Except as provided in subdivisions (b), (c), and (d), the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

(b) If the violation results in bodily injury to an individual or results in an individual being engaged in commercial sexual activity, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $15,000.00, or both.

(c) If the violation results in serious bodily injury to an individual, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

(d) If the violation involves kidnapping or attempted kidnapping, [CSC-I] or attempted [CSC-I], or an attempt to kill or the death of an individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $50,000.00, or both.” MCL 750.462f(1).

MCL 750.462f(3) subjects “[a] person who attempts, conspires, or solicits another to [commit any human trafficking offense under MCL 750.462a–MCL 750.462h] . . . to the same penalty as [the] person who commits [the human trafficking offense].”

In addition, a person may be charged with, convicted of, or sentenced for any other violation of law “arising out of the same transaction as the violation of [MCL 750.462b].” MCL 750.462f(4).

“The court may order a term of imprisonment imposed for violating [MCL 750.462b] to be served consecutively to a term of imprisonment imposed for the commission of any other crime, including any other violation of law arising out of the same transaction as the violation of [MCL 750.462b].” MCL 750.462f(5).
For information on scoring human trafficking offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.

c. **Restitution**

“In addition to any mandatory restitution applicable under . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766, the court may order a person convicted of violating [MCL 750.462b] to pay restitution to the victim in the manner provided in . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766b, and to reimburse any governmental entity for its expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under . . . the code of criminal procedure, . . . MCL 769.1f.” MCL 750.462f(6).

For information on restitution under the William Van Regenmorter Crime Victim’s Rights Act, MCL 780.751 et seq., see the Michigan Judicial Institute’s *Crime Victim Rights Benchbook*, Chapter 8.

d. **Statute of Limitations**

An indictment for a violation or attempted violation of MCL 750.462b may be found and filed within 25 years after the offense is committed. MCL 767.24(2).104

e. **Sex Offender Registration**

MCL 750.462b is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).105 For more information on the SORA’s registration requirements, see Chapter 10.

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104 MCL 767.24(2) is known as “Theresa Flore’s Law.”

105 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
f. **Victim’s Testimony and Evidentiary Issues**

“The testimony of a victim is not required in a prosecution under [MCL 750.462b]. However, if a victim testifies, that testimony need not be corroborated.” 106 MCL 750.462g(1).

“In a prosecution under [MCL 750.462b], the victim’s resistance or lack of resistance to the actor is not relevant.” 107 MCL 750.462h.

g. **Expert Testimony on Human Trafficking Victims**

“Expert testimony as to the behavioral patterns of human trafficking victims and the manner in which a human trafficking victim’s behavior may deviate from societal expectations is admissible as evidence in court in a prosecution under [the Human Trafficking Act, MCL 750.462a et seq.,] if the expert testimony is otherwise admissible under the rules of evidence and laws of this state.” MCL 750.462g(2).

2. **Human Trafficking: Holding Individual in Debt Bondage**

a. **Statutory Authority**

“A person shall not knowingly recruit, entice, harbor, transport, provide, or obtain an individual for the purpose of holding the individual in debt bondage.” MCL 750.462c.

b. **Penalties**

Except as otherwise provided in MCL 750.462f, a person who violates MCL 750.462c is guilty of:

“(a) Except as provided in subdivisions (b), (c), and (d), the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

(b) If the violation results in bodily injury to an individual or results in an individual being

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106 See M Crim JI 36.7, Testimony of Victim Not Required/Need Not Be Corroborated.

107 See M Crim JI 36.8, Victim’s Resistance or Lack of Resistance Not Relevant.
engaged in commercial sexual activity, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $15,000.00, or both.

(c) If the violation results in serious bodily injury to an individual, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

(d) If the violation involves kidnapping or attempted kidnapping, [CSC-I] or attempted [CSC-I], or an attempt to kill or the death of an individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $50,000.00, or both.” MCL 750.462f(1).

MCL 750.462f(3) subjects “[a] person who attempts, conspires, or solicits another to [commit any human trafficking offense under MCL 750.462a–MCL 750.462h]…to the same penalty as [the] person who commits [the human trafficking offense].”

In addition, a person may be charged with, convicted of, or sentenced for any other violation of law “arising out of the same transaction as the violation of [MCL 750.462c].” MCL 750.462f(4).

“The court may order a term of imprisonment imposed for violating [MCL 750.462c] to be served consecutively to a term of imprisonment imposed for the commission of any other crime, including any other violation of law arising out of the same transaction as the violation of [MCL 750.462c].” MCL 750.462f(5).

For information on scoring human trafficking offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.

c. Restitution

“In addition to any mandatory restitution applicable under . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766, the court may order a person convicted of violating [MCL 750.462c] to pay restitution
to the victim in the manner provided in . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766b, and to reimburse any governmental entity for its expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under . . . the code of criminal procedure, . . . MCL 769.1f.” MCL 750.462f(6).

For information on restitution under the William Van Regenmorter Crime Victim’s Rights Act, MCL 780.751 et seq., see the Michigan Judicial Institute’s Crime Victim Rights Benchbook, Chapter 8.

d. **Statute of Limitations**

An indictment for a violation or attempted violation of MCL 750.462c may be found and filed within 25 years after the offense is committed. MCL 767.24(2).108

e. **Sex Offender Registration**

MCL 750.462c is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).109 For more information on the SORA’s registration requirements, see Chapter 10.

f. **Victim’s Testimony and Evidentiary Issues**

“The testimony of a victim is not required in a prosecution under [MCL 750.462c]. However, if a victim testifies, that testimony need not be corroborated.” MCL 750.462g(1).

“In a prosecution under [MCL 750.462c], the victim’s resistance or lack of resistance to the actor is not relevant.” MCL 750.462h.

g. **Expert Testimony on Human Trafficking Victims**

“Expert testimony as to the behavioral patterns of human trafficking victims and the manner in which a human

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108 MCL 767.24(2) is known as “Theresa Flore’s Law.”

109The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
trafficking victim’s behavior may deviate from societal expectations is admissible as evidence in court in a prosecution under [the Human Trafficking Act, MCL 750.462a et seq.,] if the expert testimony is otherwise admissible under the rules of evidence and laws of this state.” MCL 750.462g(2).

3. Human Trafficking: Recruiting or Racketeering

a. Statutory Authority

“A person shall not do either of the following:

(a) Knowingly recruit, entice, harbor, transport, provide, or obtain an individual by any means, knowing that individual will be subjected to forced labor or services or debt bondage.

(b) Knowingly benefit financially or receive anything of value from participation in an enterprise, as that term is defined in [MCL 750.159f], if the enterprise has engaged in an act proscribed under [MCL 750.462a–MCL 750.462h].” MCL 750.462d.

b. Penalties

Except as otherwise provided in MCL 750.462f, a person who violates MCL 750.462d is guilty of:

“(a) Except as provided in subdivisions (b), (c), and (d), the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

(b) If the violation results in bodily injury to an individual or results in an individual being engaged in commercial sexual activity, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $15,000.00, or both.

110 MCL 750.159f(a) defines the term enterprise to include “an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity[and to] include[] illicit as well as licit enterprises.”

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(c) If the violation results in serious bodily injury to an individual, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

(d) If the violation involves kidnapping or attempted kidnapping, [CSC-I] or attempted [CSC-I], or an attempt to kill or the death of an individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $50,000.00, or both.” MCL 750.462f(1).

MCL 750.462f(3) subjects “[a] person who attempts, conspires, or solicits another to [commit any human trafficking offense under MCL 750.462a–MCL 750.462h] . . . to the same penalty as [the] person who commits [the human trafficking offense].”

In addition, a person may be charged with, convicted of, or sentenced for any other violation of law “arising out of the same transaction as the violation of [MCL 750.462d].” MCL 750.462f(4).

“The court may order a term of imprisonment imposed for violating [MCL 750.462d] to be served consecutively to a term of imprisonment imposed for the commission of any other crime, including any other violation of law arising out of the same transaction as the violation of [MCL 750.462d].” MCL 750.462f(5).

For information on scoring human trafficking offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.

c. Restitution

“In addition to any mandatory restitution applicable under . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766, the court may order a person convicted of violating [MCL 750.462d] to pay restitution to the victim in the manner provided in . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766b, and to reimburse any governmental entity for its expenses incurred in relation to the violation in the
same manner that expenses may be ordered to be reimbursed under . . . the code of criminal procedure, . . . MCL 769.1f.” MCL 750.462f(6).

For information on restitution under the William Van Regenmorter Crime Victim’s Rights Act, MCL 780.751 et seq., see the Michigan Judicial Institute’s Crime Victim Rights Benchbook, Chapter 8.

d. Statute of Limitations

An indictment for a violation or attempted violation of MCL 750.462d may be found and filed within 25 years after the offense is committed. MCL 767.24(2).111

e. Sex Offender Registration

MCL 750.462d is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).112 For more information on the SORA’s registration requirements, see Chapter 10.

f. Victim’s Testimony and Evidentiary Issues

“The testimony of a victim is not required in a prosecution under [MCL 750.462d]. However, if [the] victim testifies, that testimony need not be corroborated.” MCL 750.462g(1).

“In a prosecution under [MCL 750.462d], the victim’s resistance or lack of resistance to the actor is not relevant.” MCL 750.462h.

g. Expert Testimony on Human Trafficking Victims

“Expert testimony as to the behavioral patterns of human trafficking victims and the manner in which a human trafficking victim’s behavior may deviate from societal expectations is admissible as evidence in court in a prosecution under [the Human Trafficking Act, MCL 750.462a et seq.,] if the expert testimony is otherwise

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111 MCL 767.24(2) is known as “Theresa Flore’s Law.”

112The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
admissible under the rules of evidence and laws of this state.” MCL 750.462g(2).

4. **Human Trafficking: Of a Minor**

a. **Statutory Authority**

“A person shall not do any of the following, regardless of whether the person knows the age of the minor:

(a) Recruit, entice, harbor, transport, provide, or obtain by any means a minor for commercial sexual activity.

(b) Recruit, entice, harbor, transport, provide, or obtain by any means a minor for forced labor or services.” MCL 750.462e.

b. **Penalties**

“Except as otherwise provided in [MCL 750.462f], a person who violates [MCL 750.462e] is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.” MCL 750.462f(2).

MCL 750.462f(3) subjects “[a] person who attempts, conspires, or solicits another to [commit any human trafficking offense under MCL 750.462a–MCL 750.462h] . . . to the same penalty as [the] person who commits [the human trafficking offense].”

In addition, a person may be charged with, convicted of, or sentenced for any other violation of law “arising out of the same transaction as the violation of [MCL 750.462e].” MCL 750.462f(4).

“The court may order a term of imprisonment imposed for violating [MCL 750.462e] to be served consecutively to a term of imprisonment imposed for the commission of any other crime, including any other violation of law arising out of the same transaction as the violation of [MCL 750.462e].” MCL 750.462f(5).

For information on scoring human trafficking offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.
c. Restitution

“In addition to any mandatory restitution applicable under . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766, the court may order a person convicted of violating [MCL 750.462e] to pay restitution to the victim in the manner provided in . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.766b, and to reimburse any governmental entity for its expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under . . . the code of criminal procedure, . . . MCL 769.1f.” MCL 750.462f(6).

For information on restitution under the William Van Regenmorter Crime Victim’s Rights Act, MCL 780.751 et seq., see the Michigan Judicial Institute’s Crime Victim Rights Benchbook, Chapter 8.

d. Statute of Limitations

An indictment for a violation or attempted violation of MCL 750.462e may be found and filed within 25 years after the offense is committed. MCL 767.24(2).\(^\text{113}\)

e. Sex Offender Registration

MCL 750.462e(a) is a tier II listed offense under the Sex Offenders Registration Act (SORA).\(^\text{114}\) See MCL 28.722(u)(vii).\(^\text{115}\) However, MCL 750.462e(b) is not designated as a tier I, tier II, or tier III listed offense under the SORA.

For more information on the SORA’s registration requirements, see Chapter 10.

\(^{113}\) MCL 767.24(2) is known as “Theresa Flore’s Law.”

\(^{114}\)The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).

\(^{115}\) Effective January 14, 2015, 2014 PA 328 amended the SORA, MCL 28.722(u), to include a violation of MCL 750.462e(a) (prohibited conduct involving the use of a minor for commercial sexual activity) as a tier II offense.
f. **Victim’s Testimony and Evidentiary Issues**

“The testimony of a victim is not required in a prosecution under [MCL 750.462e]. However, if [the] victim testifies, that testimony need not be corroborated.” MCL 750.462g(1).

“In a prosecution under [MCL 750.462e], the victim’s resistance or lack of resistance to the actor is not relevant.” MCL 750.462h.


g. **Expert Testimony on Human Trafficking Victims**

“Expert testimony as to the behavioral patterns of human trafficking victims and the manner in which a human trafficking victim’s behavior may deviate from societal expectations is admissible as evidence in court in a prosecution under [the Human Trafficking Act, MCL 750.462a et seq.,] if the expert testimony is otherwise admissible under the rules of evidence and laws of this state.” MCL 750.462g(2).

**B. Selling Traveling Services for Purpose of Engaging in Human Trafficking**

1. **Statutory Authority**

“A person shall not knowingly sell or offer to sell travel services that include or facilitate travel for the purpose of engaging in what would be a violation of [prostitution under MCL 750.448 et seq.] . . ., or of [human trafficking under MCL 750.462a et seq.] . . ., if the violation occurred in this state.” MCL 750.459(2). For purposes of MCL 750.459, *travel services* “means transportation by air, sea, or ground, hotel or other lodging accommodations, package tours, or the provision of vouchers or coupons to be redeemed for future travel, or accommodations for a fee, commission, or other valuable consideration.” MCL 750.459(5).

Except as provided in MCL 750.451b, MCL 750.459 does not apply to a law enforcement officer while performing his or her duties. MCL 750.451a.

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116 MCL 750.451a “does not apply to a law enforcement officer if the officer engages in sexual penetration as that term is defined in [MCL 750.520a] while in the course of his or her duties.” MCL 750.451b. For more information on the term *sexual penetration*, see See Section 2.6(AA).
2. Penalties

A person who violates MCL 750.459(2) “is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000, or both.” MCL 750.459(2).

“If a person violates [MCL 750.459(2)] and the violation involves conduct against a minor, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00, or both.” MCL 750.459(3).

C. Human Trafficking Victim Commits Certain Prostitution Offenses

MCL 750.451c permits the court to defer sentencing and place an individual who pleads guilty to, or is found guilty of, certain prostitution offenses on probation without an adjudication of guilt, provided the offense “was committed as a direct result of the individual being a victim of a human trafficking violation.” See MCL 750.451c(1)-(2). Specifically, MCL 750.451c(2) provides:

“When an individual pleads guilty to, or is found guilty of, a violation of [MCL 750.448], [MCL 750.449], [MCL 750.450], or [MCL 750.462] or a local ordinance substantially corresponding to section [MCL 750.448], [MCL 750.449], [MCL 750.450], or [MCL 750.462], the court, without entering a judgment of guilt and with the consent of the accused and of the prosecuting attorney, may defer further proceedings and place the accused on probation as provided in this section. However, before deferring proceedings under this subsection, the court shall determine whether the accused has met the conditions described in subsection (1) as follows:

(a) 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.

(b) To prove that he or she is a victim of human trafficking, the accused shall state under oath that he or she meets the conditions described in subsection (1) with facts supporting his or her

117 For purposes of MCL 750.451c, “‘human trafficking violation’ means a violation of [MCL 750.462a et seq.].” MCL 750.451c(9).
claim that the violation was a direct result of being a victim of human trafficking.”

1. **Conditions of Probation**

MCL 750.451c(4) sets out conditions of probation the court may include in the order of probation entered under MCL 750.451c(2):

- The court may order “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 . . . may order the accused to participate in a drug treatment court under . . . MCL 600.1060 to [MCL] 600.1084.”

- “The 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 must 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.”

2. **Circumstances Authorizing or Requiring Entry of Adjudication of Guilt**

“Upon a violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided [under the applicable prostitution offense as set out under MCL 750.448–MCL 750.462].”

MCL 750.451c(5) requires “[t]he court [to] enter an adjudication of guilt and proceed as otherwise provided [under the applicable prostitution offense as set out under

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118 For a discussion on prostitution offenses, see Section 3.29.
MCL 750.448–MCL 750.462] if any of the following circumstances exist:

(a) The accused commits a violation of [MCL 750.448], [MCL 750.449], [MCL 750.450], or [MCL 750.462] or a local ordinance substantially corresponding to section [MCL 750.448], [MCL 750.449], [MCL 750.450], or [MCL 750.462] during the period of probation.

(b) The accused violates an order of the court that he or she receive counseling regarding his or her violent behavior.

(c) The accused violates an order of the court that he or she have no contact with a named individual.”

3. Discharge of Probation and Dismissal of Charges

“Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this section must be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.” MCL 750.451c(6).

4. Court Proceedings Open to Public

“All court proceedings under this section must be open to the public.” MCL 750.451c(7).

5. Court Record

“Except as provided in [MCL 750.451c(8)], if the record of proceedings as to the defendant is deferred under [MCL 750.451c], the record of proceedings during the period of deferral must be closed to public inspection.” MCL 750.451c(7).

MCL 750.451c(8) requires that “[u]nless the court enters a judgment of guilt under [MCL 750.451c], the department of state police shall retain a nonpublic record of the arrest, court proceedings, and disposition of the criminal charge under [MCL 750.451c]. However, the nonpublic record must be open to the following individuals and entities for the purposes noted:
(a) The courts of this state, law enforcement personnel, the department of corrections, and prosecuting attorneys for use only in the performance of their duties or to determine whether an employee of the court, law enforcement agency, department of corrections, or prosecutor’s office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, law enforcement agency, department of corrections, or prosecutor’s office.

(b) Prosecuting attorneys for informing consent under [MCL 750.451c(2)].

(c) The [DHHS] for enforcing child protection laws and vulnerable adult protection laws or ascertaining the preemployment criminal history of any individual who will be engaged in the enforcement of child protection laws or vulnerable adult protection laws.”

D. Definitions

As used in the Human Trafficking chapter, MCL 750.462a–MCL 750.462h, the following definitions apply:

• “Bodily injury’ means any physical injury.” MCL 750.462a(a).

• “Coercion’ includes, but is not limited to, any of the following:

  (i) Threatening to harm or physically restrain any individual or the creation of any scheme, plan, or pattern intended to cause an individual to believe that failure to perform an act would result in psychological, reputational, or financial harm to, or physical restraint of, any individual.

  (ii) Abusing or threatening abuse of the legal system, including threats of arrest or deportation without regard to whether the individual being threatened is subject to arrest or deportation under the laws of this state or the United States.

  (iii) Knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document or any other actual or purported government identification
document from any individual without regard to whether the documents are fraudulent or fraudulently obtained.

(iv) Facilitating or controlling an individual’s access to a controlled substance, as that term is defined in . . . the public health code, 1978 PA 368, MCL 333.7104, other than for a legitimate medical purpose.” MCL 750.462a(b).

• “‘Commercial sexual activity’ means 1 or more of the following for which anything of value is given or received by any person:

  (i) An act of sexual penetration or sexual contact as those terms are defined in [MCL 750.]520a.119

  (ii) Any conduct prohibited under [MCL 750.145c (creation, production, reproduction, copying, distribution, promotion, etc., of child sexually abusive material)].120

  (iii) Any sexually explicit performance as that term is defined in . . . MCL 722.673.”121 MCL 750.462a(c).

• “‘Debt bondage’ includes, but is not limited to, the status or condition of a debt arising from a pledge by the debtor of his or her personal services or those of an individual under his or her control as a security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not specifically limited and defined.” MCL 750.462a(d).

• “‘Financial harm” means criminal usury (MCL 438.41),122 extortion, employment contracts in violation of the wage and benefit provisions in MCL 408.471 to MCL 408.490, or any other adverse financial consequence. MCL 750.462a(e)(i)-(iv).

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119 See Section 2.6(2) and Section 2.6(AA) for definitions of sexual contact and sexual penetration, respectively.

120 See Section 3.8 for more information about child sexually abusive material.

121 See Section 3.13(C) for the definition of sexually explicit performance under MCL 722.673(g).

122 Criminal usury means to knowingly charge, take, or receive money or other property as interest on a loan or forbearance of any money or other property at a rate exceeding 25 percent at simple interest per year or the equivalent rate for a longer or shorter period, when not authorized by law to do so. MCL 438.41.
• “‘Force’ includes, but is not limited to, physical violence or threat of physical violence or actual physical restraint or confinement or threat of actual physical restraint or confinement without regard to whether injury occurs.” MCL 750.462a(f).

• “‘Forced labor or services’ means labor or services that are obtained or maintained by force, fraud, or coercion.” MCL 750.462a(g).

• “‘Fraud’ includes, but is not limited to, a false or deceptive offer of employment or marriage.” MCL 750.462a(h).

• “‘Labor’ means work of economic or financial value. MCL 750.462a(i).

• “Minor” means a person under the age of 18. MCL 750.462a(j).

• “‘Serious bodily injury’ means any physical injury requiring medical treatment, regardless of whether the victim seeks medical treatment.” MCL 750.462a(k).

• “‘Services’ means an ongoing relationship between a person and an individual in which the individual performs activities under the supervision of or for the benefit of the person, including, but not limited to, commercial sexual activity and sexually explicit performances.” MCL 750.462a(l).

E. Human Trafficking Victims Compensation Act

Under the Human Trafficking Victims Compensation Act, MCL 752.981 et seq., a person who commits a human trafficking offense under MCL 750.462a–MCL 750.462h, “is liable to the victim[123] of the violation for economic and noneconomic damages that result from the violation, including, but not limited to, all of the following:

(a) Physical pain and suffering.

(b) Mental anguish.

(c) Fright and shock.

(d) Denial of social pleasure and enjoyments.

(e) Embarrassment, humiliation, or mortification.

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123 For purposes of the Human Trafficking Victims Compensation Act, “‘victim’ means a victim of a violation of . . . MCL 750.462a to [MCL] 750.462h.” MCL 752.982.
(f) Disability.

(g) Disfigurement.

(h) Aggravation of a preexisting ailment or condition.

(i) Reasonable expenses of necessary medical or psychological care, treatment, and services.

(j) Loss of earnings or earning capacity.

(k) Damage to property.

(l) Any other necessary and reasonable expense incurred as a result of the violation.” MCL 752.983(1).

“A victim is entitled to damages under [MCL 752.983(1)] to the extent the victim has sustained the damages, regardless of whether the victim suffered any physical injury as a result of the violation.” MCL 752.983(2). A victim is also entitled to the damages under MCL 752.983(1) “regardless of whether the damages sustained were foreseeable to the violator[,] and “regardless of whether the violator was charged with or convicted of a violation of [a human trafficking offense], . . . MCL 750.462a to [MCL] 750.462h.” MCL 752.983(3)-(4).

“An action to recover damages under [MCL 752.983] must be filed within 3 years after the last violation that is the subject of the action occurred.” MCL 752.984.

“[The Human Trafficking Victims Compensation Act] does not affect any right that a victim has to recover damages under other law.” MCL 752.985.

F. Medical Assistance Benefits For Victim

“If an individual is a victim of a human trafficking violation,[124] he or she may receive medical assistance benefits for medical and psychological treatment resulting from his or her status as a victim of that human trafficking violation.” MCL 400.109m(1).

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124 For purposes of MCL 400.109m, “human trafficking violation’ means a violation of [the human trafficking] chapter, . . . MCL 750.462a to [MCL] 750.462h.” MCL 400.109m(2).
3.19 Indecent Exposure

A. Statutory Authority and Penalties

MCL 750.335a prohibits a person from knowingly making an open or indecent exposure of himself or herself or of another person. Specifically, MCL 750.335a states:

“(1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.

(2) A person who violates subsection (1) is guilty of a crime, as follows:

(a) Except as provided in subdivision (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(b) If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(c) If the person was at the time of the violation a sexually delinquent person,"[125] the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.

(3) A mother’s breastfeeding of a child or expressing breast milk does not constitute indecent or obscene conduct under subsection (1) regardless of whether or not her areola or nipple is visible during or incidental to the breastfeeding or expressing of breast milk."[126]

"[I]ndividuals convicted of being ‘sexually delinquent persons’ [are not required to] be given a ‘1 day to life’ prison sentence in accordance with MCL 750.335a(2)(c)” because “a ‘1 day to life’ sentence has never been required by the statutory scheme[].” People v Arnold, 502 Mich 438, 444 (2018), overruling People v Campbell, 316

125 See Section 3.31 for a definition of sexually delinquent person.

126 “[S]exual [delinquency under MCL 750.335a(2)(c)] 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.” People v Franklin (John II), 298 Mich App 539, 547 (2012).
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Mich App 279 (2016) and People v Butler, 465 Mich 940 (2001), and disavowing People v Buehler, 477 Mich 18 (2007). People v Kelly, 186 Mich App 524 (1990), “correctly construed the sexual-delinquency ‘1 day to life’ scheme, as an option a trial court could use its discretion to consider imposing alongside the other statutory penalties available under the statute.” Arnold, 502 Mich at 482-483 (vacating the Court of Appeals’ unpublished opinion and remanding for consideration of “what effect the adoption of the legislative sentencing guidelines in 1998—and in particular, their classification of the instant offense as a Class A felony—had on a trial court’s options in sentencing a defendant convicted of indecent exposure by a sexually delinquent person”). See also Section 2.7 for information about additional monetary penalties and assessments.

B. Sex Offender Registration

MCL 750.335a(2)(b) is a tier I listed offense under the Sex Offenders Registration Act (SORA) when the victim is a minor. See MCL 28.722(s)(ii). For more information on the SORA’s registration requirements, see Chapter 10.

C. Pertinent Case Law

1. Construction of Terms

The conduct prohibited under the indecent exposure statute is not precisely defined. When a word’s meaning is not defined in a statute, a court may consult a dictionary to determine the plain and ordinary meaning of the term. People v Hill (Brian), 269 Mich App 505, 518 n 6 (2006). In People v Vronko, 228 Mich App 649, 653-654 (1998), the Court of Appeals defined several terms appearing in the indecent exposure statute:

“With respect to the common uses of the words contained in the statute, Webster’s New Collegiate Dictionary (1977) defines ‘open,’ in part, as being ‘exposed to general view or knowledge,’ ‘having no protective covering,’ and ‘to disclose or expose

127 The listed offenses described in MCL 28.722(e)(iv) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) in 2011 PA 17, effective July 1, 2011. The reorganized structure of listed offenses eliminated a third or subsequent violation of any combination of MCL 750.167 (disorderly person descriptions), MCL 750.335a(2)(a) (open or indecent exposure), or a substantially corresponding local ordinance of a municipality. See Chapter 10 for a complete history of listed offenses from the time when the SORA was enacted.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
to view.’ Likewise, the word ‘exposure’ is defined as meaning a ‘disclosure to view’ especially of ‘a weakness or something shameful or criminal.’ *Id.* ‘Indecent’ is defined as ‘grossly unseemly or offensive to manners or morals.’ *Id.* Finally, ‘indecent exposure’ is defined as being an ‘intentional exposure of part of one’s body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community.’”

2. **Statute Is Not Unconstitutionally Vague**

In *Vronko*, 228 Mich App at 654, the Court of Appeals held that the indecent exposure statute was not unconstitutionally vague as applied to the defendant. According to the *Vronko* Court:

“Given the definitions and judicial constructions [of the terms in *MCL 750.335a*], the language of the indecent exposure statute (1) provided fair notice to defendant that . . . [his conduct was] proscribed by the statute, and (2) did not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed in the context of the charged conduct.” *Vronko*, *supra* at 654.

3. **Indecent Act Need Not Be Witnessed**

“[T]here is no requirement that the defendant’s exposure actually be witnessed by another person in order to constitute ‘open or indecent exposure,’ as long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it.” *Vronko*, 228 Mich App at 657. In *Vronko*, *supra* at 655, there was no evidence that another person actually saw the defendant’s genitalia; however, “[f]rom the witness’s testimony that defendant’s legs were bare, that his hand was moving in his crotch, and that it looked like he had something in his hand, a rational trier of fact could infer that defendant was masturbating and that his penis was uncovered.”

4. **Consent of Audience Is No Defense**

On-stage acts of masturbation in front of a consenting audience are actionable under the indecent exposure statute. *People v*
Wilson (Maria), 95 Mich App 440, 441-443 (1980). “A prosecution for indecent exposure is not beyond the scope of MCL 750.335a simply because the charged conduct is performed before a theater audience which is comprised primarily or even totally of consenting adults.” Wilson (Maria), supra at 443.

5. **Person Exposed Cannot Also Be Person Offended**

To support a prosecution for open or indecent exposure, the person offended by the exposure must be someone other than the person who is exposed. People v Williams (Jeffrey), 256 Mich App 576, 577, 580 (2003) (against his 8-year-old niece’s wishes, the defendant sat in the bathroom while she was bathing and proceeded to draw a picture of his niece that included depictions of her vagina and breasts). The Court of Appeals in Williams (Jeffrey), supra at 583, could “find no justification, either in the language of the statute or the cases interpreting it, that the test for whether a punishable open exposure occurred is whether the person being viewed might have been offended by his own exposure. In our view, the definition of ‘open exposure’ . . . adopted in Vronko[, 228 Mich App at 657,] supports the conclusion that the Legislature’s aim was to punish exposures that would be offensive to viewers, actual or potential, and not to the person exposed.”

6. **Televised Indecent Act Actionable**

In People v Huffman, 266 Mich App 354, 357 (2005), the defendant produced a television show with a three-minute segment showing a penis and testicles marked with facial features. A voice-over provided “purportedly humorous commentary as if on behalf of the character.” Huffman, supra at 357. The defendant was charged with and convicted of indecent exposure. Id. at 358. On appeal, the defendant argued that MCL 750.335a cannot be properly construed to apply to televised images. Huffman, supra at 358-359. The Court of Appeals upheld the conviction, concluding that the purposes of the indecent exposure statute are “fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure.” Id. at 360. The Court explained:

“[Although] a televised exposure is qualitatively different than a physical exposure, . . . in some ways, it can be more offensive and threatening. While a person might minimally suspect that some stranger might expose himself in a public forum, to be subjected to a televised exposure in the privacy
of a home is likely a more shocking event. Further, [the] defendant’s exposure, while televised, was presumably more of an immediate closeup than would occur if he had been physically present with those subject to his exposure. . . . [Furthermore, the exposure] was probably larger than actual size and the exposure continued for fully three minutes, much longer than would have likely been allowed . . . in some other public square.” Huffman, 266 Mich App at 360-361.

7. Public Exposure Not Necessary

In People v Neal (Ronald), 266 Mich App 654, 655 (2005), the defendant exposed his erect penis to a minor female guest in his home. The defendant argued that in order to be convicted of indecent exposure under MCL 750.335a, the exposure must take place in a public place. Neal (Ronald), supra at 655-656. However, MCL 750.335a prohibits open or indecent exposures that are knowingly made, and does not require that indecent exposures only occur in a public place. Neal (Ronald), supra at 656. Accordingly, the focus should not be on the location of an indecent exposure but rather on “the act of intentionally exposing oneself to others who would be expected to be shocked by the display.” Id. at 658. The Court explained:

“Here, [the] defendant’s exposure clearly falls within the definition of an ‘open’ exposure. The victim would have reasonably been expected to observe it, and she might reasonably have been expected to have been offended by what was seen. . . . Additionally, [the] defendant’s conduct also falls under the definition of ‘indecent’ exposure. [The d]efendant . . . made a knowing and intentional exposure of part of his body (his genitals) to a minor child in a place (a house) where such exposure is likely to be an offense against generally accepted standards of decency in a community. . . . It was not necessary that the exposure occur in a public place because there was in fact a witness to the exposure itself. Thus, [the] defendant’s exposure could be properly categorized not only as an ‘open’ exposure, but also as an ‘indecent’ exposure for purposes of MCL 750.335a.” Neal (Ronald), 266 Mich App at 663-664 (internal citations omitted).
8. **Double Jeopardy**

“Aggravated indecent exposure and indecent exposure are the ‘same offense’ for purposes of double jeopardy[] . . . [because t]he offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure.” *People v Franklin (John II)*, 298 Mich App 539, 547 (2012). “‘Where one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes.’” *Franklin (John II)*, *supra* at 547. “Therefore, because the legislature has not expressed a clear intent to permit multiple punishments for the same conduct, [a] defendant cannot be convicted of both offenses.” *Id.*

9. **Trial**

“[S]eparate jury trials under MCL 767.61a are discretionary, not mandatory.” *People v Breidenbach*, 489 Mich 1, 4 (2010), overruling in part *People v Helzer*, 404 Mich 410 (1978). Whether separate juries are necessary should be determined on a case-by-case basis according to the provisions of MCR 6.120(B) (joinder and severance of related charges). *Breidenbach*, 489 Mich at 4. A trial court may empanel separate juries if, in its discretion, the trial court “determine[s] that bifurcation is necessary in order to protect a defendant’s rights or ensure a fair determination of guilt or innocence[.]” *Id.*; MCR 6.120(B).

See *People v Campbell (Michael)*, 316 Mich App 279, 294, 297 (2016), overruled on other grounds by *People v Arnold*, 502 Mich 438 (2018) (holding that the trial court did not abuse its discretion or deny the defendant his due process right to a fair trial when it refused to bifurcate the proceedings or hold

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129 “[S]exual [delinquency under MCL 750.335a(2)(c)] 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.” *Franklin (John II)*, 298 Mich App at 547.

130 *Helzer*, 404 Mich at 424, held that separate juries were required to determine a defendant’s guilt or innocence of a principal sexual offense and the question of the defendant’s status as a sexually delinquent person. According to the Court, “[t]hough not explicitly stated, we find a separate hearing and record directed by clear implication [in MCL 767.61a].” *Helzer*, 404 Mich at 419 n 13. *Breidenbach*, 489 Mich at 4, held that “the Helzer Court erred when it created a compulsory rule to that effect.”

131 “A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
separate trials as to whether he both committed indecent exposure and was a sexually delinquent person;132 “[g]iven the substantial overlap in the evidence and the trial court’s ability to adequately protect [the defendant’s] rights with a limiting instruction concerning the evidence that was admissible only to prove that [he] was a sexually delinquent person, . . . the trial court’s decision to hold a single trial was within the range of reasonable and principled outcomes.”).

3.20 Intentional Dissemination of Sexually Explicit Visual Material of Another Person

MCL 750.145e prohibits an individual, under certain circumstances, from intentionally disseminating any sexually explicit visual material of another person with the intent to threaten, coerce, or intimidate. “[MCL 750.145e] does not prohibit a person from being charged with, convicted of, or punished for another violation of law committed by that person while violating or attempting to violate [MCL 750.145e],” MCL 750.145e(3).

A. Statutory Authority

“A person shall not intentionally and with the intent to threaten, coerce, or intimidate disseminate any sexually explicit visual material of another person if all of the following conditions apply:

(a) The other person is not less than 18 years of age.

(b) The other person is identifiable from the sexually explicit visual material itself or information displayed in connection with the sexually explicit visual material. This subdivision does not apply if the identifying information is supplied by a person other than the disseminator.

(c) The person obtains the sexually explicit visual material of the other person under circumstances in which a reasonable person would know or understand that the sexually explicit visual material was to remain private.

(d) The person knows or reasonably should know that the other person did not consent to the dissemination of the sexually explicit visual material.” MCL 750.145e(1).

132 For additional information on the crime of sexual delinquency, see Section 3.31.
B. Statutory Exceptions

“[MCL 750.145e(1)] does not apply to any of the following:

(a) To the extent content is provided by another person, a person engaged in providing:

(i) An interactive computer service as that term is defined in 47 USC 230;

(ii) An information service, telecommunications service, or cable service as those terms are defined in 47 USC 153;

(iii) A commercial mobile service as defined in 47 USC 332;

(iv) A direct-to-home satellite service as defined in 47 USC 303(v); or

(v) A video service as defined in 2006 PA 480, MCL 484.3301 to [MCL 484.3315].

(b) A person who disseminates sexually explicit visual material that is part of a news report or commentary or an artistic or expressive work, such as a performance, work of art, literary work, theatrical work, musical work, motion picture, film, or audiovisual work.

(c) A law enforcement officer, or a corrections officer or guard in a correctional facility or jail, who is engaged in the official performance of his or her duties.

(d) A person disseminating sexually explicit visual material in the reporting of a crime.” MCL 750.145e(2).

C. Definitions

In addition to the United States Code definitions referenced in MCL 750.145e(2), for purposes of MCL 750.145e, the following additional definitions apply:

• “‘Disseminate’ means post, distribute, or publish on a computer device, computer network, website, or other electronic device or medium of communication.” MCL 750.145e(5)(a).

• “‘Nudity’ means displaying a person’s genitalia or anus or, if the person is a female, her nipples or areola.” MCL 750.145e(5)(b).
• “‘Sexually explicit visual material’ means a photograph or video that depicts nudity, erotic fondling, sexual intercourse, or sadomasochistic abuse.” MCL 750.145e(5)(c).

• “‘Video service’ means video programming, cable services, IPTV [(internet protocol television)], or OVS [(open video system)] provided through facilities located at least in part in the public rights-of-way without regard to delivery technology, including internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined in 47 USC 332(d) or provided solely as part of, and via, a service that enables users to access content, information, electronic mail, or other services offered over the public internet.” MCL 484.3301(2)(p).

D. Penalties

A first violation of MCL 750.145e is a “misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.” MCL 750.145f(1). “For a second or subsequent violation of [MCL 750.145e], the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.” MCL 750.145f(2).

3.21 Inducing a Minor to Commit a Felony

The inducement statute, MCL 750.157c, was enacted to “prohibit adults from taking advantage of minors to further the adults’ own felonious activities.” People v Pfaffle, 246 Mich App 282, 300 (2001).

A. Statutory Authority

MCL 750.157c states:

“A person 17 years of age or older who recruits, induces, solicits, or coerces a minor less than 17 years of age to commit or attempt to commit an act that would be a felony if committed by an adult is guilty of a felony and shall be punished by imprisonment for not more than the maximum term of imprisonment authorized by law for that act. The person may also be punished by a fine of not more than 3 times the amount of the fine authorized by law for that act.”
B. Penalties

**MCL 750.157c** states that a person “shall be punished by imprisonment for not more than the maximum term of imprisonment authorized by law for that act [the act that would be a felony].” Therefore, a person convicted of inducement is subject to the maximum penalties of the target offense or offenses. Additionally, the statute allows for a fine of not more than three times the amount of the fine authorized by the target offense or offenses.\(^{133}\)

**MCL 750.503** provides the penalties applicable to felony convictions when no specific penalty is prescribed by any statute governing the felony offense: If the statute governing a felony is silent on imprisonment and fines, the felony conviction is punishable by imprisonment for not more than four years, or a fine of not more than $5,000, or both.\(^{134}\)

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

C. Sex Offender Registration

**MCL 750.157c** is not designated as a tier I, tier II, or tier III *listed offense* under the Sex Offenders Registration Act (SORA).\(^{135}\) For more information on the SORA’s registration requirements, see Chapter 10.

D. Pertinent Case Law

The four different actions listed in the inducement statute, **MCL 750.157c**, do not all require that the minor actually commit or attempt to commit the felony that the defendant intends for the minor to commit. *Pfaffle*, 246 Mich App at 299-300. In *Pfaffle, supra* at 298, the Court of Appeals consulted a dictionary to assign “a more technical definition” to the following terms used in the inducement statute: recruits, induces, solicits, or coerces. According to *Pfaffle,*

\(^{133}\) See also **Section 2.7** for information about additional monetary penalties and assessments.

\(^{134}\) See also **Section 2.7** for information about additional monetary penalties and assessments.

\(^{135}\) The listed offenses formerly described in **MCL 28.722(e)** were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
supra at 298, quoting Random House Webster's College Dictionary (2d ed):

- **Recruit** means “‘to engage in finding and attracting new members.’”
- **Solicit** means “‘to try to obtain by earnest plea or application . . . to entreat; petition.’”
- **Induce** means “‘to lead or move by persuasion or influence, as to some action or state of mind.’”
- **Coerce** means “‘to compel by force or intimidation . . . to bring about through force.’”

Only inducement and coercion require that the minor actually commit or attempt to commit a felony. *Pfaffle*, 246 Mich App at 299. According to the Court:

“Especially telling with respect to inducement is that ‘induce’ means ‘to bring about or cause.’ An adult who induces a minor to commit or attempt to commit a felony has essentially persuaded that minor ‘to bring about or cause’ the felony. Coercion has an almost identical meaning in that an adult who coerces a minor to commit or attempt to commit a felony has used ‘force or intimidation’ to ‘bring about’ that crime.

Recruitment and solicitation do not, however, naturally require the minor to commit or attempt to commit the felony. Instead, the definitions of these words emphasize the adult’s conduct in attracting a minor or asking a minor to commit or attempt to commit the felony. In other words, the felony is why the adult is recruiting the minor or what the adult is soliciting the minor to do.” *Pfaffle*, 246 Mich App at 299-300.

In *Pfaffle*, 246 Mich App at 285-286, the defendant supplied a 15-year-old minor with alcohol and cigarettes in order to convince the minor to assist him in luring young boys to the defendant so that the defendant could rape and kill the boys. The defendant’s attempts to persuade the minor to join the defendant’s plan to rape and murder children constituted recruitment for purposes of the inducement statute. *Pfaffle*, supra at 301. The defendant also solicited the minor to commit two additional crimes involving the minor only and the minor’s choice of victim. *Id.* Because the minor never acted on the requests made by the defendant as part of the defendant’s plan, the defendant could not be convicted of inducement or coercion. *Id.* However, “[e]ven if [the defendant’s] conduct did not constitute inducement or coercion, because [the minor] never acted, [the
defendant’s] acts of recruiting [the minor] and soliciting him to commit two, and possibly three, felonies were punishable under the inducement statute.” *Id.*

### E. Distinction Between Solicitation and Inducement

The solicitation statute, *MCL 750.157b*,\(^\text{136}\) is not specific to minors and contains a definition of *solicit* expressly applicable to the solicitation statute itself. According to *MCL 750.157b*, “‘solicit’ means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.” The inducement statute, *MCL 750.157c*, expressly prohibits specific conduct directed toward *minors*. Therefore, a defendant’s solicitation under the solicitation statute is “entering into or attempting to enter into what is essentially a criminal contract with an adult who can exercise independent judgment.” *Pfaffle*, 246 Mich App at 304. In contrast, the inducement statute prohibits a defendant from trying to take advantage of a minor by recruiting, soliciting, inducing, or coercing the minor to commit a felony. *Pfaffle, supra* at 304.

### 3.22 Internet and Computer Solicitation

#### A. Statutory Authority

1. **Minor Victims Only**

   *MCL 750.145d(1)(a)* punishes a person who uses the Internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under any of the following statutes, if the victim or intended victim is a minor or is believed by that person to be a minor:\(^\text{137}\)

   - Accosting, enticing, or soliciting a child for an immoral purpose, *MCL 750.145a*.
   - Child sexually abusive activity, *MCL 750.145c*.
   - Recruiting, inducing, soliciting, or coercing a minor to commit a felony, *MCL 750.157c*.

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\(^\text{136}\) See *Section 3.33*. See also *M Crim JI 10.6* for an instruction on *Solicitation to Commit a Felony*.

\(^\text{137}\) For purposes of this statute, a *minor* is a person under age 18. *MCL 750.145d(9)(g).*
2. **Minor and Adult Victims**

MCL 750.145d(1)(b) punishes a person who uses the Internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the following offenses, without regard to the age of the intended victim:

- Stalking, MCL 750.411h.
- Aggravated stalking, MCL 750.411i.

**B. Jurisdictional Requirements**

1. **Under the Penal Code**

MCL 750.145d contains jurisdictional requirements specific to a violation or attempted violation of its provisions:

“A violation or attempted violation of [MCL 750.145d] may be prosecuted in any jurisdiction in which the communication originated or terminated.” MCL 750.145d(7).

“A violation or attempted violation of [MCL 750.145d] occurs if the communication originates in this state, is intended to terminate in this state, or is intended to terminate with a person who is in this state.” MCL 750.145d(6).
A person may be charged with, convicted of, and punished for any other violation of law committed while violating or attempting to violate MCL 750.145d, including the underlying offense. MCL 750.145d(4).

A person may be prosecuted under MCL 750.145d even if the person is not convicted of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense. MCL 750.145d(5).

2. Under the Code of Criminal Procedure

Additionally, MCL 762.2 addresses general jurisdictional requirements applicable to the prosecution of criminal offenses committed within or outside of this state:

“(1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist:

(a) He or she commits a criminal offense wholly or partly within this state.

(b) His or her conduct constitutes an attempt to commit a criminal offense within this state.

(c) His or her conduct constitutes a conspiracy to commit a criminal offense within this state and an act in furtherance of the conspiracy is committed within this state by the offender, or at his or her instigation, or by another member of the conspiracy.

(d) A victim of the offense or an employee or agent of a governmental unit posing as a victim resides in this state or is located in this state at the time the criminal offense is committed.

(e) The criminal offense produces substantial and detrimental effects within this state.

(2) A criminal offense is considered under subsection (1) to be committed partly within this state if any of the following apply:

(a) An act constituting an element of the crime is committed within this state.
(b) The result or consequences of an act constituting an element of the criminal offense occurs within this state.

(c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed.”

C. Definitions

• “’Computer’ means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network. Computer includes a computer game device or a cellular telephone, personal digital assistant (PDA), or other handheld device.” MCL 750.145d(9)(a).

• “’Computer network’ means the interconnection of hardwire or wireless communications lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.” MCL 750.145d(9)(b).

• “’Computer program’ means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.” MCL 750.145d(9)(c).

• “’Computer system’ means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.” MCL 750.145d(9)(d).

• “’Device’ includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.” MCL 750.145d(9)(e).

• “’Internet’ means that term as defined in . . . 47 USC 230.” MCL 750.145d(9)(f). 47 USC 230(f)(1) defines Internet as
“the international computer network of both Federal and non-Federal interoperable packet switched data networks.”

• “‘Minor’ means an individual who is less than 18 years of age.” MCL 750.145d(9)(g).

D. Penalties

MCL 750.145d(2) contains the following penalties for violations of MCL 750.145d(1), regardless of the victim’s age:

• If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of less than one year, the person is guilty of a misdemeanor punishable by not more than one year of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(a).

• If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of one year or more but less than two years, the person is guilty of a felony punishable by not more than two years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(b).

• If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of two years or more but less than four years, the person is guilty of a felony punishable by not more than four years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(c).

• If the underlying crime is a felony with a maximum term of imprisonment of four years or more but less than ten years, the person is guilty of a felony punishable by not more than ten years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(d).

• If the underlying crime is a felony with a maximum term of imprisonment of ten years or more but less than 15 years, the person is guilty of a felony punishable by not more than 15 years of imprisonment, or a maximum fine of $10,000, or both. MCL 750.145d(2)(e).

• If the underlying crime is a felony with a maximum term of imprisonment of 15 years or more or for life, the person is guilty of a felony punishable by not more than 20 years of imprisonment, or a maximum fine of $20,000, or both. MCL 750.145d(2)(f).

A court may order a person convicted of violating MCL 750.145d to reimburse the state or local unit of government for expenses incurred in relation to the violation in the same manner that
expenses may be ordered to be reimbursed under MCL 769.1f. For information on scoring these offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

A term of imprisonment imposed for violating MCL 750.145d may be made consecutive to any term of imprisonment imposed for conviction of the underlying offense. MCL 750.145d(3).

E. Sex Offender Registration

MCL 750.145d(1)(a), except for a violation arising out of a violation of MCL 750.157c, is a tier II listed offense under the Sex Offenders Registration Act (SORA). See MCL 28.722(u)(iv). For more information about the SORA’s registration requirements, see Chapter 10.

F. Pertinent Case Law

A defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor for the purpose of attempting or committing CSC-III under MCL 750.520d(1)(a) may be bound over for trial for allegedly violating MCL 750.145d(1)(a). People v Cervi, 270 Mich App 603, 606, 615, 619 (2006) (the defendant attempted to arrange a meeting at which he expected the minor to fellate him). Similarly, a defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor for the purpose of producing or attempting to produce child sexually abusive material under MCL 750.145c(2) may be bound over for trial for allegedly violating MCL 750.145d(1)(a). Cervi, supra at 606, 625 (the defendant attempted to arrange a meeting at which the defendant was to videotape the sexual activity that occurred between him and the minor).

138 MCL 769.1f authorizes expenses for emergency response and prosecution.

139 A violation of MCL 750.145d(1)(a) was added as a listed offense by 2011 PA 17, effective July 1, 2011. This offense was not included in the former group of listed offenses found in MCL 28.722(e).

140 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

141 In this case, the minor was an undercover deputy sheriff posing as a minor.
See also People v Adkins (Lowell), 272 Mich App 37, 38 (2006), where the defendant was properly convicted of violating MCL 750.145d(1)(a) for attempting to commit child sexually abusive activity, MCL 750.145c(2), when he communicated via the Internet with a law enforcement officer posing as a minor.

The prosecution may charge a defendant under MCL 750.145d(1)(a) for each time the defendant used a computer to communicate on the Internet with a perceived minor with the specific intent to engage the minor in conduct prohibited by MCL 750.520d(1)(a). Cervi, 270 Mich App at 617.

MCL 750.145d “does not impermissibly burden free expression because ‘words alone’ are not punishable under the statute; rather the statute criminalizes communication with a minor or perceived minor with the specific intent to make that person the victim of one of the enumerated crimes.” Cervi, 270 Mich App at 605-606, 620.

### 3.23 Kidnapping

The crime of kidnapping, while sexually-neutral in title and substance, may be committed to avoid detection and to facilitate a sexual assault—or kidnapping may be committed after a sexual assault in an effort to exercise power and control over the victim and potential witnesses to keep them from reporting the crime or from testifying in judicial proceedings.

Threats of kidnapping, if they coerce the victim to submit to a sexual penetration or contact, fall under the force or coercion provisions of the CSC Act. Threats of kidnapping are specifically characterized as force or coercion under the CSC Act:

> “Force or coercion includes . . . [w]hen the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person. . . . As used in this subdivision, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.” MCL 750.520b(1)(f)(iii); MCL 750.520e(1)(b)(iii).

#### A. Statutory Authority

MCL 750.349 states:

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142 CSC-II and CSC-III incorporate by reference CSC-I’s force or coercion provision. See MCL 750.520c(1)(d)(i); MCL 750.520c(1)(f); MCL 750.520d(1)(b).

143 See also Section 2.6(J).

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“(1) A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:

(a) Hold that person for ransom or reward.

(b) Use that person as a shield or hostage.

(c) Engage in criminal sexual penetration or criminal sexual contact prohibited under [MCL 750.520b–MCL 750.520m,] with that person.

(d) Take that person outside of this state.

(e) Hold that person outside of this state.

(f) Engage in child sexually abusive activity, as that term is defined in [MCL 750.145c144], with that person, if that person is a minor.

(2) As used in this section, ‘restrain’ means to restrict a person’s movements or to confine the person so as to interfere with that person’s liberty without that person’s consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.”

B. Penalties

A violation of MCL 750.349 is “a felony punishable by imprisonment for life or any term of years or a fine of not more than $50,000.00, or both.”145 MCL 750.349(3). An offender convicted of kidnapping under MCL 750.349 may also be charged with, convicted of, or sentenced for any other offenses arising from the same transaction as the kidnapping violation. MCL 750.349(4).

C. Sex Offender Registration

MCL 750.349 is a tier III listed offense under the Sex Offenders Registration Act (SORA)146 if the offense is committed against a minor. See MCL 28.722(w)(ii). For more information about the SORA’s registration requirements, see Chapter 10.

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144 MCL 750.145c(1)(n) defines the term child sexually abusive activity as “a child engaging in a listed sexual act.” “Listed sexual act” means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.” MCL 750.145c(1)(i).

145 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.
3.24 Kidnapping a Child Under Age 14

A. Statutory Authority and Penalties

MCL 750.350 states:

“(1) A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child’s parent or legal guardian, or from the person or persons who have adopted the child, or from any other person having the lawful charge of the child. A person who violates this section is guilty of a felony, punishable by imprisonment for life or any term of years.

(2) An adoptive or natural parent of the child shall not be charged with and convicted for a violation of this section.”

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

B. Sex Offender Registration

MCL 750.350 is a tier III listed offense under the Sex Offenders Registration Act (SORA). See MCL 28.722(w)(iii). For more information on the SORA’s registration requirements, see Chapter 10.

146 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

147 The parental kidnapping statute, MCL 750.350a, applies to the conduct of adoptive and natural parents.

148 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

149 A violation of MCL 750.350 was added as a listed offense by 2011 PA 17, effective July 1, 2011. This offense was not included in the former group of listed offenses found in MCL 28.722(e).
C. Pertinent Case Law

Although adoptive and natural parents are exempt from prosecution for kidnapping under MCL 750.350(1)-(2), an individual whose parental rights were previously terminated does not constitute a natural parent, and thus, is not exempt from prosecution under the statute. People v Wambar, 300 Mich App 121, 126, 129 (2013) (once the defendant-father’s parental rights were terminated, he was not a natural parent under MCL 750.350(2), and thus, was properly convicted of kidnapping his biological child under MCL 750.350(1).150

3.25 Lewd and Lascivious Cohabitation/Gross Lewdness

A. Statutory Authority and Penalties

MCL 750.335 proscribes lewd and lascivious cohabitation and gross lewdness:

“Any man or woman, not being married to each other, who lewdly and lasciviously associates and cohabits together, and any man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense.”151

B. Definition of Lewd and Lascivious

“Although variations of the word ‘lewd’ appear in several Michigan statutes, the decisions of this Court provide no clear guidance with regard to the meaning of the word.” Michigan ex rel Wayne Co Pros v Dizzy Duck, 449 Mich 353, 362-363 (1995) (lewd conduct considered in the context of MCL 600.3801, which addresses public nuisance complaints). In its review of Michigan case law where the issue of

150 In Wambar, 300 Mich App at 126-127, the Court of Appeals acknowledged that “[w]hile it is true that the Legislature could have added an explicit provision to MCL 750.350(2) explaining that the phrase ‘natural parent’ does not encompass a person whose parental rights have been terminated, we nonetheless conclude, in light of the special legal definition of ‘parent[,]’ [which “indicates that a person may cease to be a parent for certain purposes under the law if that person’s status as a parent has been terminated in a legal proceeding”] and in light of the general import of a termination of parental rights, that the exemption in MCL 750.350(2) should be read to exclude a person [whose parental rights were previously terminated].”

151 See Section 2.7 for information about additional monetary penalties and assessments.
lewdness was discussed, the Supreme Court noted that it “[w]as left with the fact that ‘lewdness’ has been understood to have a meaning closely related to the word ‘prostitution.’” *Dizzy Duck*, *supra* at 364. However, the Court concluded that “[t]he breadth of what might be lewd cannot be determined, but lewdness does include some sexual activities that stop just short of prostitution, as well as scandalous sexual exhibitions.” *Id.*

In *Dizzy Duck*, 449 Mich at 364-365, the Court specifically labeled the following conduct as lewd:

“As described in the record of this case, lap dancing is lewd. An almost-nude female employee squirming in the lap of a customer for his sexual arousal is conduct that carries one right up to the line where prostitution begins. . . .

The activities in the fantasy room were also lewd. While there was no physical contact whatever between the employee and the customer, an exhibition of masturbation by an employee who urges a customer to masturbate in her presence is certainly a scandalous sexual exhibition. It is, therefore, lewd conduct.

For the same reasons, the nude dancing was lewd to the extent, and only to the extent, that it involved masturbation or other sexual activity . . . on stage.”

Determining what constitutes lewd and lascivious conduct should be considered on a case-by-case basis. *Dizzy Duck*, 449 Mich at 364 n 13.

### C. Sex Offender Registration

*MCL 750.335* is not designated as a tier I, tier II, or tier III *listed offense* under the Sex Offenders Registration Act (SORA). For more information on SORA’s registration requirements, see Chapter 10.

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152 The listed offenses formerly described in *MCL 28.722(e)* were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
D. Pertinent Case Law

MCL 750.335 “does not prohibit cohabitation per se. To be found guilty under [the statute], the couple must ‘lewdly and lasciviously associate.’” McCready v Hoffius, 459 Mich 131, 133-135, 141 (1998), vacated in part on other grounds 459 Mich 1235 (1999) (case involving landlord’s refusal to rent to an unmarried couple based on landlord’s religious beliefs about unmarried couples living together).

The Michigan Supreme Court has referred to MCL 750.335 as “an antiquated and rarely enforced statute.” McCready, 459 Mich at 136.

3.26 Local Ordinances Governing Misdemeanor Sexual Assault

Sex offenders are sometimes convicted of sex offenses (and other related offenses) that were enacted as local misdemeanor ordinances by municipalities. “The Home City Rule Act,” MCL 117.1a et seq., permits municipalities to adopt a state statute for which the maximum period of imprisonment is 93 days.153 MCL 117.3(k).

Local misdemeanor convictions present two areas of concern for trial courts: sex offender registration requirements and the availability of records pertaining to an accused’s criminal history. Each area of concern is discussed below.

A. Sex Offender Registration

Not all ordinance violations enacted by a municipality are registrable under the Sex Offenders Registration Act (SORA). Only where a violation of an ordinance does not constitute a tier II or tier III offense and involves circumstances that by its nature constitutes a “sexual offense” against a person “less than 18 years of age” qualifies under the catch-all provision as a listed offense under the SORA.154 See MCL 28.722(s)(vii).

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153 A city shall not enforce any provision adopted by reference, if the maximum period of imprisonment exceeds 93 days. MCL 117.3(k).

154 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. All catch-all violations described in MCL 28.722(s)(vii) are designated as tier I listed offenses. The catch-all language does not appear in the tier II and tier III provisions.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
B. Availability of Records and Setting Bond Conditions

Sexual assault crimes differ from many crimes in that the perpetrators exhibit a high recidivism rate. To adequately protect the public, it is important for a court to have complete information about the past behavior of the accused so it can make an accurate safety assessment and set appropriate bond conditions.

State Police records are a critical source for information about the past criminal behavior of an individual. These police records can be used for setting bond conditions under MCR 6.106 and for imposing enhanced sentences for repeat criminal conduct, as may be authorized by law.

Convictions for local ordinances may not appear in State Police records if they do not carry the 93-day penalty that triggers the collection and forwarding of biometric data requirements under MCL 28.243(1). Under this provision, a law enforcement agency must send the biometric data to the State Police within 72 hours after the arrest of a person charged with a felony, a state law misdemeanor exceeding 92 days’ imprisonment or a fine of $1,000.00, or both, “or a misdemeanor authorized for DNA collection under . . . MCL 28.176[(1)(b)],” or for criminal contempt for violating a personal protection order or foreign protection order, or a juvenile offense other than one for which the maximum penalty does not exceed 92 days’ imprisonment or a fine of $1,000.00, or both, “or for a juvenile offense that is a misdemeanor authorized for DNA collection under . . . MCL 28.176[(1)(b)].” However, law enforcement agencies are only required to collect the biometric data of a person arrested for a local ordinance when the local ordinance has a maximum possible penalty of 93 days’ imprisonment and it substantially corresponds to a violation of state law that is a misdemeanor for which the maximum term of imprisonment is 93 days. MCL 28.243(2). Under MCL 28.243(2), the biometric data collected in such circumstances are not required to be sent to the State Police within 72 hours after arrest, but only after the court forwards a copy of the disposition of conviction to the applicable law enforcement agency. The law enforcement agency must in turn forward the biometric data to the State Police within 72 hours after receipt of the disposition of conviction. Thus, State Police records will be incomplete to the

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155 For purposes of MCL 28.243, “‘[b]iometric data’ means all of the following: (i) [f]ingerprint images recorded in a manner prescribed by the department [of state police]; (ii) [p]alm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the department [of state police]; (iii) [d]igital images recorded during the arrest or booking process, including a full-face capture, left and right profile, and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by the department [of state police]; and (iv) [a]ll descriptive data associated with identifying marks, scars, amputations, and tattoos.” MCL 28.241a(b); MCL 28.241a(e).
extent that local authorities do not have to collect biometric data and report persons convicted of ordinance violations carrying a maximum 90-day jail term until after the persons have been convicted. In some jurisdictions, these gaps in state police records have permitted persons with previous convictions of sexual assault ordinance violations to avoid stricter bond conditions, thus unnecessarily endangering the victims and public.

Courts can correct the gaps in State Police records by working with local sexual assault coordinating councils to encourage reporting of local ordinance violations, and to remove barriers to reporting that exist in their communities.

3.27 Malicious Use of a Telecommunications Service or Device

Offenders may use a telephone or other communication device in an attempt to frighten and intimidate victims of, and witnesses to, sexual assault. This type of communication may occur as a means of facilitating the sexual assault, or in an effort to exercise power and control over victims and witnesses after an assault has occurred. MCL 750.540e punishes the use of a telephone or other communication device to engage in such conduct. Additionally, such conduct, if it involves two or more malicious uses of a communications device, may be actionable under the stalking and aggravated stalking statutes.156

A. Statutory Authority

MCL 750.540e states:

“(1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:

(a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device.

(b) Falsely and deliberately reporting by message through the use of a telecommunications service or device that a person has been injured, has

156 See Section 3.34 for information on the crimes of stalking and aggravated stalking.
suddenly taken ill, has suffered death, or has been the victim of a crime or an accident.

(c) Deliberately refusing or failing to disengage a connection between a telecommunications device and another telecommunications device or between a telecommunications device and other equipment provided for the transmission of messages through the use of a telecommunications service or device.

(d) Using vulgar, indecent, obscene, or offensive language or suggesting any lewd or lascivious act in the course of a conversation or message through the use of a telecommunications service or device.

(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.

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(g) Deliberately engaging or causing to engage the use of a telecommunications service or device of another person in a repetitive manner that causes interruption in telecommunications service or prevents the person from utilizing his or her telecommunications service or device."

(2) . . . An offense is committed under [MCL 750.540e] if the communication either originates or terminates in this state and may be prosecuted at the place of origination or termination.”

B. Penalties

A violation of MCL 750.540e is a misdemeanor punishable by imprisonment for not more than six months, or a maximum fine of $1,000, or both. MCL 750.540e(2).157

C. Sex Offender Registration

MCL 750.540e is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).158 For

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157 See Section 2.7 for information about additional monetary penalties and assessments.
more information on SORA’s registration requirements, see Chapter 10.

D. Pertinent Case Law

1. Specific Intent Crime

MCL 750.540e is a specific intent crime. People v Taravella, 133 Mich App 515, 525 (1984). In Taravella, supra at 523, the Court of Appeals explained the statutory construct of MCL 750.540e:

“[W]e find that the statute does not create two separate offenses, one requiring specific intent, the other not. Section (1) sets forth the conduct which is prohibited (the malicious use of a communications service with intent), while the following subsections enumerate the specific types of activities which, taken in conjunction with the basic requirements of (1), provide a basis for a criminal prosecution under the statute. Thus, one who acts with either the intent to annoy or terrorize or with the intent to disturb the peace and quiet of another and who further does one of the activities listed in subsections (a) through (d)\[159\] may be guilty of the misdemeanor offense of malicious use of service.”

The caller’s malicious intent, not the listener’s subjective perceptions of the nature of the call, establishes the criminality of the conduct. Taravella, 133 Mich App at 521.

2. Statute is Constitutional

MCL 750.540e is not unconstitutionally vague or overbroad; the statutory language in MCL 750.540e provides fair notice of the conduct proscribed and properly reflects the state’s substantial interest in protecting its citizens’ privacy. Taravella, 133 Mich App at 521-522.

\[158\] The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

\[159\] At the time Taravella, 133 Mich App 515, was decided, MCL 750.540e(1) contained only subparagraphs (a)-(d). Subparagraphs (e)-(g) were added by 1988 PA 395, effective March 30, 1989.
3.28 Obstruction of Justice

A. Interference With Reporting or Investigating a Crime

1. Statutory Authority

MCL 750.483a(1) punishes an individual who interferes with the reporting of a crime:

“A person shall not do any of the following:

* * *

(b) Prevent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person.

(c) Retaliate or attempt to retaliate against another person for having reported or attempted to report a crime committed or attempted by another person. As used in this subsection, ‘retaliate’ means to do any of the following:

(i) Commit or attempt to commit a crime against any person.

(ii) Threaten to kill or injure any person or threaten to cause property damage.”

Under MCL 750.483a(3), it is unlawful to do the following:

“(a) Give, offer to give, or promise anything of value to any person to influence a person’s statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime.

(b) Threaten or intimidate any person to influence a person’s statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime.”

It is an affirmative defense to charges under MCL 750.483a(3) that the defendant’s conduct was entirely lawful “and that the defendant’s sole intention was to encourage, induce, or cause
the other person to provide a statement or evidence truthfully.” MCL 750.483a(7).

2. **Penalties**

A violation of MCL 750.483a(1) or MCL 750.483a(3) constitutes a misdemeanor punishable by imprisonment for not more than one year, or a maximum fine of $1,000, or both. MCL 750.483a(2)(a); MCL 750.483a(4)(a). A violation involving the commission or attempted commission of a crime, or a threat to kill or injure any person or to cause property damage constitutes a felony punishable by imprisonment for not more than ten years, or a maximum fine of $20,000, or both. MCL 750.483a(2)(b); MCL 750.483a(4)(b).160

3. **Sex Offender Registration**

MCL 750.483a is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).161 For more information on SORA’s registration requirements, see Chapter 10.

4. **Pertinent Case Law**

MCL 750.483a(1)(b) does not require the prosecution to prove beyond a reasonable doubt that the crime to be reported was committed or attempted by another person. *People v Holley*, 480 Mich 222, 224 (2008). The Supreme Court explained: “By including MCL 750.483a(1)(b) and its criminalization of the interference with the report of a crime within this statutory scheme, the Legislature has made clear that its concern was to prevent interference with the report of a crime and not with whether the crime being reported was actually committed or attempted.” *Holley, supra* at 227.

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160 See Section 2.7 for information about additional monetary penalties and assessments.

161 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
B. Interference With Testimony or Attendance at an Official Proceeding

MCL 750.122 prohibits an individual from engaging in conduct that discourages or prevents a victim from testifying or attending an official proceeding.

1. Statutory Authority

Under MCL 750.122(3), it is unlawful to do any of the following by threat or intimidation:

“(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

(b) Influence or attempt to influence testimony at a present or future official proceeding.

(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.”

MCL 750.122(6) prohibits a person from willfully impeding, interfering with, preventing, or obstructing or attempting to willfully impede, interfere with, prevent, or obstruct “the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.”

MCL 750.122(8) prohibits a person from retaliating, attempting to retaliate, or threatening to retaliate against any person for having been a witness in an official proceeding.

2. Definitions

An official proceeding is “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.” MCL 750.122(12)(a). The proceeding need not take place and the victim or witness need not have been subpoenaed or ordered to appear in the proceeding. MCL 750.122(9). However, the defendant must know or have reason
to know that the victim could be a witness at any official proceeding. *Id.*

*Retaliate* means (1) to commit or attempt to commit a crime against any person, or (2) threatening to kill or injure any person or threatening to cause property damage. MCL 750.122(8)(a)-(b).

*Threaten or intimidate* does not include communication regarding the otherwise lawful access to courts or other branches of government not intended to harass the other person, such as filing a civil action or police report. MCL 750.122(12)(b).

### 3. Penalties

- Except as otherwise indicated in MCL 750.122(7)(b)-(c), a violation of MCL 750.122(3) or MCL 750.122(6) is a felony punishable by imprisonment for not more than four years, or a maximum fine of $5,000, or both. MCL 750.122(7)(a).

- If the violation of MCL 750.122(3) or MCL 750.122(6) “is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years,” the violation is a felony punishable by not more than ten years of imprisonment, or a maximum fine of $20,000, or both. MCL 750.122(7)(b).

- If the violation of MCL 750.122(3) or MCL 750.122(6) “involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage,” the violation is a felony punishable by not more than 15 years of imprisonment, or a maximum fine of $25,000, or both. MCL 750.122(7)(c).

- A violation of MCL 750.122(8) is a felony punishable by not more than ten years of imprisonment, or a maximum fine of $20,000, or both. MCL 750.122(8).

For information on scoring these offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3. See also *Section 2.7* for information about additional monetary penalties and assessments.
4. Pertinent Case Law

A defendant may be guilty of witness tampering under MCL 750.122(6) without having threatened or intimidated a witness who was subpoenaed to appear in a proceeding against the defendant. People v Greene (Jimmy), 255 Mich App 426, 447 (2003). In Greene (Jimmy), supra at 429-432, the defendant engaged in a telephone conversation with the female victim during which he did not attempt to intimidate or threaten her if she obeyed the subpoena that ordered her to appear in a proceeding against him. However, the defendant encouraged the victim not to attend the hearing, and in order to avoid being forced to attend, the defendant encouraged the victim to be absent from her home until after the courts had closed for the day. Id. at 430-432. The Court of Appeals found that the circumstances created a question of fact concerning whether the defendant violated MCL 750.122(6) and that the trial court wrongly dismissed the witness tampering charge against the defendant. Greene (Jimmy), supra at 447-448. According to the Court:

“We do not hold that a request, alone, not to attend a hearing or a stated desire that a witness not attend a hearing would be unlawful under MCL 750.122(6). Neither act would necessarily affect a witness’s ability to attend a hearing. Nor do we intend to imply that [the defendant] will be convicted of [witness tampering]. Rather, in sum, the evidence presented at the preliminary examination would allow a reasonable person to infer that [the defendant] knew [the victim] would be attending the preliminary examination to provide testimony against him; [the defendant] did not want [the victim] to attend the hearing; [the defendant] chose not to use bribery, threats or intimidation, or retaliation to dissuade [the victim] from attending the hearing; [the defendant] then willfully attempted to interfere with [the victim’s] intention to attend that hearing by telling her explicitly not to attend, playing to her feelings for him, and assuring her that the consequences would be minor or nonexistent; and this interference attempted to affect her ability to attend the hearing by impairing her ability to choose to do the right thing, which was to obey the subpoena.” Greene (Jimmy), 225 Mich App at 447.
5. **Sex Offender Registration**

MCL 750.122 is not designated as a tier I, tier II, or tier III *listed offense* under the Sex Offenders Registration Act (SORA).\(^{162}\)

For more information on SORA’s registration requirements, see Chapter 10.

C. **Common-Law Obstruction of Justice**

“Obstruction of justice is generally understood as an interference with the orderly administration of justice, and embraces a category of separate offenses.” *People v Thomas (James)*, 438 Mich 448, 455, 457 (1991).

“‘At [] common law, to dissuade or prevent, or to attempt to dissuade or prevent, a witness from attending or testifying upon the trial of a cause is an indictable offense.’ Actual intimidation of the witness is not required; a defendant is guilty of common-law obstruction of justice who uses an unlawful means to attempt to intentionally dissuade a witness from testifying.” *People v Williams (Barbara)*, 481 Mich 942 (2008), quoting *People v Boyd (William)*, 174 Mich 321, 324 (1913).

Sufficient evidence was presented to support the defendant’s conviction of obstruction of justice where, “shortly after breaking into [the victim’s] apartment and assaulting her[,]” he “sent several harassing text messages to [the victim] . . . [that] made it clear that he would harm [her] if she made a statement to police.” *People v Meissner*, 294 Mich App 438, 455 (2011).

A “mere attempt to persuade a witness not to testify” constitutes common-law obstruction of justice. *People v Coleman (William)*, 350 Mich 268, 280 (1957). The attempt may be made through words or actions and need not be successful, but it must unambiguously be directed at dissuading the witness’s testimony. *Coleman (William)*, supra at 278, 280.

A defendant’s statement to a potential witness that the witness is “making a mistake” does not unambiguously refer to the witness’s impending testimony, and therefore, does not constitute probable cause to believe that the defendant intended to obstruct justice. *People v Tower*, 215 Mich App 318, 319, 322-323 (1996).

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\(^{162}\) The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
1. Penalties

Common-law obstruction of justice is a felony punishable by not more than five years of imprisonment, or a maximum fine of $10,000, or both. MCL 750.505.163

2. Sex Offender Registration

Common-law obstruction of justice is not designated as a listed offense under the Sex Offenders Registration Act (SORA). For more information on the SORA’s registration and public notification requirements, see Chapter 10.

3.29 Offenses Involving Prostitution or Houses of Prostitution

MCL 750.448 et seq., the chapter in the Michigan Penal Code titled Prostitution, proscribes the following conduct:

- Soliciting and accosting another person to commit prostitution, MCL 750.448.
- Admitting a person into a place for the purpose of prostitution, MCL 750.449.
- Engaging services of another person164 for the purpose of prostitution, MCL 750.449a.
- Aiding and abetting certain prostitution offenses, MCL 750.450.
- Keeping a house of prostitution, MCL 750.452.
- Leasing a house to another person knowing that the house is intended for the purpose of prostitution, MCL 750.454.
- Procuring a person for a house of prostitution, MCL 750.455.
- Placing spouse in a house of prostitution, MCL 750.456.
- Accepting the earnings of a prostitute, MCL 750.457.
- Detaining a person in a house of prostitution, MCL 750.458.

163 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

164 Engaging the services of the offender’s own spouse is not an offense under this section. See MCL 750.449a(1)-(2).
- Transporting a person for prostitution, MCL 750.459.
- Selling travel services\textsuperscript{165} for purposes of prostitution, MCL 750.459.
- Allowing a person age 16 or under to remain in a house of prostitution, MCL 750.462.

The discussion in this section of the benchbook is limited to the crimes of prostitution, soliciting and accosting, and procuring or attempting to procure a person for prostitution.

A. Prostitution

Engaging or offering to engage the services of another person for the purpose of prostitution is prohibited by MCL 750.449a.

1. Statutory Authority

MCL 750.449a states:

“(1) Except as provided in [MCL 750.449a(2)], a person who engages or offers to engage the services of another person, not his or her spouse, for the purpose of prostitution, lewdness or assignation, by the payment in money or other forms of consideration, is guilty of a misdemeanor. A person convicted of violating this section is subject to . . . MCL 333.5201 to [MCL 333.5210\textsuperscript{166}](hazardous communicable disease testing)].

(2) A person who engages or offers to engage the services of another person, who is less than 18 years of age and who is not his or her spouse, for the purpose of prostitution, lewdness, or assignation, by the payment in money or other forms of consideration, is guilty of a crime punishable as provided in [MCL 750.451].”

\textsuperscript{165} For purposes of MCL 750.459, travel services “means transportation by air, sea, or ground, hotel or other lodging accommodations, package tours, or the provision of vouchers or coupons to be redeemed for future travel, or accommodations for a fee, commission, or other valuable consideration.” MCL 750.459(5).

\textsuperscript{166} For a discussion of MCL 333.5210 (AIDS/HIV and sexual penetration), see Section 3.6.
Except as provided in MCL 750.451b, MCL 750.449a does not apply to a law enforcement officer while performing his or her duties. MCL 750.451a.

2. Penalties

   a. Violation of MCL 750.449a(1)

   Generally, a violation of MCL 750.449a(1) is a misdemeanor punishable by imprisonment for not more than 93 days, or a maximum fine of $500, or both. MCL 750.449a(1); MCL 750.451(1). However, MCL 750.451 provides for enhanced penalties if certain circumstances apply.

   A defendant who violates MCL 750.449a(1) and who has a prior conviction for an offense specified in MCL 750.451(9) is guilty of a misdemeanor punishable by imprisonment for not more than one year, or a maximum fine of $1,000, or both. MCL 750.451(2).

   A defendant who violates MCL 750.449a(1) and who has two or more prior convictions for an offense specified in MCL 750.451(9) is guilty of a felony punishable by imprisonment for not more than two years, or a maximum fine of $2,000, or both. MCL 750.451(3).

   Under MCL 750.451(5), a prosecutor who intends to seek an enhanced sentence based on a defendant’s prior conviction(s) must include on the complaint and information a statement listing the prior conviction(s). Additionally, at sentencing or at a separate hearing before sentencing, the court, without a jury, must determine the existence of the defendant’s prior conviction(s). Id. The existence of a prior conviction may be established by any relevant evidence, including, but not limited to, one or more of the following:

   “(a) A copy of the judgment of conviction.

   (b) A transcript of a prior trial, plea-taking, or sentencing.

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167 MCL 750.451a “does not apply to a law enforcement officer if the officer engages in sexual penetration as that term is defined in [MCL 750.520a] while in the course of his or her duties.” MCL 750.451b. For more information on the term sexual penetration, see See Section 2.6(AA).

168 For purposes of MCL 750.451, a prior conviction means a violation of MCL 750.448, MCL 750.449, MCL 750.449a(1), MCL 750.450, MCL 750.462, or a violation of a law of another state or of a political subdivision of this state or another state substantially corresponding to those statutes. MCL 750.451(9).
(c) Information contained in a presentence report.

(d) The defendant’s statement.” MCL 750.451(5).

See Section 2.7 for information about additional monetary penalties and assessments.

b. **Violation of MCL 750.449a(2)**

A violation of MCL 750.449a(2) is a felony punishable by imprisonment for not more than 5 years, or a maximum fine of $10,000, or both. MCL 750.451(4).

See Section 2.7 for information about additional monetary penalties and assessments.

3. **Prosecution of Person Under Age 18**

a. **Presumption of Coercion**

“In any prosecution of a person under 18 years of age for an offense punishable under this section or a local ordinance substantially corresponding to an offense punishable under this section, it shall be presumed that the person under 18 years of age was coerced into child sexually abusive activity or commercial sexual activity in violation of [MCL 750.462e] or otherwise forced or coerced into committing that offense by another person engaged in human trafficking in violation of [MCL 750.462a] to [MCL 750.462h].[170] The prosecution may overcome this presumption by proving beyond a reasonable doubt that the person was not forced or coerced into committing the offense.” MCL 750.451(6).

The state may also petition the court to find the juvenile “to be dependent and in danger of substantial physical or psychological harm under [the Juvenile Code, MCL 712A.2(b)(3)],” MCL 750.451(6). If the juvenile “fails to substantially comply with court-ordered services under [MCL 712A.2(b)(3)], [he or she] is not eligible for the presumption under [MCL 750.451(6)].” MCL 750.451(6).

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170 For a discussion of the human trafficking laws under MCL 750.462a–MCL 750.462h, see Section 3.18.
b. Mandatory Reporting of Suspected Human Trafficking Crime

“Excluding any reasonable period of detention for investigation purposes, a law enforcement officer who encounters a person under 18 years of age engaging in any conduct that would be a violation of [MCL 750.448, MCL 750.449, MCL 750.449a, MCL 750.450, or MCL 750.462], or a local ordinance substantially corresponding to [MCL 750.448, MCL 750.449, MCL 750.449a, MCL 750.450, or MCL 750.462], if engaged in by a person 16 years of age or over shall immediately report to the [DHHS] a suspected violation of human trafficking involving a person under 18 years of age in violation of [MCL 750.462a] to [MCL 750.462h].” MCL 750.451(7).

“The [DHHS] shall begin an investigation of a human trafficking violation reported to the [DHHS] under [MCL 750.451(7)] within 24 hours after the report is made to the [DHHS], as provided in . . . MCL 722.628. The investigation shall include a determination as to whether the person under 18 years of age is dependent and in danger of substantial physical or psychological harm under [MCL 712A.2(b)(3)].” MCL 750.451(8).

4. Sex Offender Registration

MCL 750.449a(1) is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).171

MCL 750.449a(2) is a tier I listed offense under the SORA if the victim is a minor. See MCL 28.722(s)(iv).172

For more information on SORA’s registration requirements, see Chapter 10.

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171 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

172 Effective January 14, 2015, 2014 PA 328 amended the Sex Offenders Registration Act, MCL 28.722(s), to include a violation of MCL 750.449a(2) (engaging or offering to engage a minor for prostitution) as a tier I offense.
5. **Pertinent Case Law**

*Prostitution* is not limited to sexual intercourse in exchange for money; it also includes the “sexual stimulation of a [man’s] penis by direct manual contact, in exchange for money[.]” *People v Warren (Larry)*, 449 Mich 341, 347 (1995). The Supreme Court has also suggested that prostitution is not limited to masturbatory massages:

> “Appellate decisions often describe ‘prostitution’ with a reference to sexual intercourse. However, such references rarely constitute a judicial holding that other paid sexual acts, such as fellatio, cunnilingus, anal intercourse, or masturbation are *not* prostitution. Exceptions exist, but we find them less persuasive than decisions that have found that it is prostitution to perform masturbatory massages for money.” *Warren (Larry)*, 449 Mich at 346.

See also *People v Morey (Morey I)*, 230 Mich App 152, 156 (1998), aff’d *People v Morey (Morey II)*, 461 Mich 325 (1999) (*prostitution*, for purposes of MCL 750.457—accepting the earnings of a prostitute—includes an agreement to perform fellatio in exchange for money when the prostitute “actually initiated physical contact with the [customer’s] ‘private areas’”).

**B. Soliciting and Accosting**

The crime of *soliciting and accosting* involves conduct known as prostitution, regardless of the gender of the person soliciting and accosting or of the person being solicited and accosted.

1. **Statutory Authority**

MCL 750.448 proscribes the soliciting, accosting, or inviting of another person to commit prostitution or to do any other lewd or immoral act:

> “A person 16 years of age or older who accosts, solicits, or invites another person in a public place or in or from a building or vehicle, by word, gesture, or any other means, to commit prostitution or to do any other lewd or immoral act, is guilty of a crime punishable as provided in [MCL 750.451].”
Except as provided in MCL 750.451b, MCL 750.448 does not apply to a law enforcement officer while performing his or her duties. MCL 750.451a.

2. Penalties

A violation of MCL 750.448 is a misdemeanor punishable by imprisonment for not more than 93 days, or a maximum fine of $500, or both. MCL 750.451(1). If the defendant violated MCL 750.448 as a direct result of he or she being a victim of a human trafficking offense, the court may under certain circumstances defer sentencing and place the defendant on probation without an adjudication of guilt. MCL 750.451c.

A defendant who violates MCL 750.448 and who has a prior conviction for an offense specified in MCL 750.451(9) is guilty of a misdemeanor punishable by imprisonment for not more than one year, or a maximum fine of $1,000, or both. MCL 750.451(2).

A defendant who has two or more prior convictions for an offense specified in MCL 750.451(9) is guilty of a felony punishable by imprisonment for not more than two years, or a maximum fine of $2,000, or both. MCL 750.451(3).

See Section 2.7 for information about additional monetary penalties and assessments.

Under MCL 750.451(5), a prosecutor who intends to seek an enhanced sentence based on a defendant’s prior conviction(s) must include on the complaint and information a statement listing the prior conviction(s). Additionally, at sentencing or at a separate hearing before sentencing, the court, without a jury, must determine the existence of the defendant’s prior conviction(s). Id. The existence of a prior conviction may be established by any relevant evidence, including, but not limited to, one or more of the following:

“(a) A copy of the judgment of conviction.

173 MCL 750.451a “does not apply to a law enforcement officer if the officer engages in sexual penetration as that term is defined in [MCL 750.520a] while in the course of his or her duties.” MCL 750.451b. For more information on the term sexual penetration, see Section 2.6(AA).

174 For additional information on a victim of human trafficking committing a crime of prostitution under MCL 750.448, see Section 3.18(C).

175 For purposes of MCL 750.451, a prior conviction means a violation of MCL 750.448, MCL 750.449, MCL 750.449a(1), MCL 750.450, MCL 750.462, or a violation of a law of another state or of a political subdivision of this state or another state substantially corresponding to those statutes. MCL 750.451(9).
(b) A transcript of a prior trial, plea-taking, or sentencing.

(c) Information contained in a presentence report.

(d) The defendant’s statement.” MCL 750.451(5).

### 3. Prosecution of Person Under Age 18

#### a. Presumption of Coercion

“In any prosecution of a person under 18 years of age for an offense punishable under this section or a local ordinance substantially corresponding to an offense punishable under this section, it shall be presumed that the person under 18 years of age was coerced into child sexually abusive activity or commercial sexual activity in violation of [MCL 750.462e] or otherwise forced or coerced into committing that offense by another person engaged in human trafficking in violation of [MCL 750.462a] to [MCL 750.462h].[^176] The prosecution may overcome this presumption by proving beyond a reasonable doubt that the person was not forced or coerced into committing the offense.” MCL 750.451(6).

The state may also petition the court to find the juvenile “to be dependent and in danger of substantial physical or psychological harm under [the Juvenile Code, MCL 712A.2(b)(3)].” MCL 750.451(6). If the juvenile “fails to substantially comply with court-ordered services under [MCL 712A.2(b)(3)], [he or she] is not eligible for the presumption under [MCL 750.451(6)].” MCL 750.451(6).

#### b. Mandatory Reporting of Suspected Human Trafficking Crime

“Excluding any reasonable period of detention for investigation purposes, a law enforcement officer who encounters a person under 18 years of age engaging in any conduct that would be a violation of [MCL 750.448, MCL 750.449, MCL 750.449a, MCL 750.450, or MCL 750.462], or a local ordinance substantially corresponding to [MCL 750.448, MCL 750.449, MCL 750.449a, MCL 750.450, or MCL 750.462], if engaged in by a person 16 years of age or over shall immediately report to the [DHHS] a suspected violation of human trafficking

[^176]: For a discussion of the human trafficking laws under MCL 750.462a–MCL 750.462h, see Section 3.18.
involving a person under 18 years of age in violation of [MCL 750.462a] to [MCL 750.462h].” MCL 750.451(7).

“The [DHHS] shall begin an investigation of a human trafficking violation reported to the [DHHS] under [MCL 750.451(7)] within 24 hours after the report is made to the [DHHS], as provided in . . . MCL 722.628. The investigation shall include a determination as to whether the person under 18 years of age is dependent and in danger of substantial physical or psychological harm under [MCL 712A.2(b)(3)].” MCL 750.451(8).

4. Sex Offender Registration

MCL 750.448 is a tier II listed offense under the Sex Offenders Registration Act (SORA)\(^{177}\) if the victim is a minor. See MCL 28.722(u)(viii). For more information on the SORA’s registration requirements, see Chapter 10.

5. Pertinent Case Law

The solicitation statute applies to two-party situations in which one party, through words or conduct, invites another to perform an immoral act. *People v Mabry*, 102 Mich App 336, 337-338 (1980).

C. Procuring or Attempting to Procure a Person for Prostitution

1. Statutory Authority

MCL 750.455 proscribes the procuring of or attempting to procure another person to become a prostitute:

“A person who does any of the following is guilty of a felony punishable by imprisonment for not more than 20 years:

(a) Procures an inmate for a house of prostitution.

\(^{177}\) The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
(b) Induces, persuades, encourages, inveigles, or entices a person to become a prostitute.

(c) By promise, threat, or violence, or by any device or scheme, causes, induces, persuades, encourages, takes, places, harbors, inveigles, or entices a person to become an inmate of a house of prostitution or assignation place or any place where prostitution is practiced, encouraged, or allowed.

(d) By any promise or threat, or by violence or any device or scheme, causes, induces, persuades, encourages, inveigles, or entices an inmate of a house of prostitution or place of assignation to remain there as an inmate.

(e) By any promise or threat, or by violence, any device or scheme, fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages, or procures any person to engage in prostitution.

(f) Inveigles, entices, persuades, encourages, or procures any person to come into this state or to leave this state for the purpose of prostitution.

(g) Upon the pretense of marriage, takes or detains a person for the purpose of sexual intercourse.

(h) Receives or gives, or agrees to receive or give, any money or thing of value for procuring or attempting to procure any person to become a prostitute or to come into this state or leave this state for the purpose of prostitution.”

2. Definitions

The words induce, inveigle, persuade, and entice, as used in MCL 750.455, “all imply an active leading to a particular action.” People v Springs, 101 Mich App 118, 127 (1980). In contrast, the word encourage “indicates a less active role [that] falls short of persuading.” Springs, supra at 127.
The statutory language of MCL 750.455, “‘to become a prostitute[,]’ means to change, grow to be, or develop into a [person] who engages in sexual intercourse for money.” Morey (Morey II), 461 Mich at 331. In other words, “someone who is already practicing prostitution cannot be enticed to become a prostitute.” Morey (Morey II), supra at 334. But see People v Norwood, 303 Mich App at 473-474 (“defendants[‘] offer[] to further entice [an undercover] officer into prostitution by engaging her in an interstate practice, sending her to the [S]tate of Florida with promises of clothing, shoes, a residence, and cosmetic enhancement surgery” was “conduct [] prohibited by . . .[.] MCL 750.455[]”).

Assignation is “an offer to perform sexual services for the payment of money[.]” State ex rel Macomb Co Pros Attorney v Mesk, 123 Mich App 111, 120 (1983).

3. Penalties

A violation of MCL 750.455 is a felony punishable by imprisonment for not more than 20 years. MCL 750.455.

4. Sex Offender Registration

MCL 750.455 is a tier II listed offense under the Sex Offenders Registration Act (SORA). See MCL 28.722(u)(ix). For more information on the SORA’s registration requirements, see Chapter 10.

178 The Court in People v Springs, 101 Mich App at 127, analyzed the statutory language of MCL 750.455 before the 2014 PA 331 amendment (effective October 16, 2014), which, among other changes, deleted the term pandering and eliminated gender-specific language from the statutory language of MCL 750.455; however, the Court’s analysis of the terms induce, inveigle, persuade, entice, and encourage remains applicable.

179 The Court in Morey (Morey II), 461 Mich at 331, analyzed the statutory language of MCL 750.455 before the 2014 PA 331 amendment (effective October 16, 2014), which, among other changes, deleted the term pandering and eliminated gender-specific language from the statutory language of MCL 750.455; however, the Court’s analysis of the phrase “to become a prostitute” remains applicable.

180 The Court in People v Norwood, 303 Mich App at 473-474, analyzed the statutory language of MCL 750.455 before the 2014 PA 331 amendment (effective October 16, 2014), which, among other changes, deleted the term pandering and eliminated gender-specific language from the statutory language of MCL 750.455; however, the Court’s analysis of the phrase “to become a prostitute” remains applicable.

181 The Court in State ex rel Macomb Co Pros Attorney v Mesk, 123 Mich App at 120, analyzed the statutory language of MCL 750.455 before the 2014 PA 331 amendment (effective October 16, 2014), which, among other changes, deleted the term pandering and eliminated gender-specific language from the statutory language of MCL 750.455; however, the Court’s analysis of the term assignation remains applicable.

182 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.
3.30 Seduction

A. Statutory Authority and Penalties

MCL 750.532 punishes a man who seduces and debauches any unmarried woman:

“Any man who shall seduce and debauch any unmarried woman shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by fine of not more than 2,500 dollars; but no prosecution shall be commenced under this section after 1 year from the time of committing the offense.”

B. Sex Offender Registration

MCL 750.532 is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information on SORA’s registration requirements, see Chapter 10.

C. Pertinent Case Law

“‘Seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have and do have that effect, and result in her ultimately submitting her person to the sexual embraces of the person accused.’” People v Smith (Alba), 132 Mich 58, 61 (1902), quoting People v Gibbs, 70 Mich 425, 430 (1888).

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183 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

184 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

185 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
An act of sexual intercourse induced simply by a mutual desire to gratify the parties’ lustful passion does not constitute the crime of seduction. *People v DeFore*, 64 Mich 693, 699 (1887).

The crime of seduction “consist[s] of the means used by [a defendant] to induce [the victim] to yield and surrender to [the defendant] her chastity and her virtue; and such means always include all the acts, artifices, influences, promises, enticements, and inducements, calculated, under all the circumstances of the case being considered, to accomplish that object[.]” *Gibbs*, 70 Mich at 426-428 (56-year-old defendant’s false promise to buy clothes for the victim, who was under the age of 15, supported the defendant’s conviction).

If a promise of marriage is used to seduce a woman, and the promise is kept and performed, it is against public policy to permit prosecution for seduction. *People v Gould*, 70 Mich 240, 245 (1888).

### 3.31 Sexual Delinquency

#### A. Statutory Structure

In Michigan, a person charged with certain sex offenses may also be charged with and convicted of being a “sexually delinquent person.” However, Michigan’s *sexually delinquent person* crime is not a separate crime. “The history of sexual delinquency legislation clearly indicates the Legislature’s intent to create a comprehensive, unified statutory scheme . . . to provide an alternate sentence for certain specific sexual offenses[.]” *People v Winford*, 404 Mich 400, 405-406 (1978). See also *People v Helzer*, 404 Mich 410, 419-420 (1978), overruled in part on other grounds by *People v Breidenbach*, 489 Mich 1, 4 (2010). This unified statutory scheme consists of:

- The definition of *sexually delinquent person*, MCL 750.10a;
- The procedure for charging an offender with being a sexually delinquent person, MCL 767.61a; and
- An alternate sentencing provision for an offender convicted of being a sexually delinquent person at the time he or she violated any of the following statutes:
  - Gross indecency between males, MCL 750.338.
  - Gross indecency between females, MCL 750.338a.
  - Gross indecency between a male and a female, MCL 750.338b.
• Crime against nature (sodomy/bestiality), MCL 750.158.

• Indecent exposure, MCL 750.335a.

An offender may only be charged as a sexually delinquent person in conjunction with the commission of one of the five offenses listed above.

B. Definition of Sexually Delinquent Person

MCL 750.10a defines a sexually delinquent person as any person whose sexual behavior is characterized by any of the following:

• “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 sexual relations of either a heterosexual or homosexual nature, or by

• the commission of sexual aggressions against children under the age of 16.” (Bullet added.)

“MCL 750.10a is a definitional statute, and does not carry the possibility of a separate conviction or sentence independent of other charges in the Criminal Code.” People v Craig (Lamar), 488 Mich 861 (2010) (case remanded to trial court “for amendment of the judgment of sentence to reflect a single conviction under MCL 750.338b for gross indecency between male and female as a sexually delinquent person as defined by MCL 750.10a, with a single sentence...”).

C. Procedure for Charging an Offender as a Sexually Delinquent Person

MCL 767.61a contains the procedures and duties of the court in cases involving sexual delinquency:

“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 every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused
at his [or her] request. 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 (the procedure for accepting guilty pleas)], and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. 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.”

1. **Charging Discretion**

A person can be lawfully charged with sexual delinquency only when the principal offense is also charged; the principal offense must contain the alternate sentencing language regarding sexual delinquency. *People v Helzer*, 404 Mich 410, 417 n 10 (1978). “[A] charge of sexual delinquency is totally dependent for its prosecution upon conviction of the principal offense.” *People v Winford*, 404 Mich 400, 408 n 10 (1978); see also *People v Franklin (John II)*, 298 Mich App 539, 547 (2012) (noting that “sexual [delinquency under MCL 750.335a(2)(c)] 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[ ]”).

A sexual delinquency charge must be brought before the beginning of trial on the principal charge; a sexual delinquency charge cannot be brought after trial on the principal charge has begun. *Winford*, 404 Mich at 407-408; *Helzer*, 404 Mich at 424-426. If a sexual delinquency charge is not included in the original indictment or in an amended indictment or information before the principal offense is tried, the prosecutor waives the opportunity to bring a sexual delinquency charge. *Helzer*, 404 Mich at 424-426.

2. **Circuit Court Jurisdiction**

If the sexual delinquency charge is based on an underlying misdemeanor offense (e.g., indecent exposure), the prosecutor should bring the prosecution in circuit court under the concurrent jurisdiction statute, MCL 767.1. *Pepole v Winford*,
404 Mich 400, 408 n 11 (1978). If the prosecutor initially charges only the principal misdemeanor offense and later, but before trial, amends and charges sexual delinquency, the proceedings are subject to transfer to circuit court at the time the sexual delinquency charge is added. *Id.*

3. **Preliminary Examination**

Although the prosecutor must include a sexual delinquency charge on the original or amended indictment before the beginning of trial on the principal charge, the magistrate, at the defendant’s preliminary examination, need only find probable cause to bind the defendant over on the principal offense. *People v Winford*, 404 Mich 400, 408 n 10 (1978). The magistrate is not required to find probable cause on the charge of sexual delinquency. *Id.*

4. **Guilty Plea**

“[MCL 767.61a] contemplates that a defendant may be charged and tried in one action for both sexual delinquency and the underlying sexual offense. Moreover, *MCL 767.61a* only calls for a separate hearing in regards to sexual delinquency ‘[i]n the event the accused shall plead guilty . . . .’” *People v Breidenbach*, 489 Mich 1, 10 (2010). If a defendant pleads guilty to both charges (the underlying offense and the charge of sexual delinquency), MCL 767.61a permits a separate hearing to be held for the purpose of presenting psychiatric and expert testimony regarding the question of the defendant’s status as a sexual delinquent. *Breidenbach*, 489 Mich at 9-10; *People v Helzer*, 404 Mich 410, 418-419 (1978).

*MCL 767.61a* states in pertinent part: “In the event the accused shall plead guilty to both charges in such indictment, the court . . . before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony.” Testimony that might assist in determining the defendant’s mental and physical condition at the time he or she committed the principal offense includes “any competent medical, sociological or psychological testimony[.]” *Helzer*, 404 Mich at 419 n 14.

Under *MCL 767.61a*, if a defendant pleads guilty or *nolo contendere* to both the principal and delinquency charges, “the trial court [may not] . . . sentence the defendant as a sexually delinquent person without first holding a hearing to determine if [the] defendant was sexually delinquent.” *People v Franklin*
(John II), 298 Mich App 539, 542, 544 (2012) (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).

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 II), 298 Mich App at 545, quoting Breidenbach, 489 Mich at 10.

Note: Because the Court of Appeals determined that the defendant’s underlying conviction for indecent exposure violated his double jeopardy rights where the defendant was also convicted of aggravated indecent exposure, the Court vacated its previous opinion, which remanded with instructions for the lower court to conduct a requisite hearing after the lower court failed to meet the examination requirement under MCL 767.61a. Franklin (John II), 298 Mich App at 545, vacating People v Franklin, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2012 (Docket No. 296591). See Section 3.19(C)(8) for additional information on double jeopardy.

5. Trial

“[S]eparate jury trials under MCL 767.61a are discretionary, not mandatory.” People v Breidenbach, 489 Mich 1, 4 (2010), overruling in part People v Helzer, 404 Mich 410 (1978).186 Whether separate juries are necessary in cases where a defendant is charged with a criminal sexual offense and with being sexually delinquent at the time he or she committed the principal offense, should be determined on a case-by-case basis according to the provisions of MCR 6.120(B) (joinder and

186 Helzer, 404 Mich at 424, held that separate juries were required to determine a defendant’s guilt or innocence of a principal sexual offense and the question of the defendant’s status as a sexually delinquent person. According to the Court, “[t]hough not explicitly stated, we find a separate hearing and record directed by clear implication [in MCL 767.61a].” Helzer, 404 Mich at 419 n 13. Breidenbach, 489 Mich at 4, held that “the Helzer Court erred when it created a compulsory rule to that effect.”
severance of related charges). *Breidenbach*, 489 Mich at 4. A trial court may empanel separate juries if, in its discretion, the trial court “determine[s] that bifurcation is necessary in order to protect a defendant’s rights or ensure a fair determination of guilt or innocence[.]” Id.; MCR 6.120(B). See *People v Campbell (Michael)*, 316 Mich App 279, 294, 297 (2016), overruled on other grounds by *People v Arnold*, 502 Mich 438 (2018) (holding that the trial court did not abuse its discretion or deny the defendant his due process right to a fair trial when it refused to bifurcate the proceedings or hold separate trials as to whether he both committed indecent exposure and was a sexually delinquent person; “[g]iven the substantial overlap in the evidence and the trial court’s ability to adequately protect [the defendant’s] rights with a limiting instruction concerning the evidence that was admissible only to prove that [he] was a sexually delinquent person, . . . the trial court’s decision to hold a single trial was within the range of reasonable and principled outcomes.”).

“[B]ecause sexual delinquency is an alternate sentencing provision under which a defendant is prosecuted in order to determine whether special circumstances surrounding the principal charge warrant an alternate sentence, proof of the sexual delinquency charge may involve more than the simple ministerial considerations of proving prior convictions. Although prior convictions may form the basis for a guilty verdict, sexual delinquency is not explicitly dependent upon any prior conviction except the principal charge. The only limitation is that the jury must weigh the acts specified in MCL 750.10a as constituting sexual delinquency.” *People v Oswald (Robert) (After Remand)*, 188 Mich App 1, 11-12 (1991) (internal citation omitted).

In every sexual delinquency prosecution, if requested by an indigent defendant, the court must provide expert testimony for the defense. MCL 767.61a.

6. Burden of Proof and Timing

The statutory language, “at the time of the said offense,” indicates that “the relevant time to decide whether defendant was sexually delinquent [is] at the point when the principal offense was committed.” Helzer, 404 Mich at 416 n 8.

D. Penalties

1. Alternate Penalty for Offenders Sentenced as Sexually Delinquent Persons

If an offender is convicted of being a sexually delinquent person at the time he or she committed one of the specified offenses (gross indecency, a crime against nature, or indecent exposure), the offender may be sentenced to the state prison for an indeterminate term, the minimum of which shall be one day, and the maximum of which shall be life. See MCL 750.158 (crime against nature or sodomy); MCL 750.335a (indecent exposure); MCL 750.338 (gross indecency between male persons); MCL 750.338a (gross indecency between female persons); MCL 750.338b (gross indecency between male and female persons).

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 People v Helzer, 404 Mich 410, 416-417 (1978), overruled in part by People v Breidenbach, 489 Mich 1 (2011). Regarding MCL 750.335a, the Court has specifically held that the “1 day to life” provision in MCL 750.335a(2)(c) provides “an option a trial court could use its discretion to consider imposing alongside the other statutory penalties available under [MCL 750.335a],” and that if the trial court chooses to impose a “1 day to life” sentence it cannot be modified. People v Arnold, 502 Mich 438, 469, 483 (2018).

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

2. Sentencing

“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"); 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; People v Arnold, 502 Mich 438, 469 (2018) (if the trial court chooses to impose a "1 day to life" sentence it cannot be modified).

See Section 2.7 for information about authorized fines, costs, and assessments.

E. Sex Offender Registration

An offense committed by a sexually delinquent person, as defined in MCL 750.10a, is a tier I listed offense under the Sex Offenders Registration Act (SORA). See MCL 28.722(s)(viii). For more information on the SORA’s registration requirements, see Chapter 10.

3.32 Sexual Intercourse Under Pretext of Medical Treatment

A. Statutory Authority and Penalties

MCL 750.90 states as follows:

"Any person who shall undertake to medically treat any female person, and while so treating her, shall represent to such female that it is, or will be, necessary or beneficial to her health that she have sexual intercourse with a man, and shall thereby induce her to have carnal sexual intercourse with any man, and any man, not being the husband of such female, who shall have sexual intercourse with her by reason of such representation, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years."

189 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
Note: This offense is similar to the CSC Act’s force or coercion provisions that penalize sexual penetrations or contacts that involve medical treatments or examinations “for purposes that are medically recognized as unethical or unacceptable.” See MCL 750.520b(1)(f)(iv) (CSC-I); MCL 750.520e(1)(b)(iv) (CSC-IV). However, unlike the force or coercion provisions under the CSC Act, MCL 750.90 is restricted to sexual intercourse and does not include sexual contact.

B. Definition of Sexual Intercourse

For purposes of MCL 750.90, sexual intercourse is not defined. However, other statutes define sexual intercourse as follows:

- “‘Sexual intercourse’ means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal.” MCL 722.672(e) (dissemination of sexually explicit matter to minors).

- “‘Sexual intercourse’ means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.” MCL 750.145c(1)(r) (child sexually abusive activity).

C. Sex Offender Registration

MCL 750.90 is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information on SORA’s registration requirements, see Chapter 10.

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190 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about authorized fines, costs, and assessments.

191 CSC-II and CSC-III incorporate by reference CSC-I’s force or coercion provision. See MCL 750.520c(1)(d)(i); MCL 750.520c(1)(f); MCL 750.520d(1)(b). See also Section 2.6(I).

192 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.
3.33 Solicitation to Commit a Felony

Solicitation is one of three inchoate offenses discussed in this chapter. An inchoate offense is defined as “[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment.” Black’s Law Dictionary (9th ed).

A. Statutory Authority and Penalties

MCL 750.157b states as follows:

“(1) For purposes of this section, ‘solicit’ means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.

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(3) Except as provided in subsection (2) [(solicitation of murder)], a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows:

(a) If the offense solicited is a felony punishable by imprisonment for life, or for 5 years or more, the person is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine not to exceed $5,000.00, or both.

(b) If the offense solicited is a felony punishable by imprisonment for a term less than 5 years or by a fine, the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or by a fine not to exceed $1,000.00, or both, except that a term of imprisonment shall not exceed 1/2 of the maximum imprisonment which can be imposed if the offense solicited is committed.”

For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

193 The other inchoate offenses are attempt and conspiracy. See Sections 3.7 and 3.9, respectively.
B. Sex Offender Registration

MCL 750.157b is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information on SORA’s registration requirements, see Chapter 10.

C. Pertinent Case Law

1. Specific Intent Crime

Solicitation to commit a felony is a specific intent crime and requires proof that the defendant intended that the solicited crime actually be committed. *People v Vandelinder*, 192 Mich App 447, 450 (1992).

2. Solicitation Generally

The crime of solicitation requires proof that something of value was used to induce another to commit the crime solicited. *MCL 750.157b(1).*

“Solicitation is complete when the solicitation is made.” *Vandelinder*, 192 Mich App at 450. Whether the crime solicited is accomplished does not affect the completed solicitation. *Vandelinder, supra* at 450-451. A “conditional” solicitation, i.e., soliciting another to commit a felony only if certain conditions exist, still constitutes solicitation. *Id.* In other words, “[a] contingency in the plan affects whether the victim will be murdered, but does not change the solicitor’s intent that the victim be murdered.” *Id.* at 451.

3. Defenses


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194 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).

195 For more information on the impossibility defense, see *Section 4.9.*
Renunciation is an affirmative defense to solicitation and the defendant must prove it by a preponderance of the evidence.\(^{196}\) \(\text{MCL 750.157b(4)}\) states:

“\(\text{It is an affirmative defense to a prosecution under [MCL 750.157b] that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this subsection.}\)”

### 3.34 Stalking and Aggravated Stalking

Sexual assault perpetrators may stalk their victims before or after an assault. Perpetrators may also stalk or otherwise harass a victim’s family members or potential witnesses. However, stalking most commonly occurs in cases involving domestic violence. The discussion in this benchbook is limited to a statutory overview of the stalking offenses.\(^{197}\)

#### A. Stalking

1. Statutory Authority

\(\text{MCL 750.411h(1)(d)}\) defines stalking:

“‘Stalking’ means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.”

In a prosecution for stalking under \(\text{MCL 750.411h}\), evidence that the defendant continued to make repeated unconsented contact with the victim after the victim requested that the

\(^{196}\) For more information on the defense of renunciation, see Section 4.3(B).

\(^{197}\) See the Michigan Judicial Institute’s \textit{Domestic Violence Benchbook}, Chapter 2, for detailed information and case law regarding stalking.
defendant stop such contact and refrain from further unconsented contact, raises a rebuttable presumption that the victim felt terrorized, frightened, intimidated, threatened, harassed, or molested by the defendant’s continued contact.\(^{198}\) MCL 750.411h(4).

2. Definitions

The following definitions further explain this offense:

- “‘Course of conduct’ means a pattern of conduct composed of 2 or more separate, noncontinuous acts evidencing a continuity of purpose.” MCL 750.411h(1)(a).

- “‘Emotional distress’ means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.” MCL 750.411h(1)(b).

- “‘Harassment’ means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.” MCL 750.411h(1)(c).

- “‘Unconsented contact’ means any contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

  (i) Following or appearing within the sight of that individual.

  (ii) Approaching or confronting that individual in a public place or on private property.

  (iii) Appearing at that individual’s workplace or residence.

  (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

  (v) Contacting that individual by telephone.

\(^{198}\) See M Crim JI 17.25, Stalking.
(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.” MCL 750.411h(1)(e).

- “‘Victim’ means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.” MCL 750.411h(1)(f).

3. Penalties

Except in cases where the victim is less than 18 years of age at any time during the offender’s course of conduct and the offender is five or more years older than the victim, stalking is a misdemeanor offense punishable by imprisonment for not more than one year, or a fine of not more than $1,000, or both. MCL 750.411h(2)(a).

MCL 750.411h(2)(b) provides enhanced penalties for stalking convictions when the victim is under the age of 18 at any time during the offender’s course of conduct and the offender is five or more years older than the victim. In such cases, stalking is a felony offense punishable by imprisonment for not more than five years, or a fine of not more than $10,000, or both. MCL 750.411h(2)(b). For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

See Section 2.7 for information about additional monetary penalties and assessments.

A penalty imposed for a violation of MCL 750.411h “may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.” MCL 750.411h(5).

Under MCL 750.411h(3), the court may place a defendant convicted of stalking on probation for not more than five years.\(^\text{199}\) If the court orders probation, it may impose any lawful condition of probation, and may additionally order the defendant to do any of the following:

\(^{199}\) See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for a detailed discussion of probation.
“(a) Refrain from stalking any individual during the term of probation.

(b) Refrain from having any contact with the victim of the offense.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and if, determined appropriate by the court, to receive such psychiatric, psychological, or social counseling at his or her own expense.” MCL 750.411h(3).

4. **Defense to Stalking**

MCL 750.411h(1)(c) provides a defense to stalking by excluding from its definition of harassment conduct that is constitutionally protected or that serves a legitimate purpose.

5. **Sex Offender Registration**

MCL 750.411h is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA).200 For more information on SORA’s registration requirements, see Chapter 10.

**B. Aggravated Stalking**

1. **Statutory Authority**

Aggravated stalking is stalking accompanied by one or more of the following circumstances:201

“(a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction.

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200 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).

201 Stalking, as used in MCL 750.411, is defined exactly as it is in MCL 750.411h(1)(d). MCL 750.4111(1)(e). See Section 3.34(A).
(b) At least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

(c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim’s family, or another individual living in the same household as the victim.

(d) The individual has been previously convicted of a violation of this section or [MCL 750.411h].” MCL 750.411i(2).

In a criminal prosecution for aggravated stalking, evidence that the defendant continued to make unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.202 MCL 750.411i(5).

2. Definitions

The definitions of course of conduct, emotional distress, harassment, stalking, unconsented contact, and victim are the same for aggravated stalking as for stalking.203 See MCL 750.411i(1)(a); MCL 750.411i(c)-(g). The statutory language in the aggravated stalking statute contains an additional definition for the conduct prohibited by MCL 750.411i:

“‘Credible threat’ means a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual.” MCL 750.411i(1)(b).

3. Penalties

Aggravated stalking is a felony offense. MCL 750.411i(3). Except in cases where the victim is under the age of 18 and the offender is five or more years older than the victim, aggravated stalki...
stalking is punishable by imprisonment for not more than five years, or a fine of not more than $10,000, or both. MCL 750.411i(3)(a).

MCL 750.411i(3)(b) provides enhanced penalties for an aggravated stalking conviction when the victim is under the age of 18 at any time during the defendant’s course of conduct, and the defendant is five or more years older than the victim. In such cases, aggravated stalking is punishable by imprisonment for not more than ten years, or a fine of not more than $15,000, or both. MCL 750.411i(3)(b).

For information on scoring these offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

Under MCL 750.411i(4), the court may place a defendant convicted of aggravated stalking on probation for any term of years, but not less than five years. If the court orders probation, the court may impose any lawful condition of probation, and may additionally order the defendant to do any of the following:

“(a) Refrain from stalking any individual during the term of probation.

(b) Refrain from having any contact with the victim of the offense.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.” MCL 750.411i(4).

4. Defense to Aggravated Stalking

MCL 750.411i(1)(d) provides a defense to aggravated stalking by excluding from its definition of harassment conduct that is constitutionally protected or that serves a legitimate purpose. The trial court properly refused the defendant’s claim that he violated the temporary restraining order against him for the legitimate purpose of communicating with his wife in an effort

5. **Sex Offender Registration**

   MCL 750.411i is not designated as a tier I, tier II, or tier III *listed offense* under the Sex Offenders Registration Act (SORA). For more information on SORA’s registration requirements, see Chapter 10.

### 3.35 Unlawful Imprisonment

#### A. Statutory Authority

A person who knowingly restrains another person under any of the following circumstances has committed the crime of unlawful imprisonment:

- the person was restrained through the use of a weapon or dangerous instrument.
- the person restrained was secretly confined.
- the person was restrained in order to facilitate the commission of another felony or to facilitate flight after another felony was committed. MCL 750.349b(1)(a)-(c).

MCL 750.349b(1)(c) does not require that the defendant be found guilty of the predicate felony in order to be found guilty of committing the crime of unlawful imprisonment. *People v Chelmicki*, 305 Mich App 58, 67 (2014) (“trial court properly denied [the] defendant’s request for a directed verdict as to [MCL 750.349b(1)(c)]” where “the fact that the jury ultimately found [the] defendant not guilty of the [predicate] arson charge [was] immaterial, because a jury’s verdict regarding one offense does not preclude it from reaching a different conclusion when that offense forms an element of another crime[”].

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205 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see [http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).
B. Definitions

MCL 750.349b(3) defines the following terms used in the statutory language describing unlawful imprisonment:

- “‘Restrain’ means to forcibly restrict a person’s movements or to forcibly confine the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.” MCL 750.349b(3)(a).

- “Secretly confined” means “[t]o keep the confinement of the restrained person a secret [or t]o keep the location of the restrained person a secret.” MCL 750.349b(3)(b).

MCL 750.349b “does not define the word ‘confine[,]’” and “[n]othing in [MCL 750.349b] requires a certain level of difficulty of discovery or escape;” rather, “[o]ur [Michigan] Supreme Court has stated that ‘secret confinement’ means the ‘deprivation of the assistance of others by virtue of the victim’s inability to communicate his [or her] predicament.’” People v Kosik, 303 Mich App 146, 152-153 (2013), quoting People v Jaffray, 445 Mich 287, 309 (1994). See Kosik, 303 Mich App at 152 (finding that secret confinement included “restrict[ing] the victim’s movement within the bounds of [a] conference room”); People v Rainer, 288 Mich App 213, 218 (2010) (finding that confinement included restricting the victim’s ability to leave a parked car where the victim “dared not leave while in the defendant’s presence”).

“‘The determination whether a person has been secretly confined is generally not dependent on the duration of the confinement[,] and . . . [w]hether and when [a] defendant [chooses] to release [a] victim is immaterial to whether there [is] secret confinement.” Kosik, 303 Mich App at 153, citing Jaffray, 445 Mich at 308.

C. Penalties

The crime of unlawful imprisonment is a felony punishable by not more than 15 years of imprisonment, or a fine of not more than $20,000, or both. MCL 750.349b(2). In addition, a defendant may be charged with, convicted of, or sentenced for any other violation of law committed during the defendant’s commission of the unlawful imprisonment violation. MCL 750.349b(4).
D. Sex Offender Registration

MCL 750.349b is a tier I listed offense under the Sex Offenders Registration Act (SORA) if the victim is a minor. See MCL 28.722(s)(iii).

See People v Bosca, 310 Mich App 1, 70 (2015) (“hold[ing], from a statutory interpretation perspective, that the reach of SORA extends generally to the offense of unlawful imprisonment where the victim is a minor, without regard to whether the underlying conduct was in any way sexual in nature”).

Note: “[T]he requirement of registration for offenders who commit the crime of unlawful imprisonment of a minor without a sexual purpose survives rational basis review” and does not violate substantive due process; “the Legislature has stated that it ‘has determined that a person who has been convicted of committing an offense covered by [SORA] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state’ and therefore has required their registration ‘to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.’” People v Bosca, 310 Mich App 1, 66, 78 (2015), quoting MCL 28.721a. Additionally, because the applicable version of SORA “explicitly lists [unlawful imprisonment] as a Tier I offense[,]” SORA “is [not] unconstitutionally vague as applied to [this offense].” Bosca, 310 Mich App at 81.

For more information about the SORA’s registration requirements, see Chapter 10.

207 A violation of MCL 750.349b was added as a listed offense by 2011 PA 17, effective July 1, 2011. This offense was not included in the former group of listed offenses found in MCL 28.722(e).

208 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

209 In Bosca, 310 Mich App at 69, 92, the court noted that, because the federal Sex Offender Registration and Notification Act (SORNA) “expressly include[d] kidnapping and false imprisonment as ‘specified offenses[s] against a minor’ that[] . . . requir[e] registration, Michigan was obliged to conform to that minimum national standard by similarly including within SORA [those crimes] against a minor[,]” the panel, however, “invite[d] the Legislature to amend SORA to eliminate its vagueness and ambiguity, and any resulting misperceptions[]” about its applicability to non-sexual offenses.
E. Pertinent Case Law

1. Evidence Supported Conviction

Sufficient evidence existed to support the defendant’s conviction of unlawful imprisonment under MCL 750.349b(1)(b) (secret confinement) where “[t]he defendant waited until the victim’s co-worker left on her break [and the store was empty] to return to the store[,]” he “forcefully grabbed the victim, led her into a [windowless] conference room [that was “not visible to anyone who may have walked by or came into the store”][;] [he] closed the door behind him . . . [and] stood in front of the door to the conference room [to prevent the victim from escaping; and] . . . [he] took the phone away from the victim so she could not call for help.” People v Kosik, 303 Mich App 146, 153-154 (2013).

Sufficient evidence existed to support the defendant’s conviction of unlawful imprisonment under MCL 750.349b(1)(b) (secret confinement) where the defendant forcibly confined the victim against her will when he dragged her by her hair and forced her into her car, drove her to another location where he punched her in the mouth and choked her until she lost consciousness, drove her to a store where he prevented her from communicating with her sister over the phone, and took her car keys and phone when he went into the store. People v Railer, 288 Mich App 213, 215-219 (2010). The Court of Appeals held that the defendant’s actions “provided sufficient evidence that [the] defendant knowingly committed this misconduct, so a jury could have reasonably inferred that [the] defendant knowingly restrained [the victim]. Furthermore, the phone call from [the victim’s] sister revealed that [the] defendant intended to keep both the actual confinement and location of the confinement a secret. Indeed, frightened of [the] defendant, [the victim] complied with [the] defendant’s demand that she not reveal their location.” Railer, supra at 218.

Sufficient evidence existed to support the defendant’s conviction of unlawful imprisonment under MCL 750.349b(1)(c) (facilitating commission of another felony) where “[t]he predicate felony . . . was arson[,]” and, although he was not convicted of arson, he “facilitate[d] the commission of [that] felony[,]” because “[a] rational trier of fact could infer . . . that [the] defendant possessed the intent to set fire to the apartment building[]” when “the defendant stated to the victim that he turned the gas on in the apartment to ‘kill us both[,]’ . . . [and the] neighbors testified that the victim told
them on the night of the altercation that [the] defendant turned on the gas burners and was ‘attempting to blow up the apartment complex[.]’” *People v Chelmicki*, 305 Mich App 58, 65-67 (2014).

### 2. Double Jeopardy Concerns

A defendant’s convictions and sentences for unlawful imprisonment and assault with a dangerous weapon[210] arising from a “continuous transaction[]” do not constitute multiple punishments for the same offense; “the elements of [each offense] comprise separate and distinct offenses[,] and . . . ‘each [offense] requires proof of a fact that the other does not.’” *People v Bosca*, 310 Mich App 1, 41-42 (2015).

### 3.36 Voyeurism

#### A. Statutory Authority

*MCL 750.539j* prohibits conduct commonly known as voyeurism:

“(1) A person shall not do any of the following:

(a) Surveil another individual who is clad only in his or her undergarments, the unclad genitalia or buttocks of another individual, or the unclad breasts of a female individual under circumstances in which the individual would have a reasonable expectation of privacy.

(b) Photograph, or otherwise capture or record, the visual image of the undergarments worn by another individual, the unclad genitalia or buttocks of another individual, or the unclad breasts of a female individual under circumstances in which the individual would have a reasonable expectation of privacy.

(c) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section.”

210 “The elements of [assault with a dangerous weapon] are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *Bosca*, 310 Mich App at 20, quoting *People v Avant*, 235 Mich App 499 (1999).
B. Penalties

An individual with no previous convictions for violating or attempting to violate MCL 750.539j(1)(a) (surveilling another individual) who violates or attempts to violate MCL 750.539j(1)(a) is guilty of a felony punishable by not more than two years of imprisonment, or a maximum fine of $2,000, or both. MCL 750.539j(2)(a)(i).

An individual with a previous conviction for violating or attempting to violate MCL 750.539j(1)(a), who violates or attempts to violate MCL 750.539j(1)(a) is guilty of a felony punishable by not more than five years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.539j(2)(a)(ii).

An individual who violates or attempts to violate MCL 750.539j(1)(b) (photographing/otherwise recording) or MCL 750.539j(1)(c) (distribute/transmit photograph or visual image) is guilty of a felony punishable by not more than five years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.539j(2)(b).

“[MCL 750.539j] does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate [MCL 750.539j(1)(a)-(c)].” MCL 750.539j(3).

For information on scoring these offenses under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

C. Definitions

For purposes of MCL 750.539j, “surveil’ means to subject an individual to surveillance as that term is defined in [MCL 750.539a].” MCL 750.539j(6). “Surveillance’ means to secretly observe the activities of another person for the purpose of spying upon and invading the privacy of the person observed.” MCL 750.539a(3).

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211 “[MCL 750.539j] does not prohibit security monitoring in a residence if conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose.” MCL 750.539j(4). In addition, “[MCL 750.539j] does not apply to a peace officer of this state or of the federal government, or the officer’s agent, while in the performance of the officer’s duties.” MCL 750.539j(5).
D. Sex Offender Registration

MCL 750.539j is a tier I listed offense under the Sex Offenders Registration Act (SORA) if the victim is a minor. See MCL 28.722(s)(vi). For more information about the SORA’s registration requirements, see Chapter 10.

3.37 Vulnerable Adult Abuse

The vulnerable adult abuse statute punishes a caregiver (or person with authority over the vulnerable adult) who causes physical harm, serious physical harm, or serious mental harm to a vulnerable adult.

A. Statutory Authority and Penalties

MCL 750.145n(1)-(4) outline four degrees of vulnerable adult abuse:

1. First-Degree Vulnerable Adult Abuse

“A caregiver is guilty of vulnerable adult abuse in the first degree if the caregiver intentionally causes serious physical harm or serious mental harm to a vulnerable adult. Vulnerable adult abuse in the first degree is a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.” MCL 750.145n(1).

2. Second-Degree Vulnerable Adult Abuse

“A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the second degree if the reckless act or reckless failure to act of the caregiver or other person with authority over the vulnerable adult causes serious physical harm or serious mental harm to a vulnerable adult. Vulnerable adult abuse in the second degree is a felony punishable by imprisonment for not more than 4

212 A violation of MCL 750.539j was added as a listed offense by 2011 PA 17, effective July 1, 2011. This offense was not included in the former group of listed offenses found in MCL 28.722(e).

213 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011.

Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

214 For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.
years or a fine of not more than $5,000.00, or both.”\textsuperscript{215} MCL 750.145n(2).

3. **Third-Degree Vulnerable Adult Abuse**

“A caregiver is guilty of vulnerable adult abuse in the third degree if the caregiver intentionally causes physical harm to a vulnerable adult. Vulnerable adult abuse in the third degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,500.00, or both.”\textsuperscript{216} MCL 750.145n(3).

4. **Fourth-Degree Vulnerable Adult Abuse**

“A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the fourth degree if the reckless act or reckless failure to act of the caregiver or other person with authority over a vulnerable adult causes physical harm to the vulnerable adult or the caregiver or other person with authority over the vulnerable adult knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a vulnerable adult, regardless of whether physical harm results. Vulnerable adult abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.”\textsuperscript{217} MCL 750.145n(4).

Alternatively, or in addition to the penalties specified above, a court may sentence a defendant to perform community service under MCL 750.145r:

- A defendant may be sentenced to not more than 160 days of community service if he or she was convicted of a felony. MCL 750.145r(1)(a).

- A defendant may be sentenced to not more than 80 days of community service if he or she was convicted a misdemeanor. MCL 750.145r(1)(b).

\textsuperscript{215} For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

\textsuperscript{216} For information on scoring this offense under the Michigan’s statutory sentencing guidelines, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3. See also Section 2.7 for information about additional monetary penalties and assessments.

\textsuperscript{217} See Section 2.7 for information about additional monetary penalties and assessments.
Note: Community service shall not include “activities involving interaction with or care of vulnerable adults.” MCL 750.145r(2). Furthermore, a defendant must not be compensated for performing community service, and “[the defendant] shall reimburse the state or appropriate local unit of government for the cost of supervision incurred by the state or local unit of government as a result of the person’s activities in that community service.” MCL 750.145r(3).

A conviction or sentence for vulnerable adult abuse does not preclude a conviction or sentence for a violation of “any other applicable law.” MCL 750.145q.

B. Definitions

MCL 750.145m defines the following terms:

- “‘Caregiver’ means an individual who directly cares for or has physical custody of a vulnerable adult.” MCL 750.145m(c).

- “‘Other person with authority over a vulnerable adult’ includes, but is not limited to, a person with authority over a vulnerable adult in that part of a hospital that is a hospital long-term care unit, but does not include a person with authority over a vulnerable adult in that part of a hospital that is not a hospital long-term care unit. As used in this subdivision, ‘hospital’ and ‘hospital long-term care unit’ mean those terms as defined in . . . MCL 333.20106.” MCL 750.145m(k).

- “‘Physical harm’ means any injury to a vulnerable adult’s physical condition.” MCL 750.145m(n).

- “‘Reckless act or reckless failure to act’ means conduct that demonstrates a deliberate disregard of the likelihood that the natural tendency of the act or failure to act is to cause physical harm, serious physical harm, or serious mental harm.” MCL 750.145m(p).

- “‘Serious physical harm’ means a physical injury that threatens the life of a vulnerable adult, that causes substantial bodily disfigurement, or that seriously impairs the functioning or well-being of the vulnerable adult.” MCL 750.145m(r).

- “‘Serious mental harm’ means a mental injury that results in a substantial alteration of mental functioning that is
manifested in a visibly demonstrable manner.” MCL 750.145m(s).

• “Vulnerable adult” means one or more of the following:

“(i) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.

(ii) An adult as defined in . . . MCL 400.703[(1)(b)].

(iii) An adult as defined in . . . MCL 400.11[(b)].” MCL 750.145m(u).

C. Sex Offender Registration

MCL 750.145n is not designated as a tier I, tier II, or tier III listed offense under the Sex Offenders Registration Act (SORA). For more information on the SORA’s registration requirements, see Chapter 10.

D. Pertinent Case Law

Sufficient evidence existed to support the defendant’s conviction of first-degree vulnerable adult abuse under MCL 750.145n(1) where the victim qualified as a vulnerable adult under both MCL 750.145m(u)(i) and MCL 750.145m(u)(iii). People v Cline, 276 Mich App 634, 642-646 (2007). In Cline, supra at 643, the defendant “abused and exploited [the victim] by manipulating her insulin so as to cause her to become unconscious, placing plastic bags over her head that restricted her breathing, tying her up in various stages of undress, and videotaping her for his sexual pleasure.” The victim qualified as a vulnerable adult under MCL 750.145m(u)(i) because she required personal care as a result of her blindness and diabetes, and under MCL 750.145m(u)(iii) because she was suspected of being

218 MCL 400.703(1)(b) defines adult as “[a] person who is placed in an adult foster care family home or an adult foster care small group home[.]”

219 MCL 400.11(b) defines adult as “a vulnerable person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.”

220 The listed offenses formerly described in MCL 28.722(e) were replaced by a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17, effective July 1, 2011. Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA’s requirements and content, see http://www.ojp.usdoj.gov.smart/pdfs/final_sornaguidelines.pdf.
or believed to be abused, neglected, or exploited. *Cline, supra* at 643-646.
Chapter 4: Defenses To Sexual Assault Crimes

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4.1 Chapter Overview

This chapter discusses defenses applicable to criminal sexual conduct offenses and other related offenses.1 Defenses that do not apply to sex-related offenses are not discussed in this chapter. Also, defenses that are contained within the statutory provisions of the crimes themselves are generally discussed with the specific crimes in Chapters 2 and 3, and if those defenses require extended treatment, they are discussed in this chapter.

4.2 Jury Instructions2

The rules for instructing juries on potential defenses have been established by case law, statute, and court rule. “Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them.” People v Canales, 243 Mich App 571, 574 (2000) (self-defense). A trial court is required to give a defendant’s requested instruction on his or her theory of defense when the defendant presents “some evidence” to support all elements of the defense. People v Lemons, 454 Mich 234, 248 (1997) (defense of duress). “[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.” People v Mills (Vester), 450 Mich 61, 81 (1995) (accident defense).

Under MCL 768.29, “[a] court shall instruct the jury as to the law applicable to the case . . . . The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.”

Under MCR 2.513(N)(1), “[a] court must instruct the jury as required and appropriate.”

4.3 Abandonment and Renunciation

Although similar in concept, abandonment and renunciation are two affirmative defenses that differ in their applicability to offenses and in their specific requirements. Voluntary abandonment constitutes an affirmative defense to criminal attempt under MCL 750.92. People v Kimball, 109 Mich App 273, 286 (1981), mod on other grounds 412 Mich 890 (1981);3 People v Cross (Charles), 187 Mich App 204, 206 (1991).4

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1 See Chapter 2 for discussion of criminal sexual conduct offenses. See Chapter 3 for discussion of other related offenses.

2 Specific jury instructions are referenced where appropriate, but the text of specific jury instructions is not included in this benchbook.
Renunciation constitutes an affirmative defense to solicitation. MCL 750.157b(4). The requirements for each defense are in the following subsections.5

A. Voluntary Abandonment (Attempt Crimes)


The attempt statute’s use of the terms fail, prevented, and intercepted in the context of a defendant’s failure to complete the attempted offense indicates that involuntary abandonment is not a defense to criminal attempt. Kimball, 109 Mich App at 287.

Abandonment is not voluntary when:

“the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of detention or apprehension. Nor is the abandonment ‘voluntary’ when the defendant fails to consummate the attempted offense after deciding to

5 In Kimball, 109 Mich App at 283-286, the Court uses the terms voluntary abandonment and renunciation interchangeably with regard to the crime of attempt.

6 “[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.

7 For more information on criminal attempt and solicitation, see Section 3.7 and Section 3.33, respectively.

8 “[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.
postpone the criminal conduct until another time or to substitute another victim or another but similar objective.” *Kimball*, 109 Mich App at 286-287.

A victim’s entreaties or pleadings may constitute “unanticipated difficulties” or “unexpected resistance.” *People v McNeal*, 152 Mich App 404, 417 (1986), disagreed with on other grounds by *People v Jaffray*, 445 Mich 287 (1994),9, 10 (victim’s repeated appeals to let her go because she had tests to take at school and her promise not to tell anyone about the defendant’s criminal conduct amounted to “unanticipated difficulties” or “unexpected resistance” that negated the defendant’s claim of voluntary abandonment). “[I]t is no defense that a defendant fails to carry through to completion the crime attempted because of the intervention of outside forces, because circumstances turn out to be different than expected, or because the defendant meets more resistance than expected.” *Kimball*, 109 Mich App at 281.

See *Cross (Charles)*, 187 Mich App at 205, where the defendant was apprehended as he began climbing the prison’s inner fence in an attempt to escape. According to the Court, “abandonment is not voluntary where it is made in the face of apprehension or due to a realization that the attempted crime cannot successfully proceed. Indeed, to conclude otherwise would be to hold that a criminal who is caught in the act of committing a crime can avoid criminal punishment merely by ceasing the criminal attempt and surrendering to the authorities.” *Cross (Charles)*, 187 Mich App at 210.

See also *People v Stapf*, 155 Mich App 491, 495-496 (1986), where the defendant hid under a dock near a lake after he dragged a minor female into the woods in an attempt to kidnap her but let her go after she kicked, screamed, and hit him, and he saw a flash. According to the Court, “[the] defendant’s abandonment was not voluntary. . . . [The d]efendant’s actions in going to the lake and hiding under a dock reinforced the idea that he abandoned his attempt because he thought someone was coming and he feared getting caught. . . . [C]ircumstances which increase the probability of apprehension negate the voluntariness of abandonment.” *Stapf, supra* at 496.

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10[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
1. Burden of Proof

A defendant has the burden of proof to establish by a preponderance of the evidence a voluntary and complete abandonment of criminal purpose. Kimball, 109 Mich App at 286. A defendant must produce some evidence on all elements of an affirmative defense before the trial court is required to instruct the jury regarding the affirmative defense. See People v Lemons, 454 Mich 234, 248 (1997). Shifting the burden of proof to the defendant is not unconstitutional, because voluntary abandonment is an affirmative defense and does not negate an element of the offense. McNeal, 152 Mich App at 417-418; Kimball, 109 Mich App at 286 n 7.

2. Voluntary Abandonment Is a Jury Question

Whether voluntary abandonment has been established is a jury question, and any challenge to it goes to the weight of the evidence not the sufficiency of the evidence. McNeal, 152 Mich App at 415. However, if an affirmative defense is supported by the victim’s testimony or other prosecution evidence, a trial court may direct a verdict. Id. at 416.

B. Renunciation (Solicitation Crimes)

1. Statutory Authority

The renunciation defense applies to the statutory crime of solicitation.11 MCL 750.157b(4) states:

“It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this subsection.”

11 See M Crim JI 10.7, Renunciation as a Defense to Solicitation.
2. Pertinent Case Law

Unlike voluntary abandonment, the affirmative defense of renunciation, established in MCL 750.157b(4), requires the solicitor to:

“(1) notify the solicitee of the solicitor’s intent to renounce the crime and either (2)(a) warn and cooperate with law enforcement officials or (2)(b) engage in other substantial efforts to prevent the event solicited from occurring.” People v Crawford (Norman), 232 Mich App 608, 618 (1998).

The crime of “[s]olicitation is complete when the solicitation is made. A contingency in the plan may affect whether the [intended crime will be committed], but does not change the solicitor’s intent that the [intended crime be committed].” Crawford (Norman), 232 Mich App at 616. In Crawford (Norman), supra at 618, the Court of Appeals held that a defendant’s mere nonpayment of funds for soliciting the murder of a witness scheduled to testify at the defendant’s embezzlement trial, did not, without more, constitute notice of renunciation. The Court of Appeals determined that the “defendant’s mere nonpayment may be attributed to other reasons: that [the] defendant, though still intending that the witness die, was simply unable to obtain funds for the down payment; or . . . that [the] defendant’s nonpayment . . . represented an attempt to obtain something for nothing.” Id.

The Court further explained that “[MCL 750.]157b(4) requires renunciation ‘under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose,’ and because no such circumstances exist[ed in this case, the Court] conclude[d] that [the] defendant’s failure to make a down payment on the murder did not satisfy the required notice element of the renunciation defense.” Crawford (Norman), 232 Mich App at 618. In addition, the Court noted that even if the defendant’s nonpayment constituted notice, the “defendant completely failed to demonstrate any attempt to either warn or cooperate with law enforcement or engage in other substantial efforts to stop [the solicited murderer] from killing the witness.” Crawford (Norman), supra at 619.

4.4 Accident

A defendant may raise the defense of accident when he or she claims that an unintentional or accidental sexual contact or penetration occurred under what are normally thought to be lawful circumstances, such as
performing a medical procedure, bathing someone, or changing a child’s diaper.

Only one published case involves a defendant’s claim that the alleged CSC occurred accidentally—during a wrestling match with the defendant’s 13-year-old stepdaughter. *People v Legg*, 197 Mich App 131, 135 (1992). In *Legg*, supra, at 135, the defendant claimed that “his fingers might have went [sic] between [the victim’s] vagina lips” when the two were wrestling. However, the trial court “chose to disbelieve and disregard” the defendant’s accident defense because the “‘accident’ defense was entirely inconsistent with [the] complainant’s description of what happened [(complainant said she was awakened by the defendant while she was sleeping when he removed her underwear and touched her)].” *Id.*

### 4.5 Alibi

“Alibi testimony is testimony offered for the purpose of placing [the] defendant elsewhere than at the scene of the crime.” *People v Mott*, 140 Mich App 289, 292 (1985). The alibi defense itself has been coined a “hip pocket” defense, because it can be easily manufactured in the final hours of trial. *People v Travis*, 443 Mich 668, 676 n 8 (1993). In Michigan, MCL 768.20, known as the notice-of-alibi statute, governs the admission of alibi testimony.

#### A. Statutory Notice Requirements

MCL 768.20(1) states:

“If a defendant in a felony case proposes to offer in his [or her] defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his [or her] intention to claim that defense. The notice shall contain, as particularly as is known to the defendant or the defendant’s attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant’s notice shall include specific information as

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12 See *M Crim JI 7.3a*, Accident as Defense to Specific Intent Crime.

to the place at which the accused claims to have been at the time of the alleged offense.”

**MCL 768.20(2)** provides the notice requirements for naming rebuttal witnesses:

> “Within 10 days after the receipt of the defendant’s notice but not later than 5 days before the trial of the case, or at such other time as the court may direct, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal which shall contain, as particularly as is known to the prosecuting attorney, the names of the witnesses whom the prosecuting attorney proposes to call in rebuttal to controvert the defendant’s defense at the trial of the case.”

**MCL 768.20(3)** places the defendant and prosecutor under a continuing duty to “disclose promptly” the names of additional witnesses who come to either party’s attention after filing their respective notices under **MCL 768.20(1)** and **MCL 768.20(2)**. An additional witness may only be called to establish or rebut an alibi defense on a showing, in a motion with notice to the other party, that the witness was not available when the previous notices were filed and could not have been available by the exercise of due diligence. *Id.* “Due diligence is defined as doing everything reasonable, not everything possible.” *People v LeFlore* (*After Remand*), 122 Mich App 314, 319 (1983).

**MCL 768.20(1)-(2)** require notice of the names of prospective witnesses; they do not require that addresses or information regarding the nature of the testimony be provided. *Travis*, 443 Mich at 679.

**B. Burden of Proof**

“Although alibi is frequently characterized as a defense, it is in fact merely a rebuttal of the prosecution’s evidence. The defendant may not be required to ‘prove’ an alibi.” *People v Burden*, 395 Mich 462, 466 (1975).

“Testimony in support of an alibi may accomplish no more than the raising of a reasonable doubt as to the sufficiency of the proofs connecting an accused with the crime alleged or render such proofs unsatisfactory. If the testimony relative to an alibi serves such purpose[,] it creates a reasonable doubt as to the guilt of an accused. In other words, an alibi may fail as a substantive defense and yet serve to raise a reasonable doubt as to the guilt of an accused.” *Burden*, 395 Mich at 467-468, quoting *People v Marvill*, 236 Mich 595, 597 (1926).
“[T]he ‘defense’ of alibi offers the defendant two separate avenues of relief. First, if the alibi is established, a perfect defense has been shown. Perhaps more importantly, if any reasonable doubt exists as to the presence of the defendant at the scene of the crime at the time the offense was committed (if such presence is necessary to commit the crime), the defendant must also be acquitted.” *Burden*, 395 Mich at 467.

A defendant does not have the burden of proving his or her alibi defense beyond a reasonable doubt, but the defendant does “ha[ve] the burden of producing at least some evidence in support of his [or her] claim of alibi, possibly sufficient evidence to raise a reasonable doubt.” *People v Fiorini*, 85 Mich App 226, 229-230 (1978).

“While a defendant’s general denial of the charges against him [or her] does not constitute an alibi defense, if a defendant gives specific testimony regarding his [or her] whereabouts at the time in question, it is alibi testimony the same as if another witness had given the testimony.” *People v McGinnis*, 402 Mich 343, 346 (1978) (internal citations omitted). Even a defendant’s uncorroborated testimony as to his or her whereabouts entitles him or her to an instruction on the alibi defense.14 *McGinnis, supra* at 347.

Failing to give an unrequested alibi instruction is not reversible error, “so long as the court gives a proper instruction on the elements of the offense and on the requirement that the prosecution prove each element beyond a reasonable doubt.” *Burden*, 395 Mich at 467.

**C. Excluding Testimony When Notice Is Not Timely**

*MCL 768.21* requires a court to exclude testimony from a defendant’s alibi witness or the prosecution’s rebuttal witness when either party fails to comply with the notice requirements in *MCL 768.20*:

“(1) If the defendant fails to file and serve the written notice prescribed in [MCL 768.20], the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi . . . . If the notice given by the defendant does not state, as particularly as is known to the defendant or the defendant’s attorney, the name of a witness to be called in behalf of the defendant to establish a defense specified in [MCL 768.20], the court shall exclude the testimony of a witness which is

14 See *M Crim JI 7.4, Lack of Presence (Alibi).*
offered by the defendant for the purpose of establishing that defense.

(2) If the prosecuting attorney fails to file and serve a notice of rebuttal upon the defendant as provided in [MCL 768.20], the court shall exclude evidence offered by the prosecution in rebuttal to the defendant’s evidence relevant to a defense specified in [MCL 768.20]. If the notice given by the prosecuting attorney does not state, as particularly as is known to the prosecuting attorney, the name of a witness to be called in rebuttal of the defense of alibi . . . , the court shall exclude the testimony of a witness which is offered by the prosecuting attorney for the purpose of rebutting that defense.”

Notwithstanding the express language used in MCL 768.21 concerning the exclusion of certain witness testimony when notices are untimely, the Michigan Supreme Court concluded that a trial court retains discretion over the admission of such testimony because of the language used in MCL 768.20 to describe the notice requirements in cases where an alibi defense is raised. Travis, 443 Mich at 678-679. The Court determined “that the language ‘or at such other time as the court may direct’ [(appearing in MCL 768.20(1)-(2))] preserves the trial court’s discretion to fix the timeliness of notice in view of the circumstances.” Travis, supra at 679. Because the sanction in MCL 768.21 expressly refers to the notice requirements in MCL 768.20, “the sanction provision necessarily takes into account the words in [MCL 768.20] that grant discretion to the trial court (‘or at such other time as the court may direct’).” Travis, supra at 679 n 11.15

To properly exercise its discretion when determining whether to exclude alibi or rebuttal testimony for a failure to comply with the

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15 But see People v Seals, 285 Mich App 1, 20 (2009), where the defendant’s claim of ineffective assistance of counsel was based on his attorney’s failure to call any witnesses on his behalf. On appeal, the defendant attached affidavits of witnesses who might provide him with an alibi. Seals, supra at 20. No notice of the defendant’s alibi defense was ever filed and nothing in the lower court record suggested that the witnesses could provide an alibi, and the Court said simply, “If the defendant fails to file and serve the [required] written notice, the trial court is required [by MCL 768.21(1)] to exclude evidence offered by the defendant for the purpose of establishing an alibi.” Seals, supra at 20. Any apparent conflict between Seals and Travis is perhaps explained by the Seals defendant’s failure to file even an untimely notice of his intent to raise an alibi offense. Travis, 443 Mich at 679, clearly concludes that the discretion vested in the trial court by MCL 768.20(1) “preserves the trial court’s discretion to fix the timeliness of notice . . . .” Had the defendant in Seals attempted to file an untimely notice of alibi, the trial court had discretion whether to allow or disallow the defendant’s notice. Travis, supra at 679. However, in light of the Seals defendant’s failure to file any alibi notice at all, the Seals Court, supra at 20, relied on the plain language of MCL 768.21(1): “If the defendant fails to file and serve the written notice prescribed in [MCL 768.20], the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi . . . .”
notice requirements of MCL 768.20, a court should consider the following factors:

(1) The resulting amount of prejudice caused by a party’s failure to disclose;

(2) The reason(s) for nondisclosure;

(3) Whether and to what extent subsequent events may have mitigated the harm caused by nondisclosure;

(4) The weight of evidence properly admitted in support of the defendant’s guilt; and

(5) Other relevant factors arising from the circumstances of the case. Travis, 443 Mich at 682-683, adopting the factors enunciated in United States v Myers, 550 F2d 1036, 1043 (CA 5, 1977).

According to Travis, 443 Mich at 683,

“the Myers\(^{16}\) test provides an appropriate standard by which to judge the exercise of discretion vested in the trial court by our notice-of-alibi statute. This test takes into account not only the diligence of the prosecution, but also the conduct of the defendant and the degree of harm done to the defense. It tends to protect the prosecution in cases where the defendant is at fault or where the defendant suffers little or no prejudice. At the same time, it tends to protect the defendant when the conduct of the prosecution unfairly limits the defendant’s choice of trial strategy[.]”

Note: In Travis, 443 Mich at 681, the Court expressly “decline[d] to adopt due diligence, alone, as the controlling standard in judging the timeliness of alibi or rebuttal notice[,]” despite the phrase’s use in MCL 768.20(3).

D. Impeachment of Alibi Witnesses

A jury may be informed that a defendant’s alibi witness failed to come forward to inform the police of any exculpatory information; the prosecution is not required to establish a foundation for the admission of such evidence. People v Gray (Norman), 466 Mich 44, 47 (2002), citing People v Phillips (Arthur), 217 Mich App 489, 494 (1996).

\(^{16}\) United States v Myers, 550 F2d 1036 (CA 5, 1977).
In Gray (Norman), supra at 48, quoting Phillips (Arthur), supra at 495-496, the Court stated:

"A juror or other fact[-]finder is certainly qualified to consider whether offered reasons for an alibi witness'[s] delay in coming forward make sense, ring true, or are otherwise persuasive. The timeliness of an alibi account may be highly probative of its truthfulness; it may, in fact, be the best or only way to determine whether the alibi is credible. A witness should not be able to take the timeliness issue from the fact[-]finder by fabricating ‘good’ reasons for not coming forward earlier. We conclude that the trial court did not err in overruling defense counsel’s objections to the cross-examination questions at issue. The credibility of an alibi witness, regarding both the alibi account and the failure to come forward earlier with that account, should not be taken from the jury through the imposition of any special foundational requirement."

4.6 Confabulation

The dangers of confabulation (a possible result when a witness is hypnotized for the purpose of improving the witness’s memory of details about a crime) were summarized by the Michigan Supreme Court in People v Gonzales (Salvadore I), 415 Mich 615, 623-624 (1982), mod on other grounds People v Gonzales (Salvadore II), 417 Mich 1129 (1983):

"The hypnotic state is a condition of altered consciousness marked by heightened suggestibility. A subject in a hypnotic state may not have accurate recall. A hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended. Such suggestion may be transmitted either during the hypnotic session or before it by such persons as, in this case, the policemen investigating the killing. The person under hypnosis experiences a compelling desire to please either the hypnotist or others who have asked the person hypnotized to remember or who have urged that it is important that he or she remember certain events. The subject may produce the particular responses he [or she] believes are expected of him [or her]. In this state of hypersuggestibility and hypercompliance the subject will unconsciously create answers to the questions which the hypnotist asks if he [or she] cannot recount the details being sought. This process of filling the gaps of memory with fantasy is called confabulation. Neither the person hypnotized nor the expert observer can distinguish between
confabulation and accurate recall in any particular instance. Finally, a witness who is uncertain of his [or her] recollections before being hypnotized will become convinced through the process that the story he [or she] told under hypnosis is true and correct in every respect. This effect not only persists, but the witness’s conviction of the absolute truth of his [or her] hypnotically induced recollection grows stronger each time he [or she] is asked to repeat the story.”

Consequently, as a general rule, a witness’s testimony is inadmissible after he or she has undergone hypnosis for the purpose of improving the witness’s memory of the details about a crime. Gonzales (Salvadore I), 415 Mich at 626-627:

“The process of hypnosis is not a reliable means of accurately restoring forgotten incidents or repressed memory . . . . Therefore, we hold that until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy . . . , the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases.”

However, “a witness may testify regarding facts ‘‘demonstrably recalled prior to hypnosis.’’” People v Lee (Albert), 434 Mich 59, 72 (1990), quoting People v Nixon (Richard), 421 Mich 79, 90 (1984), quoting State v Collins, 132 Ariz 180, 210 (1982). “In order to ensure that the witness'[s] trial testimony is based solely on facts recalled and related prior to hypnosis, we hold that the party offering the testimony must establish its reliability by clear and convincing evidence.” Nixon (Richard), supra at 90.

“The use of statements obtained prior to hypnosis for substantive, impeachment, and other purposes is governed by the same rules applicable to other prior recorded statements. Statements obtained after hypnosis are inadmissible per se under Gonzales [(Salvadore I)], except as otherwise stated in this opinion [(a witness who has undergone hypnosis is permitted to testify to factual information the witness recalled before being hypnotized)] and in accordance with applicable evidentiary rules.” Nixon (Richard), 421 Mich at 91 n 3.

### 4.7 Consent

#### A. Applicability to Criminal Sexual Conduct Offenses

“The [CSC statutes are generally] silent on the defense of consent. However, th[e] Court [of Appeals] has previously stated that the [CSC] statute[s] impliedly comprehend[] that a willing, noncoerced
act of sexual intercourse between persons of sufficient age who are neither mentally defective, or incapacitated nor physically helpless is not criminal sexual conduct.” *People v Jansson*, 116 Mich App 674, 682 (1982). The defense of consent has generally been established by case law. In *People v Hearn*, 100 Mich App 749, 755 (1980), the Court of Appeals stated:

“Although the [CSC] statute[18] does not specifically address the defense of consent, its various provisions when considered together clearly imply the continuing validity of that defense. Certainly the Legislature, in eliminating the necessity of proof of nonconsent by the prosecution, did not intend to preclude an accused from alleging consent as a defense to the charge.” *Hearn*, 100 Mich App at 755.[19]

“[C]onsent . . . precludes conviction of criminal sexual conduct in the third degree by force and coercion[.]” *Jansson*, 116 Mich App at 682. However, nonconsent is not an independent element of a CSC offense based on force and coercion and need not be proven by the prosecutor. *Jansson*, supra at 682-683.

The defense of consent is an affirmative defense.20 *People v Thompson (Charles)*, 117 Mich App 522, 528 (1982) (CSC-I based on commission of an underlying felony – kidnapping). When a defendant produces sufficient evidence to give rise to the issue of a consent defense, the prosecutor must disprove the defense beyond a reasonable doubt. *Thompson (Charles)*, supra at 528.

Except for the offenses detailed in the next subsection, which involve victims who lack the legal capacity to consent, the defense of consent may be applied to all other CSC offenses, including those offenses with elements that contain the language “armed with a weapon.” *Hearn*, 100 Mich App at 753-755. Consent is not a defense to CSC-I under MCL 750.520b(1)(c) (penetration under circumstances involving the commission of any other felony) if

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17 “[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).

18 The CSC statute at issue in *Hearn*, 100 Mich App at 753, was MCL 750.520b(1)(e).

19 But see MCL 750.520e(1)(e), which specifically precludes consent as an affirmative defense to the offense of CSC-IV where the actor was a mental health professional, and the sexual contact occurs during or within two years after the victim was the actor’s client (and not the actor’s spouse).

20 See M Crim JI 20.27, Consent.
consent is not a valid defense to the underlying felony itself. *People v Wilkens*, 267 Mich App 728, 737 (2005). Consent is not a defense to the felony of producing child sexually abusive material, MCL 750.145c(2), and therefore, it is not a defense to MCL 750.520b(1)(c) under these circumstances. *Wilkens, supra* at 737-738.

In contrast, consent is a defense to MCL 750.520b(1)(c) based on the underlying felony of kidnapping, because consent is a defense to kidnapping. *Thompson (Charles)*, 117 Mich App at 525-526.

In *People v Waltonen*, 272 Mich App 678, 689 (2006), the Court of Appeals explained the consent defense in the context of a case involving sexual penetration during the commission of another felony:

“[T]he issue of consent relative to charges brought under [MCL 750.520b(1)(c)] can only arise in the context of the underlying felony because if a defendant successfully argues the existence of consent with respect to the underlying felony, assuming that consent is a legally recognizable defense, the prosecution cannot establish the second element of CSC[-]I pursuant to [MCL 750.520b(1)(c)].”

**B. Consent Defense Inapplicable to Certain CSC Offenses**

The consent defense does not apply to CSC offenses involving victims who lack the legal capacity to consent. In *People v Khan*, 80 Mich App 605, 619 n 5 (1978), the Court of Appeals observed that the consent defense applied only to consensual intercourse between individuals “of sufficient age” to consent to such conduct and who are not affected by mental or physical limitations. According to the Court:

“Although the statute is silent on the defense of consent, we believe it impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither ‘mentally defective,’[22] ‘mentally incapacitated,’ nor ‘physically helpless,’ is not criminal sexual conduct.” *Khan*, 80 Mich App at 619 n 5 (internal citations omitted).

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22 The *mentally defective* terminology has been deleted from the language in the CSC Act. In its place, the Legislature has added *intellectual disability, mental illness, mentally disabled*, and *mentally incapable*. See Sections 2.6(L), (P), (Q), and (R), respectively.
1. **Offenses Requiring Proof of Age**

   Because a person under the age of 16 is legally incapable of consenting to a sexual act, consent is inapplicable for all CSC offenses involving victims under the age of 16. *People v Starks*, 473 Mich 227, 235 (2005); *People v Cash*, 419 Mich 230, 247-248 (1984); see also *In re Tiemann*, 297 Mich App 250, 263 (2012) (rejecting “[the respondent’s] argument that MCL 750.520d violates public policy or is ambiguous with regard to prosecution of consenting minors engaging [in] sexual conduct[”]). Furthermore, the reasonable mistake-of-fact defense is inapplicable to these offenses because they do not contain the “knows or has reason to know” language that is necessary for such a defense.\(^{23}\)

Consent may not be raised as a defense to the following CSC offenses:

- **First-degree criminal sexual conduct** (penetration) when:
  - the victim is under age 13. MCL 750.520b(1)(a).
  - the victim is at least age 13 but less than age 16, and the actor is a member of the victim’s household. MCL 750.520b(1)(b)(i).
  - the victim is at least age 13 but less than age 16, and the actor is related to the victim by blood or affinity to the fourth degree. MCL 750.520b(1)(b)(ii).
  - the victim is at least age 13 but less than age 16, and the actor is in a position of authority over the victim and used his or her authority to coerce the victim to submit. MCL 750.520b(1)(b)(iii).
  - the victim is at least age 13 but less than age 16, and the actor is a teacher, substitute teacher, or administrator of the school, school district, or intermediate school district where the victim is enrolled. MCL 750.520b(1)(b)(iv).
  - the victim is at least age 13 but less than age 16, and the actor is an employee or contractual service provider of the school, school district, or intermediate school district where the victim is enrolled. MCL 750.520b(1)(b)(v).

\(^{23}\) See Section 4.11 for more information on this defense.
• the victim is at least age 13 but less than age 16, and the actor is a non-student volunteer in any school, an employee of the state of Michigan or a local unit of government of the state of Michigan or of the United States who is assigned to provide any service to the school, school district, or intermediate school district where the victim is enrolled and used his or her employee, contractual, or volunteer status to access or establish a relationship with the victim. MCL 750.520b(1)(b)(vi).

• the victim is at least 13 but less than 16, and “[t]he actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home,” where the victim is a resident and the sexual penetration occurred during the victim’s residency. MCL 750.520b(1)(b)(vi).

• Second-degree criminal sexual conduct (contact) when:
  • the victim is under age 13. MCL 750.520c(1)(a).
  • the victim is at least age 13 but less than age 16, and the actor is a member of the victim’s household. MCL 750.520c(1)(b)(i).
  • the victim is at least age 13 but less than age 16, and the actor is related to the victim by blood or affinity to the fourth degree. MCL 750.520c(1)(b)(ii).
  • the victim is at least age 13 but less than age 16, and the actor is in a position of authority over the victim and used his or her authority to coerce the victim to submit. MCL 750.520c(1)(b)(iii).
  • the victim is at least age 13 but less than age 16, and the actor is a teacher, substitute teacher, or administrator of the school, school district, or intermediate school district where the victim is enrolled. MCL 750.520c(1)(iv).
  • the victim is at least age 13 but less than age 16, and the actor is an employee or contractual service provider of the school, school district, or intermediate school district where the victim is enrolled. MCL 750.520c(1)(b)(v).
• the victim is at least age 13 but less than age 16, and the actor is a non-student volunteer in any school, an employee of the state of Michigan or a local unit of government of the state of Michigan or of the United States who is assigned to provide any service to the school, school district, or intermediate school district where the victim is enrolled and used his or her employee, contractual, or volunteer status to access or establish a relationship with the victim. MCL 750.520c(1)(b)(v).

• the victim is at least 13 but less than 16, and “[t]he actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home,” where the victim is a resident and the sexual contact occurred during the victim’s residency. MCL 750.520c(1)(b)(vi).

• **Third-degree criminal sexual conduct** (penetration) when:
  • the victim is at least age 13 but less than age 16. MCL 750.520d(1)(a).\(^{24}\)

• **Fourth-degree criminal sexual conduct** (contact) when:
  • the victim is at least age 13 but less than age 16, and the actor is five or more years older than the victim. MCL 750.520e(1)(a).

**Note:** A person may be charged with and convicted of a criminal sexual conduct offense under MCL 750.520b to MCL 750.520g, even when the victim is the person’s legal spouse. “However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16, mentally incapable, or mentally incapacitated.” MCL 750.520l.

2. **Offenses Requiring Proof That a Victim Has a Mental or Physical Disability**

Some provisions of the CSC Act require proof of a victim’s incapacity. A victim who has a *mental illness* or who is

\(^{24}\) MCL 750.520d does not conflict with MCL 28.722(w)(iv). *In re Tiemann*, 297 Mich App 250, 261 (2012) (rejecting the 15-year-old respondent’s assertion “that it would be irreconcilable if a defendant did not have to register under SORA after a finding of consent but would nonetheless remain convicted of consensual statutory rape[]”).
intellectually disabled, mentally disabled, mentally incapable, mentally incapacitated, or physically helpless\textsuperscript{25} is presumed legally incapable of consent under the CSC Act; accordingly, a consent defense is inapplicable to these offenses. In \textit{People v Davis (Clarence)}, 102 Mich App 403, 408 (1980), a CSC-III case involving the former \textit{mentally defective} element, the Court of Appeals stated as follows:

“The rationale behind statutes prohibiting sexual relations with mentally defective persons is that such persons are presumed to be incapable of truly consenting to the sexual act. This rationale remains just as cogent in light of the enactment of MCL 750.520d(1)(c).”\textsuperscript{26}

Consent may \textit{not} be raised as a defense to the following CSC offenses:

\begin{itemize}
  \item \textbf{First-degree criminal sexual conduct} (penetration) when:
    \begin{itemize}
      \item “[t]he actor is aided or abetted by 1 or more other persons[,] and . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520b(1)(d)(i).
      \item “[t]he actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520b(1)(g).
      \item “[t]hat other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and . . . [t]he actor is related to the victim by blood or affinity to the fourth degree . . . [or t]he actor is in a position of authority over the victim and used this authority to coerce the victim to submit.” MCL 750.520b(1)(h)(i)-(ii).
    \end{itemize}
  \item \textbf{Second-degree criminal sexual conduct} (contact) when:
\end{itemize}

\textsuperscript{25} See Section 2.6 for the definitions of these terms.
\textsuperscript{26} MCL 750.520d(1)(c) prohibits sexual penetration with an individual “[t]he actor knows or has reason to know . . . is mentally incapable, mentally incapacitated, or physically helpless.” (Emphasis added.)
• “[t]he actor is aided and abetted by 1 or more other persons[,] and . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520c(1)(d)(i).

• “[t]he actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520c(1)(g).

• “[the victim] is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and . . . [t]he actor is related to the victim by blood or affinity to the fourth degree. . . . [or t]he actor is in a position of authority over the victim and used this authority to coerce the victim to submit.” MCL 750.520c(1)(h)(i)-(ii).

• Third-degree criminal sexual conduct (penetration) when:

  • “[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520d(1)(c).

• Fourth-degree criminal sexual conduct (contact) when:

  • “[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520e(1)(c).

Note: A person may be charged with and convicted of a criminal sexual conduct offense under MCL 750.520b to MCL 750.520g, even when the victim is the person’s legal spouse. “However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16, mentally incapable, or mentally incapacitated.” MCL 750.520l.

3. Offense Requiring Proof of Professional Relationship Between Actor and Victim

Consent may not be raised as a defense to the following CSC offense:
• **Fourth-degree criminal sexual conduct** (contact) when:

  • “[t]he actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse.” MCL 750.520e(1)(e).

C. **Burden of Proof**

Once a defendant produces enough evidence to put consent in controversy, the prosecutor bears the burden of disproving consent beyond a reasonable doubt. *People v Thompson (Charles)*, 117 Mich App 522, 528 (1982) (kidnapping and CSC-I). To obtain a jury instruction on consent, a defendant must first produce enough evidence to put consent in controversy. See *Thompson (Charles)*, *supra* at 528-529.

“[T]he presence of consent is not necessarily the factual equivalent of the absence of coercion.” *People v Bayer*, 279 Mich App 49, 68 (2008) (victim was a patient of the defendant-psychiatrist), vacated in part on other grounds 482 Mich 1000 (2008).27, 28

D. **Jury Instructions on Consent**

When drafting instructions on consent, a trial court must be mindful not to impermissibly shift the burden of proof to the defendant. See *People v Ullah*, 216 Mich App 669, 677-678 (1996). In *Ullah*, the Court of Appeals approved a jury instruction “virtually identical to [M Crim JI 20.27],” which stated that if the jury found that the evidence of consent raised a reasonable doubt concerning whether the complainant consented freely and willingly, it “must find [the] defendant not guilty.” *Ullah*, *supra* at 677-678. The Court explained that the “instruction did not state that [the] defendant had the burden of proving or establishing a reasonable doubt. . . . [T]he instruction given . . . required acquittal if the jury found the evidence relating to consent raised a reasonable doubt concerning whether the complainant consented to the acts.” *Id.* at 678.

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27 The Michigan Supreme Court vacated “the portion of the judgment of the Court of Appeals that state[d] that medical testimony is required in all prosecutions under MCL 750.520b(1)(f)(iv).”

28 “A prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also *MCR 7.215(J)(1)*. However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
4.8 Duress

The duress defense is not often asserted in sexual assault cases, but it may arise in situations where the defendant, as an aider and abettor or conspirator to the sexual assault, or even as the principal, is threatened with imminent bodily harm or death by one of the perpetrators if he or she does not participate in the criminal sexual conduct.

“Duress is a common-law affirmative defense.”29 People v Lemons, 454 Mich 234, 245 (1997). If a duress defense is successful, it “excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act; the compulsion or duress overcomes the defendant’s free will and his actions lack the required mens rea.” People v Luther, 394 Mich 619, 622 (1975). However, duress may not be raised as a defense to all crimes. “Duress is an affirmative defense ‘applicable in situations where the crime committed avoids a greater harm.’” People v Ramsdell, 230 Mich App 386, 400-401 (1998) (noting that duress is not a defense to homicide), quoting Lemons, supra at 246.

Note: Duress is not the same as necessity. “‘The difference between the defenses of duress and necessity is that the source of compulsion for duress is the threatened conduct of another human being, while the source of compulsion for necessity is the presence of natural physical forces.’” People v Hubbard, 115 Mich App 73, 77 (1982), quoting People v Hocquard, 64 Mich App 331, 337 n 3 (1975).

A. Elements of Defense

A defendant must introduce some evidence to support the following elements of duress:

“‘A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

‘B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

‘C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

‘D) The defendant committed the act to avoid the threatened harm.’” Lemons, 454 Mich at 247, quoting Luther, 394 Mich at 623.

29 See M Crim Jl 7.6, Duress.
Note: Although not expressly noted in the elements above or in M Crim JI 7.6, “[a] mere threat of future injury is insufficient to support a defense of duress.” Ramsdell, 230 Mich App at 401. “Rather the threatened danger must be present, imminent, and impending.” Ramsdell, supra at 401. Additionally, the threatening conduct must not have arisen as a result of the negligence or fault of the person who relies on the defense of duress. Lemons, 454 Mich at 247; M Crim JI 7.6.

B. Factors That May Cause Forfeiture of a Duress Defense

A duress defense may be forfeited under the following circumstances:

- If the defendant fails to take advantage of a reasonable opportunity to escape, when escape could be accomplished without unduly exposing himself or herself to death or seriously bodily harm; and

- If the defendant fails to discontinue his or her conduct as soon as the alleged duress is no longer coercive. Lemons, 454 Mich at 247 n 18, citing 1 LaFave & Scott, Substantive Criminal Law, § 5.3, pp 619-620.

C. Burden of Proof

To properly raise the affirmative defense of duress, the defendant must introduce some evidence from which the jury could conclude that the elements of duress are satisfied. Luther, 394 Mich at 623. See also Lemons, 454 Mich at 248 (“‘[b]efore a defendant is entitled to an instruction on the defense of duress, he [or she] must establish a prima facie case of the . . . elements of that defense . . . .’”), quoting United States v Beltran-Rios, 878 F2d 1208, 1213 (CA 9, 1989). Once the defense is successfully raised, the prosecutor must prove beyond a reasonable doubt that the defendant did not act under duress. People v Terry (Parshall), 224 Mich App 447, 453-454 (1997).

4.9 Impossibility

“[T]he common-law defense of impossibility, . . . if proven[,] negates the actus reus of a crime.” People v Likine, 492 Mich 367, 392 (2012). “[A] defendant cannot be held criminally liable for failing to perform an act that was impossible for the defendant to perform[,] and w]hen it is genuinely impossible for a defendant to discharge a duty imposed by law, the defendant’s failure is excused.” Likine, supra at 396, 398 (holding that
“genuine impossibility is a defense to [a] charge of [the strict-liability offense of] felony nonsupport under MCL 750.165[)].”

“The doctrine of ‘impossibility’ as it has been discussed in the context of inchoate crimes represents the conceptual dilemma that arises when, because of the defendant’s mistake of fact or law, his actions could not possibly have resulted in the commission of the substantive crime underlying an attempt charge.” People v Thousand (Thousand II), 465 Mich 149, 156 (2001).30

However, impossibility is not a defense to the crime of attempt because all that is required for conviction of an attempted offense is that “the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be ‘impossible’ for the defendant to have committed the completed offense is simply irrelevant to the analysis.” Thousand II, 465 Mich at 166.

The Court in Thousand II, 465 Mich at 156-157, provided several concrete examples of the impossibility defense as it would operate to defeat completion of the following attempted offenses:

“Classic illustrations of the concept of impossibility include: (1) the defendant is prosecuted for attempted larceny after he [or she] tries to ‘pick’ the victim’s empty pocket; (2) the defendant is prosecuted for attempted rape after he tries to have nonconsensual intercourse, but is unsuccessful because he is impotent; (3) the defendant is prosecuted for attempting to receive stolen property where the property he [or she] received was not, in fact, stolen; and (4) the defendant is prosecuted for attempting to hunt deer out of season after he [or she] shoots at a stuffed decoy deer. In each of these examples, despite evidence of the defendant’s criminal intent, he [or she] cannot be prosecuted for the completed offense of larceny, rape, receiving stolen property, or hunting deer out of season, because proof of at least one element of each offense cannot be derived from his [or her] objective actions. The question, then, becomes whether the defendant can be prosecuted for the attempted offense, and the answer is dependent upon whether he [or she] may raise the defense of ‘impossibility.’”

In Thousand II, the fact that the defendant could not have completed the crime of distributing obscene matter to a minor because the “minor” with whom the defendant was communicating via the Internet was, in fact, a

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police detective, did not invalidate the charge against the defendant for attempted distribution of obscene matter to a minor.\textsuperscript{31} 

The defendant in \textit{Thousand II}, 465 Mich at 165. The impossibility resulting from the defendant’s mistake of fact regarding the identity and age of his intended victim was irrelevant to the attempt charge because the crime of attempt requires only that the defendant “attempt to commit an offense prohibited by law,” and that the defendant engage in “any act towards the commission of the intended offense.” \textit{Thousand II}, supra at 164.

According to the Court, “[t]he attempt statute carves out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception.” \textit{Thousand II}, 465 Mich at 165.

### 4.10 Mental Status: Insanity, Guilty But Mentally Ill, and Involuntary Intoxication

#### A. Insanity Defense

MCL 768.21a(1) governs the test for criminal insanity:

“It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in . . . MCL 330.1400, or as a result of having an intellectual disability as defined in . . . MCL 330.1100b, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness having an intellectual disability does not otherwise constitute a defense of legal insanity.”\textsuperscript{34} (Emphases added.)

\textit{Mental illness}, as defined in MCL 330.1400(g), is:

\textsuperscript{31} The defendant in \textit{Thousand II} was charged under the general attempt statute, MCL 750.92, for attempting to engage in conduct prohibited by MCL 722.675, distribution of obscene material to a minor.

\textsuperscript{32} The former diminished capacity defense was abrogated by \textit{People v Carpenter (James)}, 464 Mich 223 (2001). However, this holding may not be applied retroactively. \textit{Lancaster v Metrish}, 683 F3d 740, 742, 744-754 (CA 6, 2012) (because the defense of diminished capacity was well-established and its abolition was unforeseeable when the petitioner committed his crime, the retroactive application of \textit{Carpenter (James)}, supra, was objectively unreasonable).

\textsuperscript{33} See \textit{M Crim JI} 7.11, \textit{Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof}.

\textsuperscript{34} See \textit{M Crim JI} 7.9, \textit{The Meanings of Mental Illness, Intellectual Disability and Legal Insanity}.
“a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”

Intellectual disability, as defined in MCL 330.1100b(12), is:

“a condition manifesting before the age of 18 years that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

(a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.

(b) The existence of limitation in adaptive skills occurs within the context of community environments typical of the individual’s age peers and is indexed to the individual’s particular needs for support.

(c) Specific adaptive skill limitations often coexist with strengths in other adaptive skills or other personal capabilities.

(d) With appropriate supports over a sustained period, the life functioning of the individual with an intellectual disability will generally improve.”

Michigan’s insanity defense is a two-pronged test assessing a mentally ill or intellectually disabled defendant’s cognitive ability to appreciate the nature and quality or wrongfulness of his or her conduct as well as the defendant’s volitional ability to conform his or her conduct to the requirements of the law. People v Jackson (Damon), 245 Mich App 17, 23-24 (2001), citing M Crim JI 7.11(6). The phrase in MCL 768.21a, “substantial capacity,” modifies both the cognitive and volitional prongs of a defendant’s insanity defense. Jackson (Damon), supra at 20 n 3. See also People v Carpenter (James), 464 Mich 223, 230-231 (2001).

35 The same definition of mental illness also appears in MCL 330.2001a(5).

36 “[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).
“[I]nsanity is a defense to all crimes, including general intent and strict liability offenses.” People v Moore (Eric), 497 Mich 1043, 1043 (2015) (citing MCL 768.21a and noting that “the Court of Appeals [in People v Moore (Eric), unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 315193),] misinterpreted” People v Carpenter (James), 464 Mich 223 (2001), “in stating that insanity is not a defense to general intent crimes[.]”)

1. Retroactive Application


2. Notice Requirements

A defendant in a felony case who intends to raise the affirmative defense of insanity must serve a written notice on the court and on the prosecutor of his or her intent no more than 30 days before the trial date, or at such other time as the court directs. MCL 768.20a(1); Carpenter (James), 464 Mich at 231.

3. Examination Requirements

After a defendant provides proper notice of his or her intent to assert an insanity defense, the court must order the defendant to submit to an examination by the forensic psychiatry center or other qualified personnel for a period of not more than 60 days from the date of the court order. MCL 768.20a(2).

a. Incarcerated Defendants

If a defendant is incarcerated pending his or her trial, the examination may be conducted in jail, or the qualified personnel assigned to conduct the examination may have the defendant transported to the facility used by the qualified examiner to conduct the examination. MCL 768.20a(2). The defendant must be returned to jail after the examination is completed. Id.

37 The 1994 amendment to MCL 768.21a “eliminated the prosecution’s burden of proving sanity beyond a reasonable doubt and placed on [the] defendant the burden of proving he [or she] was insane by a preponderance of the evidence, thus permitting the prosecution to convict on less evidence.” McRunels, 237 Mich App at 171.
b. Defendants Who Are Not Incarcerated

A defendant who is out on bail or otherwise not incarcerated pending trial must make himself or herself available for the court-ordered examination at the location and time set by the qualified examiner for the examination. MCL 768.20a(2). The court, without a hearing, may order a defendant who was not incarcerated pending trial to be committed to the center for forensic psychiatry if the defendant received notice of the time and place for the examination and fails to present himself or herself for the examination. *Id.*

c. Independent Examinations

At his or her own expense, a defendant may have an independent psychiatric evaluation conducted by a clinician chosen by the defendant on the issue of his or her insanity at the time of the offense. MCL 768.20a(3). If a defendant is indigent, and on a showing of good cause, the court may order the county to pay for a defendant’s independent psychiatric evaluation. *Id.* If a defendant intends to have an independent psychiatric evaluation, he or she must notify the prosecutor at least five days before the evaluation is scheduled. *Id.* The prosecution may also obtain an independent psychiatric evaluation of the defendant. *Id.* An indigent defendant’s clinician of choice is entitled to be paid a reasonable fee approved by the court. *Id.*

A trial court may properly deny a defendant’s untimely request for an independent examination. *People v Smith (Clifford),* 103 Mich App 209, 210-211 (1981) (trial court did not abuse its discretion in denying the defendant’s request for an independent examination when the defendant made the request on the day of trial).

d. Defendant Must Cooperate with Examination

A defendant must cooperate fully with the qualified clinician who conducts his or her examination, as well as with any independent examiners selected by the defendant and prosecution. MCL 768.20a(4). If a defendant fails to cooperate with the examination, and at a hearing held before trial, the court is satisfied that the defendant failed to cooperate, the defendant must not be permitted to introduce at trial any testimony related to his
or her sanity. *Id.* See also *People v Hayes (Larry)*, 421 Mich 271, 282-283 (1985).

e. **Psychiatric Examination Report and Rebuttal Notice**

After completion of a defendant’s examination by the center for forensic psychiatry, other qualified personnel, or an independent examiner, the clinician(s) who conducted the examination must prepare and submit a written report to the prosecution and the defendant’s counsel. MCL 768.20a(6). The written report must contain:

“(a) The clinical findings of the center, the qualified personnel, or any independent examiner.

(b) The facts, in reasonable detail, upon which the findings were based.

(c) The opinion of the center or qualified personnel, and the independent examiner on the issue of the defendant’s insanity at the time the alleged offense was committed and whether the defendant was mentally ill or intellectually disabled at the time the alleged offense was committed.” MCL 768.20a(6).

Within ten days of receiving the forensic center’s or qualified personnel’s report, or within ten days of receiving the report from the prosecutor’s independent examiner, whichever occurs later, but not less than five days before trial or at such other time directed by the court, the prosecutor must file and serve the defendant with notice that the prosecution intends to rebut the insanity defense. MCL 768.20a(7). The notice must contain the names of the witnesses the prosecution may call to rebut the defendant’s insanity defense. *Id.*

f. **Defendant’s Statements Made During Examination Are Not Admissible at Trial**

“Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other
than his or her mental illness or insanity at the time of the alleged offense.” MCL 768.20a(5).

A defendant’s statements made during a psychiatric examination are not admissible for impeachment purposes. People v Toma, 462 Mich 281, 293 (2000). The Toma Court “express[ed] no opinion . . . on whether MCL 768.20a(5) requires a court to sit by while testimony known to the court to be perjury is introduced.” Toma, supra at 293 n 7. The Court did note, however, that it “ha[s] previously stated that a defendant has ‘no right, constitutional or otherwise, to testify falsely . . . .’” Id., quoting People v Adams (Steven), 430 Mich 679, 694 (1988).

g. Sanctions for Noncompliance with Notice and Examination Requirements

• Defendant’s noncompliance.

The court must exclude a defense witness’s testimony intended to establish the defendant’s insanity if the defendant has failed to comply with the notice requirements of MCL 768.20a(1). MCL 768.21(1). The court must exclude a defense witness’s testimony if a defendant’s notice fails to state, “as particularly as is known to the defendant or the defendant’s attorney,” the name of any witness the defendant intends to call in order to establish an insanity defense. Id.

• Prosecution’s noncompliance.

The court must exclude the prosecution’s rebuttal evidence if the prosecution fails to comply with the requirements for notice of rebuttal in MCL 768.20a(7). MCL 768.21(2). If the prosecution’s notice of rebuttal fails to state, “as particularly as is known to the prosecuting attorney,” the name of any witness the prosecution intends to call to rebut the defendant’s claim of insanity, the witness’s testimony must be excluded. Id.

• Noncompliance may not always result in the exclusion of testimony.

Strict compliance with the statutory notice requirements regarding an insanity defense may not always result in the exclusion of witness testimony when the parties have actual notice of witnesses who may be called at trial and no surprise will result from the parties’ noncompliance.38
In addition, MCL 768.20a contains the same language concerning a defendant’s insanity defense as does MCL 768.20 concerning a defendant’s alibi defense. Both statutes permit a trial court to exercise its discretion to accept notice of a party’s alibi or insanity defense at a time later than the time expressly indicated in the relevant statutory language. MCL 768.20a directs a defendant in a felony case to file notice of his or her intention to present testimony in support of his or her insanity defense “not less than 30 days before the date set for the trial of the case, or at such other time as the court directs.” MCL 768.20a(1) (emphasis added). MCL 768.20(1) also requires a defendant to provide notice within a specific time frame, “or at such other time as the court directs,” of his or her intent to present an alibi defense.

In People v Travis, 443 Mich 668, 679 (1993), the Michigan Supreme Court concluded “that the language ‘or at such other time as the court may direct’ preserves the trial court’s discretion to fix the timeliness of notice in view of the circumstances.” The Travis Court further explained that because the sanction in MCL 768.21 expressly refers to the notice requirements in MCL 768.20, “the sanction provision necessarily takes into account the words in [MCL 768.20] that grant discretion to the trial court (‘or at such other time as the court may direct’).” Travis, supra at 679 n 11.  

38 See e.g., People v Blue, 428 Mich 684, 690 (1987) (defendant was not entitled to set aside plea of guilty but mentally ill on the basis that he did not provide written notice under MCL 768.20a because he did provide actual notice by orally petitioning the court for a psychiatric examination).

39 See Section 4.5(A) and Section 4.5(C).

40 But see People v Seals, 285 Mich App 1, 20 (2009) (alibi defense), where the defendant’s claim of ineffective assistance of counsel was based on his attorney’s failure to call any witnesses on his behalf. On appeal, the defendant attached affidavits of witnesses who might provide him with an alibi. Seals, supra at 20. No notice of the defendant’s alibi defense was ever filed and nothing in the lower court record suggested that the witnesses could provide an alibi, and the Court said simply, “If the defendant fails to file and serve the [required] written notice, the trial court is required [by MCL 768.21(1)] to exclude evidence offered by the defendant for the purpose of establishing an alibi.” Seals, supra at 20. Any apparent conflict between Seals and Travis is perhaps explained by the Seals defendant’s failure to file even an untimely notice of his intent to raise an alibi offense. Travis, 443 Mich at 679, clearly concludes that the discretion vested in the trial court by MCL 768.20(1) “preserves the trial court’s discretion to fix the timeliness of notice . . . .” Had the defendant in Seals attempted to file an untimely notice of alibi, the trial court had discretion whether to allow or disallow the defendant’s notice. Travis, supra at 679. However, in light of the Seals defendant’s failure to file any alibi notice at all, the Seals Court, supra at 20, relied on the plain language of MCL 768.21(1): “If the defendant fails to file and serve the written notice prescribed in [MCL 768.20], the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi . . . .”

It is unclear whether and to what extent the Seals holding would apply to a situation involving MCL 768.20a.
The *Travis* Court, 443 Mich at 682-683, provided several factors a trial court should consider when exercising the discretion authorized by MCL 768.20 (and by extension, MCL 768.20a) when deciding whether to admit or exclude testimony offered by a defendant who failed to comply with the notice requirements in MCL 768.20 (and by extension, MCL 768.20a). According to the *Travis* Court, a trial court should consider the following factors when determining whether to admit testimony under such circumstances:

1. the amount of prejudice caused by a party’s noncompliance with the notice requirements;
2. the party’s reason(s) for failure to comply with the notice requirements;
3. whether subsequent events may have mitigated the harm resulting from the failure to comply and to what extent those events may have mitigated the harm;
4. the weight of evidence properly admitted in support of the defendant’s guilt; and

### 4. Burden of Proof

MCL 768.21a(3) requires the defendant to prove by a preponderance of the evidence that he or she:

- has a mental illness or
- has an intellectual disability, and

as a result of his or her mental condition, the defendant

- lacked substantial cognitive capacity to appreciate the nature and quality or the wrongfulness of his or her conduct, or

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41 See M Crim JI 7.11, *Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof*. 
- lacked the substantial volitional capacity to conform his or her conduct to the requirements of the law. See MCL 768.21a(1).

5. “Policeman at the Elbow” Standard

When considering the volitional prong of the insanity defense, trial courts may use what is known as the “policeman at the elbow” standard. *Jackson (Damon)*, 245 Mich App at 21-25. The *policeman at the elbow* standard is “one of many avenues of inquiry” the court may allow to show whether a defendant had substantial capacity to control his or her conduct. *Jackson (Damon)*, *supra* at 21. This standard asks whether the defendant would have committed the crime if there had been a policeman at his or her elbow, i.e., whether a defendant could refrain from committing the crime “even if faced with immediate capture and punishment[.]” *Id.* at 21.

“If it is approached as being one of many avenues of inquiry, the hypothetical [of the *policeman at the elbow* standard] is directly probative of one dimension of a defendant’s capacity to control his [or her] conduct as required by law. Certainly, if credible testimony offered by a defendant establishes that he [or she] could not refrain from acting even if faced with immediate capture and punishment, then the defendant would have gone a long way toward establishing that he [or she] lacked the requisite substantial capacity to conform to requirements of the law. The converse, however, is not true. A defendant who could resist until the threat posed by a policeman had passed does not necessarily possess the capacity to conform. Nonetheless, if it so chooses, the prosecution must be allowed to explore the depths of [a] defendant’s alleged incapacity by posing the ‘policeman at the elbow’ hypothetical inasmuch as the question is probative of a defendant’s ability to conform to the requirements of the law under the most extreme circumstance of immediate capture and punishment.” *Jackson (Damon)*, 245 Mich App at 21-22.

6. Voluntary Intoxication

Voluntary intoxication alone is not sufficient to support a defendant’s claim of legal insanity.42 *Carpenter (James)*, 464 Mich at 231 n 5. MCL 768.21a(2) states:
“An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.”

However, an insanity defense might be properly raised “if the [defendant’s] voluntary continued use of mind-altering substances results in a settled condition of insanity before, during, and after the alleged offense.” People v Caulley, 197 Mich App 177, 187 n 3 (1992), citing People v Conrad (Glenn), 148 Mich App 433, 438 (1986) (“The [insanity] statute . . . does not automatically preclude for all time the assertion of an insanity defense if a person is rendered insane by the voluntary ingestion of a drug.”). See also People v Matulonis, 115 Mich App 263, 267 (1982) (“[L]ong term voluntary intoxication resulting in physical brain deterioration could form the basis of a viable insanity defense.”).

7. Jury Instructions

MCL 768.29a(1) governs the trial court’s delivery of jury instructions in cases involving the insanity defense:

“If the defendant asserts a defense of insanity in a criminal action which is tried before a jury, the judge shall, before testimony is presented on that issue, instruct the jury on the law as contained in [MCL 330.1400a] and [MCL 330.1500(g)] and in [MCL 768.21a].”

Note: MCL 768.29a(1) references MCL 330.1400a for the definition of mental illness. However, MCL 330.1400a was repealed by 1995 PA 290. Mental illness is defined in MCL 330.1400(g). Mette, 243 Mich App at 325. MCL 768.29a(1) also references MCL 330.1500 for

42 See M Crim JI 7.10, Person Under the Influence of Alcohol or Controlled Substances.

43 Although Caulley, 197 Mich App 177, Conrad (Glenn), 148 Mich App 433, and Matulonis, 115 Mich App 263, were decided before a 1994 amendment to MCL 768.21a(2) added the language “solely because of being under the influence of the alcohol or controlled substances,” the amended language appears to incorporate the intention of the appellate panels that considered the issue of a defendant’s voluntary intoxication and the defendant’s claim that his or her voluntary intoxication rendered the defendant legally insane at the time of the offense. No cases have been published since MCL 768.21(2) was amended.

44 See M Crim JI 7.9, The Meanings of Mental Illness, Intellectual Disability and Legal Insanity; M Crim JI 7.11, Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof; M Crim JI 7.13, Insanity at the Time of the Crime; and M Crim JI 7.14, Permanent or Temporary Insanity.
the definition of *mentally retarded*. However, the term *mentally retarded* has been replaced by the term *intellectual disability*, which is now defined in MCL 330.1100b(12). MCL 768.21a(1) also references to MCL 330.1100b(12) for the definition of *intellectual disability*.

**B. Guilty But Mentally Ill**

Michigan’s insanity defense is an all or nothing defense. *Carpenter (James)*, 464 Mich at 237. A person who is mentally ill or mentally retarded but who is not legally insane may be found *guilty but mentally ill* of a charged offense. *Carpenter (James)*, supra at 237.

A defendant who is found *guilty but mentally ill* “must be sentenced in the same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment.” MCL 768.36(3). Through this statutory provision, the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent.” *Carpenter (James)*, 464 Mich at 237.

MCL 768.36 sets forth the requirements for, and the consequences of, finding an individual *guilty but mentally ill*. A guilty but mentally ill person is an individual who, although mentally ill at the time the offense was committed, was not legally insane.

MCL 768.36(1) states:

“If the defendant asserts a defense of insanity in compliance with [MCL 768.20a], the defendant may be found ‘guilty but mentally ill’ if, after trial, the trier of fact finds all of the following:

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45 Since the holding in *People v Carpenter (James)*, 464 Mich 223 (2001), the term *mentally retarded* found in MCL 768.36(3) has been replaced with the term *intellectual disability*. See 2014 PA 76, effective March 28, 2014.

46 The diminished capacity defense, formerly part of the insanity defense, was abrogated. *Carpenter (James)*, 464 Mich at 236-237. However, this holding may not be applied retroactively. *Lancaster v Metrish*, 683 F3d 740, 742, 744-754 (CA 6, 2012) (because the defense of diminished capacity was well-established and its abolition was unforeseeable when the petitioner committed his crime, the retroactive application of *Carpenter (James)*, supra, was objectively unreasonable).

47 *Carpenter (James)*, 464 Mich at 237, holding that diminished capacity is not a cognizable defense, may not be applied retroactively. *Lancaster v Metrish*, 683 F3d 740, 742, 744-754 (CA 6, 2012) (because the defense of diminished capacity was well-established and its abolition was unforeseeable when the petitioner committed his crime, the retroactive application of *Carpenter (James)*, supra, was objectively unreasonable).
(a) The defendant is guilty beyond a reasonable doubt of an offense.

(b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.

(c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.”

1. **Accepting Unconditional Plea of *Guilty But Mentally Ill***

With the consent of the court and prosecutor, a defendant may plead *guilty but mentally ill*. MCR 6.301(C)(1). See also MCL 768.36(2). However, before the court accepts such a plea, the defendant must first undergo a psychiatric examination pursuant to the requirements in MCL 768.20a. MCR 6.301(C)(1). See also MCL 768.36(2). The defendant must further comply with the requirements of MCL 768.36.

MCR 6.303 details the procedure for accepting a plea of *guilty but mentally ill*:

> “Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or [MCR 6.302](D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill, at the time of the offense to which the plea is entered. The reports must be made a part of the record.” See also MCL 768.36(2).

2. **Accepting Conditional Plea of *Guilty But Mentally Ill***

With the consent of the court and prosecutor, a defendant may enter a conditional plea of *guilty but mentally ill*. MCR 6.301(C)(2). “A conditional plea preserves for appeal a

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48 Under MCL 768.36(2), a judge is not entitled to examine the psychiatric reports unless the defendant consents.
specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal.” *Id.* The defendant must, orally or in writing, specify on the record the ruling or rulings that he or she reserves the right to appeal. *Id.*

### 3. Jury Instructions49

After trial, and if supported by the evidence, a jury instructed on the insanity defense must also be instructed on the definition of *guilty but mentally ill* as an alternative verdict.50 MCL 768.29a(2) states:

“At the conclusion of the trial, where warranted by the evidence, the charge to the jury shall contain instructions that it shall consider separately the issues of the presence or absence of mental illness and the presence or absence of legal insanity and shall also contain instructions as to the verdicts of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty with regard to the offense or offenses charged and, as required by law, any lesser included offenses.” (Emphasis added.)

### 4. Sentencing Considerations51

If the defendant is found *guilty but mentally ill* or the court accepts a defendant’s plea of *guilty but mentally ill*, the trial court must “impose any sentence that could be imposed by law upon a defendant who is convicted of the same offense.” MCL 768.36(3). See also *Carpenter (James)*, 464 Mich at 237 (defendant “must be sentenced in the same manner as any other defendant committing the same offense and [is] subject to psychiatric evaluation and treatment” by the Department of Corrections (DOC) or the Department of Community Health (DCH), as described in MCL 768.36(3)).

If a defendant who is found *guilty but mentally ill* is sentenced to incarceration under the jurisdiction of the DOC, he or she must “undergo further evaluation and be given such treatment as is psychiatrically indicated for his or her mental illness or

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49 See M Crim JI 7.9, *The Meanings of Mental Illness, Intellectual Disability and Legal Insanity; M Crim JI 7.11, Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof; M Crim JI 7.13, Insanity at the Time of the Crime; and M Crim JI 7.14, Permanent or Temporary Insanity.*

50 See M Crim JI 7.12, *Definition of Guilty but Mentally Ill.*

51 See MCL 768.36(2), MCL 768.36(3), and MCL 768.36(4) for detailed sentencing information.
intellectual disability[,]” administered by either the DOC or the DCH, as provided by law. MCL 768.36(3). If the defendant is paroled, “the defendant’s treatment shall, upon recommendation of the treating facility, be made a condition of parole. Failure to continue treatment except by agreement with the designated facility and parole board is grounds for revocation of parole.” Id.

If a defendant who is found guilty but mentally ill is placed on probation under the sentencing court’s jurisdiction, the trial judge must, upon recommendation of the Center for Forensic Psychiatry, make treatment a condition of probation. MCL 768.36(4). Unless the treating agency and the sentencing court agree to the defendant’s discontinuation of treatment, a defendant’s failure to continue treatment may result in revocation of his or her probation. Id. Furthermore, the period of probation must not be for less than five years and must not be shortened without the sentencing court’s receipt and consideration of a forensic psychiatric report. Id.

C. Involuntary Intoxication

“Intoxication has been defined as a ‘disturbance of mental or physical capacities resulting from the introduction of any substance into the body.’” Caulley, 197 Mich App at 187, quoting People v Low, 732 P2d 622, 627 (Colo, 1987). “‘Involuntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant.’” Caulley, supra at 187 (defendant murdered his wife after ingesting a prescription medication in doses larger than prescribed), quoting Low, supra at 627.

When a defendant asserts that he or she was involuntarily intoxicated at the time of an offense, the defendant has effectively raised an insanity defense, because “involuntary intoxication is a defense included within the ambit of the insanity defense.”52 People v Wilkins (David), 184 Mich App 443, 449 (1990) (defendant who was

52 Generally, “an individual who is voluntarily intoxicated does not have grounds for an absolute defense based upon his [or her] insanity.” Caulley, 197 Mich App at 187 (emphasis added). See MCL 768.37(1), a statute that expressly states that voluntary intoxication is not a defense to any crime, subject to the exception made in MCL 768.37(2) for specific intent crimes. However, voluntary intoxication may support an insanity defense “if the voluntary continued use of mind-altering substances results in a settled condition of insanity before, during, and after the alleged offense.” Caulley, supra at 187 n 3. “[A] settled condition of insanity caused by drug abuse, even if temporary in nature, may nevertheless be legal insanity if the condition was not limited merely to periods of intoxication.” People v Conrad (Glenn), 148 Mich App 433, 439 (1986) (defendant murdered his brother after smoking PCP on several occasions before the offense, and defendant’s mental condition deteriorated both before and after the murder). See Section 4.13 for a discussion of voluntary intoxication.
convicted of vehicular manslaughter claimed he was temporarily insane at the time of the collision as a result of involuntary intoxication caused by the combined effect of alcohol and prescription medication).

“[T]he defense of involuntary intoxication is part of the defense of insanity when the chemical effects of drugs or alcohol render the defendant temporarily insane.” Caulley, 197 Mich App at 187, citing Wilkins (David), 184 Mich App at 448-449. A defendant claiming involuntary intoxication as a defense must “demonstrate that the involuntary use of drugs created a state of mind equivalent to insanity.” Caulley, supra at 187. Because the involuntary intoxication defense is evaluated in terms of the insanity defense, the same procedural requirements apply, and a defendant must give notice of his or her intention to assert a defense of involuntary intoxication within the statutory time limits prescribed for raising an insanity defense (notice must be provided to the court and to the prosecution not less than 30 days before trial or at such other time directed by the court, MCL 768.20a(1)). Wilkins (David), supra at 449-450.

To prove involuntary intoxication in cases involving prescription medication, three things must be established:

- First, the defendant must prove that he or she “[did] not know or have reason to know that the prescribed drug [was] likely to have the intoxicating effect.” Caulley, 197 Mich App at 188.

- Second, the defendant’s intoxication must have been caused by the prescribed drug and not another intoxicant. Caulley, supra at 188.

- Third, the defendant must show that he or she was rendered temporarily insane as a result of his or her intoxicated condition. Id.

Where a defendant has successfully established these three things, the jury must be properly instructed on the issue of involuntary intoxication and insanity.53 In general,

“the trial court must instruct the jury that if it determines that [the] defendant was involuntarily intoxicated as a result of ingesting a prescription drug . . . without knowledge of its side effects, the jury can then assess whether because of this involuntary

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53 See M Crim JI 7.10, Person Under the Influence of Alcohol or Controlled Substances. See also M Crim JI 7.9, The Meanings of Mental Illness, Intellectual Disability and Legal Insanity; M Crim JI 7.11, Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof; M Crim JI 7.13, Insanity at the Time of the Crime; and M Crim JI 7.14, Permanent or Temporary Insanity.
intoxication [the] defendant lacked the capacity to conform his [or her] conduct to the requirements of the law. The court should formulate instructions that will clarify that it is for the jury to decide, on the basis of the evidence, whether [the] defendant was intoxicated, whether the intoxication was voluntary or involuntary, and what effect, if any, the intoxication had on [the] defendant’s mental condition. If the jury finds that [the] defendant was involuntarily intoxicated, then it may consider whether that could cause mental illness or legal insanity, as the court [defines] those terms.” Caulley, 197 Mich App at 189-190.

4.11 Mistake of Fact

A. Offenses Requiring Proof That a Victim Has a Mental or Physical Disability

The mistake-of-fact defense applies to CSC offenses that reference a victim’s mental or physical condition if the statutory language requires that the defendant knows or has reason to know of the victim’s condition. Because criminal culpability in such cases depends on whether a defendant knows or has reason to know of the victim’s mental or physical condition, a defendant who makes a reasonable mistake as to the victim’s mental or physical condition may not be criminally liable for his or her conduct. People v Davis (Clarence), 102 Mich App 403, 406-407 (1980).

Davis (Clarence), supra, appears to be the sole published case dealing with the knows or has reason to know component of MCL 750.520d(1)(c). However, the facts in Davis (Clarence), supra, do not provide a clear application of the statutory language to the defendant’s conduct with the victim in that case (defendant was highly intoxicated at the time he picked up a woman wandering on the grounds of a state mental institution and offered to drive her back to her ward).54

However, the Court in Davis (Clarence), 102 Mich App at 406-407, discussed the Legislative intent behind the knows or has reason to know language appearing in MCL 750.520d(1)(c):

54 The Davis (Clarence) Court discussed the knows or has reason to know statutory language only in the context of the defendant’s claim that the language in MCL 750.520d(1)(c) “imposes a specific intent element which must be established in order to sustain a conviction.” Davis (Clarence), 102 Mich App at 406. Based on his assertion that MCL 750.520d(1)(c) required specific intent, the defendant contended that the jury should have been instructed that “his intoxication could be a defense to the crime if his drunken state precluded him from knowing or having reason to know that the victim was mentally defective.” Davis (Clarence), supra at 406.
“It is our belief that by including the ‘knows or has reason to know’ language, the Legislature did not desire to excuse a defendant who is unreasonable in his conclusion that the victim could consent to the sexual penetration. Rather, we believe that the Legislature was desirous of protecting individuals who have sexual relations with a partner who appears mentally sound, only to find out later that this is not the case. A mental illness which renders a person ‘mentally defective’ [55] within the meaning of MCL 750.520a(c) . . . is not necessarily always apparent to the world at large. . . . We are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons.” (Emphasis added.)

The reasoning of the Court in Davis (Clarence), 102 Mich App at 406-407, likely applies by extension to the following CSC crimes involving a victim’s mental or physical condition:

• **First-degree criminal sexual conduct** (penetration) and **second-degree criminal sexual conduct** (contact):
  
  • The actor engages in sexual penetration or contact with the victim and is aided or abetted by one or more other persons, and “[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520b(1)(d)(i) (CSC-I); MCL 750.520c(1)(d)(i) (CSC-II).

  • The actor engages in sexual penetration or contact with, and causes personal injury to, the victim, “and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520b(1)(g) (CSC-I); and MCL 750.520c(1)(g) (CSC-II).

• **Third-degree criminal sexual conduct** (penetration):

  • The actor engages in sexual penetration with the victim, and “[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520d(1)(c).

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55 At the time Davis (Clarence), 102 Mich App 403, was decided, MCL 750.520d(1)(c) stated: “The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.” Currently, MCL 750.520d(1)(c) reads: “The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” The term **mentally defective** no longer appears in the criminal sexual conduct statutes.
• Fourth-degree criminal sexual conduct (contact):

  - The actor engages in sexual contact with the victim, and “[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” MCL 750.520e(1)(c).

In People v Baker (Thomas), 157 Mich App 613, 614-615 (1986), the defendant was convicted of CSC-I (personal injury and knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless) for engaging in sexual intercourse with a mentally impaired woman. On appeal, the defendant claimed that the jury should have analyzed his subjective perception and evaluation of the victim’s mental incapacity, and that the jury should not have applied a reasonable person standard. Baker (Thomas), supra at 615. The Court of Appeals, relying on Davis (Clarence), 102 Mich App at 407 (”[w]e are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons”), rejected the defendant’s argument and held that the statute requires a reasonable person or objective standard. Baker (Thomas), supra at 615.

B. Offenses Requiring Proof of a Victim’s Age

A defendant’s reasonable mistake of fact regarding a victim’s age is not a defense to a statutory rape offense. People v Gengels, 218 Mich 632, 641 (1922). Consequently, the CSC Act’s “age” offenses are strict liability crimes. In re Hildebrant, 216 Mich App 384, 386 (1996) (a defendant’s status as a minor did not preclude conviction of CSC-III when the victim was a minor at least age 13 but less than age 16). “The language of the third-degree criminal sexual conduct statute does not exclude any class of offenders on the basis of age.” In re Hildebrant, supra at 386; see also In re Tiemann, 297 Mich App 250, 261 (2012) (rejecting the 15-year-old respondent’s contention “that MCL 750.520d violates public policy as applied to consenting minors in the same age class[ ]”).

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56 “[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).

57 Although In re Hildebrant, 216 Mich App 384, involved CSC-III, the Court’s conclusion regarding the age of an offender would be equally applicable to other CSC offenses involving minor victims.
See People v Cash, 419 Mich 230, 235 (1984), where the defendant was convicted of CSC-III (victim was at least age 13 but less than age 16), for engaging in sexual intercourse with a 15-year-old girl who, at the time of the offense, told the defendant she was 17. The Michigan Supreme Court rejected the defendant’s contention that he was entitled to a jury instruction regarding his reasonable mistake about the victim’s age. According to the Court:

“In the case of statutory rape, . . . legislation, in the nature of ‘strict liability’ offenses, has been upheld as a matter of public policy because of the need to protect children below a specified age from sexual intercourse on the presumption that their immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct.” Cash, 419 Mich at 242.

The Supreme Court also noted that the Legislature could have provided a reasonable mistake-of-age defense by adding the knows or has reason to know language to the CSC Act’s age elements, as it did for other elements:

“Had the Legislature desired to revise the existing law by allowing for a reasonable-mistake-of-age defense, it could have done so, but it did not do so. This is further supported by the fact that under another provision of the same section of the statute, concerning the mentally ill or physically helpless rape victim, the Legislature specifically provided for the defense of a reasonable mistake of fact by adding the language that the actor ‘knows or has reason to know’ of the victim’s condition where the prior statute contained no requirement of intent. The Legislature’s failure to include similar language under the section of the statute in question indicates to us the Legislature’s intent to adhere to the Gengels[58] rule that the actual, and not the apparent, age of the complainant governs in statutory rape offenses.” Cash, 419 Mich at 241.

4.12 Statutes of Limitations


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58 People v Gengels, 218 Mich 632 (1922).
criminal case is a nonjurisdictional, waivable affirmative defense.” *People v Burns (Gary)*, 250 Mich App 436, 439 (2002).

The following subsections address the limitations periods applicable to criminal offenses discussed in this benchbook.

A. **No Limitations Period**

MCL 767.24(1)(a) states that an indictment for first-degree criminal sexual conduct, MCL 750.520b, may be found and filed at any time.

B. **Ten-Year Limitations Period or By Victim’s 21st Birthday**

Unless the case involves DNA evidence from an unidentified individual (MCL 767.24(3)(b)) or a violation of CSC-II and CSC-III against an alleged victim under the age of 18 (MCL 767.24(4)),

MCL 767.24(3)(a) states that an indictment for a violation or attempted violation of any of the following statutes may be found and filed within ten years after the offense is committed or by the alleged victim’s 21st birthday, whichever is later:

- MCL 750.145c, child sexually abusive activity or material.
- MCL 750.520c, second-degree criminal sexual conduct.
- MCL 750.520d, third-degree criminal sexual conduct.
- MCL 750.520e, fourth-degree criminal sexual conduct.
- MCL 750.520g, assault with intent to commit criminal sexual conduct.

MCL 767.24(3)(b) states:

“If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified.”

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60 For a discussion on MCL 767.24(4), see Section 4.12(C).

61 For purposes of MCL 767.24(3), “identified” means the individual’s legal name is known and he or she has been determined to be the source of the DNA.” MCL 767.24(5)(b).
identified or by the alleged victim’s twenty-first birthday, whichever is later.”

C. **Fifteen-Year Limitations Period or By Victim’s 28th Birthday**

Unless the case involves DNA evidence from an unidentified individual (MCL 767.24(4)(b), MCL 767.24(4)(a) provides that where the alleged victim is under the age of 18, an indictment for a violation of either of the following statutes may be found and filed within 15 years after the offense is committed or by the alleged victim’s 28th birthday, whichever is later:

- MCL 750.520c, second-degree criminal sexual conduct.
- MCL 750.520d, third-degree criminal sexual conduct.

MCL 767.24(4)(b) provides:

“If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim’s twenty-eighth birthday, whichever is later.”

D. **Ten-Year Limitations Period**

“[E]xcept as otherwise provided in [MCL 767.24(6)(b)],” MCL 767.24(6)(a) requires that an indictment for an offense under the following statutes must be found and filed within ten years after the offense is committed:

- Kidnapping, MCL 750.349.
- Extortion, MCL 750.213.  

In certain circumstances, the timeframe for finding and filing an indictment for the crimes listed in MCL 767.24(6) may be extended:

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62 For purposes of MCL 767.24(4), “‘DNA’ means human deoxyribonucleic acid.” MCL 767.24(5)(a).

63 For purposes of MCL 767.24(4), “‘[i]dentified’ means the individual’s legal name is known and he or she has been determined to be the source of the DNA.” MCL 767.24(5)(b).

64 MCL 767.24(6) contains other crimes that have a ten-year limitations period. However, they outside the scope of this benchbook.
“If the offense is reported to a police agency within 1 year after the offense is committed and the individual who committed the offense is unknown, an indictment for that offense may be found and filed within 10 years after the individual is identified. This subsection shall be known as Brandon D’Annunzio’s Law. As used in this subsection, ‘identified’ means the individual’s legal name is known.” MCL 767.24(6)(b).

E. Six-Year Limitations Period

MCL 767.24(10) states that “[a]ll other indictments may be found and filed within 6 years after the offense is committed.”

F. Nonresident Tolling of a Statute of Limitations

MCL 767.24(11) states that “[a]ny period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed.” “The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect.” MCL 767.24(12).

“The tolling provision [is] all-encompassing, . . . [and] any period during which a defendant [does] not reside in Michigan [an]not be considered in calculating the time within which charges must be found and filed, i.e., the pertinent limitations period.” People v Kasben, 324 Mich App 1, 10 (2018). “[C]harges not yet time-barred by an existing period of limitations are subject to a new period of limitations set forth in an amended statute.” Id. at 3, 10-11 (finding that even though the crime was committed under a six-year limitations period, which was later extended to a victim’s 21st birthday, and the defendant left Michigan just before the victim turned 21 and after the limitations period had been extended, defendant’s “CSC-I charge was not time-barred under MCL 767.24” because the period of limitations was tolled when defendant left Michigan; “in light of the tolling, the 2001 amendment [to MCL 767.24] became applicable to the case, extending indefinitely the period of limitations on a charge of CSC-I”), citing People v Russo, 439 Mich 584, 588 (1992).66

65 “The term ‘party charged’ simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply.” People v James, ___ Mich App ___, ___ (2018) (the authority relied on by the trial court “for the proposition that, for the tolling provision to apply, defendant must have been a ‘suspect’ or an ‘accused’ prior to the expiration of the untolled limitations, [was] inapposite”).

66 For a discussion on retroactive application of new limitations periods, see Section 4.12(I).
The nonresident tolling provision in MCL 767.24(11)\(^{67}\) applies even when a defendant resides “openly and publicly” in a state other than Michigan. *People v Crear*, 242 Mich App 158, 163-165 (2000), overruled on other grounds *People v Miller (Michael)*, 482 Mich 540, 561 n 26 (2008)\(^{68}\) (a new trial is not always required when a juror at trial would have been excusable for cause). See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because “the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24\(^{69}\)] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]” a “[d]efendant’s subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan”).


“[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant’s constitutional right to interstate travel or . . . equal protection under the law[].”\(^{71}\) *People v James*, ___ Mich App ___, ___ (2018). “[T]he tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person’s right to travel within, across, or outside of Michigan’s border”; “residents and nonresidents are not similarly situated for equal-protection purposes,” and there are rational grounds for “[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes.” *James*, ___ Mich App at ___ (where the trial court dismissed a CSC-III charge against the defendant on the basis that “had defendant been a resident, the limitations period would have expired before the

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\(^{67}\) Formerly MCL 767.24(7).

\(^{68}\) A prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.

\(^{69}\) The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

\(^{70}\) Formerly MCL 767.24(7).

\(^{71}\) Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).
crime was reported,” the Court of Appeals reversed and held that “it is not a violation of defendant’s right to interstate travel or equal protection to charge him with CSC-III related to alleged criminal conduct not reported until after the untolled limitations periods had expired”).

G. Factual Disputes About a Limitations Period

Factual disputes involving a statute of limitations issue arising under MCL 767.24 are questions to be decided by a jury. People v Artman, 218 Mich App 236, 239 (1996). See also People v Wright (John), 161 Mich App 682, 686 (1987), where the Court of Appeals “liken[ed] the statute of limitations issue to the question of venue in criminal proceedings, which, although likewise bearing on the jurisdiction of the trial court, is one of fact for the jury.”

H. Waiver of a Statute of Limitations Defense

An unconditional guilty or no contest plea waives the defendant’s right to assert a statute of limitations defense, because “[t]he purpose of a criminal statute of limitations is clearly related to determining the factual guilt of a defendant.” Allen (Lee), 192 Mich App at 602. See also People v Burns (Gary), 250 Mich App 436, 441-442 (2002) (statute of limitations defense must be waived in order for a trial court to instruct a jury on lesser included offenses for which the statute of limitations has expired).

I. Retroactive Application of New Limitations Period

A trial court may retroactively apply an extended limitations period under MCL 767.24, if the offense was not time-barred under the preamended limitations period at the time the extended limitations period became effective. People v Chesebro, 185 Mich App 412, 418-419 (1990) (the trial court should have applied the amended period of limitations, which would have allowed the charge to be filed by the victim’s 21st birthday, because the amended period of limitations became effective one month before the preamended six-year period expired). According to the Chesebro Court:

“Because the preamended version of the statute of limitations had not yet expired at the time the amended version extending the period limitations became effective, defendant had not acquired a right to the statute of limitations defense.” Chesebro, 185 Mich App at 418-419.

See also People v Kasben, 324 Mich App 1, 3, 10-11 (2018) (“recognizing that charges not yet time-barred by an existing period
of limitations are subject to a new period of limitations set forth in an amended statute,” and finding that even though the crime was committed under a six-year limitations period, which was later extended to a victim’s 21st birthday, and the defendant left Michigan just before the victim turned 21 and after the limitations period had been extended, defendant’s “CSC-I charge was not time-barred under MCL 767.24” because the period of limitations was tolled when defendant left Michigan; “in light of the tolling, the 2001 amendment [to MCL 767.24] became applicable to the case, extending indefinitely the period of limitations on a charge of CSC-I”), citing People v Russo, 439 Mich 584, 588 (1992).

“[T]he extended limitation period for criminal sexual conduct involving a minor was intended by the Legislature to apply to formal charges of offenses not time-barred on the effective date of the act filed after its effective date. This application is not a violation of the Ex Post Facto Clauses of the United States and Michigan Constitutions.” Russo, 439 Mich at 588.

4.13 Voluntary Intoxication

A. Statutory Authority

The defense of voluntary intoxication is available only to specific intent crimes and only under the circumstances described in MCL 768.37(2). In its entirety, MCL 768.37 states:

“(1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

(2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.”

72 See M Crim JI 7.10, Person Under the Influence of Alcohol or Controlled Substances; M Crim JI 7.13, Insanity at the Time of the Crime; and M Crim JI 7.14, Permanent or Temporary Insanity.
“‘Alcoholic liquor’ means that term as defined in . . . MCL 436.1105.”\footnote{MCL 436.1105(3) defines \textit{alcoholic liquor} as “any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1\% or more of alcohol by volume which are fit for use for beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in this chapter [(Chapter 436 of the Michigan Liquor Control Code, Alcoholic Beverages)].”}

“‘Consumed’ means to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body.” MCL 768.37(3)(b).

“‘Controlled substance’ means that term as defined in . . . MCL 333.7104.”\footnote{MCL 333.7104(2) defines \textit{controlled substance} as “a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 [(MCL 333.7201 to MCL 333.7231)].”}

\section*{B. Determining Specific or General Intent}

To determine whether an offense requires specific or general intent, a court must look to the Legislative intent and the specific language of the statute. \textit{People v Henry (Scott)}, 239 Mich App 140, 144 (1999). “‘Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself.’” \textit{Henry (Scott)}, supra at 144, quoting \textit{People v Lardie}, 452 Mich 231, 240 (1996), overruled on other grounds by \textit{People v Schaefer}, 473 Mich 418, 422 (2005). “Words typically found in specific intent statutes include ‘knowingly,’ ‘willfully,’ ‘purposely,’ and ‘intentionally.’” \textit{People v Davenport (Bruce)}, 230 Mich App 577, 580 (1998).

\section*{C. Applicability to Criminal Sexual Conduct Offenses}

Voluntary intoxication is available as a defense to the following specific intent criminal sexual conduct offenses:

- Assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). \textit{People v Nickens}, 470 Mich 622, 631 (2004).

- Assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2). \textit{People v Snell}, 118 Mich App 750, 755 (1982).

Voluntary intoxication is \textit{not} applicable to the following general intent criminal sexual conduct crimes:


Chapter 5: Bond, Discovery, and Protective Measures

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5.1 Chapter Overview

This chapter contains information about the statutory and court rule provisions governing the pretrial release of offenders. Pretrial release of an offender, with or without conditions, may affect the safety of a crime victim or the public; therefore, the primary focus of this chapter is on bond and pretrial release orders. Personal protection orders specific to victims of sexual assault are also discussed in this chapter. The remainder of the chapter contains information about pretrial discovery and discusses a defendant’s right to obtain exculpatory evidence and a victim’s right to safety and privacy.¹

5.2 Bond in General

The Michigan Constitution authorizes bond for all persons before conviction, but permits a court to deny bond to certain persons accused of committing specific crimes when proof of the person’s culpability is evident or the presumption of the person’s guilt is great. Const 1963, art 1, §15. See also MCL 765.5; MCL 765.6. Generally, a defendant must be held in custody under MCR 6.106(B), released on the accused’s own personal recognizance or an unsecured appearance bond, or, with or without money bail (ten percent, cash, or surety), or released with conditions. MCR 6.106(A). According to MCR 6.106(B)(1), Const 1963, art 1, §15 permits a court to deny pretrial release to

“(a) a defendant charged with

(i) murder or treason, or

(ii) committing a violent felony and

[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or

[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents,

¹ The discussion in this chapter assumes that the defendant is an adult. For a discussion of pretrial release of juvenile offenders, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 7. A general discussion of crime victim safety appears in the Michigan Judicial Institute’s Crime Victim Rights Benchbook.
if the court finds that proof of the defendant’s guilt is evident or the presumption great;

(b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds that proof of the defendant’s guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.”

Const 1963, art 1, §15(d) also authorizes a court to deny bail to “[a] person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony.”

According to both Const 1963, art 1, §15 and MCR 6.106(B)(2), a violent felony is “a felony, an element of which involves a violent act or threat of a violent act against any other person.”

A. Custody Hearing

“A court having jurisdiction of a defendant may conduct a custody hearing if the defendant is being held in custody pursuant to [MCR 6.106(B)] and a custody hearing is requested by either the defendant or the prosecutor. The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision pursuant to [MCR 6.106(B)].” MCR 6.106(G)(1).

If a custody hearing is held,

• “the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other’s witnesses.” MCR 6.106(G)(2)(a).

• “[t]he rules of evidence, except those pertaining to privilege, are not applicable.” MCR 6.106(G)(2)(b).

• “[a] verbatim record of the hearing must be made.” MCR 6.106(G)(2)(b).

• the defendant must be released under MCR 6.106(C) (personal recognizance) or MCR 6.106(D) (conditional release) unless the court makes sufficient findings to enter an order that the defendant be held in custody under MCR 6.106(B)(1). MCR 6.106(G)(2).
B. Custody Order

“If the court determines as provided in [MCR 6.106(B)(1)] that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail.” MCR 6.106(B)(3). See also Const 1963, art 1, §15, which contains substantially similar language.

The court’s reasons for holding a defendant in custody must be stated on the record and on the SCAO-approved form, MC 240, Order for Pretrial Release/Custody. MCR 6.106(B)(4). “The completed form must be placed in the court file.” Id.

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

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

5.3 Advising Defendant of the Right to Counsel

A brief discussion on the defendant’s right to counsel is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 4.

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 et seq., and the Michigan Court Rules require courts to advise certain defendants of their right to counsel, and to appoint counsel for indigent defendants. MCL 780.991(1)(c); MCR 6.005(A); MCR 6.104(E)(2); MCR 6.610(D). A defendant’s right to proceed in propria persona is discussed in People v Adkins (Kenneth) (After Remand), 452 Mich 702, 720-727 (1996), overruled in part on other grounds by People v Williams (Rodney), 470 Mich 634, 641 n 7 (2004) (standard of review issue: trial court decisions regarding Sixth Amendment waivers are reviewed de novo).
A. Michigan Indigent Defense Commission Act (MIDCA)

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 et seq., authorizes the Michigan Indigent Defense Commission (MIDC)\(^2\) to specify minimum standards for attorneys who represent indigent criminal defendants. Although the MIDC is within the executive branch (and not the judicial branch), the MIDCA does not violate the separation of powers doctrine of the Michigan Constitution because “any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary.” *Oakland Co v State of Michigan*, ___ Mich App ___, ___ (2018). The MIDCA “does not directly regulate trial courts or attorneys.” *Id.* at ___. Instead, it “regulates ‘indigent criminal defense system[s],’ statutorily defined as funding units, rather than trial courts themselves.” *Id.* at ___. In addition, it “repeatedly recognizes the Michigan Supreme Court’s constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts.” *Id.* at ___. Further, “the [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the [MIDCA] purport to control what happens in court.” *Id.* at ___. Accordingly, the MIDCA is not facially unconstitutional. *Id.* at ___.

The MIDCA requires the court to:

- “assure that each criminal defendant is advised of his or her right to counsel[;]” and
- assign counsel “as soon as an indigent adult\(^3\) is determined to be eligible for indigent criminal defense services.” MCL 780.991(1)(c).

“A preliminary inquiry regarding, and the determination of, the indigency of any defendant for purposes of this act shall be made as determined by the indigent criminal defense system\(^4\) not later than

\(^2\) The MIDC is within the Department of Licensing and Regulatory Affairs (LARA). MCL 780.985(1); MCL 780.983(b).

\(^3\) Under the MIDCA, *adult* means: (1) “[a]n adult 17 years of age or older[,]” MCL 780.981(a)(i); or (2) “[a]n individual less than 17 years of age at the time of the commission of a felony if any of the following conditions apply:”
- during consideration of a traditional waiver petition under MCL 712A.4,
- in prosecutor-designated proceedings under MCL 712A.2d,
- during consideration of a petition to designate a case under MCL 712A.2d(2), or
- during automatic waiver proceedings under MCL 764.1f, MCL 780.981(a)(ii).

\(^4\) An *indigent criminal defense system* is “[t]he local unit of government that funds a trial court.” MCL 780.983(g)(i). Alternatively, “[i]f a trial court is funded by more than 1 local unit of government,” an *indigent criminal defense system* is “those local units of government, collectively.” MCL 780.983(g)(ii).
at the defendant’s first appearance in court. The determination may be reviewed by the indigent criminal defense system at any other stage of the proceedings.”\(^5\) MCL 780.991(3)(a). The trial court may play a role in the determination of indigency by way of a constitutionally-consistent compliance plan, and nothing in the MIDCA prevents a court “from making a determination of indigency for any purpose consistent with [Const 1963, art 6].”\(^5\) MCL 780.991(3)(a).

Counsel must be assigned as soon as the defendant has been determined as eligible for indigent criminal defense services, and counsel must be appointed “as soon as the defendant’s liberty is subject to restriction by a magistrate or judge.” MIDC Standard 4.\(^6\) “Representation includes but is not limited to the arraignment on the complaint and warrant.”\(^7\) Id. “All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.” Id. However, the defendant is not prohibited “from making an informed waiver of counsel.” Id.

B. Felony Arraignments in General

MCR 6.104 addresses various situations in which a defendant may be arraigned or make his or her first preliminary appearance. MCR 6.104(E) expressly sets forth the procedures and judicial responsibilities for all felony arraignments, beyond the requirement that a defendant be advised of his or her right to an attorney. According to MCR 6.104(E):

“(E) Arraignment Procedure; Judicial Responsibilities.
The court at arraignment must

(1) inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law;

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\(^5\) This statute recognizes “the authority of the judicial branch with respect to indigency determinations,” and “it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area.” \textit{Oakland Co,} \(\_\_\) Mich App at \(\_\_\).  


\(^7\) The requirement that counsel be appointed at arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. \textit{Oakland Co,} \(\_\_\) Mich App at \(\_\_\) (although the US Constitution does not require the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited). “Absent a state constitutional prohibition, states are free to enact legislative ‘protections greater than those secured under the United States Constitution[.]’” \textit{Id.} at \(\_\_\), quoting \textit{People v Harris}, 499 Mich 332, 338 (2016).
(2) if the accused is not represented by a lawyer at the arraignment, advise the accused that

(a) the accused has a right to remain silent,

(b) anything the accused says orally or in writing can be used against the accused in court,

(c) the accused has a right to have a lawyer present during any questioning consented to, and

(d) if the accused does not have the money to hire a lawyer, the court will appoint a lawyer for the accused;

(3) advise the accused of the right to a lawyer at all subsequent court proceedings and, if appropriate, appoint a lawyer;

(4) set a date for a probable cause conference not less than 7 days or more than 14 days after the date of the arraignment and set a date for preliminary examination not less than 5 days or more than 7 days after the date of the probable cause conference;[8]

(5) determine what form of pretrial release, if any, is appropriate; and

(6) ensure that the accused has been fingerprinted as required by law.

The court may not question the accused about the alleged offense or request that the accused enter a plea.”

C. Misdemeanor Cases

In misdemeanor cases, an indigent defendant has the right to appointed counsel only if (1) the offense with which the defendant is charged requires a minimum term in jail upon conviction, or (2) the court determines, should the defendant be convicted, that it

[8] MCR 6.108 (governing probable cause conferences) was added by ADM File No. 2014-42, effective January 1, 2015. MCR 6.108(A) provides that “[t]he state and the defendant are entitled to a probable cause conference, unless waived by both parties. If the probable cause conference is waived, the parties shall provide written notice to the court and indicate whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea.” See also the Michigan Judicial Institute's Criminal Proceedings Benchbook, Vol. 1, Chapter 7, for more information on probable cause conferences.
might sentence the defendant to a term of incarceration, even if suspended. MCR 6.610(D)(2).

D. Felony Cases

MCR 6.005 details a defendant’s right to an attorney in felony cases. At a defendant’s arraignment on a warrant or complaint, the court must advise the defendant that he or she is entitled to the assistance of an attorney at all subsequent proceedings, and that if the defendant cannot afford an attorney’s assistance but wishes to have the assistance of a lawyer, the court will appoint one at public expense. MCR 6.005(A)(1)-(2).

In felony cases, the court must promptly appoint an attorney to a defendant, and promptly notify the attorney of the appointment, if the court finds that the defendant is financially unable to retain an attorney. MCR 6.005(D). A defendant who is able to contribute to the cost of an appointed attorney may be required to do so. MCR 6.005(C).9

Note: The order of contribution permitted under MCR 6.005(C) pertains to “an on-going obligation during the term of the appointment” to contribute to the cost of an attorney and is distinct from reimbursement for attorney fees, “which suggests an obligation arising after the term of appointment has ended[.]” People v Jose, 318 Mich App 290, 298 (2016). MCR 6.005(C) “pertains to contribution and should not be construed as authorizing subsequent reimbursement.” Jose, 318 Mich App at 298, quoting People v Nowicki, 213 Mich App 383, 386-387, n 3 (1995). However, MCR 6.005(C) “does not preclude trial courts from ordering subsequent reimbursement of expenses paid for court-appointed counsel.” Jose, 318 Mich App at 298, quoting Nowicki, 213 Mich App at 386-387, n 3.

E. Reimbursement of Attorney Costs10

A trial judge has “selectively discretionary authority” to order reimbursement and apply the known assets of an alleged indigent

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9 See MCR 6.005(B) for guidelines to determining a defendant’s indigency, and MCR 6.005(D)-(E) for information about a defendant’s waiver of the assistance of an attorney and the court’s duty to continue advising the defendant of his or her right to counsel at all subsequent proceedings. See also the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 4.

10 In general, see Section 2.7 for information concerning fines, costs, assessments, and a defendant’s contribution or reimbursement of his or her costs of prosecution and/or defense. For a detailed discussion of these topics, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.
defendant toward defraying “some part” of the cost of appointed counsel. *Davis v Oakland Circuit Judge*, 383 Mich 717, 720 (1970). In *People v Nowicki*, 213 Mich App 383, 386 (1995), the Court of Appeals emphasized that a defendant’s obligation to reimburse the county for the costs of his or her legal representation, “does not arise as a consequence of his [or her] conviction. Instead, it arises from the defendant’s obligation to defray the public cost of representation.”

### 5.4 Personal Recognizance

An accused who is arrested for a misdemeanor or ordinance violation may be required to surrender his or her operator’s or chauffeur’s license as a condition of his or her release on personal recognizance if the person’s license is not expired, suspended, revoked, or cancelled. MCL 765.6(3).

If an accused is not held in custody pursuant to MCR 6.106(B), he or she must be released on his or her own recognizance or on an unsecured appearance bond, subject to the following conditions:

- he or she will appear in court as required
- he or she will not leave the state without the court’s permission
- he or she will not commit any crime while on release. MCR 6.106(C).

Release on a defendant’s own personal recognizance is not appropriate if the court decides that such a release will not reasonably ensure the defendant’s appearance in court as required, or that such release will endanger the public. MCR 6.106(C).

### 5.5 Interim Bond

This section discusses interim bond and its applicability to sex offenders charged with misdemeanor offenses. The interim bond statutes in MCL 780.581 to MCL 780.587 apply generally to defendants arrested with or without a warrant for misdemeanor or ordinance violations punishable by not more than one year of imprisonment, a fine, or both.

“Cash bonds accepted under [MCL 780.581 to MCL 780.587] shall be known as interim bonds, and shall be for the purpose of securing the defendant’s arraignment in court, at which time said court may continue

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11 The interim bond provisions in MCR 6.102 apply only to offenders arrested pursuant to a warrant.
said bond for further proceedings, or may require a property bond or a cash bond in a greater or lesser amount.” MCL 780.586.

A court is not specifically restricted from allowing a sex offender to be released on interim bond provided the offense is a misdemeanor violation or an ordinance violation punishable by not more than one year of imprisonment, a fine, or both. However, interim bond may be denied when an offender is also charged with misdemeanor assault and/or battery.

A. Misdemeanor Offenses

In addition to complying with the requirements of MCR 6.102(D) and MCR 6.102(F), misdemeanor cases must comply with the requirements of the general interim bond provisions in MCL 780.581 et seq. When a magistrate is not available, or a trial cannot be had immediately, a person arrested without a warrant, MCL 780.582a, “may deposit with the arresting officer or the direct supervisor of the arresting officer or department, or with the sheriff or a deputy in charge of the county jail if the person arrested is lodged in the county jail, an interim bond to guarantee his or her appearance.” MCL 780.581(2). The officer accepting the bond is responsible for determining the amount, but the bond amount may not exceed the maximum amount possible for the fine, and the bond amount may not be less than 20 percent of the minimum amount possible for the fine. MCL 780.581(2).13

Specific restrictions from setting interim bond arise in misdemeanor cases involving certain assault and battery offenses. MCL 780.582a(1) states that interim bail is not available in certain misdemeanor cases and requires that “[an accused] be held until he or she can be arraigned or have interim bond set by a judge or district court magistrate” under either of the following circumstances:

- the accused is arrested without a warrant under MCL 764.15a (authorizing the warrantless arrest of an individual accused of assault and battery or domestic assault and battery, MCL 750.81, and aggravated assault or domestic aggravated assault, MCL 750.81a), or a local ordinance substantially complying with MCL 764.15a; or

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12 CSC-IV is the only misdemeanor sexual conduct offense for which interim bond may be appropriate and imposed provided the conditions of the interim bond requirements are satisfied. See Section 2.4(B) for detailed information regarding CSC-IV offenses.

13 “Every officer taking a deposit under this act within 48 hours thereafter or at the next session of court shall deposit the same with the magistrate named in the receipt form, together with the facts relating to such arrest, and failure to make such report and deposit such money shall be deemed embezzlement of public money.” MCL 780.584.
the accused is arrested with a warrant for a violation of MCL 750.81 (assault and battery and domestic assault and battery), MCL 750.81a (aggravated assault and domestic aggravated assault), or a local ordinance substantially corresponding to MCL 750.81, and the person “is a spouse or former spouse of the victim of the violation, has or has had a dating relationship with the victim of the violation, has or has had a child in common with the victim of the violation, or is a person who resides or has resided in the same household as the victim of the violation.” MCL 780.582a(1)(a)-(b).

If an accused is granted interim bond under MCL 780.582a, the judge or magistrate must consider, and may impose, “the condition that the person released shall not have or attempt to have contact of any kind with the victim.” MCL 780.582a(2). MCL 780.582a(7) authorizes a judge or magistrate “to impose protective or other release conditions under other applicable statutes or court rules.”

Unless otherwise directed by MCL 780.582a, an arresting officer who arrests a person on a misdemeanor warrant from another county “may release the arrested person on his or her own recognizance. An interim bond receipt . . . shall be executed. On the face of the receipt shall be written ‘released on own recognizance’.” MCL 780.583a.

B. Accused Released Under Protective Conditions

If an accused’s release under MCL 780.582a is made subject to protective conditions, “the judge or district court magistrate shall inform the person on the record, either orally or by a writing that is personally delivered to the person, of the specific conditions imposed and that if the person violates a condition of the release, he or she will be subject to arrest without a warrant and may have his or her bond forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if he or she is found in contempt of court.” MCL 780.582a(3).

If a judge or magistrate issues an order or amended order of pretrial release with protective conditions under MCL 780.582a(3), the order must contain:

“(a) A statement of the person’s full name.

(b) A statement of the person’s height, weight, race, sex, date of birth, hair color, eye color, and any other

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14 See the Michigan Judicial Institute’s Contempt of Court Benchbook for detailed information about contempt of court.
identifying information the judge or district court magistrate considers appropriate.

(c) A statement of the date the conditions become effective.

(d) A statement of the date on which the order will expire.

(e) A statement of the conditions imposed, including, but not limited to, the condition prescribed in [MCL 780.582a](3).\textsuperscript{15} MCL 780.582a(4).

The judge or magistrate must immediately direct, in writing, that the appropriate law enforcement agency enter into the law enforcement information network (LEIN) an order or amended order issued under MCL 780.582a(3). MCL 780.582a(5). If an order is rescinded, the judge or magistrate must immediately order the appropriate law enforcement agency to remove the order or amended order from the LEIN. \textit{Id.} The law enforcement agency directed to enter or remove an order or amended order from the LEIN must comply with a judge’s or magistrate’s direction. MCL 780.582a(6). In addition, the law enforcement agency must remove an order or amended order from the LEIN whenever the order expires. \textit{Id.}

C. Delay of Interim Bond Due to Condition or Circumstances of Arrestee

MCL 780.581(3) permits an arresting officer to detain an arrestee if the officer believes that the arrestee “is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, is wanted by police authorities to answer to another charge, is unable to demonstrate his or her identity, or it is otherwise unsafe to release him or her[.]” Under these circumstances, the arrestee must be held at a place prescribed in MCL 780.581(4)\textsuperscript{16} until the arrestee “is in a proper condition to be released, or until the next session of the court.” MCL 780.581(3).

\textsuperscript{15} Conditions to protect named persons from harm.

\textsuperscript{16} Places included in MCL 780.581 include holding cells, holding centers, and lockups in political subdivisions that have them. If those locations are at capacity, or if the political subdivision does not have a holding facility, the arrestee may be held in any holding cell, center, or lockup that will accept him or her, or in the county jail. MCL 780.581(4).
D. Interim Bond Permitted for Persons Arrested With a Warrant

Under the conditions in MCL 780.581, and except as provided in MCL 780.582a, MCL 780.582 permits release on interim bond for a person arrested with a warrant for a misdemeanor offense or ordinance violation punishable by not more than one year of imprisonment, a fine, or both, with the added condition “that the interim bond shall be directed to the magistrate who has signed the warrant, or to any judge authorized to act in his or her stead.” MCL 780.582. For interim bonds issued under MCL 780.582, “the magistrate issuing the warrant may endorse on the back thereof a greater or a lesser amount of an interim bond.”17 MCL 780.585.

Where permitted by law, MCR 6.102(D) also authorizes interim bond for misdemeanor cases in which a warrant has been issued. This rule contains no specific restrictions for sex offenders, allows the court to specify on the warrant the amount of bond required for a defendant’s release before arraignment and if appropriate, the court may “include as a bail condition that the arrest of the accused occur on or before a specified date or within a specified period of time after issuance of the warrant.” MCR 6.201(D). If bond has been specified on the warrant, a defendant must, under MCR 6.102(F), either be “arraigned promptly or released pursuant to the interim bail provision.” The requirements listed in MCR 6.102(F)(1)-(4) must be satisfied before the defendant posts bail and submits a recognizance to appear at a specified court at a specified time:

“(F) Release on Interim Bail. If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision. The accused may obtain release by posting the bail on the warrant and by submitting a recognizance to appear before a specified court at a specified date and time, provided that

(1) the accused is arrested prior to the expiration date, if any, of the bail provision;

(2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;

17 “[Interim] bond shall be a sum of money, as determined by the officer who accepts the bond, not to exceed the amount of the maximum possible fine but not less than 20% of the amount of the minimum possible fine that may be imposed for the offense for which the person was arrested.” MCL 780.581(2).
(3) the accused is not under the influence of liquor or controlled substance; and

(4) the condition of the accused or the circumstances at the time of the arrest do not otherwise suggest a need for judicial review of the original specification of bail.”

5.6 Pretrial Release

A court must consider the relevant information listed in MCR 6.106(F) when making its decision on which release to use and the terms and conditions to impose on that release. The relevant information includes:

“(a) defendant’s prior criminal record, including juvenile offenses;

(b) defendant’s record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

(c) defendant’s history of substance abuse or addiction;

(d) defendant’s mental condition, including character and reputation for dangerousness;

(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

(f) defendant’s employment status and history and financial history insofar as these factors relate to the ability to post money bail;

(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

(h) facts indicating the defendant’s ties to the community, including family ties and relationships, and length of residence, and

(i) any other facts bearing on the risk of nonappearance or danger to the public.”

A. Granting Bail

When a court determines that a defendant is entitled to bail, the amount of bail must not be excessive. MCL 765.6(1). In determining the appropriate amount of bail, the court must consider and make record findings for each of the following:
“(a) The seriousness of the offense charged.

(b) The protection of the public.

(c) The previous criminal record and the dangerousness of the person accused.

(d) The probability or improbability of the person accused appearing at the trial of the cause.” MCL 765.6(1).

If bail is granted under MCL 765.6(1), and the court allows the defendant to post a 10 percent deposit bond, the defendant “may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under [MCL 765.6(1) and executed by a surety approved by the court.” MCL 765.6(2). See also MCR 6.106(A)(3).

If, after considering the factors in MCR 6.106(F)(2), the court determines the defendant should be held in custody or granted pretrial release subject to any conditions in MCR 6.106(D)18 that include money bail, the court must state on the record the reasons for its decision. MCR 6.106(F)(2). The court does not need to make a finding regarding each of the factors. Id. Nothing in the provisions of MCR 6.106(C)-(F) should be construed to approve of a decision to detain or release a defendant on the basis of race, religion, gender, economic status, or other impermissible criteria. MCR 6.106(F)(3).

B. Appealing a Release Decision

A party may appeal a release decision by filing a motion in the court with appellate jurisdiction over the court that made the release decision. MCR 6.106(H)(1). There is no fee for the appeal, and the appellate court cannot stay, vacate, modify, or reverse the trial court’s release decision absent a finding that the trial court abused its discretion. Id.

C. Modifying a Release Decision

1. Before Arraignment on the Information

On its own initiative or at the motion of any party, any court before which proceedings against the defendant are pending may modify a court’s prior release decision or reopen a defendant’s prior custody hearing any time before the defendant’s arraignment on the information. MCR 6.106(H)(2)(a).

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18 See Section 5.6 for a discussion of pretrial release conditions.
2. **At and Following Arraignment**

   At a defendant’s arraignment, and afterwards, on its own initiative or at the motion of any party, the court with jurisdiction over the defendant may make a de novo determination to modify a court’s prior release decision or reopen the defendant’s prior custody hearing. MCR 6.106(H)(2)(b).

3. **Burden of Going Forward**

   The burden of going forward lies with the party seeking modification of the release decision. MCR 6.106(H)(2)(c).

4. **Emergency Release to Relieve Overcrowding**

   “If a defendant being held in pretrial custody under [MCR 6.106] is ordered released from custody as a result of a court order or law requiring the release of prisoners to relieve jail conditions, the court ordering the defendant’s release may, if appropriate, impose conditions of release in accordance with this rule to ensure the appearance of the defendant as required and to protect the public. If such conditions of release are imposed, the court must inform the defendant of the conditions on the record or by furnishing to the defendant or the defendant’s lawyer a copy of the release order setting forth the conditions.” MCR 6.106(H)(3).

D. **Termination of Release Order**

   The court must vacate a defendant’s release order and discharge any person who has posted bail or bond once the release order’s conditions are met and the defendant is discharged from all obligations of the case. MCR 6.106(I)(1). If cash or its equivalent was posted in the full amount of the bail, the court must return the cash or its equivalent. *Id.* If there was a 10 percent deposit of the full bail amount, the court must return 90 percent of the amount of money deposited and keep 10 percent. *Id.*

   Any bail or bond money deposited and executed by the defendant must first be applied to any fine, costs, or statutory assessments imposed; any balance remaining must be returned to the defendant, subject to MCR 6.106(I)(1). MCR 6.106(I)(3).
E. Violation of Amended Order and Forfeiture of Bond

Whenever the court modifies its order to impose an additional release condition after the surety has signed the bond, the surety’s consent to that condition must be obtained before forfeiture based on a defendant’s violation of the additional condition is permitted. *Kondzer v Wayne Co Sheriff*, 219 Mich App 632, 639 (1996) (after bond was set and obtained, the trial court added a condition that the defendant have no contact with the complaining witness; the defendant raped the complaining witness after the condition was added, but forfeiture of the bond was not appropriate where the bondswoman had no notice of the additional condition).

5.7 Conditional Pretrial Release

A. Court Rule Authority

Conditional release of a defendant is possible if a court determines that release on the defendant’s own recognizance or on an unsecured appearance bond is not appropriate. MCR 6.106(D). Pursuant to MCR 6.106(D), the court may order a defendant’s pretrial release subject to any combination of the following conditions if the court determines a condition is appropriate both to reasonably ensure the defendant’s appearance and the public’s safety:

- that the defendant will appear in court when required, that the defendant will not leave the state without the court’s permission, and that the defendant will not commit any crime while on release, MCR 6.106(D)(1);
- other condition(s) the court decides are reasonably necessary to ensure the defendant’s appearance and to protect the public, which may include requiring the defendant to:

  “(a) make reports to a court agency as are specified by the court or the agency;
  (b) not use alcohol or illicitly use any controlled substance;
  (c) participate in a substance abuse testing or monitoring program;
  (d) participate in a specified treatment program for any physical or mental condition, including substance abuse;
(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

(f) surrender driver’s license or passport;

(g) comply with a specified curfew;

(h) continue to seek employment;

(i) continue or begin an educational program;

(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

(k) not possess a firearm or other dangerous weapon;

(l) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;

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

(n) satisfy any injunctive order made a condition of release; or

(o) comply with any other condition, including the requirement of money bail as described in [MCR 6.106(E)], reasonably necessary to ensure the defendant’s appearance as required and the safety of the public.” MCR 6.106(D)(2).

**B. Statutory Authority**

The Code of Criminal Procedure also outlines requirements for releasing a defendant subject to conditions that are determined to be reasonably necessary to ensure the protection of one or more named persons. MCL 765.6b(1).19 “If a judge or district court magistrate releases a defendant under [MCL 765.6b] subject to protective
conditions, the judge or district court magistrate shall make a finding of the need for protective conditions and inform the defendant on the record, either orally or by a writing that is personally delivered to the defendant, of the specific conditions imposed and that if the defendant violates a condition of release, he or she will be subject to arrest without a warrant and may have his or her bail forfeited or revoked[20] and new conditions of release imposed, in addition to the penalty provided under [MCL 771.3f] and any other penalties that may be imposed if the defendant is found in contempt of court.” MCL 765.6b(1).21

An order, or amended order, issued pursuant to MCL 765.6b(1) must contain all of the following,22

• the defendant’s full name

• the defendant’s height, weight, race, sex, date of birth, hair color, eye color, and any other information considered appropriate by the judge or the district court magistrate to identify the defendant.

• the effective date of the ordered conditions.

• the expiration date of the ordered conditions.

• a statement of the conditions imposed on the defendant. MCL 765.6b(2)(a)-(e).

Pretrial release orders or amended orders issued under MCL 765.6b must be immediately entered into LEIN. MCL 765.6b(4)-(5). The judge or magistrate must direct the law enforcement agency within its jurisdiction or the issuing court, in writing, to enter the order or amended order into LEIN. MCL 765.6b(4). If the pretrial release order is rescinded or expires, the law enforcement agency or the

19 “[MCL 765.6b] does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules, including ordering a defendant to wear an electronic monitoring device.” MCL 765.6b(10). See also People v Mysliwiec, 315 Mich App 414, 419 (2016) (finding that, contrary to the defendant’s argument, “MCL 765.6b does not provide that a defendant may only be held in contempt of court for violating conditions necessary to protect named persons and not for violating other conditions[]”). For additional information on holding the defendant in criminal contempt of court for violation of a court order, see Section 5.8(C).

20 See the Michigan Judicial Institute’s Domestic Violence Benchbook, Chapter 3, for more information on bond forfeiture and revocation proceedings.

21 See the Michigan Judicial Institute’s Contempt of Court Benchbook for more information on contempt of court procedures and penalties.

22 MCL 765.6b requires the court to make a record using the SCAO-approved form MC 240, Order for Pretrial Release/Custody. See also form MC 240a, Order Extending Bond for Protection of Named Person(s).

23 For purposes of MCL 765.6b, “LEIN” means the law enforcement information network regulated under the C.J.I.S. policy council act, 1974 PA 163, MCL 28.211 to [MCL] 28.215, or by the department of state police.” MCL 765.6b(11).
issuing court must remove the order from LEIN as directed by the judge or magistrate or upon expiration. **MCL 765.6b(4)-(5).**

**Note:** “[C]ourts that enter [pretrial release orders under MCL 765.6b subject to] protective conditions into LEIN [on behalf of a law enforcement agency] must first execute an agreement with the law enforcement agency for which it enters these records[, and] . . . [the] courts must ensure these orders and their conditions are able to be confirmed 24 hours a day, seven days a week.”


### C. Money Bail as a Condition of Release

“If the court determines for reasons it states on the record that the defendant’s appearance or the protection of the public cannot otherwise be assured, money bail, with or without conditions described in [MCR 6.106](D), may be required.

(1) The court may require the defendant to

(a) post, at the defendant’s option,

(i) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or

(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by

[A] a cash deposit, or its equivalent, for the full bail amount, or

[B] a cash deposit of 10 percent of the full bail amount, or, with the court’s consent,

[C] designated real property; or

(b) post, at the defendant’s option,

(i) a surety bond that is executed by a surety approved by the court in an amount equal to the full bail amount, or

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24 “Th[e] confirmation can be accomplished by providing a copy of the order to the law enforcement agency, or by another method approved by [the Michigan State Police (MSP)] LEIN.”
(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by

[A] a cash deposit, or its equivalent, for the full bail amount, or, with the court’s consent,

[B] designated real property.

(2) The court may require satisfactory proof of value and interest in property if the court consents to the posting of a bond secured by designated real property.”

D. Firearm Prohibitions

A pretrial release order or amended order issued under MCL 765.6b(1) may prohibit a defendant from purchasing or possessing a firearm. MCL 765.6b(3). If the defendant is ordered to carry or wear an electronic monitoring device as provided in MCL 765.6b(6), the court must impose a pretrial release order prohibiting the defendant from purchasing or possessing a firearm. MCL 765.6b(3).

Note: Federal law also prohibits a defendant convicted of specific crimes, including crimes involving domestic violence and violence against intimate partners from possessing firearms. 18 USC 922(g). In part, 18 USC 922(g) states:

“(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

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(8) who is subject to a court order that—

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25 See the Michigan Judicial Institute’s Domestic Violence Benchbook, Chapter 6, for more information on firearm restrictions.

26 MCL 765.6b(3) still contemplates an order to carry an electronic monitoring device, but see MCL 765.6b(6), which was amended effective June 11, 2013, to no longer authorize a court to order a defendant to carry an electronic monitoring device. See 2013 PA 54.

27 “‘Electronic monitoring device’ includes any electronic device or instrument that is used to track the location of an individual or to monitor an individual’s blood alcohol content, but does not include any technology that is implanted or violates the corporeal body of the individual.” MCL 765.6b(6)(c).
(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

E. Electronic Monitoring Device Requirements

Under MCL 765.6b(6), a court may order a defendant charged with a crime involving domestic violence, as that term is defined in MCL 400.1501(d), or any other assaultive crime, as that term is defined in MCL 770.9a, to wear an electronic monitoring device\(^{28}\) as a condition of release. MCL 765.6b(6). MCL 400.1501(d) defines domestic violence as:

\(^{28}\) “Electronic monitoring device” includes any electronic device or instrument that is used to track the location of an individual or to monitor an individual’s blood alcohol content, but does not include any technology that is implanted or violates the corporeal body of the individual.” MCL 765.6b(6)(c).
“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(e) defines a family or household member as:

“(i) A spouse or former spouse.

(ii) An individual with whom the person resides or has resided.

(iii) An individual with whom the person has or has had a dating relationship.

(iv) An individual with whom the person is or has engaged in a sexual relationship.

(v) An individual to whom the person is related or was formerly related by marriage.

(vi) An individual with whom the person has a child in common.

(vii) The minor child of an individual described in subparagraphs (i) to (vi).”

The definition of domestic violence in MCL 400.1501(d) has far-reaching implications because the language appearing in MCL 750.81 and MCL 750.81a reflects the relationships and conduct described in MCL 400.1501, even though MCL 750.81 and MCL 750.81a do not themselves contain the term domestic violence. The definition of domestic violence in MCL 400.1501(d)(iii) also expressly indicates that domestic violence includes conduct addressed in the criminal sexual conduct statutes. MCL 400.1501(d)(iii) includes in its list of conduct constituting domestic violence behavior that “[c]aus[es] or attempt[s] to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.” The
significance of the connection between *domestic violence* and sexual assault is seen in the electronic monitoring requirements set out in MCL 765.6b(6).

Several criminal sexual conduct crimes contain elements that satisfy the characteristics of *domestic violence* as defined in MCL 400.1501(d)(3). MCL 750.520b(1)(b)(i)-(ii) describe CSC-I felony offenses (penetration) involving minor members living in the same household with the defendant, or victims related to the defendant. MCL 750.520c(1)(b)(i)-(ii) describe CSC-II felony offenses (contact) involving minor victims living in the same household with the defendant, or victims related to the defendant. MCL 750.520d(1)(d) describes a CSC-III felony offense (penetration) involving force or coercion with a victim related to the defendant. And finally, MCL 750.520e(1)(d) describes a CSC-IV misdemeanor offense (contact) involving a victim related to the defendant.

### 1. Electronic Monitoring Devices

A defendant charged with an offense involving domestic violence or an assaultive crime may be released on the condition that he or she wear an electronic monitoring device. MCL 765.6b(6).

An *electronic monitoring device* is “any electronic device or instrument that is used to track the location of an individual or to monitor an individual’s blood alcohol content, but does not include any technology that is implanted or violates the corporeal body of the individual.” MCL 765.6b(6)(c).

With a victim’s informed consent, the court may also require the defendant to provide the victim with an electronic receptor device that, based on its reception of information from the defendant’s device, notifies the victim if the defendant comes within the proximity agreed on by the judge or magistrate and the victim. MCL 765.6b(6).29

A victim’s informed consent is defined in MCL 765.6b(6)(d):

“(c) ‘Informed consent’ means that the victim was given information concerning all of the following before consenting to participate in electronic monitoring:

(i) The victim’s right to refuse to participate in that monitoring and the process for

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29 See the Michigan Judicial Institute’s *Domestic Violence Benchbook*, Chapter 3, for more information on electronic monitoring devices.
requesting the court to terminate the victim’s participation after it has been ordered.

(ii) The manner in which the monitoring technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim’s location and movements.

(iii) The boundaries imposed on the defendant during the monitoring program.

(iv) Sanctions that the court may impose on the defendant for violating an order issued under this subsection.

(v) The procedure that the victim is to follow if the defendant violates an order issued under this subsection or if monitoring equipment fails to operate properly.

(vi) Identification of support services available to assist the victim to develop a safety plan to use if the court’s order issued under this subsection is violated or if the monitoring equipment fails to operate properly.

(vii) Identification of community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other help in addressing the consequences and effects of domestic violence.

(viii) The nonconfidential nature of the victim’s communications with the court concerning electronic monitoring and the restrictions to be imposed upon the defendant’s movements.”

2. Additional Conditions Required

Although a pretrial release order issued under MCL 765.6b(1) may prohibit a defendant from purchasing or possessing a firearm, if the defendant is ordered to carry an electronic monitoring device, but see MCL 765.6b(6), which was amended effective June 11, 2013, to no longer authorize a court to order a defendant to carry an electronic monitoring device. See 2013 PA 54.
electronic monitoring device as provided in MCL 765.6b(6), the court must impose a pretrial release order prohibiting the defendant from purchasing or possessing a firearm. MCL 765.6b(3).

F. Effect of Release Order

“Under Michigan law, a court’s decision in setting bond is a court order[,]” and “a bail decision is an interlocutory order.” People v Mysliwiec, 315 Mich App 414, 417 (2016) (noting that “[b]ond conditions necessarily ‘command, direct, or instruct’” a defendant and are thus, “court orders within the term’s plain and ordinary meaning[,] and] finding a “defendant’s bond condition prohibiting the use of alcohol was a court order punishable by contempt[]” under MCL 600.1701(g) where the trial court orally ordered that a condition of the defendant’s bond was to abstain from possession or consumption of any alcohol and then “issued written mittimus requiring that [the] defendant have no alcohol[]”).

5.8 Defendant’s Failure to Comply with Conditions of Release

If the defendant fails to comply with the conditions of release, he or she may be arrested with or without a warrant. See MCL 764.15(1)(g); MCL 764.15e(1); MCR 6.106(I)(2). The court may enter an order revoking the defendant’s conditional release and declare the bail money deposited or any surety bond, forfeited. MCR 6.106(I)(2). In addition, the defendant may be held in criminal contempt of court. See People v Mysliwiec, 315 Mich App 414, 418 (2016).

A. Issuance of an Arrest Warrant

The court may issue an arrest warrant for a defendant and revoke the defendant’s release order if the defendant fails to comply with the conditions of his or her release. MCR 6.106(I)(2). Any bail money deposited or surety bond may be forfeited. Id. However, whenever the conditions of release have been modified to impose an additional release condition after the surety has signed the bond, the surety’s consent to that condition must have been obtained before forfeiture based on a defendant’s violation of the additional condition is permitted. Kondzer v Wayne Co Sheriff, 219 Mich App 632, 639 (1996) (after bond was set and obtained, the trial court added a condition that the defendant have no contact with the

31 For additional information on criminal contempt of court for violation of a court order, see Section 5.8(C).
complaining witness; the defendant raped the complaining witness after the condition was added, but forfeiture of the bond was not appropriate where the bondswoman had no notice of the additional condition).

If a defendant’s pretrial release is revoked, the court must immediately mail notice of the revocation to the defendant’s last known address, and if the court ordered the forfeiture of any bail or bond, the court must notify any party who posted bail or bond for the defendant. MCR 6.106(I)(2)(a).

MCR 6.106(I)(2)(b)-(c) state:

“(b) If the defendant does not appear and surrender to the court within 28 days after the revocation date, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bail or bond for an amount not to exceed the full amount of the bail, and costs of the court proceedings, or if a surety bond was posted, an amount not to exceed the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. If the defendant does not within that period satisfy the court that there was compliance with the conditions of release other than appearance or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant alone for an amount not to exceed the full amount of the bond, and costs of the proceedings.

(c) The 10 percent bail deposit made under [MCR 6.106](E)(1)(a)(ii)[B] must be applied to the costs and, if any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court case, to the treasuries of the governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case.”

Any bail or bond money deposited and executed by the defendant must first be applied to any fine, costs, or statutory assessments
imposed; any balance remaining must be returned to the defendant, subject to MCR 6.106(I)(1). MCR 6.106(I)(3).

B. Warrantless Arrest

“A peace officer, without a warrant, may arrest and take into custody a defendant whom the peace officer has or receives positive information that another peace officer has reasonable cause to believe is violating or has violated a condition of release imposed [under MCL 765.6b or MCL 780.582a].” MCL 764.15e(1). However, “MCL 764.15e and its procedural requirements do not apply” where the defendant is arrested for violating a condition not imposed under MCL 765.6b or MCL 780.582a. People v Mysliwiec, 315 Mich App 414, 421 (2016) (MCL 764.15e and its requirements did not apply where the “[d]efendant was arrested for violating a bond condition involving alcohol, which was not imposed under MCL 765.6b or MCL 780.582a”).32

If a defendant has been arrested without a warrant under MCL 764.15e(1) for an alleged violation of a condition of his or her pretrial release, the arresting officer must “[p]repare a complaint of violation of conditional release substantially in the . . . format [prescribed by MCL 764.15e(2)(a).]” MCL 764.15e(2)(a). The procedure after preparing the complaint differs slightly depending on whether the defendant was arrested in or out of the judicial district where the pretrial release conditions were imposed. Hearing and revocation procedures for cases under MCL 764.15e are governed by the Michigan Court Rules. MCL 764.15e(5).

1. Same Judicial District

If the defendant was arrested in the same judicial district of the court that imposed the conditions of his or her pretrial release, the arresting officer must immediately provide copies of the complaint as follows:

- one copy of the complaint must be provided to the defendant.
- the original complaint and one copy of it must be provided to the court in the judicial district where the conditional release order originated.

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32 The defendant's bond condition prohibiting the use of alcohol was a court order punishable by contempt. Mysliwiec, 315 Mich App at 418. For additional information on criminal contempt of court for violation of a court order, see Section 5.8(C).
• one copy of the complaint must be provided to the prosecuting attorney involved in the case in which the conditional release was granted.

• one copy of the complaint must be kept by the law enforcement agency. MCL 764.15e(2)(b)(i).

In addition, within one business day after his or her arrest, the defendant must be brought before the court that issued the pretrial release to answer the alleged violation. MCL 764.15e(2)(b)(ii).

2. Different Judicial District

If the arrest occurred outside the judicial district of the court that imposed the pretrial release conditions, the arresting officer must immediately provide copies of the complaint as follows:

• one copy of the complaint must be provided to the defendant.

• the original complaint and one copy of it must be provided to the district court or municipal court in the judicial district where the violation occurred.

• one copy of the complaint must be kept by the law enforcement agency. MCL 764.15e(2)(c)(i).

In addition, within one business day of the defendant’s arrest, he or she must be brought before the district or municipal court in which the violation occurred. MCL 764.15e(2)(c)(ii). That court must “determine conditions of release and promptly transfer the case to the court that released the defendant subject to conditions.” Id. “The court to which the case is transferred shall notify the prosecuting attorney in writing of the alleged violation.” Id.

3. Release on Interim Bond

“If, in the opinion of the arresting police agency or officer in charge of the jail, it is safe to release the defendant before the defendant is brought before the court under [MCL 764.15e](2), the arresting police agency or officer in charge of the jail may release the defendant on interim bond of not more than $500.00 requiring the defendant to appear at the opening of court the next business day. If the defendant is held for more than 24 hours without being brought before the court under [MCL 764.15e](2), the officer in charge of the jail shall note in the jail
records why it was not safe to release the defendant on interim bond under this subsection.” MCL 764.15e(3).

Priority must be given to cases in which the defendant is in custody or cases “in which the defendant’s release would present an unusual risk to the safety of any person.” MCL 764.15e(4).

C. Criminal Contempt of Court

A court may find persons who have violated a court order guilty of criminal contempt. See MCL 600.1701(g) (providing the court with statutory authority to punish a person for contempt if he or she disobeys “any lawful order, decree, or process of the court[ ]”). For a detailed discussion on contempt of court in general, see the Michigan Judicial Institute’s Contempt of Court Benchbook.

Violation of a bond condition is punishable by criminal contempt because “a court’s decision in setting bond is a court order[,]” and “a bail decision is an interlocutory order.” People v Mysliwiec, 315 Mich App 414, 417 (2016) (finding a “defendant’s bond condition prohibiting the use of alcohol was a court order punishable by contempt[ ]” under MCL 600.1701(g) where “[t]he trial court . . . issued written mittimuses requiring that [the] defendant have no alcohol[]” following the defendant’s arraignment on a charge of operating a motor vehicle while under the influence of alcohol).

D. Enforcing Foreign Protection Orders That Are Conditional Release Orders

A foreign protection order that is a conditional release order is subject to enforcement under MCL 600.2950m, MCL 764.15(1)(g), MCL 780.1–MCL 780.31, or MCL 780.41–MCL 780.45. MCL 600.2950l(2). Violation of such an order is a 93-day/$500 misdemeanor. MCL 600.2950m.

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33MCL 600.2950h(a) defines foreign protection order as “an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person’s violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person; foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.”
5.9 Notice to Victim Regarding Arrest and Pretrial Release

Under the Crime Victim’s Rights Act, the law enforcement agency investigating the offense must provide the victim, in writing, with the opportunity to request notice of the defendant’s (or juvenile’s) arrest, subsequent release, or both. See MCL 780.753(d) (felonies), MCL 780.782(d) (juvenile offenders), and MCL 780.813(1)(d) (misdemeanors).

Upon such request, MCL 780.755(1) requires the law enforcement agency to “promptly provide” this and other information, as follows:

“No later than 24 hours after the arraignment of the defendant for a crime, the law enforcement agency having responsibility for investigating the crime shall give to the victim notice of the availability of pretrial release for the defendant, the telephone number of the sheriff or juvenile facility, and notice that the victim may contact the sheriff or juvenile facility to determine whether the defendant has been released from custody. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the defendant, or both, if the victim requests or has requested that information. If the defendant is released from custody by the sheriff or juvenile facility, the sheriff or juvenile facility shall notify the law enforcement agency having responsibility for investigating the crime.”

Substantially similar provisions exist for cases involving a juvenile released from a juvenile facility or cases involving a serious misdemeanor. MCL 780.785(1) (time requirement for notice to victim of juvenile is within 48 hours of juvenile’s preliminary hearing); MCL 780.815 (time requirement for notice to victim of serious misdemeanor is within 72 hours of arrest).

5.10 Discovery Provisions for Sexual Assault Cases

A. Applicable Discovery Rules in Felony Cases

In felony cases, discovery is governed by MCR 6.201. No specific court rule or statute applies to discovery in misdemeanor cases. The
Michigan Supreme Court, in Administrative Order No. 1999-3, expressly stated that MCR 6.201 does not apply to misdemeanor cases. See also People v Greenfield (On Reconsideration), 271 Mich App 442, 450 n 6 (2006) (“reiterat[ing] for the bench and bar that MCR 6.201 does not apply to misdemeanor cases”). Discovery in juvenile delinquency proceedings is governed by MCR 3.922(A).

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution[,]” and irrespective of whether defense counsel exercised “reasonable diligence” to discover the evidence. People v Chenault, 495 Mich 142, 146, 149, 155 (2014), quoting Brady v Maryland, 373 US 83, 87 (1963), and overruling People v Lester, 232 Mich App 262 (1998).36 The prosecutor must provide such evidence to the defendant regardless of whether the defendant makes a request. United States v Agurs, 427 US 97, 104 (1976). Evidence encompassed by these requirements may include inconsistent statements by the victim and victim recantations. Agurs, supra at 103-104.

B. Mandatory Disclosure

1. Prosecution’s Obligations

Under MCR 6.201(B)(1)-(5), the prosecutor must, upon request, provide the defendant with the following:

- “any exculpatory information or evidence known to the prosecuting attorney;
- any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;
- any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
- any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
- any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.”

36 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol 1, Chapter 9, for additional discussion of Brady, 373 US 83.
(Bullets added.) Other provisions requiring disclosure of information to a defendant in a case involving sexual assault include:

- **MCL 768.27a**, prosecutor must disclose to a defendant charged with committing a listed offense against a minor its intent to offer “evidence that the defendant committed another listed offense against a minor[.]”

- **MCL 768.27b**, prosecutor must disclose to a defendant charged with an offense involving domestic violence its intent to offer “evidence of the defendant’s commission of other acts of domestic violence for any purpose for which it is relevant, if it is not otherwise excluded under [MRE] 403.”

- **MCL 768.27c**, prosecutor must disclose to a defendant, “the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered” under this provision. **MCL 768.27c** provides for the admission of certain statements made to a law enforcement officer.

2. **All Parties’ Obligations**

Discovery applies to all parties in felony cases. Under **MCR 6.201(A)(1)-(6)**, on request, a party must disclose to other parties all of the following:

“(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;

(2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant’s own statement;

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37 **MCL 768.27b** defines offense involving domestic violence to include “[c]ausing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.”
(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert’s opinion, and the underlying basis of that opinion;

(4) any criminal record that the party may use at trial to impeach a witness;

(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and

(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence.”

A prosecuting attorney’s notes from an interview with a witness who will be called at trial do not constitute a “statement” of the witness subject to mandatory disclosure upon request under MCR 6.201(A)(2). People v Holtzman, 234 Mich App 166, 168 (1999). The Court based its holding on two grounds: an attorney’s notes do not meet the definition of “statement” applicable to discovery requests under MCR 6.201(A)(2), and allowing discovery of such notes would compromise the “work-product privilege.” Holtzman, supra at 168-170. In applying the definition of “statement” under MCR 2.302(B)(3)(c) to MCR 6.201(A)(2), the Court held that none of the exceptions listed in MCR 6.001(D) apply. Holtzman, supra at 176-177. Thus, for purposes of MCR 6.201(A)(2), a statement is either of the following:

“(i) a written statement signed or otherwise adopted or approved by the person making it; or

38 MCR 6.001(D) states that a rule of civil procedure applies to a criminal case except “(1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, (3) when a statute or court rule provides a like or different procedure, or (4) with regard to limited appearances and notices of limited appearance.”
‘(ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.’" Holtzman, 234 Mich App at 176, quoting MCR 2.302(B)(3)(c).

A trial judge may not compel a party in a criminal case to generate a report for its expert witness when no such report exists. People v Phillips (Paul), 468 Mich 583, 584 (2003). MCR 6.201(A), by its plain and unambiguous language, applies only to already-existing reports. Phillips (Paul), supra at 584.

3. Discovery Before Preliminary Examination

The felony discovery rule in MCR 6.201 applies to felony proceedings in both district and circuit court. Greenfield (On Reconsideration), 271 Mich App at 450 n 6. “Thus, under the court rule, a prosecutor must supply a felony defendant copies of the defendant’s statements, the statements of any codefendants and any accomplices whether or not they are potential witnesses at trial, and any exculpatory information known to the prosecution. Furthermore, under the court rule, requests for this information may be made at any stage of the proceedings—in the district court or the circuit court—and must be satisfied within [21] days of a request.” People v Pruitt, 229 Mich App 82, 87-88 (1998).

A district court has the authority to order discovery as part of satisfying its duty to conduct preliminary examinations. People v Laws (Louis), 218 Mich App 447, 451 (1996). A district court has jurisdiction to conduct an in camera review before the preliminary examination to determine whether evidence sought is discoverable. Laws (Louis), supra at 452-453. In Laws (Louis), supra at 452, the Court concluded that the district court’s in camera review of police reports concerning the defendant’s activities as an informant on other cases did not exceed its authority or jurisdiction, especially since the discovery was sought to support allegations of due process violations, such as prosecutorial vindictiveness and unreasonable prearrest delay. “A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or innocence.” Id. “During the course of a preliminary examination, the district court generally defers to the circuit court with regard to

39 Effective January 1, 2006, MCR 6.201(F) was amended to extend the time for discovery to 21 days. 473 Mich xliii, lxiii (2005).
these matters. However, there exists no court rule or statute that prohibits the district court from conducting a due process hearing before or during the preliminary examination, or before the defendant is bound over for trial.” *Id.* at 453.

C. Limitations on Discovery

1. Depositions and Pretrial Witness Interviews

As an alternative to the mandatory disclosure of a witness’s name and address, MCR 6.201(A)(1) permits a party to “provide the name of the witness and make the witness available to the other party for interview.” MCR 6.001(D) prohibits taking depositions as provided in subchapter 2.300 of the Michigan Court Rules in criminal cases for discovery purposes. However, a deposition may be taken (and used) in criminal cases under some circumstances. MCL 768.26 provides, in relevant part:

> “Testimony . . . taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony cannot, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.”

MCL 767.79 also provides:

> “After an indictment shall be found against any defendant, he [or she] may have witnesses examined in his [or her] behalf conditionally on the order of a judge of the court in which the indictment is pending, in the same cases upon the like notice to the prosecuting attorney, and with like effect in all respects as in civil suits.” (Emphasis added.)

2. Discovery of Privileged or Confidential Information or Evidence

In Michigan, written or oral communications made in the following relationships are protected by statutory privileges and are not discoverable under most circumstances:40

- Attorney-client privilege, MCL 767.5a(2);

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40 See the Michigan Judicial Institute’s *Evidence Benchbook* for more information on privileges.
• Domestic violence or sexual assault counselor-client privilege, MCL 600.2157a(1)(a);

• Licensed/limited licensed counselor-client privilege, MCL 333.18117;

• Physician-patient privilege, MCL 600.2157 and MCL 767.5a(2);

• Polygraph examiner privilege, MCL 338.1728;\ 41

• Clergy-penitent privilege, MCL 767.5a(2)\ 42;

• Psychologist-patient privilege, MCL 333.18237;

• School official-student privilege, MCL 600.2165;

• Social worker-client privilege, MCL 333.18513; and

• Spousal communication privilege, MCL 600.2162(1)-(2).\ 43

Other records that are confidential include juvenile diversion records, MCL 722.828 and MCL 722.829; records of mental health services, MCL 330.1748; records of federal drug or alcohol abuse prevention programs, 42 USC 290dd-2(a); and records of prescriptions, MCL 333.17752.

Notwithstanding these statutory privileges and protections, a defendant may be entitled, in certain circumstances, to information contained within confidential records. People v Stanaway, 446 Mich 643, 649-650 (1994). In Stanaway, 446 Mich at 648-649, the Michigan Supreme Court considered the circumstances under which two defendants charged with criminal sexual conduct could discover records of psychologists, sexual assault counselors, social workers, and

41 Where “polygraph reports are exempt from disclosure by the [Forensic Polygraph Examiners Act (FPEA), MCL 338.1728(3)], they are likewise exempt under the [Freedom of Information Act (FOIA), MCL 15.243(1)(d)].” King v Michigan State Police Dep’t, 303 Mich App 162, 178-179 (2013) (plaintiffs did not identify any law or rules that would otherwise require disclosure).

42 MCL 600.2156 (a provision often cited as one of the clergy-penitent privileges) “does not qualify as an evidentiary privilege.” People v Bragg, 296 Mich App 433, 436-437, 453 (2012) (holding that the defendant’s admission to his pastor that the defendant had sexually assaulted his young cousin was “privileged and confidential under MCL 767.5a(2),” notwithstanding that the pastor had initiated the conversation and that the defendant’s mother was present). For discussion of the clergy-penitent privilege and Bragg, supra, see the Michigan Judicial Institute’s Domestic Violence Benchbook, Chapter 4.

43 For purposes of sexual assault cases, MCL 600.2162(3)(c) provides an exception from this privilege when a crime is committed against a child of either or both of the parties or an individual under the age of 18. Other exceptions exist that are not related to sexual assault cases. See MCL 600.2162(3).
juvenile diversion officers who counseled the complainants. The Court held:

“[W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his [or her] defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. Only when the trial court finds such evidence, should it be provided to the defendant.” Stanaway, 446 Mich at 649-650 (emphasis added).

The Supreme Court in Stanaway made the following determinations:

• “Absolute privileges—privileges providing that information is not to be disclosed to anyone—have been abrogated despite the existence of the government’s privilege to withhold disclosure of the identity of an informant where disclosure was compelled to satisfy the defendant’s Sixth Amendment confrontation rights.” Stanaway, 446 Mich at 668.

• “Common-law and statutory privileges may have to be narrowed or yielded if those privileges interfere with certain constitutional rights of defendants.” Stanaway, 446 Mich at 668-669.

• A discovery request should not be granted “if the record reflects that the party seeking disclosure is merely on ‘a fishing expedition to see what may turn up.’” Stanaway, 446 Mich at 680 (the defendant sought to examine the complainant’s counseling records), quoting Bowman Dairy Co v United States, 341 US 214, 221 (1951).

• “[A] generalized assertion that the counseling records may contain evidence useful for impeachment on cross-examination” was insufficient to justify an in camera inspection by the trial court. Stanaway, 446 Mich at 681.

• Suppression of the privilege holder’s testimony is the appropriate sanction where the privilege is absolute and the privilege holder will not waive his or her statutory privilege and allow the in camera inspection after the defendant’s motion has been granted. Stanaway, 446 Mich at 684. Nonabsolute privileges,
which do not specify that an express waiver is required, do not require waiver by the privilege holder before an order to produce documents for in camera inspection is entered. *Id.* at 683 n 47.

Procedures for considering defense requests for privileged records as set forth in *Stanaway* are codified in MCR 6.201(C),44 *Prohibited Discovery*, as follows:

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

(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder’s testimony.

(b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder’s testimony.

(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make

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44 Staff Comment to 1996 Amendment: “Consistent with *People v Stanaway*, 446 Mich 643 (1994), the addition of subrule (C)(2) in 1996 provided for the in-camera inspection of confidential records protected by privilege, and subsequent appellate review.”
findings sufficient to facilitate meaningful appellate review.

(d) The court shall seal and preserve the records for review in the event of an appeal

(i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or

(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.

(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.”


“[T]he touchstone of materiality . . . is a ‘reasonable probability’[45] of a different result. The question is whether, in the absence of the disputed evidence, the defendant received a fair trial, i.e., a trial resulting in a verdict worthy of confidence. The suppressed evidence must be viewed collectively, not item by item.”

See also People v Tessin, 450 Mich 944 (1995), where the Michigan Supreme Court, in a peremptory order, stated that its decision in Stanaway, 446 Mich 643, does not automatically require an in camera review of a victim’s psychological records “simply because psychological harm is the alleged ‘personal injury’ which must be established to satisfy the ‘personal injury’ element of [CSC-I]. Under Stanaway, the defendant must establish a ‘reasonable probability’ that the records contain information material to his [or her] defense.” Tessin, 450 Mich at 944.

An in camera review should not be conducted when “the party seeking disclosure is on “a fishing expedition to see what may turn up[;]”’ [a] defendant ‘is fishing’ for information when he or she relies on generalized assertions and fails to state any ‘specific articulable fact’ that indicates the privileged records are needed to prepare a defense.” People v Davis-Christian, 316 Mich App 204, 208 (2016), quoting Stanaway, 446 Mich at 680-681. In Davis-Christian, 316 Mich App at 209, the trial court abused its discretion in granting the defendant’s motion for an in camera review of the complainant’s counseling records where the trial court “failed to apply the law as articulated in Stanaway and MCR 6.201(C)(2)[,]” and its “articulated standard would [impermissibly] allow an in camera review of most—if not all—of the counseling records of alleged sexual assault victims.”\footnote{The standard articulated by the trial court, and rejected by the Court of Appeals, centered on relevance. Davis-Christian, 316 Mich App at 209. The trial court explained that the counseling records were relevant because they might contain information to “free” the defendant or to “put[] him behind bars[,]” \textit{Id.} Accordingly, the trial court stated that it was “going to read [the records] and say yea or nay,” \textit{Id}.} The defendant did not demonstrate that the records “would be ‘necessary to the defense[‘]” as required under MCR 6.201(C)(2); rather, he was “attempting to . . . access privileged information to ‘fish’ for evidence that [might have] enhance[d] his defense strategy.” Davis-Christian, 316 Mich App at 212, 213 (noting that “[the d]efendant [had] access to the police report and forensic interview” of the victim, which gave him “the information necessary to properly prepare a defense[,]” and that his “assertion of need merely voice[d] a hope of corroborating evidence, untethered to any articulable facts[‘]”) (citations omitted).

3. Excision

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

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

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

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

D. **Discovery Violations and Remedies**

MCR 6.201(J) addresses a party’s failure to comply with the requirements of MCR 6.201:

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

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

1. Timing of Discovery

MCR 6.201(F) requires the prosecuting attorney and the defendant, unless otherwise ordered by the court, to comply with the discovery requirements within 21 days of a request under MCR 6.201.

2. Copies

“Except as ordered by the court on good cause shown, a party’s obligation to provide a photograph or paper of any kind is satisfied by providing a clear copy.” MCR 6.201(G).

3. Continuing Duty to Disclose

“If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party.” MCR 6.201(H).

4. Modification

“On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.” MCR 6.201(I).

5. Electronic Materials

“Except as otherwise provided in MCR 2.302(B)(6),[47] electronic materials are to be treated in the same manner as nonelectronic materials under this rule. Nothing in this rule shall be construed to conflict with MCL 600.2163a.” MCR 6.201(K).

5.11 Non-domestic Personal Protection Orders (PPOs) in Sexual Assault Cases

MCL 600.2950a governs non-domestic stalking personal protection orders (PPOs) (as opposed to domestic relationship PPOs, which are governed by MCL 600.2950).[49] Non-domestic stalking PPOs under MCL

[47] MCR 2.302(B)(6) contains a provision concerning “electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”

[48] MCL 600.2163a provides for the admission of videotaped statements in certain cases, including cases involving sexual assault. See Section 6.8(B) for more information.
600.2950a are available to enjoin stalking behavior by any person, regardless of that person’s relationship with the petitioner. MCL 600.2950a also governs non-domestic PPOs in sexual assault cases.

This section addresses the substantive prerequisites for issuing non-domestic PPOs in sexual assault cases.

A. Persons Who May Be Restrained

MCL 600.2950a(2)(a)-(b) authorizes the family division of circuit court to issue a PPO against a respondent who has been convicted\(^{50}\) of sexual assault\(^{51}\) against the petitioner or of furnishing obscene material to the petitioner under MCL 750.142, or who has subjected the petitioner to, threatened the petitioner with, or placed the petitioner in reasonable apprehension of sexual assault by the respondent. However, certain exceptions exist:

- A non-domestic sexual assault PPO may not be issued under MCL 600.2950a(2) if the petitioner and respondent have a parent/child relationship and the child is an unemancipated minor. MCL 600.2950a(27)(a)-(b).

- A non-domestic sexual assault PPO may not be issued under MCL 600.2950a(2) against a respondent under the age of ten. MCL 600.2950a(27)(c).

- A non-domestic sexual assault PPO may not be issued under MCL 600.2950a(2) against a respondent under age 18. Issuance of a PPO against a minor respondent is subject to the Juvenile Code, MCL 712A.1 to MCL 712A.32. MCL 600.2950a(28).

“A court shall not grant relief under [MCL 600.2950a(2)(b)] unless the petition alleges facts that demonstrate that the respondent has

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\(^{49}\) See the Michigan Judicial Institute’s Domestic Violence Benchbook, Chapter 5, for information regarding domestic relationship personal protection orders.

\(^{50}\) “Convicted” means 1 of the following:

(i) The subject of a judgment of conviction or a probation order entered in a court that has jurisdiction over criminal offenses, including a tribal court or a military court.

(ii) Assigned to youthful trainee status under . . . MCL 762.11 to [MCL] 762.15, if the individual’s status of youthful trainee is revoked and an adjudication of guilt is entered.

(iii) The subject of an order of disposition entered under . . . MCL 712A.18, that is open to the general public under . . . MCL 712A.28.”

(iv) “The subject of an order of disposition or other adjudication in a juvenile matter in another state or country.” MCL 600.2950a(31)(a).

\(^{51}\) “Sexual assault” means an act, attempted act, or conspiracy to engage in an act of criminal conduct as defined in . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or] [MCL] 750.520g, or an offense under a law of the United States, another state, or a foreign country or tribal or military law that is substantially similar to an offense listed in this subdivision.” MCL 600.2950a(31)(f).
perpetrated or threatened sexual assault against the petitioner. Evidence that a respondent has furnished obscene material to a minor petitioner is evidence that the respondent has threatened sexual assault against the petitioner.” MCL 600.2950a(2)(b). A respondent may be issued a PPO under MCL 600.2950a(2)(b) regardless of whether he or she was charged or convicted of sexual assault, furnishing obscene material under MCL 750.142, or of any substantially similar federal, state, foreign, tribal or military law. MCL 600.2950a(2)(b).

Additionally, “[a] court shall not issue a mutual personal protection order.” MCL 600.2950a(8); MCR 3.706(B). However, correlative separate orders are permitted if both parties properly petition the court, and the court makes separate findings that support an order against each party. MCL 600.2950a(8). The court has no authority under the Michigan PPO statutes to accept the parties’ stipulation to a mutual protection order.

**B. Petitioner May Not Be a Prisoner**

A court must not enter a non-domestic sexual assault PPO if the petitioner is a prisoner. MCL 600.2950a(30). A **prisoner** is “a person subject to incarceration, detention, or admission to a prison who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of federal, state, or local law or the terms and conditions of parole, probation, pretrial release, or a diversionary program.” MCL 600.2950a(31)(e).

If a PPO is erroneously issued to a petitioner who is a prisoner, the court must “rescind the [PPO] upon notification and verification that the petitioner is a prisoner.” MCL 600.2950a(30).

**C. Conduct that May be Enjoined by a Non-Domestic Sexual Assault PPO**

Under MCL 600.2950a(3), “[t]he court may restrain or enjoin an individual against whom a [non-domestic sexual assault PPO] is sought under [MCL 600.2950a(2)] from 1 or more of the following:

(a) Entering onto premises.

(b) Threatening to sexually assault, kill, or physically injure petitioner or a named individual.

(c) Purchasing or possessing a firearm.

(d) Interfering with the petitioner’s efforts to remove the petitioner’s children or personal property from
premises that are solely owned or leased by the individual to be restrained or enjoined.

(e) Interfering with the petitioner at the petitioner’s place of employment or education or engaging in conduct that impairs the petitioner’s employment or educational relationship or environment.

(f) Following or appearing within the sight of the petitioner.

(g) Approaching or confronting the petitioner in a public place or on private property.

(h) Appearing at the petitioner’s workplace or residence.

(i) Entering onto or remaining on property owned, leased, or occupied by the petitioner.

(j) Contacting the petitioner by telephone.

(k) If the petitioner is a minor who is enrolled in a public or nonpublic school that operates any of grades K to 12, attending school in the same building as the petitioner.

(l) Sending mail or electronic communications to the petitioner.

(m) Placing an object on, or delivering an object to, property owned, leased, or occupied by the petitioner.

(n) Engaging in conduct that is prohibited under . . . MCL 750.411s."

(o) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence or sexual assault.”

D. Standard for Issuing an Ex Parte PPO

MCL 600.2950a(12) sets out the following standard for cases in which the petitioner requests an ex parte PPO:

“A court shall not issue a [PPO] ex parte without written or oral notice to the individual enjoined or his or her attorney unless it clearly appears from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate
notice or that the notice will precipitate adverse action before a [PPO] can be issued.”

Unless modified or rescinded, an ex parte PPO is valid for not less than 182 days. MCL 600.2950a(13). “The individual restrained or enjoined may file a motion to modify or rescind the [PPO] and request a hearing under the Michigan court rules. A motion to modify or rescind the [PPO] must be filed within 14 days after the order is served or after the individual restrained or enjoined receives actual notice of the [PPO] unless good cause is shown for filing the motion after 14 days have elapsed.” MCL 600.2950a(13).

E. Constitutionality

“MCL 600.2950a provides sufficient procedural safeguards to satisfy due process.” IME v DBS, 306 Mich App 426, 437 (2014), citing Kampf v Kampf, 237 Mich App 377, 383-386 (1999). The Kampf Court stated that “[t]here is no procedural due process defect [under MCL 600.2950] in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued.” Kampf, 237 Mich App at 383-384. Accordingly, the procedural safeguards set out in MCL 600.2950a(1)-(2) (issuing ex parte order), MCL 600.2950a(13)-(14) (filing motion to modify or rescind ex parte order; hearing on motion), MCL 600.2950a(14) (hearing on motion to modify or rescind ex parte order), MCL 600.2950a(18) (notice), and MCL 600.2950a(22) (requiring actual notice and opportunity to comply before being arrested) satisfy due process. See IME, 306 Mich App at 436-438.

Moreover, MCL 600.2950a(2)(a) is not facially invalid “[b]ecause the statute does not on its face impair a fundamental right[]” and because “[t]he Legislature’s decision to allow the victims of sexual assault to seek [PPOs] against the persons convicted of assaulting them is reasonably related to the legitimate government purpose of protecting the victims of sexual assault from further victimization.” IME, 306 Mich App at 441, 443 (citations omitted). In addition, “trial courts have substantial discretion to fashion a PPO that balances the petitioner’s need for appropriate protection and the respondent’s liberty interests[,]” and “[t]his flexibility advances the Legislature’s

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52 See also MCR 3.703(G), which contains similar language.

53 See also MCR 3.707(A)(1)(b), which contains similar language. See the Michigan Judicial Institute’s Domestic Violence Benchbook, Chapter 5, for more information about procedural and notice issues involving PPOs.
interest in protecting the victims of sexual assault while ensuring that the perpetrators’ liberty interests are not arbitrarily or unreasonably restrained.” *Id.* at 443-444.

F. Rape Shield Statute\(^{54}\)

MCL 750.520j (concerning evidence of a victim’s sexual conduct), “applies in any hearing on a petition for, a motion to modify or terminate, or an alleged violation of a [PPO] requested or issued under [MCL 600.2950a(2)], except as follows:

(a) The written motion and offer of proof must be filed at least 24 hours before a hearing on a petition to issue a [PPO] or on an alleged violation of a [PPO].

(b) The written motion and offer of proof must be filed at the same time that a motion to modify or terminate a [PPO] is filed.” MCL 600.2950a(4).

5.12 Victim’s Retention of Existing Wireless Telephone Number

“In an action described in [MCL 600.2950(1) (domestic relationship PPOs)] or [MCL 600.2950a(1) (nondomestic stalking PPOs)],\(^{55}\) or in another action if the respondent in the action has been ordered, in a separate criminal case, to have no contact with the petitioner or a minor child of whom the petitioner has legal custody,” and the petitioner is not the named wireless service phone customer, the court may order a wireless telephone service provider to transfer billing responsibility for and rights to the petitioner’s wireless telephone number (or the wireless telephone number of a minor to whom the petitioner has legal custody) to the petitioner.\(^{56}\) MCL 600.2950n(1). *Note* that transferring to the petitioner the billing responsibility for and rights to a wireless telephone number will require the petitioner to “assume all financial responsibility for service to the transferred number, monthly service costs, and costs for any mobile device associated with the number.” MCL 600.2950o(4).

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\(^{54}\) See Section 7.2 in this benchbook, and see the Michigan Judicial Institute’s *Evidence Benchbook* for more information on the Rape Shield Act.

\(^{55}\) For a detailed discussion on domestic relationship PPOs issued under MCL 600.2950(1) and nondomestic stalking PPOs issued under MCL 600.2950a(1), see the Michigan Judicial Institute’s *Domestic Violence Benchbook*, Chapter 5.

\(^{56}\) “[MCL 600.2950n] and [MCL 600.2950o] do not affect the ability of the court to determine the temporary use, possession, and control of personal property or to apportion the assets and debts of the parties as otherwise provided by law.” MCL 600.2950n(3).
“An order issued under [MCL 600.2950n(1)] must list the name and billing telephone number of the named customer, the name and telephone number of the petitioner[-victim], and each telephone number to be transferred to the petitioner[-victim]. The court shall ensure that the contact information of the petitioner[-victim] is not provided to the customer or [the] respondent.” MCL 600.2950n(2).

If the wireless telephone service provider notifies the petitioner-victim within 72 hours of receiving the court’s order that it cannot “operationally or technically effectuate” the order for one of the reasons set out under MCL 600.2950o(2)(a)-(d), the court’s order is automatically suspended. MCL 600.2950o(2)-(3).
Chapter 6: Specialized Procedures Governing Preliminary Examinations and Trials

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6.1 Chapter Overview

This chapter explores various procedures that a court may use in sexual assault cases to accommodate the circumstances of a victim, a witness, or a defendant. Some of these procedures deal with closing the courtroom and protecting victims, witnesses, and defendants from embarrassment, intimidation, and potentially violent encounters while testifying or while outside the courtroom. Included is information on sequestration rights, separate waiting areas, special protections for victims and witnesses, and confidentiality concerns.

Others topics discussed in this chapter deal with speedy trial rights, a defendant’s right to self-representation, and ordering a defendant to undergo testing and counseling for various communicable diseases, including sexually transmitted infection, hepatitis, and human immunodeficiency virus (HIV).

6.2 Court-Appointed Foreign Language Interpreter

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). 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).

6.3 Closing Courtrooms to the Public

This section discusses the circumstances under which a judge may close the courtroom to the public. Three types of proceedings are covered: preliminary examinations, criminal trials, and proceedings pertaining to juvenile delinquency matters.

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1 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 1, for more information on foreign language interpreters.

2 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(8)(2).
**A. Preliminary Examinations in Cases Involving Sexual Misconduct**

In a case where the defendant is charged with criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct, the court may close a preliminary examination to the public on motion of a party if the following conditions are met:

“(a) The magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public’s right of access to the examination.

(b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.

(c) The magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public.” MCL 766.9(1)(a)-(c).

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, as required in MCL 766.9(1)(a), the court must consider:

“(a) The psychological condition of the victim or witness.

(b) The nature of the offense charged against the defendant.

(c) The desire of the victim or witness to have the examination closed to the public.” MCL 766.9(2)(a)-(c).

The statute further provides that a court may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

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

(b) Reasonable alternatives to closure cannot adequately protect the party’s right to a fair trial.” MCL 766.9(3)(a)-(b).

Before closing a preliminary examination to the public, a magistrate must state the specific reasons for the decision on the record. MCL 766.9(1)(c). In narrowly tailoring the closure under MCL 766.9 to accommodate the interests of a victim testifying about sensitive
matters, the magistrate should only close those portions of the examination in which such matters are discussed. In re Closure of Preliminary Examination (People v Jones), 200 Mich App 566, 569-570 (1993) (the Court of Appeals reversed the trial court’s “broad denial[] of access to [the defendant’s] preliminary examination[.] . . . [where] the bulk of the testimony presented at the examination did not concern the sensitive subject [(description of a brutal assault and “heinous” sexual attack)] for which the court sought to protect the victim.”).

B. Criminal Trials

“Although the Sixth Amendment right [to a public trial] ‘is the right of the accused,’ a member of the public can invoke the right to a public trial under the First Amendment.” People v Vaughn (Joseph), 491 Mich 642, 652 (2012). “[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’” Richmond Newspapers, Inc v Virginia, 448 US 555, 580 (1980), quoting Branzburg v Hayes, 408 US 665, 681 (1972). “Thus, a defendant cannot affirmatively seek to exclude the public from his [or her] trial unless he [or she] can overcome the public’s First Amendment right. That right exists separately from [the] defendant’s Sixth Amendment right, and its mere existence does not prevent [an appellate court] from enforcing [the] traditional rules of forfeiture and waiver when reviewing a defendant’s claim that his [or her] Sixth Amendment right has been violated.” Vaughn (Joseph), supra at 659; see also Richmond Newspapers, Inc, supra at 580-581 (a criminal trial must be open to the public, unless the trial court finds that no alternative short of closure will adequately assure a fair trial for the accused).³ A defendant’s Sixth Amendment right to a public trial extends to pretrial suppression hearings, Waller v Georgia, 467 US 39, 43-47 (1984), and the jury selection process, Presley v Georgia, 558 US 209, 212-213 (2010).⁴

³ See Section 6.6 for limitations on a court’s authority to sequester witnesses, and Section 6.8 for provisions that protect witnesses.

⁴ “[T]he right to a public trial also encompasses the right to public voir dire proceedings[.]” Vaughn (Joseph), 491 Mich at 650-652, citing Presley, 558 US at 213.
• In light of “massive pretrial publicity,” the adoption of stricter rules governing the use of the courtroom by reporters.

• Insulation or sequestration of the witnesses.

• Regulation of the release of information to the press by law enforcement personnel, witnesses, and counsel.

• A court order prohibiting any lawyer, party, witness, or court official from making extrajudicial statements that divulge prejudicial matters.

• Continuance of the case until the threat of news prejudicial to the defendant’s right to a fair trial abates.

• Change of venue.

• Sequestration of the jury.

“[A]lthough the Sixth Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial.” Richmond Newspapers, Inc, 448 US at 580, citing Gannett Co v DePasquale, 443 US 368, 382 (1979). Parties to a criminal trial may not, by mere agreement, empower a judge to exclude the public and press from a session of the court, and the defendant cannot waive his or her Sixth Amendment right to public trial in absolute derogation of the public interest in seeing that justice is administered openly and publicly. See Detroit Free Press, Inc v Macomb Circuit Judge, 405 Mich 544, 546, 549 (1979) (defendant was charged with criminal sexual conduct involving one of her ten-year-old male students). On the rare occasions when closure may be appropriate, the court must exercise its discretion and “must always carefully balance the fundamental common-law principle of open trials with the specific unusual circumstance that allegedly endangers a fair trial.” Detroit Free Press, Inc v Recorder’s Court Judge, 409 Mich 364, 390 (1980). The size of the courtroom may justify limiting attendance, and it is permissible to exclude members of the public who create disturbances or are dangerous. Detroit Free Press, Inc, supra at 386-387. Closure orders must be narrowly tailored to the circumstances of the case, even if space limitations justifiably limit attendance. In re Closure of Jury Voir Dire (People v Lawrence), 204 Mich App 592, 595 (1994) (trial court closed the courtroom because it reached capacity without any attempt to narrowly tailor the closure).

“While a criminal defendant has the constitutional right to a public trial, that right is forfeited when no objection is made at the time of the courtroom’s closure to members of the public.” Vaughn (Joseph), 491 Mich at 674. However, because this forfeited right is of constitutional magnitude, “the defendant can obtain relief if he [or
she] shows that the court’s exclusion of members of the public during voir dire was ‘a plain error that affected substantial rights’ and that he [or she] either ‘is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.’”  Vaughn (Joseph), supra at 674-675, quoting People v Carines, 460 Mich 750, 774 (1999).

A party who seeks to exclude the public from a sexual misconduct trial bears a heavy burden to show a substantial probability that prejudicial error depriving the defendant of a fair trial would result from opening the case to the press and public, a substantial probability that closure will effectively deal with the danger, and that no alternatives to closure exist that would protect the defendant’s right to a fair trial. Detroit Free Press, Inc, 409 Mich at 390. See also People v Kline, 197 Mich App 165, 169 (1992), citing Waller v Georgia, 467 US 39, 48 (1984), where the Court of Appeals reiterated the United States Supreme Court’s “requirements for the total closure of a trial”:

“(1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.”

C. Voir Dire

“A First Amendment right of access applies to criminal trials, including jury voir dire proceedings.” In re Closure of Jury Voir Dire, 204 Mich App at 594; see also Vaughn (Joseph), 491 Mich at 650-652. The same presumption of openness that applies to trials and preliminary examinations also applies to the jury selection process. See Press-Enterprise Co v Superior Court of Calif, 464 US 501, 508-511 (1984). In Press-Enterprise Co, supra at 508, 510, the United States Supreme Court, in reversing the trial court’s decision to close six weeks of voir dire proceedings to the public in a rape and murder trial of a teenage girl, stated the following regarding the presumption of openness:

“The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure
order was properly entered.” *Press-Enterprise Co*, 464 US at 510.

However, the Supreme Court noted that “[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain.” *Press-Enterprise Co*, 464 US at 511. According to the Court:

“Some questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons. For example a prospective juror might privately inform the judge that she, or a member or her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.” *Press-Enterprise Co*, 464 US at 512.

### D. Juvenile Delinquency Proceedings

MCR 3.925(A)(1) states generally that all juvenile court proceedings on the formal calendar and all preliminary hearings must be open to the public. On motion of a party or a victim, the court may close proceedings to the public during the testimony of a juvenile witness or a victim to protect the welfare of the juvenile witness or victim. MCL 712A.17(7); MCR 3.925(A)(2). In making such a determination, the court must consider:

- The age, maturity, and preference of the juvenile witness or the victim;
- The nature of the proceedings; and
- The desire of the juvenile witness, of the juvenile witness’s family or guardian, or of the victim to testify in a room closed to the public. MCL 712A.17(7)(a)-(c); MCR 3.925(A)(2).\(^5\)

For purposes of MCL 712A.17(7), a “juvenile witness” does not include the juvenile against whom the proceeding is brought for a criminal offense. MCL 712A.17(8).

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\(^5\) Proceedings may not be closed to the public during a juvenile’s testimony if jurisdiction under MCL 712A.2(a)(1) (establishing Family Division jurisdiction over juveniles who violate any law or ordinance) has been requested. MCR 3.925(A)(2) (circumstances under which courtroom may be closed).
6.4 Limitations on Film or Electronic Media Coverage in Courtrooms

By Administrative Order (AO) No. 1989-1, 432 Mich cxii (1989), the Michigan Supreme Court ordered that, upon request, film or electronic media coverage is permitted in all Michigan courts. With limited exceptions, a written request for film or electronic media coverage must be allowed if the request is made at least three business days before the beginning of the proceeding to be filmed. Id. at Part 2(a). The parties must be notified of a request for film or electronic media coverage. Id.

Under AO 1989-1, Part 2(b), “[a] judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion,” of either of the following:

- The fair administration of justice requires such action; or
- There has been a violation of the rules established under AO 1989-1 or of additional rules imposed by the judge.

A court’s decision in applying AO 1989-1, Part 2(b) is not appealable by leave or by right. AO 1989-1, Part 2(d). In addition, “[a] judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.” Id. at Part 2(b). AO 1989-1 prohibits film or electronic media coverage of jurors and the jury selection process. Id. at Part 2(c).

6.5 Speedy Trial Rights

A. Defendant’s Right to Speedy Trial

1. Constitutional Right to Speedy Trial

A criminal defendant’s right to a speedy trial is guaranteed by US Const, Ams VI and XIV, Const 1963, art 1, § 20, MCL 768.1,

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6 “A judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action, or that rules established under this order or additional rules imposed by the judge have been violated. The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.” AO 1989-1, Part 2(b). In addition, media coverage of jurors and jury selection is prohibited. Id. at Part 2(c).

7 See Administrative Order 1989-1 for complete details governing the use of film or electronic media coverage in the courtroom.
and MCR 6.004(A). People v Mackle, 241 Mich App 583, 602 (2000). To determine whether a defendant has been denied his or her right to a speedy trial, a court must balance four factors: 
“(1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his [or her] right to a speedy trial; and (4) prejudice to the defendant from the delay.” Mackle, supra at 602, quoting People v Levandoski, 237 Mich App 612, 620 n 4 (1999). See also Barker v Wingo, 407 US 514, 530-532 (1972). “Whenever the defendant’s constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.” MCR 6.004(A).

A delay under 18 months requires the defendant to prove that he or she suffered prejudice. People v Cain (Janice), 238 Mich App 95, 112 (1999). A delay of 18 months or more is presumed prejudicial, and the prosecutor has the burden to rebut that presumption. Cain (Janice), supra at 112. There are two types of prejudice for a defendant awaiting trial: (1) prejudice to the person (e.g., pretrial incarceration depriving an accused of civil liberties); and (2) prejudice to the defense. People v Gilmore, 222 Mich App 442, 461-462 (1997).

General allegations of possible prejudice (e.g., witness’s memories fade, financial burden) are insufficient. Gilmore, 222 Mich App at 462. Rather, a defendant must “specifically argue[] how the delay caused him [or her] prejudice.” People v Rivera, 301 Mich App 188, 194 (2013) (the defendant’s “general statement that being in prison on unrelated charges for 10 months caused prejudice[]” did not constitute a “basis . . . to conclude that [he] was denied his right to a speedy trial[]”).

In reviewing a defendant’s claim that he or she was denied the right to a speedy trial, a court must consider each period of delay and assign responsibility for the delay to the prosecution or to the defendant. People v Ross (Edward), 145 Mich App 483, 491 (1985). Delays inherent in the court system, including those attributed to docket congestion, are attributed to the prosecution but are assigned minimal weight. Gilmore, 222

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8 For information about a juvenile’s right to speedy trial, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 16. For more information on issues surrounding the right to speedy trial, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 9.

9 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 ___.
Mich App at 460. However, the delay may only be attributed to
the prosecution if it is either unexplainable or inexcusable. 
People v Lown, 488 Mich 242, 262 (2011). Delays caused by
adjudication of defense motions are attributable to the
defendant. Gilmore, supra at 461. Ordinarily, “delays caused by
defense counsel are properly attributed to the defendant, even
where counsel is assigned[,]” because “assigned counsel
generally are not state actors for purposes of a speedy-trial
claim.” Vermont v Brillon, 556 US 81, 92, 94 (2009). However, it is
possible that an assigned counsel’s delay could be charged to
the state if a breakdown in the public defender system caused
the delay or if the delay was a result of the trial court’s failure
to timely appoint counsel or replacement counsel. Id. at 94.10

2. The 90-Day Rule Governing Select Felony and Violent
Felony Charges

Under MCR 6.106(B)(3), a defendant who is denied pretrial
release as provided in MCR 6.106(B)(1) for any of the following
charges must be afforded a trial within 90 days after the date of
the court’s order denying pretrial release,11 excluding delays
attributable to the defense, unless the court immediately
schedules a hearing and sets an amount of bail:

- Murder.
- Treason.
- CSC-I.
- Armed robbery.
- Kidnapping with the intent to extort money or other
valuable thing.
- A violent felony12 and:

  “[A] at the time of the commission of the violent
felony, the defendant was on probation, parole, or
released pending trial for another violent felony, or
[B] during the 15 years preceding the commission
of the violent felony, the defendant had been

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10 For more information about a defendant’s right to a speedy trial, see the Michigan Judicial Institute’s 
11 For more information on denying pretrial release and bond, see Section 5.6.
12 A violent felony is a felony that contains an element involving “a violent act or threat of a violent act
against any other person.” MCR 6.106(B)(2).
convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents[.]” MCR 6.106(B)(1)(a)-(b).

3. **180-Day Rule for Defendants Not in Custody of Department of Corrections**\(^{13}\)

Unless the court determines, by clear and convincing evidence, that the defendant presents a danger to the community or any other person, or that the defendant is unlikely to appear for future proceedings, MCR 6.004(C) requires that a defendant be released on personal recognizance after he or she has been incarcerated for a certain period of time. Specifically, MCR 6.004(C) requires that a defendant in a felony case be released on personal recognizance after being incarcerated for 180 days or more to answer for the same crime, a crime based on the same conduct, or a crime arising from the same criminal episode. *Id.* In a misdemeanor case, the defendant must be released on personal recognizance after being incarcerated for 28 days or more to answer for the same crime, a crime based on the same conduct, or a crime arising from the same criminal episode. *Id.* Pursuant to MCR 6.004(C)(1)-(6), the following periods of delay must be excluded in computing the 180-day or 28-day periods:

“(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,

(2) the period of delay during which the defendant is not competent to stand trial,

(3) the period of delay resulting from an adjournment requested or consented to by the defendant’s lawyer,

(4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either

(a) the unavailability, despite the exercise of due diligence, of material evidence that the

\(^{13}\) For more information about the 180-day rule, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook*, Vol. 1, Chapter 9.
prosecutor has reasonable cause to believe will be available at a later date; or

(b) exceptional circumstances justifying the need for more time to prepare the state’s case,

(5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and

(6) any other periods of delay that in the court’s judgment are justified by good cause, but not including delay caused by docket congestion.”

4. The 180-Day Rule for Defendants in Custody of Department of Corrections

MCL 780.131(1) states:

“(1) Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The

14 For more information about the 180-day rule, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 9.

15 MCR 6.004(D)(1) contains substantially similar language.
written notice and statement shall be delivered by certified mail.”

“The clear language of MCL 780.131(1) provides that MDOC must send written notice, by certified mail, to the prosecutor to trigger the 180-day requirement.” People v Rivera, 301 Mich App 188, 192 (2013) (holding that “[the] trial court erred when it granted [the] defendant’s motion [to dismiss the charges against the defendant] on the basis of [a violation of] the 180-day rule” where “although the MDOC sent a notice [of the defendant’s current incarceration and of the defendant’s pending criminal charges] to the district court, [but] did not send, by certified mail, a notice to the prosecuting attorney[,] . . . the 180-day rule was never triggered, so it could not have been violated”).

Pursuant to MCL 780.131(2), the 180-day rule does not apply when a person has been charged with certain criminal offenses:

“(2) This section does not apply to a warrant, indictment, information, or complaint arising from either of the following:

(a) A criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility.

(b) A criminal offense committed by an inmate of a state correctional facility after the inmate has escaped from the correctional facility and before he or she has been returned to the custody of the department of corrections.”

MCL 780.133 states:16

“In the event that, within the time limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any

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16 MCR 6.004(D)(2) contains substantially similar language: “In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.”
further force or effect, and the court shall enter an order dismissing the same with prejudice.”

See Lown, 488 Mich at 246-247, which clarified the correct interpretation of the statutory “180-day rule” established by MCL 780.131 and MCL 780.133:17

“[T]he [180-day] rule does not require that a trial be commenced or completed within 180 days of the date notice was delivered. Rather, . . . it is sufficient that the prosecutor ‘proceed promptly’ and ‘move [] the case to the point of readiness for trial’ within the 180-day period. People v Hendershot, 357 Mich 300, 304 (1959). Significantly, although a prosecutor must proceed promptly and take action in good faith in order to satisfy the rule, there is no good-faith exception to the rule. Instead, as originally articulated in Hendershot, good faith is an implicit component of proper action by the prosecutor, who may not satisfy the rule simply by taking preliminary steps toward trial but then delaying inexcusably. . . . [T]he statutory 180-day period is, by the plain terms of the statute, a fixed period of consecutive days beginning on the date when the prosecutor receives the required notice from the DOC [(Department of Corrections)]. Thus, the relevant question is not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within 180 calendar days following the date the prosecutor received the notice. If so, the rule has been satisfied unless the prosecutor’s initial steps are ‘followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly . . . .’ [Hendershot, 357 Mich at 303]. Accordingly, a court should not calculate the 180-day period by apportioning to each party any periods of delay after the DOC delivers notice. . . . [A] violation of the 180-day rule—which deprives the court of ‘jurisdiction,’ MCL 780.133—specifically divests the court of personal jurisdiction over the defendant for the particular action.”

In Lown, 488 Mich at 247, quoting Hendershot, 357 Mich at 304, “[t]he statutory 180-day rule was satisfied [] because the

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17 For more information on the 180-day rule, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 9.
prosecutor commenced action well within 180 days after receiving notice from the DOC, ‘proceed[ed] promptly and with dispatch thereafter toward readying the case for trial,’ and '[stood] ready for trial within the 180-day period . . . .’”

In People v Williams (Cleveland), 475 Mich 245, 248 (2006), the Michigan Supreme Court, overruling People v Smith (Rosie), 438 Mich 715 (1991), ruled that MCL 780.131 “contains no exception for charges subject to consecutive sentencing.” Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to any untried charge against any prisoner, without regard to potential penalty. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his or her right to a speedy trial. Williams (Cleveland), supra at 245-255.

B. Crime Victim’s Right to Speedy Trial

In addition to a criminal defendant’s right to a speedy trial, certain crime victims have a right to a speedy trial. Const 1963, art 1, § 24. For cases involving a felony in circuit court, MCL 780.759(2) provides that, upon motion of the prosecutor declaring a victim to be (or have) any of the following, the chief judge must schedule a hearing within 14 days of the motion filing date, and, if the motion is granted, a trial not earlier than 21 days from the hearing date:

• “A victim of child abuse, including sexual abuse or any other assultive crime.” MCL 780.759(1)(a).

• A victim of CSC-I, CSC-II, or CSC-III. MCL 780.759(1)(b).

• A victim of assault with the intent to commit criminal sexual conduct involving penetration or assault with the intent to commit CSC-II. MCL 780.759(1)(b).

• A victim who is 65 years old or older. MCL 780.759(1)(c).

• A victim with a disability inhibiting his or her ability to attend court or to participate in the proceedings. MCL 780.759(1)(d).

A substantially similar provision exists in delinquency proceedings. MCL 780.786a. For serious misdemeanors in district court, MCL 780.819 provides that “[a]n expedited trial may be scheduled for any case in which the victim is averred by the prosecuting attorney to be a child.” A serious misdemeanor is defined under MCL 780.811(1)(a)

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18 Overruled to the extent of its inconsistency with MCL 780.131.
and includes the following sex-related misdemeanor offenses: violations of MCL 750.145d (using internet or computer to make prohibited communication and underlying crime is punishable by less than one year imprisonment), MCL 750.335a (indecent exposure) or of a local ordinance substantially corresponding to MCL 750.145d or MCL 750.335a.

6.6 Sequestration of Victims and Witnesses

A. Court Proceedings Generally

1. Witnesses (Excluding Crime Victims)

Under the Revised Judicature Act, pursuant to MCL 600.1420, a court, for good cause shown, has the authority to sequester witnesses from the courtroom. MCL 600.1420 states in part:

“The sittings of every court within this state shall be public except that a court may, for good cause shown, exclude from the courtroom other witnesses in the case when they are not testifying and may, in actions involving scandal or immorality, exclude all minors from the courtroom unless the minor is a party or witness.”

Additionally, under MRE 615, a court may exclude nonparty witnesses from the courtroom at the request of a party or on its own motion. Sequestration requests are within the trial court’s discretion and are ordinarily granted. People v Hill (Allen), 88 Mich App 50, 65 (1979). “The purposes of sequestering a witness are to ‘prevent [the witness] from “coloring” his [or her] testimony to conform with the testimony of another, People v Stanley, 71 Mich App 56, 61 (1976), and to aid “in detecting testimony that is less than candid. Geders v United States, 425 US 80, 87 (1976).” People v Meconi, 277 Mich App 651, 654 (2008).

Practice Note:

The committee believes that the law enforcement officer assisting the prosecutor may not be subject to sequestration.

19 See the Michigan Judicial Institute’s Crime Victim Rights Benchbook for detailed information.

20 MCL 766.10 contains similar provisions for sequestering witnesses during preliminary examinations.
The authority to sequester witnesses or other persons is not unlimited. Under MRE 615, a trial court must not exclude “a person whose presence is shown by a party to be essential to the presentation of the party’s cause.” This exception applies where victim support persons are used. *People v Jehnsen*, 183 Mich App 305, 308-309 (1990) (“MCL 600.2163a(4) allows a support person to be in close proximity to a witness during his or her testimony in criminal sexual conduct cases.”).

2. **Crime Victims**

In Michigan, a crime victim has a constitutional right to attend a criminal trial, juvenile adjudication, and other court proceedings. *Const 1963, art 1 § 24* provides in pertinent part:

“(1) Crime victims, as defined by law,²¹ shall have the following rights, as provided by law:

* * *

The right to attend trial and all other court proceedings the accused has the right to attend.”

A crime victim may attend every court proceeding that an accused person has a right to attend. However, an accused person does not have a right to attend all court proceedings: he or she only has a right to attend proceedings involving “voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant’s substantial rights might be adversely affected[, including a jury view].” *People v Mallory*, 421 Mich 229, 247-248 (1984). See also *People v Thomas (Eugene)*, 46 Mich App 312, 320-321 (1973) (the accused is entitled to be present at pretrial evidentiary hearings on the admissibility of evidence); and MCL 768.3 (a person accused of a felony must be present during trial, but a person accused of a misdemeanor may request leave of court to appear through an attorney). However, the accused does not have the right to attend motions, conferences, and discussions of law, even during trial, if they do not involve substantial rights vital to the defendant’s participation in his or her own defense. See *Thomas (Eugene)*, supra at 319-320.

²¹ For a definition of *victim* under the three articles of the Crime Victim’s Rights Act, see MCL 780.752(1)(m) (felony); MCL 780.781(1)(jj) (juvenile); and MCL 780.811(1)(h) (serious misdemeanor).
A victim’s constitutional right to attend trial is circumscribed by one significant limitation: upon good cause shown, the victim may be sequestered as a witness until he or she first testifies. Provisions of the felony and serious misdemeanor articles of the Crime Victim’s Rights Act (CVRA) state:

“The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies.” MCL 780.761; MCL 780.821. (Emphasis added.)

The right to attend trial does not extend to incarcerated crime victims. Under the CVRA’s felony and serious misdemeanor articles, incarcerated individuals cannot exercise the rights and privileges established for crime victims; however, such individuals may submit a written statement for the court’s consideration at sentencing. See MCL 780.752(4) (felony article); MCL 780.811(4) (serious misdemeanor article).

B. Rebuttal Case At Trial

A trial court’s authority to sequester a rebuttal witness depends upon whether the witness is also a victim of the crime. Although MCL 600.1420 and MRE 615 provide a court with broad authority to sequester a witness before or after he or she testifies in rebuttal, MCL 780.761, MCL 780.789, and MCL 780.821, proscribe a court from sequestering a victim after he or she first testifies.

C. Sanctions For Violations of Sequestration Orders

A trial court has discretion in instances of violations of sequestration orders “to exclude or to allow the testimony of the offending witness.” People v Nixten, 160 Mich App 203, 209-210 (1987).

 “[T]he United States Supreme Court has recognized three sanctions that are available to a trial court to remedy a violation of a sequestration order: ‘(1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying.’” Meconi, 277 Mich App at 654, quoting United States v Hobbs, 31 F3d 918, 921 (CA 9, 1994),

22 MCL 780.789, a provision of the juvenile article of the CVRA, creates a similar right for crime victims to attend an entire contested adjudication or waiver hearing after the victim first testifies.
Sexual Assault Benchbook-Revised Edition

Section 6.7

6.7 Separate Waiting Areas for Crime Victims

For a defendant charged with a felony, the Crime Victim’s Rights Act, at MCL 780.757, states:

“The court shall provide a waiting area for the victim separate from the defendant, defendant’s relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim’s contact with defendant, defendant’s relatives, and defense witnesses during court proceedings.”

MCL 780.817 and MCL 780.787 contain substantially similar provisions for proceedings involving adults charged with serious misdemeanors and juveniles.

6.8 Special Protections For Victims and Witnesses

For detailed information and discussion about proper techniques involved in child victim cases, see Forensic Interviewing Protocol, available at www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf.

A. Victims and Witnesses (Regardless of Age or Disability)

1. Special Procedures to Protect Victims and Witnesses

Under MRE 611(a), a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. MRE 611(a) states:

“(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue
MRE 611(a) permits the trial court to limit cross-examination to protect witnesses from harassment or undue embarrassment. People v Daniels, 311 Mich App 257, 268 (2015). Specifically, “MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault; the court must balance the criminal defendant’s right to self-representation with ‘the State’s important interest in protecting child sexual abuse victims from further trauma.’” Daniels, 311 Mich App at 269 (holding that the “trial court wisely and properly prevented [the] defendant from personally cross-examining [his children regarding their testimony that he sexually abused them], to stop the children from suffering ‘harassment and undue embarrassment[,]’” following “a motion hearing at which [the court] heard considerable evidence that [the] defendant’s personal cross-examination would cause [the children] significant trauma and emotional stress[,]” and finding that the defendant’s right to self-representation was not violated because “a criminal defendant has ‘no constitutional right to personally cross-examine the victim of his crimes[,]’” and “[a]t all times in this case, [the] defendant maintained autonomy in presenting his defense, and was able to control the direction of the cross-examination of [the children] by writing the relevant questions for his advisory attorney[,] . . . [and the] advisory counsel conferred with [the] defendant and received assistance from him in coordinating the exhibits during [the children’s cross-]examinations[”] (quoting MRE 611(a); additional citations omitted). See also People v Adamski, 198 Mich App 133, 138 (1998) (“[t]he right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interest of the trial process or of society[]”).

MRE 611(a) contains no age or developmental disability restrictions and so may be applied to all victims and witnesses. Additionally, the trial court is free to use its authority under other rules, including any rules of civil procedure that apply in criminal cases. See MCR 6.001(D).

2. Use of Audio and Video Technology During Proceedings

A court may use telephonic, voice, video conferencing, or two-way interactive video technology during certain criminal
proceedings. See MCR 6.006.23 “The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.” MCR 6.006(D).

In Michigan, however, defendants in felony cases have a constitutional and a statutory right to be “personally present” at trial. MCL 768.3. Thus, use of this technology may implicate a defendant’s right to confrontation. But see MCR 6.006(C), which permits the court, on a showing of good cause and as long as the defendant is either present in the courtroom or has waived the right to be present, to use videoconferencing technology during certain criminal proceedings to take testimony from a person at another location.24

For more information on MCR 6.006 and a defendant’s right to confront witnesses, see the Michigan Judicial Institute’s Evidence Benchbook, Chapter 3.

3. Use of Support Person or Support Animal

MCL 600.2163a(4) permits certain witnesses to be accompanied by a support person or support animal.25 However, “a fully abled adult witness may not be accompanied by a support animal or support person while testifying.” People v Shorter (Dakota), ___ Mich App ___, ___ (2018).26

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23 Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, “[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes.” Administrative Order No. 2012-7 further provides that “[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area.” Additionally, “[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B).” Administrative Order No. 2012-7.

24 “A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.” MCR 6.006(C)(2). “[I]f either the defendant or [defense] counsel objects, the ‘party’ cannot be said to have consented; however, . . . for the . . . objection to be valid, it must be made on the record.” People v Buie (Buie III), 491 Mich 294, 297-298, 316, 318-319 (2012) (where the defendant failed to object on the record to the use of videoconferencing technology to present the testimony of an examining physician and a DNA expert, and where defense counsel stated that she would “leave [the issue of the admission of the video testimony] to the [trial c]ourt’s discretion,” the defendant both waived his constitutional right of confrontation and “consent[ed]” to the use of the video technology within the meaning of MCR 6.006(C)(2)), reversing People v Buie (Buie II) (After Remand), 291 Mich App 259 (2011).

25 For a discussion on MCL 600.2163a(4), see Sections 6.8(B)(4)-(5).
B. Victims-Witnesses Who Are Under Age 16, Age 16 or Older With Developmental Disabilities, or Vulnerable Adults

Section 6123a of the Revised Judicature Act, MCL 600.2163a, and § 17b of the Juvenile Code, MCL 712A.17b, afford certain witnesses special protections in prosecutions and proceedings involving certain offenses, if the witness meets either an age or disability requirement. These special protections include the use of dolls or mannequins; the presence of a support person; rearranging the courtroom or shielding the victim; and the use of videorecorded statements or closed-circuit television in presenting the victim-witness’s testimony.

The procedures and protections permitted under MCL 600.2163a and MCL 712A.17b are in addition to other protections and procedures afforded by law or court rule. See MCL 600.2163a(22); MCL 712A.17b(18). See also In re Hensley, 220 Mich App 331, 333-334 (1996) (these statutory provisions supplement rather than limit a trial court’s authority to protect specified child and witnesses with developmental disabilities). Accordingly, a court is free to go beyond the statutory procedures enunciated in MCL 600.2163a and MCL 712A.17b and to use its authority under other rules, such as MCR 3.923 and MRE 611.27 In re Hensley, supra at 335.

1. Witnesses Afforded Special Protections

The protections set out in MCL 600.2163a apply to a witness, defined in MCL 600.2163a(1)(f) as “an alleged victim of an [enumerated] offense” who is one of the following:

- under 16 years of age,
- 16 years of age or older with a developmental disability, or
- a vulnerable adult.28

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26 Note that Shorter was decided before 2018 PA 282 was enacted. The Court analyzed former MCL 600.2163a(4) in the context of support persons, which has been amended to also authorize the use of support dogs for certain witnesses. In addition, the Court relied on the definition of witness in coming to its conclusion that fully abled adult witnesses are not afforded the special protections under MCL 600.2163a; that definition has not been amended since the Shorter decision. Accordingly, although it is ultimately up to the trial court to decide, it does not appear that the 2018 amendments to MCL 600.2163a impact the outcome of the Shorter decision.

27 MCR 6.001(D) states that a rule of civil procedure applies to a criminal case except “(1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, (3) when a statute or court rule provides a like or different procedure, or (4) with regard to limited appearances and notices of limited appearance.”
See also MCL 712A.17b(1)(d), which contains a similar definition of witness, but does not include vulnerable adults.

For purposes of MCL 600.2163a and MCL 712A.17b, a developmental disability “includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.” MCL 600.2163a(1)(c); MCL 712A.17b(1)(b).

Although MCL 600.2163a(1)(c) and MCL 712A.17b(1)(b) do not contain a comprehensive definition of the term developmental disability, the statutes reference MCL 330.1100a. MCL 330.1100a(25) states that a developmental disability is either of the following:

“(a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:

(i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

(ii) Is manifested before the individual is 22 years old.

(iii) Is likely to continue indefinitely.

(iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

28 “Vulnerable adult” means one or more of the following:

(i) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.

(ii) An adult as defined in . . . MCL 400.703.

(iii) An adult as defined in . . . MCL 400.11.” MCL 750.145m(u); see MCL 600.2163a(1)(e).
(G) Economic self-sufficiency.

(v) Reflects the individual’s need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided.”

The Court of Appeals has stated, in dicta, that disabilities caused by the charged offense do not qualify as disabilities under MCL 600.2163a. People v Burton (Michael), 219 Mich App 278, 286-287 (1996).

2. Applicable Prosecutions and Proceedings

For purposes of a witness under the age of 16 or a witness 16 years of age or older with a developmental disability, the protections that are afforded under MCL 600.2163a and MCL 712A.17b apply only to “prosecutions and proceedings” involving the following offenses, as set out in MCL 600.2163a(2)(a) and MCL 712A.17b(2)(a):29

- Child abuse, MCL 750.136b.
- Sexually abusive activity or material involving children, MCL 750.145c.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

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29 The protections afforded under MCL 712A.17b only apply to an enumerated offense if, when committed by an adult, it would be a felony. MCL 712A.17b(2)(a). Note that MCL 712A.17b(2)(a) also refers to cruelty to and torturing of children, former MCL 750.136 and MCL 750.136a, which have both been repealed.
For purposes of a witness who is considered a vulnerable adult, protections may be afforded under MCL 600.2163a only in “prosecutions and proceedings” for one or more of the following offenses, as set out in MCL 600.2163a(2)(b)(i)-(ii):

- Home invasion, MCL 750.110a.
- Vulnerable adult abuse, MCL 750.145n–MCL 750.145p.
- An assaultive crime, as that term is defined in MCL 770.9a.

3. Dolls or Mannequins

MCL 600.2163a authorizes the use of dolls or mannequins to assist child victim-witnesses, victim-witnesses with developmental disabilities, and vulnerable adult victim-witnesses while testifying in specified court proceedings. See also MCL 712A.17b, which provides similar protections under the Juvenile Code, but is not applicable to vulnerable adults.

According to MCL 600.2163a(3):

“If pertinent, the court must permit the witness to use dolls or mannequins, including, but not limited to anatomically correct dolls or mannequins, to assist the witness in testifying on direct or cross-examination.” See also MCL 712A.17b(3), which contains substantially similar language.

An expert witness may testify about a victim’s reaction in using anatomically correct dolls or mannequins if the testimony relates the victim’s use of the doll with the expert’s experience with other victims of sexual abuse. See People v Garrison (Leonard) (On Remand), 187 Mich App 657, 658-659 (1991). However, an expert witness may not give an opinion as to whether the victim was actually sexually abused. Garrison (Leonard), supra at 659. In Garrison (Leonard), supra at 659, the expert witness improperly testified: “Based on my experience, [the victim’s] reaction to the dolls demonstrated that she had indeed been sexually abused.”
4. **Support Persons**

MCL 600.2163a authorizes the use of support persons to accompany child victim-witnesses, victim-witnesses with developmental disabilities, and vulnerable adult victim-witnesses while testifying in specified court proceedings. See also MCL 712A.17b, which provides similar protections under the Juvenile Code, but is not applicable to vulnerable adults. MCL 600.2163a(4) states in part:

“The court must permit a witness who is called upon to testify to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony.”

See also MCL 712A.17b(4), which contains substantially similar language.

“A notice of intent to use a support person... is only required if the support person... is to be utilized during trial and is not required for the use of a support person... during any other courtroom proceeding. A notice of intent under this subsection must be filed with the court and must be served upon all parties to the proceeding. The notice must name the support person... identify the relationship the support person has with the witness, if applicable, and give notice to all parties that the witness may request that the named support person... sit with the witness when the witness is called upon to testify during trial.” MCL 600.2163a(5). See also MCL 712A.17b(4), which contains similar requirements.

The defendant may file a motion objecting to the use of a named support person. See MCL 600.2163a(5); MCL 712A.17b(4). If the defendant objects, the court must rule on the motion “before the date when the witness desires to use the support person[.]” MCL 600.2163a(5); MCL 712A.17b(4).

When permitting the use of a support person, the trial court should be cognizant of the potential for unduly suggestive nonverbal communication between the support person and the witness. See Jehnsen, 183 Mich App at 308-311. In Jehnsen, supra at 310-311, the child-witness’s mother nodded and shook her head during the child’s testimony. However, the trial court concluded: “‘[N]othing of substance was said by the child following the one or two occasions in which the mother engaged in the conduct. . . . I think it is clear that there is no showing of a correlation between the conduct and the

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30 See M Crim JI 5.14 for an instruction on Support Persons or Animals.
testimony.”” Id. at 310. “[A] new trial would be warranted only if the evidence established a link between the conduct of the mother and the testimony of the child.” Id. at 311. See also People v Rockey, 237 Mich App 74, 78 (1999) (the trial court did not err in allowing the seven-year-old sexual assault victim to sit on her father’s lap while testifying where there was no evidence of nonverbal communication between the victim and her father).

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**Practice Note:**

Before testimony is taken, the judge should consider advising the support person not to react verbally or non-verbally (with gestures or motions) to questions asked of the witness or the witness’s responses.

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**5. Courtroom Support Dog**

“The court must . . . permit a [child victim-witness, a victim-witness with a developmental disability, or a vulnerable adult victim-witness] who is called upon to testify to have a courtroom support dog and handler sit with, or be in close proximity to, the witness during his or her testimony.” MCL 600.2163a(4). MCL 600.2163a(1)(a) defines courtroom support dog as “a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dog International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to the effective date of [September 27, 2018].”

“A notice of intent to use a . . . courtroom support dog is only required if the . . . courtroom support dog is to be utilized during trial and is not required for the use of a . . . courtroom support dog during any other courtroom proceeding. A notice of intent under this subsection must be filed with the court and must be served upon all parties to the proceeding. The notice must name the . . . courtroom support dog, . . . , and give notice to all parties that the witness may request that

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31 The agency supplying the courtroom support dog conveys all responsibility for the animal to the prosecutor’s office or government entity in charge of the courtroom while the dog is being utilized. See MCL 600.2163a(6)
the ... courtroom support dog sit with the witness when the witness is called upon to testify during trial.” MCL 600.2163a(5).

The defendant may file a motion objecting to the use of a courtroom support dog. See MCL 600.2163a(5). If the defendant objects, the court must rule on the motion “before the date when the witness desires to use the ... courtroom support dog.” MCL 600.2163a(5).

6. Rearranging the Courtroom and Shielding or Screening the Witness from Defendant or Other Persons

a. Preliminary Examinations

Before a preliminary examination in criminal proceedings, a party may make a motion to rearrange the courtroom to protect a child victim-witness, a victim-witness with a developmental disability, or a vulnerable adult victim-witness. A court must consider on the record all the following factors when considering whether special arrangements are needed to protect the witness’s welfare:

“(a) The age of the witness.
(b) The nature of the offense or offenses.
(c) The desire of the witness or the witness’s family or guardian to have the testimony taken in a room closed to the public.
(d) The physical condition of the witness.” MCL 600.2163a(16).

If the court determines on the record that it is necessary to protect the welfare of the witness, it must, after granting the motion, order both of the following:

“(a) That all persons not necessary to the proceeding must be excluded during the witness’s testimony from the courtroom where the preliminary examination is held. Upon request by any person and the payment of the appropriate fees, a transcript of the witness’s testimony must be made available.

(b) That the courtroom be arranged so that the defendant is seated as far from the witness
stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant’s position must be located so as to allow the defendant to hear and see the witness and be able to communicate with his or her attorney.” MCL 600.2163a(17).

b. Trials

Before a criminal trial, a party may make a motion to rearrange the courtroom to protect a child victim-witness, a victim-witness with a developmental disability, or a vulnerable adult victim-witness. A court must consider on the record all the following factors when considering whether special arrangements are needed to protect the witness’s welfare:

“(a) The age of the witness.

(b) The nature of the offense or offenses.

(c) The desire of the witness or the witness’s family or guardian to have the testimony taken in a room closed to the public.

(d) The physical condition of the witness.” MCL 600.2163a(18).

If the court finds on the record that special arrangements are necessary and grants the motion, it must order one or more of the following:

“(a) That all persons not necessary to the proceeding be excluded during the witness’s testimony from the courtroom where the trial is held. The witness’s testimony must be broadcast by closed-circuit television to the public in another location out of sight of the witness.

(b) That the courtroom be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant’s position must be the same for all witnesses and must be located so as to allow the defendant to hear and see all
witnesses and be able to communicate with
his or her attorney.

(c) That a questioner’s stand or podium be
used for all questioning of all witnesses by all
parties and must be located in front of the
witness stand.” MCL 600.2163a(19).

Although MCL 600.2163a(19) only expressly authorizes
three methods of accommodating the welfare of a witness
when testifying—the exclusion of unnecessary persons
from the courtroom, rearrangement of the courtroom, and
use of a questioner’s stand or podium—MCL 600.2163a
does not preclude the use of other methods of
“protections or procedures afforded to a witness by law
or court rule.” MCL 600.2163a(22). People v Rose
(Ronald), 289 Mich App 499, 508-509 (2010). MRE 611(a)
gives a court inherent authority “to control the mode and
order by which witnesses are interrogated.” Rose (Ronald),
289 Mich App at 509. “This inherent authority also
includes the ability to employ procedures that limit a
defendant’s right to confront his [or her] accusers face-
[-]to[-]face even when the provisions of MCL 600.2163a do
not apply.” Rose, 289 Mich App at 509. In Rose (Ronald),
289 Mich App at 516-517, the trial court’s use of a witness
screen, although not expressly authorized by MCL
600.2163a, did not violate the defendant’s right of
confrontation because “aside [from the victim’s] inability
to see [the defendant], the use of the witness screen
preserved the other elements of the confrontation right
and, therefore, adequately ensured the reliability of the
truth-seeking process.”

(c. Juvenile Proceedings

In a Family Division proceeding involving a juvenile who
is accused of an enumerated offense which, if committed
by an adult, would be a felony, a party may make a
motion to rearrange the courtroom to protect a child
victim-witness or a victim-witness with a developmental
disability. MCL 712A.17b(14). In determining whether it
is necessary to rearrange the courtroom to protect the
witness, the court must consider the following:

32 Formerly MCL 600.2163a(16).
33 Formerly MCL 600.2163a(19).
34 See the Michigan Judicial Institute’s Evidence Benchbook, Chapter 3, for more information on a
defendant’s right to confront witnesses.
“(a) The age of the witness.

(b) The nature of the offense or offenses.”

MCL 712A.17b(14)(a)-(b).

If the court determines on the record that it is necessary to protect the welfare of the witness, the court must order one or both of the following:

“(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent’s position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.

(b) A questioner’s stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand.” MCL 712A.17b(15)(a)-(b).

7. Videorecorded Statements

“A custodian of the videorecorded statement may take a witness’s videorecorded statement before the normally scheduled date for the defendant’s preliminary examination.” MCL 600.2163a(7). See also MCL 712A.17b(5), which contains substantially similar language except that it does not require the statement to be taken before the scheduled date of the preliminary examination.

A videorecorded statement is a witness’s statement taken by a custodian of the videorecorded statement as provided in [MCL 600.2163a(7)]. Videorecorded statement does not include a videorecorded deposition taken as provided in [MCL 600.2163a(20)] and [MCL 600.2163a(21)].” MCL 600.2163a(1)(d).35

A custodian of the videorecorded statement means any of the following:

- The department of health and human services;

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35 MCL 712A.17b(1)(c) contains substantially similar language.
• The investigating law enforcement agency;

• The prosecuting attorney;

• The department of attorney general; or

• Any other person designated under the county protocols established as required by MCL 722.628. MCL 600.2163a(1)(b); MCL 712A.17b(1)(a).

A videorecorded statement must:

• “state the date and time that the statement was taken;”

• “identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording;”

• “show a time clock that is running during the taking of the videorecorded statement.” MCL 600.2163a(7). See also MCL 712A.17b(5), which contains substantially similar language.

In addition, the questioning of the witness must be full and complete and in accordance with the forensic interview protocol implemented as required by MCL 722.628, or as otherwise provided by law. MCL 600.2163a(10); MCL 712A.17b(6). “[I]f appropriate for the witness's developmental level or mental acuity, [the questioning of the witness must also] include, but is not limited to, all of the following areas:

(a) The time and date of the alleged offense or offenses.

(b) The location and area of the alleged offense or offenses.

(c) The relationship, if any, between the witness and the accused [or the respondent].

(d) The details of the offense or offenses.

(e) The names of any other persons known to the witness who may have personal knowledge of the alleged offense or offenses.” MCL 600.2163a(10); MCL 712A.17b(6).
In prosecutions of adult offenders, “[a] videorecorded statement may be considered in court proceedings only for 1 or more of the following purposes:

(a) It may be admitted as evidence at all pretrial proceedings, except that it cannot be introduced at the preliminary examination instead of the live testimony of the witness.

(b) It may be admitted for impeachment purposes.

(c) It may be considered by the court in determining the sentence.

(d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea.” MCL 600.2163a(8).

In juvenile proceedings, a videorecorded statement “shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness.” MCL 712A.17b(5).

See In re Martin, 316 Mich App 73, 83-84 (2016) (reversing the trial court’s order of adjudication with respect to the respondent-father and the order terminating his parental rights where the trial court erroneously relied on the child’s videorecorded statements contained in a DVD instead of live testimony to adjudicate the respondent-father).36


If a videorecorded statement becomes part of the court record, it is subject to a court protective order to protect the witness’s privacy. MCL 600.2163a(14); MCL 712A.17b(10).

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36 “[A] videorecorded statement taken in compliance with MCL 712A.17b must be admitted at a [pretrial] tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement, i.e., to assess whether ‘the circumstances surrounding the giving of the statement provide[d] adequate indicia of trustworthiness,’ MCR 3.972(C)(2)(a)]” however, in the In re Martin case, “the forensic interviewer [whose recorded questioning of the child raised claims by the child of sexual abuse by the respondent-father] did not testify at trial with respect to the child’s statements made in the interview[,] and the trial court did not employ the [videorecorded statement] to determine whether the forensic interviewer should be allowed to testify under MCR 3.972(C)(2)(a][,] but the trial court instead erroneously] . . . used the [videorecorded statement], in and of itself, to adjudicate [the] respondent-father.” In re Martin, 316 Mich App at 83.
Unless otherwise provided in MCL 600.2163a and MCL 712A.17b, a videorecorded statement must not be copied or reproduced in any manner and is exempt from disclosure under Michigan’s Freedom of Information Act (FOIA) or under another statute or Michigan court rule governing discovery. However, the production or release of a transcript of the videorecorded statement is not prohibited. MCL 600.2163a(15); MCL 712A.17b(11). In addition, if authorized by the prosecuting attorney in the county where the videorecorded statement was taken, “a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county on the forensic interview protocol implemented as required by . . . MCL 722.628, or as otherwise provided by law.” MCL 600.2163a(12); MCL 712A.17b(8).

A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of the videorecorded statement to the following entities:

- A law enforcement agency;
- An agency authorized to prosecute the criminal case; or
- An entity that is part of the county protocols established under MCL 722.628, or as otherwise provided by law. MCL 600.2163a(11); MCL 712A.17b(7).

In prosecutions of adult offenders, the defendant and his or her attorney have the right to view and hear a videorecorded statement before the preliminary examination, and, upon request, the prosecutor must also provide the defendant and his or her attorney with reasonable access to the videorecorded statement at a reasonable time before the defendant’s pretrial or trial. MCL 600.2163a(11). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded statement be given to the defense under protective conditions, “including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement.” Id.

In juvenile adjudications, the respondent and his or her attorney have the right to view and hear a videorecorded statement “at a reasonable time before it is offered into evidence.” MCL 712A.17b(7). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded statement be given to the respondent and his or her attorney under protective conditions, “including, but not
limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement.” *Id.*

The intentional and unauthorized release or consent to release of a videorecorded statement or a copy of the statement by an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness’s parent, guardian, guardian ad litem, or attorney is a misdemeanor punishable by not more than 93 days of imprisonment, a maximum fine of $500, or both. MCL 600.2163a(13), MCL 600.2163a(23); MCL 712A.17b(9), MCL 712A.17b(19).

8. **Using Videotaped Depositions or One-Way Closed-Circuit Television When Other Protections Are Inadequate**

“If, upon the motion of a party or in the court’s discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in [MCL 600.2163a(3), [MCL 600.2163a](4), [MCL 600.2163a](17), and [MCL 600.2163a](19), the court must order that the witness may testify outside the physical presence of the defendant by closed circuit television or other electronic means that allows the witness to be observed by the trier of fact and the defendant when questioned by the parties.” MCL 600.2163a(20). See also MCL 712A.17b(16), which contains substantially similar language and is applicable during the adjudication stage of a juvenile proceeding. “A videorecorded deposition may be considered in court proceedings only as provided by law.” MCL 600.2163a(9).

The language used in MCL 600.2163a(20) and MCL 712A.17b(16) does not clearly define the minimum level of psychological or emotional harm that a trial court must find before it orders a videotaped deposition in lieu of live testimony. However, the Court of Appeals has stated that first, “the trial court must find that the defendant’s presence will cause a level of trauma that renders the witness unable to testify . . . [T]his requirement [does] not [] requir[e] that the trial court find the witness would stand mute if put on the witness stand, but rather that the witness would not be able to

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37 These subsections allow, under limited circumstances, for the use of dolls or mannequins, the presence of a support person or courtroom support dog, the exclusion of all unnecessary persons from the courtroom, the placement of the defendant as far from the witness stand as is reasonable, and the use of a podium. MCL 712A.17b contains similar provisions.
truthfully and understandably relate the witness’[s] relevant knowledge and perceptions of the circumstances of the crime. Second, the trial court must find that the witness would be unable to testify even if the procedures established in [MCL 600.2163a(3), [MCL 600.2163a(4), [MCL 600.2163a(17),38 and MCL 600.2163a(19)]39] are employed.” People v Pesquera, 244 Mich App 305, 311 (2001).

If the court grants a party’s motion to use a videotaped deposition, the deposition must comply with the following requirements of MCL 600.2163a(21), MCL 712A.17b(13), and MCL 712A.17b(17):

• “For purposes of the videorecorded deposition under MCL 600.2163a(20), the witness’s examination and cross-examination must proceed in the same manner as if the witness testified at the court proceeding for which the videorecorded deposition is to be used. The court must permit the defendant to hear the testimony of the witness and to consult with his or her attorney.” MCL 600.2163a(21).

• “For purposes of the videorecorded deposition under [MCL 712A.17b(16)], the witness’s examination and cross-examination shall proceed in the same manner as if the witness testified at the adjudication stage, and the court shall order that the witness, during his or her testimony, shall not be confronted by the respondent but shall permit the respondent to hear the testimony of the witness and to consult with his or her attorney.” MCL 712A.17b(17); see also MCL 712A.17b(13).

“The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him [or her].” People v Buie (Buie III), 491 Mich 294, 304 (2012). To preserve a defendant’s constitutional right under the Sixth Amendment to be present at trial and to confront witnesses face-to-face, the court must hear evidence and make particularized, case-specific findings that the alternate arrangement is necessary to protect the welfare of the witness. Pesquera, 244 Mich App at 309-310. In Maryland v Craig, 497 US

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38 Formerly MCL 600.2163a(10).
39 Formerly MCL 600.2163a(12).
836, 855-856 (1990), the United States Supreme Court detailed the necessary findings:

“The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than \textit{de minimis}, \textit{i.e.}, more than ‘mere nervousness or excitement or some reluctance to testify[.]’”\textsuperscript{40} (Internal citations omitted.)

Where the defendant failed to object on the record to the use of two-way interactive video technology to present the testimony of an examining physician and a DNA expert, and where defense counsel stated that she would “leave [the issue of the admission of the video testimony] to the [trial court’s] discretion,” the defendant waived his right of confrontation under the state and federal constitutions. \textit{Buie III}, 491 Mich at 297-298, 316, 318-319, reversing \textit{People v Buie (Buie II) (After Remand)}, 291 Mich App 259 (2011). Noting that “[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel[,]” the \textit{Buie III} Court held that “where the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record.” \textit{Buie III}, 491 Mich at 306, 313, overruling in part \textit{People v Lawson}, 124 Mich App 371, 374 (1983).

\textsuperscript{40} See \textit{In re Vanidestine}, 186 Mich App 205, 209-212 (1990), where the Court applied \textit{Craig}, 497 US 836, to a juvenile delinquency case.
Although defense counsel stated at trial that the defendant “‘wanted to question the veracity of these proceedings,’” that statement did not constitute an objection because (1) it was not phrased as an objection, (2) the defendant effectively acquiesced to the use of two-way interactive technology when his counsel stated that she would leave it to the court’s discretion whether to use the technology, (3) the defendant made no complaints on the record when the court proceeded to explain how the technology worked, (4) the first remote witness testified via two-way interactive technology without further complaint, and (5) there was no complaint made before the testimony of the second remote witness. Buie III, 491 Mich at 316.41

See the Michigan Judicial Institute’s Evidence Benchbook, Chapter 3, for more information on using audio and video technology and a defendant’s right to confront witnesses.

6.9 Defendant’s Right of Self-Representation

A brief discussion on a defendant’s right of self-representation is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 4.

The right to self-representation is implicitly guaranteed by the Sixth Amendment. Faretta v California, 422 US 806, 814 (1975). “[T]he Sixth Amendment right to the assistance of counsel implicitly embodies a ‘correlative right to dispense with a lawyer’s help.’” Faretta, 422 US at 814, quoting Adams v United States ex rel McCann, 317 US 269, 279 (1942). The right to self-representation is specifically guaranteed by the Michigan Constitution and Michigan statute. Const 1963, art 1, § 13 states: “A [person] in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.” MCL 763.1 states: “On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face.”

A. Limitation or Forfeiture of Right

The right to self-representation is not absolute. It may be limited or even terminated when, for instance, the defendant engages in

41 The Buie III Court additionally held that, under these circumstances, the defendant “consent[ed]” to the use of the video technology within the meaning of MCR 6.006(C)(2). Buie III, 491 Mich at 318-320.
“serious and obstructionist misconduct.” *Faretta*, 422 US at 834, n 46. See *People v Arthur (Charles)*, 495 Mich 861, 862 (2013), where “[t]he trial court did not unconstitutionally ‘nullify’ the defendant’s right to self-representation by declining to remove the defendant’s leg shackles” because “the defendant elected to relinquish his right of self-representation rather than exercise that right while seated behind the defense table.”42

“[A] defendant may forfeit his self-representation right if he does not assert it in a timely manner.” *People v Richards (Kyle)*, 315 Mich App 564, 576 (2016), rev’d on other grounds 501 Mich 921 (2017) (internal quotation marks and citation omitted).43 Although “[*Faretta*, 422 US 806 (1975),] did not establish a bright-line rule for timeliness,” the timeliness of a motion for self-representation “is established, at least in part, by the date of trial relative to the date of the request.” *Richards (Kyle)*, 315 Mich App at 577, 579. Accordingly, “the trial court’s decision denying defendant’s request for self-representation [as untimely] was well within the range of reasonable and principled outcomes and was not an abuse of discretion” where “[i]t was not until after the jury had been sworn that defendant, through counsel, made the request to proceed in *propria persona*.” *Id.* at 579-581 (noting that “defendant never made a [pretrial] request for self-representation” and that he filed multiple motions for new counsel). Additionally, case law does not require “that a trial court *must* conduct a *Faretta* inquiry prior to denying a request as untimely;” nor must the court “engage in an inquiry pursuant to MCR 6.005(D)” regarding waiver of counsel. *Richards (Kyle)*, 316 Mich App at 578. “[B]ecause the underlying rationale for a trial court to conduct an inquiry pursuant to MCR 6.005(D) “is to inform the defendant of the hazards of self-representation, not to determine whether a request is timely,”” it is “unnecessary for the trial court to engage in an inquiry pursuant to MCR 6.005(D)” when the dispositive issue is “whether defendant asserted his right to self-representation in a timely manner.” *Richards*, 316 Mich App at 578.

**B. Required Waiver of Counsel Procedures**

Determining when self-representation is appropriate is within the discretion of the trial judge. *People v Anderson (Donny)*, 398 Mich 361, 367 (1976). “When confronted with a defendant who wishes to

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42 The Court also found that ordering the defendant to wear the leg shackles in the first place was not a due process violation under the circumstances of the case. *Arthur (Charles)*, 495 Mich at 862.

43[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
represent himself or herself, the trial court must determine that the three requirements stated in [Anderson (Donny)], have been met.” Specifically, “the court must ensure:]

(1) that ‘the defendant’s request is unequivocal,’

(2) that ‘the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation,’ and


“Similarly, ‘[a trial court] may not permit the defendant to make an initial waiver of the right to . . . a lawyer’ unless the trial court first[:]

[(1)] advises the defendant ‘of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation[, and]’ . . .

[(2)] ‘offer[s] the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.”’ Campbell (Michael), 316 Mich App at 284, quoting MCR 6.005(D).

“Trial courts must substantially comply with the requirements stated in Anderson [(Donny)] and MCR 6.005(D). ‘Substantial compliance requires that the court discuss the substance of both Anderson [(Donny)] and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.’” Campbell (Michael), 316 Mich App at 284, 286, 288 (finding the trial court substantially complied with the requirements of MCR 6.005(D) and Anderson (Donny), 398 Mich 361, where “[b]oth the prosecutor and the trial court asked [the defendant] a series of questions to ascertain whether he fully

44[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215[J](1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.
understood the dangers of self-representation[;]” “the trial court could properly consider the prosecutor’s questions and [the defendant’s] responses as part of its ‘short colloquy’ to determine whether [the defendant] fully understood the import of his waiver[;]”,45 quoting People v Adkins (After Remand), 452 Mich 702, 726-727 (1996), overruled in part on other grounds by People v Williams (Rodney), 470 Mich 634, 641 n 7 (2004).

See also People v Ahumada, 222 Mich App 612, 616-617 (1997), finding:

“Although the right to proceed in propria persona is guaranteed by the United States Constitution, the Michigan Constitution, and state statute, this right is not absolute. Proper compliance with the waiver of counsel procedures requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant. The defendant must exhibit an intentional relinquishment or abandonment of the right to counsel, and the court should indulge every assumption against waiver. The presumption against waiver is in large part attributable to society’s belief that defendants with legal representation stand a better chance of having a fair trial than people without lawyers. If a court does not believe the record evidences a proper waiver, the court should note the reasons for its belief and require counsel to continue to represent the defendant.” (Internal citations omitted.)

C. Appointment of Standby Counsel

A trial judge has discretion to appoint, either sua sponte or by request, standby counsel to assist a self-represented defendant. People v Adkins (Kenneth) (After Remand), 452 Mich 702, 720 n 15 (1996), overruled in part on other grounds by People v Williams (Rodney), 470 Mich 634, 641 n 7 (2004). Appointment of standby counsel may even be made over the defendant’s objection, as long as the defendant still maintains actual control over the case presented to the jury, and if standby counsel’s participation is not allowed to

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45 Although the trial court failed to specifically list the charges against the defendant and “never explicitly found that his waiver request was unequivocal, knowing, and voluntary[,]” these errors were harmless where “there [was] record support that [the defendant] was fully aware of the charges against him[,]” and the trial court “endeavored to make the requisite determinations and . . . actually found that [the defendant’s] waiver was unequivocal, knowing, and voluntary.” Campbell (Michael), 316 Mich App at 287-288.

**D. Procedures Following Waiver of Counsel**

“If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) 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. 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.

The 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).

“MCR 6.005(E) requires the court to confirm the waiver before a subsequent ‘proceeding,’ such as a ‘trial[,]’ [but the court rule] does not require the trial court to confirm the waiver on each day of trial.” *People v Campbell (Michael)*, 316 Mich App 279, 290-291 (2016), overruled on other grounds by *People v Arnold*, 502 Mich 438 (2018)46 (concluding that “[a]lthough the trial court did not explicitly remind” the defendant, at several hearings following his initial waiver and on the second and third days of trial, “that he had the continued right to the assistance of counsel, it [was] evident [from the record] that [the defendant] was aware of that right and continued to assert his right to represent himself”).

“Unlike the rules relating to an initial waiver of counsel, the procedure outlined in MCR 6.005(E) does not stem from any

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46[A] prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally *Dunn*, 254 Mich App at 263-266.
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Section 6.10

Limitations on Duplication of Evidence in Sexually Abusive Crimes Involving Children

“In any criminal proceeding regarding an alleged violation or attempted violation of [MCL 750.145c], the court shall deny any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any photographic or other pictorial evidence of a child engaging in a listed sexual act if the prosecuting attorney makes that evidence reasonably available to the defendant. Evidence is considered to be reasonably available to the defendant under this subsection if the prosecuting attorney provides an opportunity to the defendant and his or her attorney, and any person the defendant may seek to qualify as an expert witness at trial, to inspect, view, and examine that evidence at a facility approved by the prosecuting attorney.” MCL 750.145c(10).

For purposes of MCL 750.145c, MCL 750.145c(1)(i) defines listed sexual act as “sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.”

Section 6.11

Limitations on Identifying a Victim’s Appearance, Address, Place of Employment, and Other Information

A. Prohibited Disclosure Under the Freedom of Information Act (FOIA)

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

“(a) The home address, home telephone number, work address, and work telephone number of the victim unless the address is used to identify the place of the crime.

See the Michigan Judicial Institute’s Crime Victim Rights Benchbook for more information.
(b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.

(c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent to commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed:

(i) The victim’s name and address.

(ii) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.

(iii) Any other information that would tend to reveal the identity of the victim, including a reference to the victim’s familial or other relationship to the accused.” MCL 780.758(3)(a)-(c) (felonies); MCL 780.818(2)(a)-(c) (serious misdemeanors); MCL 780.788(2)(a)-(c) (juveniles).48

These provisions “do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services.” See MCL 780.758(4) (felonies); MCL 780.818(3) (serious misdemeanors); and MCL 780.788(3) (juveniles).

B. Protection of Victim’s Identifying Information

To protect a crime victim’s constitutional right to be treated with respect for his or her dignity and privacy, the CVRA allows a prosecutor to request that a victim’s identifying information be protected from disclosure at trial. MCL 780.758(1) states:

“Based upon the victim’s reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant’s direction against the victim or the victim’s immediate family, the prosecuting attorney may move [or, in the absence of a prosecuting attorney, the victim may request49] that the victim or any other witness not be compelled to testify at pretrial

48 Neither MCL 780.818(3) nor MCL 780.788(2)(a) contain the phrase “unless the address is used to identify the place of the crime.”

49 In juvenile delinquency proceedings, there is an additional provision that allows the victim to move to limit testimony if the prosecutor is absent. MCL 780.788(1).
proceedings or at trial for purposes of identifying the victim as to the victim’s address, place of employment, or other personal identification without the victim’s consent. A hearing on the motion shall be in camera.”

These protections also apply to serious misdemeanor\(^{50}\) cases, MCL 780.818(1), and to juvenile delinquency proceedings, MCL 780.788(1).

**Note:** In criminal sexual conduct prosecutions, if the victim, defendant, or counsel requests it, the magistrate must order that the names of the victim and the defendant and the details of the alleged offense be suppressed until the defendant is arraigned on the information, the charge dismissed, or the case otherwise concluded, whichever occurs first. See MCL 750.520k.

### 6.12 Victim Confidentiality Concerns and Court Records

Court records\(^{51}\) and confidential files are not subject to requests under Michigan’s Freedom of Information Act (FOIA), because the judicial branch of government is specifically exempted from that act. See MCL 15.232(h)(iv); MCL 15.233(1). However, court records are public unless specifically restricted by law or court order. MCR 6.007; MCR 8.119(I)(1). This section examines specific restrictions preserving the confidentiality of crime victims’ identities when criminal court records are accessed.\(^{52}\)

**A. Felony Cases**

In felony cases, the Crime Victim’s Rights Act (CVRA) limits access to a victim’s address and phone number:

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

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\(^{50}\) Serious misdemeanors are described in MCL 780.811(1)(a).

\(^{51}\) See MCR 1.109 and MCR 8.119 for what constitutes a court record.

\(^{52}\) On the safety and privacy of crime victims generally, see the Michigan Judicial Institute’s *Crime Victim Rights Benchbook*, Chapter 3.
B. **Serious Misdemeanor Cases**


Although a victim’s name, address, and telephone number must appear on certain documents related to the case, these documents “shall not be a matter of public record.” See [MCL 780.812](https://michiganlaw.justia.com/codes/michigan-compilation-of-laws/1996/part-xv/chapter-83/section-780.812) (requiring investigating officer to include separate statement from victim that includes this information); [MCL 780.816(1)](https://michiganlaw.justia.com/codes/michigan-compilation-of-laws/1996/part-xv/chapter-83/section-780.816) (requiring notice being sent to prosecuting attorney regarding whether guilty or nolo contendere plea was accepted at arraignment to include this information).

C. **Juvenile Delinquency Cases**

Generally all case file records under the Juvenile Code, [MCL 712A.1 et seq.](https://michiganlaw.justia.com/codes/michigan-compilation-of-laws/1996/part-xv/chapter-712a) are open to the general public, while confidential files are only open to individuals “who are found by the court to have a legitimate interest [in the file].” [MCR 3.925(D)(1)-(2)](https://michiganlaw.justia.com/rules-of-court/michigan-court-rules/375). “In determining whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law.” [MCR 3.925(D)(2)](https://michiganlaw.justia.com/rules-of-court/michigan-court-rules/375).

“‘Records’ are as defined in MCR 1.109 and MCR 8.119 and include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders.” [MCR 3.903(A)(25)](https://michiganlaw.justia.com/rules-of-court/michigan-court-rules/375).


- the separate statement about the known victims of a juvenile’s offense, as required by [MCL 780.751 et seq.](https://michiganlaw.justia.com/codes/michigan-compilation-of-laws/1996/part-xv/chapter-780/section-780.751);
• dispositional reports under MCR 3.943(C)(3) and MCR 3.973(E)(4);

• biometric data\(^{53}\) required to be maintained under MCL 28.243;

• reports of sexually motivated crimes, MCL 28.247;

• test results when the offender is charged with certain sexual or substance offense offenses, MCL 333.5129;

• youth and family record fact sheet;

• social study;

• reports, including dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports;

• DHHS records;

• correspondence

• victim statements;

• information about the identity or location of a foster parent, preadoptive parent, or relative caregiver.

6.13 Immigrant Crime Victim

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

This ICE Courthouse Enforcement Memo confirms (in footnote 2) that immigrant crime victims and witnesses

\(^{53}\) For purposes of MCL 28.243, “[b]iometric data’ means all of the following: (i) [f]ingerprint images recorded in a manner prescribed by the department [of state police][;] (ii) [p]alm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the department [of state police][;] (iii) [d]igital images recorded during the arrest or booking process, including a full-face capture, left and right profile, and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by the department [of state police][;] and (iv) [a]ll descriptive data associated with identifying marks, scars, amputations, and tattoos.” MCL 28.241a(b), (e).
continue to receive VAWA confidentiality protections against courthouse enforcement that are in addition to the limitations on civil courthouse enforcement set out in the January 10, 2018 memo. (See further discussion below)

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

• Under both the ICE Courthouse policy and VAWA Confidentiality, supervisory approval at the high levels of the local ICE offices is needed to approve any civil immigration enforcement action that is to take place at a courthouse in a family court or civil court case (including protection orders, custody, divorce, child support, small claims, landlord tenant, etc.)

• For victims of domestic violence, sexual assault, human trafficking, stalking, and other U visa listed criminal activities once the victim has filed their immigration case the case will appear in a DHS data base of VAWA confidentiality protected cases that the supervisors and enforcement officers can access and will have to check as part of the process of approving civil enforcement at a courthouse in a non-criminal case. (Note VAWA confidentiality protected victims also receive some protection from immigration enforcement in criminal cases).

The VAWA confidentiality protected immigration case types that will be flagged for addition protection are:

• VAWA self-petitions, VAWA cancellation of removal and VAWA suspension of deportation

• U visas for crime victims

• T visas for human trafficking victims

• Battered spouse waivers

• Work authorization applications filed by abused spouses of A, E(iii), G and H visas.

• Since it is clear from research that when victims begin filing for immigration protections and seek help from lawyers, law enforcement and courts, perpetrators are actively involved in trying to get immigrant victim deported by providing ‘tips’ about the victim to immigration enforcement officials. The protections these policies offer victims are strongest once the victim has filed one of the immigration cases listed above.
Advocates, attorneys, law enforcement and prosecutors need to screen immigrant victims early and file their VAWA confidentiality protected immigration case as soon as possible so that victims can get the best protections from the policies described in more detail below.” National Immigrant Women’s Advocacy Project (NIWAP), Immigration and Customs Enforcement January 2018 Courthouse Enforcement Policy and VAWA Confidentiality Protections for Immigrant Crime Victims (January 31, 2018).

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

6.14 Testing and Counseling for Sexually Transmitted Infection, Hepatitis, and HIV

This section discusses a court’s authority to order testing and counseling for sexually transmitted infection, hepatitis, and HIV in two circumstances: (1) after a defendant has been arrested and charged for a specified sex offense; and (2) after a defendant has been bound over to circuit court on a specified sex offense. For discussion of this authority as it pertains to a defendant convicted of, or a juvenile found responsible for, a specified sex offense, see the Michigan Judicial Institute’s Evidence Benchbook, Chapter 4.

A. Defendants Arrested and Charged

1. Discretionary Examination and Testing

Under MCL 333.5129(1), a defendant who is arrested and charged with a violation of any of the following prostitution offenses may be ordered by the court to be examined or tested for sexually transmitted infection, hepatitis B infection, hepatitis C infection, human immunodeficiency virus (HIV) infection, or acquired immunodeficiency syndrome (AIDS):

- Soliciting prostitution, MCL 750.448.

54 See SCAO Form MC 234, Order For Counseling and Testing For Disease/Infection.
• Receiving a person into a place of prostitution, MCL 750.449.

• Engaging services for purpose of prostitution, MCL 750.449a.

• Aiding and abetting certain prostitution offenses, MCL 750.450.

• Keeping a house of prostitution, MCL 750.452.

• Procuring a person for a house of prostitution, MCL 750.455.

• A local ordinance prohibiting prostitution or engaging or offering to engage the services of a prostitute.

If the examination or test results indicate the presence of sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS, the examination or test results must be reported to the defendant, the department, and the appropriate local health department for partner notification, as required under MCL 333.5114 and MCL 333.5114a. MCL 333.5129(1).

2. Mandatory Distribution of Sexually Transmitted Infection and HIV Information and Recommendation of Counseling

Under MCL 333.5129(2), if a defendant is arrested and charged with a violation of any of the following sex offenses, the judge or magistrate responsible for setting the defendant’s conditions of release pending trial must distribute to the defendant the same information on sexually transmitted infection and HIV infection required to be distributed by county clerks to marriage license applicants under MCL 333.5119(1):

• Accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a.

• Gross indecency between males, MCL 750.338.

• Gross indecency between males and females, MCL 750.338b.

55 No statutory provision requires distribution of such information to a victim of the following offenses.
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- Soliciting prostitution, MCL 750.448.
- Receiving a person into a place of prostitution, MCL 750.449.
- Engaging services for purpose of prostitution, MCL 750.449a.
- Aiding and abetting certain prostitution offenses, MCL 750.450.
- Keeping a house of prostitution, MCL 750.452.
- Procuring a person for a house of prostitution, MCL 750.455.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Intravenously using a controlled substance, MCL 333.7404.56
- A local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance.

The information required to be distributed by county clerks under MCL 333.5119(1), and thus by a judge or magistrate under MCL 333.5129(2), include educational materials prepared or approved by the department on topics related to prenatal care, and the transmission and prevention of sexually transmitted infection and HIV infection. MCL 333.5119(1). This information must include a list of locations where HIV counseling and testing services financed by the department are available. Id.

Additionally, the judge or magistrate must recommend that the defendant obtain additional information and counseling at a local health department testing and counseling center.

56 A person charged or convicted of this crime, or a corresponding local ordinance, is subject to the testing, counseling, and distribution of information requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not sexually transmitted infection. MCL 333.5129(9).
regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. MCL 333.5129(2). A defendant’s participation in counseling under MCL 333.5129(2) is voluntary. Id.

B. Defendants Bound Over to Circuit Court

1. Mandatory Examination and Testing

Under MCL 333.5129(3), a defendant who is bound over to circuit court for violating any of the enumerated offenses set out in MCL 333.5129(3) must be ordered by the district court to be examined or tested for sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV, and HIV antibodies, provided there is reason to believe the alleged violation involved sexual penetration or exposure to a body fluid of the defendant.57 “[I]f the [criminal] defendant is brought before [the circuit court] by way of indictment for any of the [enumerated offenses set out in MCL 333.5129(3)][,]” the circuit court must order the examination or testing. MCL 333.5129(3).

Additionally, at the victim’s58 request and “[i]f [the] defendant is bound over to or brought before the circuit court for violating . . . MCL 750.520b [(CSC-I)], [MCL] 750.520c [(CSC-II)], [MCL] 750.520d [(CSC-III)], [MCL] 750.520e [(CSC-IV)], [or MCL] 750.520g [(assault with intent to commit CSC)][,]” the court must “order the examination or testing to be done not later than 48 hours after the date that the information or indictment is presented and the defendant is in custody or has been served with the information or indictment.” MCL 333.5129(3). “The court shall include in its order for expedited examination or testing at the victim’s request under [MCL 333.5129(3)] a provision that requires follow-up examination or testing that is considered medically appropriate based on the results of the initial examination or testing.” Id.

The enumerated offenses set out in MCL 333.5129(3) are:

- Accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.

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57 SCAO Form MC 234, Order for Counseling and Testing for Disease/Infection.
58 For purposes of MCL 333.5129, “victim’ means that term as defined in . . . MCL 750.520a.” MCL 333.5129(12)(c). See Section 2.6(AB) for MCL 750.520a’s definition of the term.
• Gross indecency between males and females, MCL 750.338b.

• Aiding and abetting certain prostitution offenses, MCL 750.450.

• Keeping a house of prostitution, MCL 750.452.

• Procuring a person for a house of prostitution, MCL 750.455.

• CSC-I, MCL 750.520b.

• CSC-II, MCL 750.520c.

• CSC-III, MCL 750.520d.

• CSC-IV, MCL 750.520e.

• Assault with intent to commit criminal sexual conduct, MCL 750.520g.

Except as otherwise provided in MCL 333.5129(5)-(7) or as otherwise provided by law, the examinations or tests must be confidentially administered by a licensed physician, the department, or a local health department. MCL 333.5129(3).

For information on mandatory testing/examination upon conviction, see Section 9.3(A).

2. Mandatory Counseling

In addition to ordering testing and examination under MCL 333.5129(3), the court must order a defendant who has been bound over for an offense listed above to undergo counseling. MCL 333.5129(3). At a minimum, this counseling must include information regarding the treatment, transmission, and protective measures against acquiring sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. Id.

C. Confidentiality of Test Results

A defendant’s examination and test results conducted pursuant to MCL 333.5129(3) are confidential, except as provided in MCL 333.5129(1) (disclosure by testing agency to defendant and health departments for partner notification if the tests indicate infection), MCL 333.5129(5) (victim notification by testing agency), MCL 333.5129(6) (disclosure made part of court record but held confidential), MCL 333.5129(7) (disclosure to department of
corrections upon receiving custody of defendant or to individual or facility having custody over juvenile found to be within the provisions of MCL 712A.2(a)(1)), or as otherwise provided by law. MCL 333.5129(3). In addition, all records, reports, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to partner notification under MCL 333.5114a are confidential. MCL 333.5131(1). Finally, the test results or the fact that testing was ordered to determine the presence of HIV infection or AIDS are subject to the physician-patient privilege, MCL 600.2157. MCL 333.5131(2).

D. Disclosure of Test Results

MCL 333.5129(5)-(7) provide three limited exceptions to the confidentiality requirements. Under these exceptions, the person or agency conducting the examination must disclose the defendant’s or juvenile’s examination or test results and other medical information (when specified) to the following persons or entities:

- The victim\(^{59}\) or individual with whom the defendant or the juvenile allegedly engaged in sexual penetration\(^{60}\) or sexual contact\(^{61}\) or who was exposed to a body fluid during the course of the crime, if the victim or individual consents.\(^{62}\) MCL 333.5129(5). The court is responsible for providing the person or agency conducting the examination with the name, address, and telephone number of the victim or other individual, if consent is provided. \(Id.\)

- The court. MCL 333.5129(6). The examination or test results, including any other medical information, must be made part of the court or probate court record only after the defendant is sentenced or an order of disposition is entered for the juvenile. \(Id.\) This court record is confidential and may only be disclosed to one or more of the following:
  
  - The defendant or juvenile. MCL 333.5129(6)(a).
  - The local health department. MCL 333.5129(6)(b).

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\(^{59}\) For purposes of MCL 333.5129, “‘victim’ means that term as defined in . . . MCL 750.520a.” MCL 333.5129(12)(c). See Section 2.6(AB) for MCL 750.520a’s definition of the term.

\(^{60}\) For purposes of MCL 333.5129, “‘sexual penetration’ means that term as defined in . . . MCL 750.520a.” MCL 333.5129(12)(b). See Section 2.6(2) for MCL 750.520a’s definition of the term.

\(^{61}\) For purposes of MCL 333.5129, “‘sexual contact’ means that term as defined in . . . MCL 750.520a.” MCL 333.5129(12)(a). See Section 2.6(AA) for MCL 750.520a’s definition of the term.

\(^{62}\) The victim or individual is entitled to also receive subsequent testing or examination results “if the defendant or [juvenile] receives appropriate follow up testing for the presence of HIV[.]” MCL 333.5129(5).
• The department of public health. MCL 333.5129(6)(c).

• “The victim or other individual required to be informed of the results . . . or, if the victim or other individual is a minor or otherwise incapacitated, to the victim’s or other individual’s parent, guardian, or person in loco parentis.” MCL 333.5129(6)(d).

• The defendant or juvenile, upon written authorization, or to the juvenile’s parent, guardian, or person in loco parentis. MCL 333.5129(6)(e).

• As otherwise provided by law. MCL 333.5129(6)(f).

• The department of corrections (for defendants), and the individual related to the juvenile or the director of the public or private agency, institution, or facility (for juveniles), if the defendant or juvenile is placed under the custody of any of these entities. MCL 333.5129(7). The court is responsible for transmitting a copy of the examination and test results, including any other medical information, to these departments, agencies, and facilities. Id.

Under MCL 333.5129(7), a person or agency receiving test results or other medical information obtained pursuant to MCL 333.5129(6) or MCL 333.5129(7) involving an individual found to be infected with HIV or AIDS is prohibited from disclosing the test results or other medical information, except as specifically permitted under MCL 333.5131(3)(a)-(b) (if made pursuant to a subpoena, court order, or consent, or if made to protect the health of the individual, to prevent further transmission of HIV, or to diagnose and care for a patient). A person who violates MCL 333.5131 is guilty of a misdemeanor punishable by imprisonment for not more than one year, or a maximum fine of $5,000, or both. MCL 333.5131(8). A person who violates MCL 333.5131 “is [also] liable in a civil action for actual damages or $1,000.00, whichever is greater, and costs and reasonable attorney fees.” Id.

E. Positive Test Results Require Referral for Appropriate Medical Care

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a sexually transmitted infection, hepatitis B, hepatitis C, or HIV, must be referred by the agency providing the counseling or testing for medical care appropriate to the person’s condition. MCL 333.5129(8). The agency is not financially

63 MCL 333.5129(7) states, in part: “A person or agency that discloses information in compliance with [MCL 333.5129(6) or MCL 333.5129(7)] is not civilly or criminally liable for making the disclosure.”
responsible for the person’s medical care received as a result of the referral. *Id.*

F. Ordering Payment of the Costs of Examination and Testing

Upon conviction or juvenile adjudication, the court may order an individual who is examined or tested under MCL 333.5129 to “pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test.” MCL 333.5129(10). MCL 333.5129(11) states:

“An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] must be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments must be allocated as provided under the probate code, . . . MCL 710.21 to [MCL] 712B.41[;] the code of criminal procedure, . . . MCL 760.1 to [MCL] 777.69[;] and the William Van Regenmorter crime victim’s rights act, . . . MCL 780.751 to [MCL] 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both.”

6.15 Voir Dire Concerns in Criminal Sexual Assault Cases

Jury selection in criminal cases involving allegations of sexual assault can be critical because jurors may make decisions based on misconceptions and erroneous stereotypes about the sexual assault itself, and also about the alleged offender(s) and victim(s). See *Educating Juries in Sexual Assault Cases*, at http://www.aequitasresource.org/EducatingJuriesInSexualAssaultCasesPart1.pdf for a comprehensive review of issues involved in educating potential jurors in sexual assault cases.
6.16 Mental Health Court Program Not Available to Violent Offenders

“The circuit court or the district court in any judicial circuit or a district court in any judicial district may adopt or institute a mental health court pursuant to statute or court rules.” MCL 600.1091(1). MCL 600.1093(1) requires “[e]ach mental health court [to] determine whether an individual may be admitted to the mental health court[,]” “based on the individual’s legal or clinical eligibility.” However, “in no case shall a violent offender be admitted into mental health court.”

For purposes of the Mental Health Court Program, MCL 600.1090(i) defines violent offender as “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.”

64 A discussion of the Mental Health Court Program is beyond the scope of this benchbook. See the Criminal Proceedings Benchbook, Vol 2, Chapter 10, for additional information. For additional information on problem-solving court programs, including standards and best practice manuals, see http://courts.mi.gov/administration/admin/op/problem-solving-courts/pages/default.aspx.
# Chapter 7: General Evidence

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7.1 Chapter Overview

This chapter addresses general evidentiary problems that are likely to arise in criminal cases involving allegations of sexual assault, including Michigan’s rape-shield law and character evidence. Also discussed are selected hearsay rules and exceptions, prosecutorial discretion and witness competency. This chapter also addresses evidentiary rules applicable to criminal sexual conduct offenses, including audiotaped and photographic evidence, polygraph examinations and the statutory rights afforded to criminal sexual conduct defendants and victims. Finally, the chapter discusses various privileges that arise from marital relationships and relationships with service providers.

7.2 Rape-Shield Provisions


A. Applicability of the Rape-Shield Statute

“The rape-shield statute ‘constitutes a legislative policy determination that sexual conduct or reputation regarding sexual conduct as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant.’ The statute also reflects a belief that ‘inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury.’ Finally, the statute protects the privacy of the alleged victim and, in so doing, removes an institutional discouragement from seeking prosecution.” People v Sharpe, 502 Mich 313, 326 (2018), quoting People v Arenda, 416 Mich 1, 10-11 (1982); People v Morse, 231 Mich App 424, 429-430 (1998).

The rape-shield statute “serves to limit the admissibility of evidence of a complainant’s sexual conduct[,]” Sharpe, 502 Mich at 325. Specifically, MCL 750.520j(1) provides:

“(1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted under [MCL 750.520b to MCL 750.520g][1] unless and only to the extent that the judge finds that the following proposed evidence is

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1 The cited statutes describe offenses under the CSC Act. See Chapter 2.
material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim’s past sexual conduct\(^2\) with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.”

Testimony concerning prior false allegations of rape do not implicate the rape shield statute. See *People v Jackson* (Nicholas), 477 Mich 1019 (2007); *People v Williams*, 191 Mich App 269 (1991).\(^3\)

1. **Interplay Between Defendant’s Right of Confrontation and Rape-Shield Statute**

   Under **US Const, Am VI** and **Const 1963, art 1, § 20**, a defendant in a criminal case has a right to confront and cross-examine the witnesses against him or her. “When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case.” *People v Benton (Allanah)*, 294 Mich App 191, 198 (2011). In “recognizing that application of the statute’s evidentiary exclusion might in some instances violate a defendant’s Sixth Amendment right to confrontation,” the Michigan Supreme Court “has indicated that . . . evidence [precluded by the rape-shield statute] may be admissible when offered for” certain narrow purposes. *People v Powell*, 201 Mich App 516, 519 (1993), citing *People v Hackett*, 421 Mich 338, 339 (1984). If a trial court determines that evidence of a victim’s past sexual conduct is not admissible under one of the statutory exceptions, it must consider whether admission is required to preserve the defendant’s constitutional right to confrontation; if the evidence is not so required, the court “‘should . . . favor exclusion’ of [the] evidence.” *Id.* at 197, quoting *Hackett*, 421 Mich at 339.

   In *Hackett*, the Michigan Supreme Court provided examples of circumstances, in addition to those contained in MRE 404(a)(3),

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\(^2\) “*P*ast sexual conduct” refers to conduct that occurred before the evidence is offered at trial. *People v Adair*, 452 Mich 473, 482-483, 489 (1996) (remanding the case to the trial court for a determination of whether the probative value of the proposed evidence was outweighed by its prejudicial nature).

\(^3\) In cases where this is an issue, “the trial court should conduct an evidentiary hearing in camera to determine the admissibility of the evidence” at which “the defendant is obligated initially to make an offer of proof with regard to the proposed evidence and to demonstrate its relevance to the purpose for which the evidence is sought to be admitted.” *Williams*, 191 Mich App at 273. See Section 7.2(A)(9) for more information on in camera hearings.
in which evidence of a victim’s reputation or past sexual conduct may be admissible:

“We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant’s constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant’s prior sexual conduct for the narrow purpose of showing the complaining witness’s bias, this would almost always be material and should be admitted. Moreover[,] in certain circumstances, evidence of a complainant’s sexual conduct may also be probative of a complainant’s ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past.”

Hackett, 421 Mich at 348 (internal citations omitted).

The right to confrontation does not include the right to present irrelevant evidence. See People v Gaines, 306 Mich App 289, 316 (2014).

Evidence irrelevant to defense - no violation. The defendant argued that he was denied his right to confront witnesses because the trial court prevented inquiry into the identities of other boys to whom the victims sent naked photographs, and precluded inquiry into whether the victims had similar sexual experience with other boys. People v Gaines, 306 Mich App 289, 315 (2014). Although the evidence showing that the victims sent photographs to others was arguably relevant because the defendant claimed that the victims first suggested sending naked photographs to him in his defense against the accosting charge, “the identities of the other alleged recipients would not have had any significant tendency to make the defense more or less probable[,]” and thus, the trial court did not err by precluding inquiry into the recipients’ identities. Gaines, 306 Mich App at 316. Additionally, evidence of the victims’ other sexual contact was not admissible even though the victims were not just testifying as victims in their own cases, but were testifying as witnesses in the other cases. Id. at 317-318. The Court held that even when testifying as witnesses in another case, the victims remained “victims” under MCL 750.520a because it was still alleged that they were “subjected to criminal sexual conduct.” Gaines, 306 Mich App at 317-318. Finally, the other instances of sexual contact were inadmissible in the accosting prosecutions even though accosting is not
protected by MCL 750.520j; because the defendant’s defense to the accosting charges was that the victims themselves first initiated sending naked photographs to him, “whether the victims had sexual contact with others was not relevant to his defense to those charges.” Gaines, 306 Mich App at 318. Accordingly, the defendant was not denied the constitutional right to confrontation by exclusion of the evidence. Id. See also People v Wilhelm (On Rehearing), 190 Mich App 574, 577-578, 586-587 (1991) (although the defendant saw the complainant expose her breasts to two men in a bar on the night of the alleged assault and permitted one of those men to touch her breasts, excluding evidence of the complainant’s public sexual conduct did not violate the defendant’s constitutional right to confrontation because the evidence was not relevant to the issue of consent).

Prejudicial nature of evidence outweighs probative value - no violation. The defendant was convicted of three counts of CSC-I arising out of incidents involving an eight-year-old boy. People v Arenda, 416 Mich 1, 5-6 (1982). The trial court precluded admission of evidence of the complainant’s possible sexual conduct with others. Id. at 5. The defendant argued that the evidence was admissible to explain the complainant’s ability to describe the sexual acts that allegedly occurred, and to dispel the inference that this ability resulted from experiences with the defendant. Id. at 6, 11-12. The Supreme Court balanced the potential prejudicial nature of this evidence against its probative value in this case and found that application of the rape-shield statute to preclude admission of the evidence did not infringe on the defendant’s right to confrontation. Id. at 7-8, 11. The Court noted that other means were available by which the defendant could cross-examine the complainant as to his ability to describe the alleged conduct. Id. at 6, 14.

2. Specific Instances of Complainant’s Sexual Conduct

Specific instance must relate to particular occurrence of conduct. For purposes of “[e]vidence of specific instances of the victim’s sexual conduct” under MCL 750.520j(1), “a specific instance of the victim’s sexual conduct must relate to a particular occurrence of the victim’s sexual conduct.” People v Sharpe, 502 Mich 313, 328 (2018) (“Evidence of [the complainant’s] pregnancy and her subsequent abortion are not evidence of a specific instance of the victim’s sexual conduct[; a]lthough this evidence necessarily implies that sexual activity occurred that caused the pregnancy, the pregnancy and abortion are not evidence regarding a specific instance of
sexual conduct, [and]... whether evidence falls within the purview of the rape-shield statute concerns whether the evidence ‘amount[s] to or reference[s] specific conduct, not whether the evidence constitutes a consequence of or relates to sexual activity generally.’”), quoting People v Ivers, 459 Mich 320, 329 (1998).

Statements as specific instances of conduct. Although not precluded by MCL 750.520j in this case, evidence of a complainant’s statements may be deemed sexual conduct and hence excluded under the statute. Ivers, 459 Mich at 328-329.

The critical distinction in the analysis is not between “statements” and “conduct,” but between whether the statements reference specific sexual conduct:

“For example, hypothetically, had the complainant’s statement referenced particular acts, i.e., ‘I’m ready to have sex at college since I had sex with X after our high school graduation party,’ that would clearly seem to be inadmissible as evidence of ‘specific instances of the victim’s sexual conduct,’ despite having some bearing on the victim’s present mental state. Likewise, ‘statements’ or references to ‘statements’ made in the course of what is referred to in common parlance as ‘phone sex’ themselves would seem to amount to a prior instance of sexual conduct, and thus be precluded. The important distinction, however, is not so much ‘statements’ versus ‘conduct’ as whether the statements do or do not amount to or reference specific conduct. Here it is plain that they do neither, and, thus, evidence of the statements would not be barred by rape-shield concerns.” Ivers, 459 Mich at 328-329.

Evidence of physical conditions (semen, pregnancy, disease, abortion, etc) as specific instances of conduct. “[S]emen, pregnancy, or disease, while perhaps related to sex, are not themselves the specific instances of sexual conduct envisioned by MCL 750.520j.” Sharpe, 502 Mich at 329. In MCL 750.520j(1)(b), “the Legislature . . . distinguished between the specific instance of sexual activity that shows the origin or the source of the semen, pregnancy, or disease—i.e., whatever sexual act led to these consequences—and the semen, pregnancy, or disease itself.” Sharpe, 502 Mich at 329 (“because pregnancy, and by extension abortion, is not a specific instance of sexual conduct, neither pregnancy nor abortion falls within the rape-shield statute”).
Evidence of lack of sexual activity. “[E]vidence that [the complainant] did not engage in other sexual intercourse . . . does not fall within the plain language of the rape-shield statute[; t]his evidence demonstrates an absence of conduct, not a ‘specific instance’ of sexual conduct.” *Sharpe*, 502 Mich at 330.

Evidence of prostitution or topless dancing. The defendant was charged with CSC-I against a neighbor woman and claimed that the sexual intercourse was a consensual act of prostitution, “and [the complainant] falsely accused him of sexual assault only because he failed to pay her.” *People v Powell (Adie)*, 201 Mich App 516, 518 (1993). The defendant sought to introduce the testimony of a witness who, before the incident, saw the complainant walking with alleged prostitutes, and, who, after the incident, saw the complainant dancing topless at a local topless club. *Id.* at 520. Additionally, the defendant sought to introduce his own testimony that, two months after the incident, he saw the complainant standing on a corner in a short skirt waving to passing cars. *Id.* The defendant claimed the evidence was material to his defense of a consensual exchange of money for sexual intercourse. *Id.* The Court of Appeals held that the trial court abused its discretion in admitting the evidence because the majority of the evidence was irrelevant to the defendant’s claim that the complainant was a prostitute from whom he solicited services. *Id.* Employment as a topless dancer does not render someone a prostitute, and such evidence, which the rape-shield statute was enacted to address, is nothing more than an attempt to place the complainant’s questionable character before the jury. *Id.* The Court found the remaining testimony—that complainant was in the company of alleged prostitutes and that she allegedly solicited men from a corner—more prejudicial than probative and self-serving. *Id.* at 520-521.

3. Evidence Offered by Complainant

“Although the [rape-shield] statute was enacted in response to the practice of impeaching the complainant’s testimony with evidence of the complainant’s sexual conduct, the plain language of the statute does not limit the exclusion of such evidence upon whether the evidence is offered by the prosecutor or by the defendant.” *People v Sharpe*, 502 Mich 313, 327 (2018).

The rape-shield statute was not designed “to prevent a complainant’s disclosure of her own sexual history or its attendant consequences.” *Sharpe*, 502 Mich at 330-331.
Accordingly, voluntarily-offered evidence of a complainant’s “pregnancy, abortion, and lack of sexual history to bolster her allegations of criminal sexual conduct against defendant” may be admissible; however “admission of this type of evidence may open the door to the introduction of evidence whose admission may otherwise have been precluded by the rape-shield statute.” *Id.* at 330, 331 n 10.

### 4. Evidence of Complainant’s Consensual Sexual Conduct With Defendant

“Where the proposed evidence concerns consensual sexual conduct with third parties, the Legislature has determined that, with very limited exceptions, the balance overwhelmingly tips in favor of exclusion as a matter of law. However, where the proposed evidence concerns consensual sexual conduct with the defendant, the Legislature has left the determination of admissibility to a case-by-case evaluation.” *People v Adair*, 452 Mich 473, 483 (1996). “When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case.” *People v Benton (Allanah)*, 294 Mich App 191, 198 (2011), citing *People v Morse (Stephen)*, 231 Mich App 424, 433 (1998). “When a trial court exercises its discretion to determine whether evidence of a complainant’s sexual conduct not within the statutory exceptions should be admitted, the court ‘should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant’s sexual conduct where its exclusion would not unconstitutionally abridge the defendant’s right to confrontation.’” *Benton (Allanah)*, 294 Mich App at 197-198, quoting *People v Hackett*, 421 Mich 338, 349 (1984).

**Complainant’s public sexual conduct.** Although the defendant saw the complainant expose her breasts to two men in a bar on the night of the alleged assault and permitted one of those men to touch her breasts, and the conduct with the other men amounted to “sexual conduct” for purposes of the rape-shield statute, the “public nature” of the complainant’s sexual conduct did not render it admissible as evidence of sexual conduct with the defendant. *People v Wilhelm (On Rehearing)*, 190 Mich App, 574, 577-578, 584-588 (1991).

### 5. Evidence Showing Origin of Semen, Pregnancy, or Disease

“The rape-shield law does not prohibit defense counsel from introducing ‘specific instances of sexual activity . . . to show the
origin of a physical condition when evidence of that condition
is offered by the prosecution to prove one of the elements of
the crime charged provided the inflammatory or prejudicial
nature of the rebuttal evidence does not outweigh its probative
value.”” People v Shaw, 315 Mich App 668, 680-681 (2016) (the
trial court erroneously held that MCL 750.520j would bar
admission of testimony from the victim’s former boyfriend
about his consensual sex with the victim 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 where, absent this
testimony, the defendant’s guilt was the only explanation for
the hymenal changes and chronic anal fissure), quoting People

6. Notice Requirements

A defendant must provide notice of an intent to offer evidence
of the complainant’s prior sexual conduct with the defendant
or evidence of specific instances of sexual activity showing the
source or origin of semen, pregnancy, or disease. MCL
750.520j(2) states, in part:

“If the defendant proposes to offer evidence
described in subsection (1)(a) or (b) [(regarding a
victim’s past sexual conduct with the actor or
specific instances of sexual activity showing the
source or origin of semen, pregnancy, or disease)],
the defendant within 10 days after the arraignment
on the information shall file a written motion and
offer of proof. The court may order an in camera
hearing to determine whether the proposed
evidence is admissible under subsection (1). If new
information is discovered during the course of the
trial that may make the evidence described in
subsection (1)(a) or (b) admissible, the judge may
order an in camera hearing to determine whether
the proposed evidence is admissible under
subsection (1).”

Violation of the notice provisions of the rape-shield statute
may result in preclusion of the proffered evidence so long as
preclusion does not infringe on the defendant’s Sixth
Amendment rights. People v Lucas (Nolan) (On Remand), 193
the defendant was charged with criminal sexual conduct
against his former girlfriend, and to support his defense of
consent, he sought to introduce evidence of their past sexual relationship by way of an oral motion at the start of trial, without complying with the statutory notice requirements. *Id.* at 300. The trial court refused to allow introduction of the evidence, based solely on the defendant’s failure to comply with the notice requirements. *Id.* Following a bench trial, the defendant was convicted of two counts of CSC-III. *Id.* at 299. After various appellate proceedings, the United States Supreme Court held that the notice requirement in the Michigan rape-shield statute does not per se violate a defendant’s Sixth Amendment rights:

“[T]he Michigan Court of Appeals erred in adopting a *per se* rule that Michigan’s notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. The Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion.” *Michigan v Lucas*, 500 US 145, 152-153 (1991).

The United States Supreme Court left it to the Michigan courts to determine whether the defendant’s rights had been violated in the *Lucas (Nolan)* case. *Michigan v Lucas*, 500 US at 153. On remand, the Michigan Court of Appeals held that the constitutionality of preclusion based on the statutory notice requirement must be determined on a case-by-case basis. *Lucas (Nolan) (On Remand)*, 193 Mich App at 302. It is error for a court to exclude evidence *solely* on the basis of the defendant’s failure to file notice under MCL 750.520j(2); the court must “exercis[e] its discretion in light of the particular circumstances of the case. *People v McLaughlin*, 258 Mich App 635, 655 (2003). In determining whether to exclude the proffered evidence, a court should consider the following factors:

1. The purpose of the statute’s ten-day notice period is intended to encourage victims to report assaults and protect victims from surprise, harassment, unnecessary invasion of privacy, and undue delay. *Lucas (Nolan)*, 193 Mich App at 302-303.

2. The purpose of the statute is to prevent surprise to the prosecution and to allow time to investigate

(3) The timing of the defendant’s offer to produce evidence—the closer to the date of trial the evidence is offered, the greater the suggestion of willful misconduct designed to create a tactical advantage. *Lucas (Nolan) (On Remand)*, 193 Mich App at 303.

After remand, the Court of Appeals agreed with the trial court’s determination that defense counsel was aware of the statutory notice requirements and made a tactical decision to move to admit the evidence on the date of trial. *People v Lucas (Nolan) (After Remand)*, 201 Mich App 717, 719 (1993). Moreover, preclusion of the evidence did not prevent defense counsel from presenting the defense of consent, because there was sufficient evidence of the prior relationship to support that defense. *Id.*

7. **In Camera Hearing**

A court *may* hold an in camera hearing where the defendant seeks to admit evidence of the victim’s sexual conduct with the defendant or to show the source or origin of semen, pregnancy, or disease. *MCL 750.520j(2)*. A court *must* hold an in camera hearing where the defendant offers evidence of the victim’s past sexual conduct that falls outside the scope of *MCL 750.520j*, and also implicates the defendant’s constitutional right of confrontation. *Hackett, 421 Mich at 350-351*, states:

“The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant’s offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant’s constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy or humiliate sexual assault victims and to guard against mere fishing
expeditions. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues or misleading the jury. We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant’s prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant’s constitutional right to confrontation.” (Internal citations omitted.)

B. Admissibility of Past Sexual Conduct Under Michigan Rules of Evidence


1. Relevant Evidence

“Generally, relevant evidence is admissible. MRE 402... Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.” Sharpe, 502 Mich at 331.

“Evidence of [a complainant’s] pregnancy, abortion, and lack of other sexual partners” may be relevant under MRE 402. Sharpe, 502 Mich at 332. In Sharpe, evidence of the complainant’s pregnancy and abortion was relevant during defendant’s criminal sexual conduct trial because the evidence made it more probable that sexual penetration had occurred; similarly, evidence of the complainant’s lack of sexual partners was relevant because it was probative of the identity of the person who impregnated the complainant. Further, “[t]he probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, and therefore... not excluded under MRE 403.” Sharpe, 502 Mich at 333-334 (“evidence of [the complainant’s] pregnancy and abortion definitively demonstrates that sexual penetration occurred” and if believed by the jury is highly probative because in “prov[ing] that defendant was the man who sexually assaulted [her]; further, “abortion evidence ... is not so inherently prejudicial in today’s society as to render it inadmissible,... [a]nd to the extent that the abortion evidence could be viewed as cumulative of the evidence of [the] pregnancy, it also serves the
purpose of explaining why the prosecutor is unable to offer DNA evidence to prove the identity of the man who impregnated [the complainant]”; finally, “lack of sexual partners eliminates the possibility that someone other than defendant impregnated [the complainant, and] . . . at the time of trial, the trial court has the ability to provide a limiting instruction to the jury concerning the use of this evidence”).

2. Character Evidence

MRE 404(a)(3) allows admission of specified acts of the alleged victim in criminal sexual conduct cases for purposes other than to prove conformity to a character trait:

• Evidence of the alleged victim’s past sexual conduct with the accused.

• Evidence of specific instances of sexual activity showing the source or origin of pregnancy, semen, or disease.

“MRE 404(a) only excludes character evidence used to prove conformity to a character trait”; it is error to exclude evidence under MRE 404(a)(3) where a valid, nonpropensity explanation for the admission of the evidence has been articulated. See People v Sharpe, 502 Mich 313, 332 n 11 (2018).

“MRE 404(a)(3) . . . preclude[s] the use of evidence of a victim’s virginity as circumstantial proof of the victim’s current unwillingness to consent to a particular sexual act.” People v Bone, 230 Mich App 699, 702 (1998).4

7.3 False Allegations of Sexual Assault

A. Issues Regarding Admissibility

Prior false accusations of sexual assault may bear directly on the victim’s credibility and the credibility of the victim’s accusations, and preclusion of such evidence may unconstitutionally abridge the defendant’s right of confrontation. People v Williams (Dale), 191 Mich App 269, 272-273 (1991). In Williams (Dale), 191 Mich App at 271, the defendant was convicted of CSC-III against a 14-year-old girl who was the babysitter of the defendant’s girlfriend’s children. At trial, defense counsel sought to question the victim about an alleged prior

4 “Not[ing], however, that evidence introduced for some other relevant purpose does not become inadmissible merely because it tends to show that the victim was a virgin.” Bone, 230 Mich App at 702 n 3.
sexual assault by her uncle five years before the trial. *Id.* at 272. The defendant wanted to prove that the victim falsely accused her uncle and that such a false accusation undermined her credibility in the instant case. *Id.* The trial court, relying on the rape-shield statute, MCL 750.520j(1), refused to allow the defense to question the victim about this prior act. *Williams (Dale)*, 191 Mich App at 272.

For reasons other than those cited by the trial court, the Court of Appeals affirmed the defendant’s conviction and held that the trial court reached the correct resolution. *Williams (Dale)*, 191 Mich App at 272. The Court found that defense counsel was unable to offer any concrete evidence to establish that the victim made a prior false accusation. *Id.* at 273. The Court also stated that defense counsel had no idea whether the prior false accusation was in fact false and was simply engaging in a “fishing expedition.” *Id.* However, the Court stated that, had the defendant introduced concrete evidence of the prior false allegation, the trial court would have erred by refusing to allow such testimony under the rape-shield statute. *Id.* at 272. The Court found that the rape-shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. *Id.* False accusations of sexual assault would bear directly on the victim’s credibility and the credibility of the victim’s accusations in the instant case. *Id.* The Court held that preclusion of such evidence would unconstitutionally abridge the defendant’s right of confrontation. *Id.* at 272-273.

See also *People v Jackson (Nicholas)*, 477 Mich 1019 (2007), where the Michigan Supreme Court reiterated the inapplicability of the rape-shield statute to the admissibility of evidence concerning a victim’s prior false allegations:

“[T]he defendant must be afforded the opportunity to introduce testimony that the complainant has previously been induced by his father to make false allegations of sexual abuse against other persons disliked by the father. MRE 404(b). Such testimony concerning prior false allegations does not implicate the rape[-]shield statute. MCL 750.520j.”

### B. False Allegations as Newly-Discovered Evidence

Newly-discovered evidence that a rape victim raised false allegations of rape against other individuals “may be grounds for a new trial if it satisfies the four-part test set forth in *People v Cress*, 468 Mich 678, 692 (2003); however[,] . . . a material, exculpatory
connection must exist between the newly discovered [impeachment] 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, supra 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 n 4 (Kelly, J., concurring). The defendant subsequently moved for relief from judgment on the basis of the newly discovered police reports. Id. at 299. 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, supra 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. Grissom, supra 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.
7.4 Evidence of Other Crimes, Wrongs, or Acts

A. Admissibility of Other Acts Evidence Under the Michigan Rules of Evidence

MRE 404(b)(1) governs the admissibility of evidence of other crimes, wrongs, or acts:

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.”

MRE 404 has “no temporal limitation” and does not permit evidence to “show defendant’s propensity or character”; however, “MRE 404(b) sets forth a list of several grounds, other than, propensity, to which such evidence may serve as proof ‘when the same is material.’” People v Rosa, 322 Mich App 726, 735-736 (2018) (concluding that “the testimony of defendant’s prior wife was not admissible under MRE 404(b) because the purpose of the evidence was to show that in this case, defendant acted in conformity with the character shown by the prior acts, i.e. that defendant was threatening, abusive, and violent”; while her testimony “demonstrated that defendant was a dangerous man and an incorrigible spouse abuser, . . . her testimony did not offer probative evidence on a material issue,” where it did not demonstrate a particular pattern or scheme that would serve to identify the defendant and “[t]estimony about defendant’s abusive treatment of his first wife many years ago” did not provide information “about whether defendant had an intent to kill when he strangled [the victim]”).

“MRE 404(b) applies to the admissibility of evidence of other acts of any person, such as a defendant, a plaintiff, or a witness.” People v Rockwell, 188 Mich App 405, 409-410 (1991).

“MRE 404(b) only applies to evidence of crimes, wrongs, or acts ‘other’ than the ‘conduct at issue in the case’ that risks an
impermissible character-to-conduct inference. Correspondingly, acts comprised by or directly evidencing the ‘conduct at issue’ are not subject to scrutiny under MRE 404(b).” People v Jackson (Timothy), 498 Mich 246, 262, 265 (2015) (holding that “[e]vidence that the defendant[, who was charged with CSC-I involving a child who was a member of the church where the defendant served as a pastor,] previously engaged in sexual relationships with other parishioners, above or below the age of consent, [fell] well within this scope of coverage[.]” and required the prosecution to provide notice under MRE 404(b)).

“[T]here is no ‘res gestae exception’ to MRE 404(b), nor does the definition of ‘res gestae’ set forth in [People v] Delgado[, 404 Mich 76 (1978),] and [People v] Sholl[, 453 Mich 730 (1996),] delineate the limits of that rule’s applicability.” Jackson (Timothy), 498 Mich at 268 n 9, 274, overruling any conflicting Court of Appeals caselaw “[t]o the extent that such caselaw holds that there is a ‘res gestae exception’ to MRE 404(b)[.]” (Citations omitted).

1. VanderVliet Test

MRE 404(b) codifies the requirements set forth in People v VanderVliet, 444 Mich 52 (1993), opinion modified 445 Mich 1205.\(^7\) The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity, is generally governed by the test established in VanderVliet, which is as follows:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime. VanderVliet, 444 Mich at 74.

- The evidence must be relevant under MRE 402 (subject to the requirements of MRE 104(b))\(^8\) to an issue or fact of consequence at trial. VanderVliet, 444 Mich at 74.

- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in

\(^7\) The Court amended the second sentence of the first full paragraph to read: “To assist the judiciary in this extraordinarily difficult context and to promote the public interest in reliable fact finding, we intend to adopt a modification of Rule 404(b). We require the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial, and authorize the trial judge, consistent with the law in ten other states, to require the defendant to articulate his theory or theories of defense.” VanderVliet, 445 Mich 1205. See Section 7.4(C) for MRE 404(b)(2), which reflects the Supreme Court’s modification of the Rule.

\(^8\) MRE 104(b) states: “Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”

- Upon request, the trial court may provide a limiting instruction under *MRE 105*, cautioning the jury to use the evidence for its proper purpose and not to infer that a defendant’s bad or criminal character caused him or her to commit the charged offense. *VanderVliet*, 444 Mich at 75.

The *VanderVliet* case underscores the following principles of *MRE 404(b)*:

- There is no presumption that other acts evidence should be excluded. *VanderVliet*, 444 Mich at 65.

- The Rule’s list of “other purposes” for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under *MRE 402*, except criminal propensity. *VanderVliet*, 444 Mich at 65.

- A defendant’s general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial. *VanderVliet*, 444 Mich at 65, 78-79.

- *MRE 404(b)* imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet*, 444 Mich at 68, 71-72.

The Supreme Court in *VanderVliet* characterized *MRE 404(b)* as a rule of inclusion rather than exclusion:

“There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he [or she] acted in conformity therewith. . . . Rule 404(b) permits the judge to admit other acts evidence whenever it is relevant on a noncharacter theory.” *VanderVliet*, 444 Mich at 65.

In cases where other acts evidence is admissible for one purpose but not others, the trial court should, upon request,
give a limiting instruction pursuant to MRE 105. See People v Sabin (After Remand), 463 Mich 43, 56 (2000); People v Basinger, 203 Mich App 603, 606 (1994) (absence of opportunity to request a limiting instruction was grounds for reversal because it denied defendant a fair trial); People v DerMartzex, 390 Mich 410, 417 (1973) (failure to give properly requested instruction is reversible error). However, the trial court has no duty, without a party’s request, to give a limiting instruction sua sponte “even though such an instruction should [be] given.” People v Chism, 390 Mich 104, 119-121 (1973).

The continued viability of VanderVliet’s analytical framework, and its characterization of MRE 404(b) as a rule of inclusion rather than exclusion, was affirmed in Sabin (After Remand), 463 Mich at 55-59, and in People v Katt, 248 Mich App 282, 303-304 (2001).

2. Golochowicz Test

The admissibility of other acts evidence under MRE 404(b) is not always governed by VanderVliet’s test. When the proponent is seeking admission of other acts evidence based on a modus operandi theory to establish identity, the trial court should employ the test enunciated in People v Golochowicz, 413 Mich 298, 309 (1982).9 See VanderVliet, 444 Mich at 66, and People v Ortiz, 249 Mich App 297, 303 (2001). The Golochowicz test is as follows:

• “(1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced[.]” Golochowicz, 413 Mich at 309.

• “(2) there must be some special quality or circumstance of the bad act tending to prove the defendant’s identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act, . . . , opportunity, [or] preparation and knowledge[.]” Golochowicz, 413 Mich at 309.

• “(3) one or more of these factors must be material to the determination of the defendant’s guilt of the charged offense[.]” Golochowicz, 413 Mich at 309.

• “(4) the probative value of the evidence sought to be introduced must not be substantially outweighed by

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9 Generally speaking, the VanderVliet test supplanted the Golochowicz test. However, the Golochowicz test remains valid when the proponent of other acts evidence seeks to show identification through modus operandi. People v Smith (Steven), 243 Mich App 657, 670-671 (2000).
the danger of unfair prejudice.” *Golochowicz*, 413 Mich at 309.

3. **Procedure for Determining Admissibility Under MRE 404(b)(2)**

MRE 404(b)(2) generally provides that the prosecution must give advance notice, preferably before trial, of its intent to use other acts evidence, and of its rationale for admitting the evidence:

“The prosecution in a criminal case shall provide written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant’s privilege against self-incrimination.” MRE 404(b)(2).

The reasons for the notice requirement are: “(1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record.” *People v Hawkins*, 245 Mich App 439, 454-455 (2001).

Under MRE 104, the trial court may conduct a hearing outside the jury’s presence to determine the admissibility of other acts evidence. MRE 104(c). The trial court is not bound by the rules of evidence, except for those rules governing privileges. MRE 104(a); MRE 1101(b)(1). Failure to conduct an evidentiary hearing on the admissibility of other acts evidence is not reversible error where the defense makes no motion in limine. *People v Williamson*, 205 Mich App 592, 596 (1994).

MRE 104(a) states that “[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).” MRE 104(b) addresses the admissibility of evidence, the relevance of which must be established by proof of other facts. This rule states:
“(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”

“[A] preliminary finding by the court that the [prosecution] has proved the act by a preponderance of the evidence is not called for under [FRE] 104(a).”\(^\text{10}\) \textit{Huddleston v United States}, 485 US 681, 689 (1988). For determinations of admissibility under FRE 104(b),\(^\text{11}\) “the trial court neither weighs credibility nor makes a finding that the [prosecution] has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.” \textit{Huddleston, supra} at 690.

Where pretrial procedures do not furnish a basis to determine the relevance and admissibility of other acts evidence, the Supreme Court in \textit{VanderVliet} advised:

“[T]he trial court should employ its authority to control the order of proofs [under MRE 611], require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. If the court still remains uncertain of an appropriate ruling at the conclusion of the prosecutor’s other proofs, it should permit the use of other acts evidence on rebuttal, or allow the prosecution to reopen its proofs after the defense rests, if it is persuaded in light of all the evidence presented at trial, that the other acts evidence is necessary to allow the jury to properly understand the issues[].” \textit{VanderVliet}, 444 Mich at 90.\(^\text{12}\)

4. Case Law

The following appellate cases address the admissibility of other acts evidence under MRE 404(b) when sexual assault is alleged.

\(^\text{10}\) FRE 104(a) is substantially similar to MRE 104(a).

\(^\text{11}\) FRE 104(b) is substantially similar to MRE 104(b).

\(^\text{12}\) For a jury instruction on other offenses where relevance is limited to a particular issue, see M Crim JI 4.11.
• **People v Kelly (Calvin), 317 Mich App 637 (2016):**

The trial court abused its discretion by excluding, at the defendant’s trial for charges arising from a sexual assault, evidence of seven other instances of alleged criminal sexual conduct by the defendant that did not result in convictions; “the trial court neglected a fundamental responsibility in its MRE 404(b) evidentiary analysis, and . . . therefore abused its discretion by excluding the proposed testimony[]” without considering whether the evidence was offered for a proper purpose or its legal relevance. *Kelly (Calvin), 317 Mich App at 646-648.* “Without considering the evidence’s legal relevance for a proper purpose, the trial court could not conclude that the evidence’s probative value was substantially outweighed by unfair prejudice or any of the other concerns identified in MRE 403[,]” resulting in a failure “to follow the proper legal framework[.]” *Kelly (Calvin), 317 Mich App at 647.* Furthermore, “the trial court . . . abdicated the necessary relevancy analysis on the basis of impermissible credibility concerns[]” by allowing the “defendant’s protestations of ‘consent’ in respect to the other acts to control the MRE 404(b) analysis.” *Kelly (Calvin), 317 Mich App at 645.* “[T]here [was] considerable evidence that the sexual acts in question occurred and that [the] defendant was the actor[,] [t]he only issue [was] whether that conduct was consensual as claimed by [the] defendant or criminal sexual conduct as asserted by the alleged victims[,] . . . and the trial court should not have dismissed the evidence . . . merely because there was a credibility dispute.” *Kelly (Calvin), 317 Mich App at 645-646.*

• **People v Jackson (Timothy), 498 Mich 246 (2015):**

MRE 404(b) governed the admissibility of testimony in the defendant’s trial for CSC-I where “the prior sexual relationships to which [the witness’s] testimony referred plainly did not constitute the ‘conduct at issue’ . . . [or] directly evidence or contemporaneously facilitate its commission[,]” *Jackson (Timothy), 498 Mich at 275.* Rather, the testimony was “offered to provide inferential support for the conclusion that the ‘conduct at issue’ occurred as alleged[,]” and was accordingly subject to MRE 404(b), including its notice requirement. *Jackson (Timothy), 498 Mich at 275-276.*

• **People v Smith (Anthony), 282 Mich App 191 (2009):**

The defendant was convicted of two counts of CSC-I and one count of CSC-II against his daughter when she was 10 or 11 years old. *Smith (Anthony), 282 Mich App at 193.* Specifically, on two occasions, the defendant entered the victim’s bedroom,
pulled down her pants and underwear, and penetrated her vagina with his penis. Smith (Anthony), supra at 193. On one of the occasions, the defendant also touched the victim’s chest under her shirt. Id. at 193. Under MRE 404(b)(1), the trial court admitted testimony from the victim’s stepsister that she lived with the defendant when she was 11 or 12 years old, and that the defendant exposed his penis to her on three occasions during that time. Smith (Anthony), supra at 193-194. The Court of Appeals held that the trial court did not abuse its discretion in admitting evidence of the defendant’s prior acts of indecent exposure. The Court discussed the relevancy prong of Sabin (After Remand), 463 Mich 43, in detail:

“[G]eneral similarity between the charged act and the prior bad act is not enough to show a pattern. Rather, there must be ‘such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.’ A high degree of similarity is required—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive.” Smith (Anthony), 282 Mich App at 196, quoting Sabin (After Remand), 463 Mich at 64-65.

The Court further explained:

“In the present case, both victims were approximately the same age at the time of the events, and both were in a father-daughter relationship with [the] defendant. The evidence supports a finding that the charged and the uncharged acts were part of [the] defendant’s common plan or system to act out sexually with preteen girls living in the same household, over whom he had parental authority. . . . As in Sabin [(After Remand)], [463 Mich 43,] reasonable persons could disagree concerning whether the charged acts and the prior bad acts were sufficiently similar to show (by probability) the existence of a scheme, plan, or system that tends to prove (by probability) that the charged acts were committed. Because the evidentiary issue was a close one, the trial court did not abuse its discretion in admitting the evidence of [the] defendant’s prior acts of indecent exposure.” Smith (Anthony), 282 Mich App at 197-198.
The Court also found that while “[t]he evidence was damaging to [the] defendant[,] . . . MRE 403 seeks to avoid unfair prejudice, which was not shown here.” Smith (Anthony), 282 Mich App at 198.


The defendant was convicted of CSC-I against his four-year-old son. Kahley, 277 Mich App at 183. At trial, evidence was admitted that the defendant sexually abused his girlfriend’s son, who was the same age as the defendant’s son. Kahley, supra at 184. The Court of Appeals found no error in the trial court’s admission of the evidence because the sexual assaults occurred within a four-month period, the victim and the defendant’s girlfriend’s son were both under the care and supervision of the defendant, they were both four years old, and the defendant sexually assaulted the boys in the same manner—by rubbing their penises, and then performing fellatio on them. Id. at 185. The Court, relying on Sabin (After Remand), 463 Mich at 65-66, noted that “[d]istinctive and unusual features are not required to establish the existence of a common plan or scheme[,]” and found that the evidence was offered for a proper purpose, and that the evidence was relevant because the charged and uncharged acts were “sufficiently similar to show that [the] defendant engaged in a common plan or scheme.” Kahley, supra at 185. The Court also found that the danger of unfair prejudice did not outweigh the probative value of the evidence, and that the trial court’s limiting instruction protected the defendant’s right to a fair trial (“[T]he trial court instructed the jury that it was to consider the evidence only for the purpose of determining if [the] defendant acted in accordance with a common plan or scheme.”). Id. at 185.

- People v Drohan, 264 Mich App 77 (2004):

The defendant was convicted of CSC-III and CSC-IV against a former coworker. Drohan (Joseph I), 264 Mich App at 79-80, 84. At trial, the victim testified that the defendant rubbed the victim’s breast and grabbed her wrist and made her touch his crotch on several occasions. Drohan (Joseph), supra at 80. She also testified that he forced her into the passenger seat of a car and forced her to perform oral sex on him. Id. at 80. The defendant argued that it was consensual sexual contact. Id. At trial, another witness testified that on a previous occasion the defendant had grabbed her breast and grabbed her arm and tried to get her to touch his exposed penis. Id. at 82. A third witness testified that she went to a party at the defendant’s house. Id. She indicated that she was sleeping in the children’s
room and when she woke up the defendant’s “‘hands were on
[her] buttocks and he was playing with himself.’” Id. The trial
court admitted the testimony regarding the defendant’s former
acts because it was “‘relevant to show the existence of a
scheme, plan, or method by which the defendant accomplished
the sexual assault in that consent is an issue, therefore,
showing a scheme, plan, or method by which he non-
consentually [sic] engages in sexual assault with women[.]’” Id.
at 84. The Court of Appeals held that the evidence was
introduced for a proper purpose because each of the incidents
had “‘common features’” that allowed the inference “‘that [the]
defendant had a common scheme of suddenly grabbing
unwilling women and seeking immediate sexual gratification
from them.’” Id. at 87. The Court also found that the evidence
was relevant, and the danger of unfair prejudice did not
substantially outweigh the probative value of the evidence. Id.

• People v Ackerman, 257 Mich App 434 (2003):

The defendant was convicted of five counts of CSC-I, three
counts of CSC-II, and two counts of child sexually abusive
activity against three girls under 13 years old. Ackerman, 257
Mich App at 437. The trial court did not abuse its discretion by
admitting evidence against the defendant of his consensual
relationships with two young women other than the
complainants, as well as evidence of the defendant’s indecent
exposure convictions returned by the jury at the defendant’s
first trial. Ackerman, supra at 437, 441-442.

In Ackerman, the defendant was the mayor of Port Huron and
served as a supervisor at a community youth center during the
time of his misconduct. Ackerman, 257 Mich App at 438. Several
young females testified that the defendant allowed his pants to
fall down to expose his genitals to the girls when they were at
the youth center. Ackerman, supra at 441. The trial court
permitted the evidence because it was relevant to the
defendant’s plan, scheme, and system of introducing young
females to his sexual misconduct, and the court determined
that the evidence’s probative value was not substantially
outweighed by the danger of unfair prejudice. Id. at 438-439.
The Court of Appeals affirmed the trial court’s admission of
this other acts evidence and agreed the evidence “‘supported
an inference that [the] defendant’s actions were part of a
system of desensitizing girls to sexual misconduct.’” Id. at 441.

• People v Katt (Katt I), 248 Mich App 282 (2001):

The defendant was convicted of three counts of CSC-I against a
seven-year-old boy and a five-year-old girl (brother and sister)
who lived with the defendant, their mother, her ex-husband, and another person. *Katt I*, 248 Mich App at 285. At trial, the defendant took the stand and denied sexually assaulting either child, further stating, “[I]t’s not my nature to go around and have sex with children.” *Katt I, supra* at 303. Because of this statement, the prosecutor renewed a previous motion, denied twice previously by the trial court, to introduce evidence *in rebuttal* of an alleged prior sexual assault against a nine-year-old boy, in which the defendant allegedly touched the boy’s “privates” while they both were disrobed after taking a bath together. *Id.* at 301-302, 303. The trial court admitted the evidence in rebuttal. *Id.* at 301, 303.

The Court of Appeals affirmed the trial court’s decision, finding that the alleged prior act was properly admitted under the common scheme, plan or system of logical relevance, because the charged and uncharged conduct was “sufficiently similar” to support an inference that they were manifestations of a common system. *Katt I*, 248 Mich App at 305. The Court found the following similarities: “(1) the victims and [the] defendant knew each other, (2) the victims were all of a tender age, (3) the alleged sexual abuse occurred when [the] defendant was alone with the children, and (4) the improper contact allegedly involved the touching of the children’s sexual organs when [the] defendant and the victims were disrobed.” *Katt, supra* at 306. The Court found that the trial court correctly determined that the prior act had significant probative value and was not substantially outweighed by its prejudicial effect. *Id.* at 306-307.

*People v Watson (David)*, 245 Mich App 572 (2001):

The defendant was convicted of three counts of CSC-I and one count of assault with intent to commit CSC-II against his stepdaughter, who was between ages 11 and 13 at the time of the charged offenses. *Watson (David)*, 245 Mich App at 574-575. On appeal, the defendant challenged the trial court’s admission of a cropped photograph found in the defendant’s wallet that showed the victim’s naked buttocks. *Watson (David), supra* at 575. The defendant also challenged the admission of an enlargement showing the entire, uncropped photograph. *Id.* at 575. The Court of Appeals found no reversible error in the admission of this evidence, ruling that it was properly admitted under MRE 404(b) to show the defendant’s motive:

“[E]vidence in the instant case that [the] defendant had a sexual interest specifically in his stepdaughter would show more than simply his sexually deviant character—it would show his
motive for sexually assaulting his stepdaughter. Thus, evidence that [the] defendant carried in his wallet a photograph of his stepdaughter’s naked buttocks had probative value to show that the victim’s allegations were true. [The d]efendant denied sexually assaulting his stepdaughter, but the other acts evidence demonstrated that he had a motive to engage in sexual relations with her. . . .

[T]he other acts evidence involved the specific victim herself, not someone else, as in Sabin [(After Remand), 463 Mich 43 (where other acts evidence was admissible to show scheme or plan but not to show motive)]. Thus, the other acts evidence showed more than [the] defendant’s propensity toward sexual deviancy; it showed that he had a specific sexual interest in his stepdaughter, which provided the motive for the alleged sexual assaults.” Watson (David), 245 Mich App at 579-580.

• People v Pesquera, 244 Mich App 305 (2001):

The defendant was convicted of two counts of CSC-I and five counts of CSC-II against five children, aged four to six, who lived in the same mobile home park as the defendant. Pesquera, 244 Mich App at 308. At trial, two other children testified to being sexually assaulted by the defendant. Pesquera, supra at 316-317. The Court of Appeals found that the trial court did not abuse its discretion in admitting this testimony under a scheme, plan, or system theory of relevance. Id. at 318-319. The common features identified by the Court of Appeals were: (1) the defendant and the victims knew each other; (2) the defendant and the victims were friends; (3) the victims were very young; (4) the assaults occurred after the defendant invited the children to play with him; and (5) the assaults involved the defendant’s touching of the children’s sexual organs. Id. at 319.

• People v Sabin (After Remand), 463 Mich 43 (2000):

The defendant was convicted of CSC-I against his 13-year-old daughter. Sabin, 463 Mich at 47-48, 52. According to the complainant, the defendant told her after the assault that if she told her mother, her mother would be upset with her for breaking up the family again. Sabin, supra at 48-49. Over the defendant’s objection, his stepdaughter testified that he performed oral sex on her from the time she was in kindergarten until she was in seventh grade. Id. at 49-50. She testified that the defendant told her not to tell anyone about his
conduct because it would hurt the family and because her mother would be angry with them. *Id.* at 50.

On appeal, the Supreme Court found no error in the trial court’s admission of the stepdaughter’s testimony as relevant to the defendant’s scheme, plan, or system. *Sabin*, 463 Mich at 66. According to the *Sabin* Court:

“[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.” *Sabin*, 463 Mich at 63-64.

The following common features beyond commission of the acts of sexual abuse supported the trial court’s discretionary ruling: (1) the father-daughter relationship; (2) the similar age of the victims; and (3) the defendant’s attempt to silence the victims by playing on their fears of breaking up the family. *Sabin*, *supra* at 66.


The defendant was convicted of two counts of CSC-I and one count of CSC-II against his daughter. *Starr*, 457 Mich at 491-492, 493. The defendant at trial presented evidence that the victim’s mother fabricated the charges. *Starr*, *supra* at 493, 501. The trial court permitted the prosecutor to introduce testimony by the defendant’s half-sister that the defendant had subjected her to similar, uncharged sexual acts over a 13-year period beginning when she was four years old. *Id.* at 492-493, 502. The court gave the jury a limiting instruction regarding this evidence. Applying the *VanderVliet*, 444 Mich 52, standard, the Supreme Court found that the trial court did not abuse its discretion in admitting the other acts evidence testimony of the defendant’s half-sister.


The defendant was convicted of one count of CSC-I and two counts of CSC-II against his niece. *Layher*, 238 Mich App at 575. The charged assaults occurred while the victim and the defendant were living at the apartment of the victim’s grandmother. *Layher*, *supra* at 586. According to the victim, two
of the charged assaults took place while other family members were in the apartment. \textit{Id.} At trial, evidence of an earlier, uncharged sexual assault by the defendant against the victim, during which the victim’s mother was nearby, was admitted. \textit{Id.} The Court of Appeals found that the prosecutor, by showing that the defendant was willing to risk assaulting the victim while other family members were nearby, properly offered this evidence under MRE 404(b) to rebut the defendant’s theory that the victim had fabricated the instant allegations. \textit{Id.} at 585-586.

Over the defendant’s objection, the trial court permitted the prosecutor to cross-examine a defense witness (an individual hired by the defense to investigate the defendant’s alleged misconduct) about the fact that the witness had once been charged with and acquitted of CSC-I against the witness’s daughter who was under the age of 13 at the time. \textit{Layher}, 238 Mich App at 575-576. “The trial court reasoned that the prior charge was not being offered to impeach [the witness’s] credibility or to show his predisposition to commit CSC crimes. Instead, the trial court ruled that the evidence was being offered for the limited purpose of showing [the witness’s] potential bias toward [the] defendant.” \textit{Layher}, \textit{supra} at 575-576. The Court of Appeals agreed with the trial court: “[W]e conclude that inquiry may be made on cross-examination regarding prior arrests or charges that did not result in conviction where the evidence is offered for the purpose of and is relevant to establishing a witness’[s] bias or interest.” \textit{Id.} at 580-581.

\textbf{Note:} In \textit{People v Layher}, 464 Mich 756 (2001), the Michigan Supreme Court affirmed the Court of Appeals holding that evidence of bias arising from a past arrest without conviction is admissible under MRE 403. \textit{Layher}, 464 Mich at 769-771.

\textbf{B. Admissibility of Other Acts Evidence Under § 768.27}

MCL 768.27 provides for the admission of other acts evidence. MCL 768.27 states:

“In any criminal case where the defendant’s motive, intent, the absence of, mistake or accident on his [or her] part, or the defendant’s scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his [or her] motive, intent, the absence of, mistake or accident on his [or her] part, or the defendant’s scheme, plan or system in doing
the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.”

“[W]hile MRE 404(b) and MCL 768.27 certainly overlap, they are not interchangeable.” People v Jackson (Timothy), 498 Mich 246, 269 (2015). MCL 768.27 authorizes the admission of other-acts evidence for the same purposes listed in MRE 404(b)(1) when one or more of the matters “is material.” MCL 768.27. “Unlike MCL 768.27, however, MRE 404(b)’s list of such purposes is expressly nonexhaustive, and thus plainly contemplates the admission of evidence that may fall outside the statute’s articulated scope.” Jackson (Timothy), 498 Mich at 269. Accordingly, “MCL 768.27 does not purport to define the limits of admissibility for evidence of uncharged conduct.” Jackson (Timothy), 498 Mich at 269.

C. Admissibility of Other Acts Evidence in Cases Involving a Listed Offense Against a Minor

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. Evidence that a defendant previously committed a listed offense13 against a minor is admissible against that defendant in a subsequent criminal case14 in which the defendant is accused of committing a listed offense against a minor. MCL 768.27a states in part:

“(1) Notwithstanding [MCL 768.27,15] in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.”

“MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts,” and “does not violate the principles of separation of powers.” People v Pattison, 276 Mich App 613, 619-620 (2007). Further, “MCL 768.27a

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13 For purposes of MCL 768.27a, a listed offense means any of the offenses found in MCL 28.722. See Section 10.4 for a description of listed offenses.

14 “MCL 768.27a applies in juvenile-delinquency trials.” In re Kerr, Minor, 323 Mich App 407, 411-412 (2018), citing People v Watkins, 491 Mich 450, 473, 476-477 (2012) (because “MCL 768.27a embodies substantive policy considerations regarding criminal law, and there is no provision in the juvenile code or juvenile court rules that conflicts or parallels MCL 768.27a,” it applies to juvenile-delinquency proceedings) (internal citation omitted).

15 See Section 7.4(B) for a discussion of MCL 768.27.
does not violate the Ex Post Facto Clause because the altered standard for admission of evidence does “not lower the quantum of proof or value of the evidence needed to convict a defendant.” 


When admitting evidence under MCL 768.27a, the trial court should instruct the jury in accordance with M Crim JI 20.28a, the standard instruction on evidence of other acts of child sexual abuse. _Watkins II_, 491 Mich at 490-491.

1. **Notice Required Under MCL 768.27a**

MCL 768.27a(1) generally provides that the prosecution must give advance notice before trial of its intent to offer evidence under this statute:

“If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.”

MCL 768.27a(1) “only requires the prosecutor to ‘disclose . . . evidence [that the defendant committed another listed offense against a minor] to the defendant at least 15 days’ before trial[; it] does not preclude a prosecutor from incorporating the disclosure of the evidence in the notice of intent by reference[]’ to police reports and other discovery, rather than “listing the other acts in the [notice of intent] document[].” _People v Gaines_, 306 Mich App 289, 303 (2014).

2. **Procedure for Determining Admissibility of Evidence**

“MCL 768.27a permits the admission of evidence that MRE 404(b) precludes. . . . [Specifically], the language in MCL 768.27a allowing admission of another listed offense[16] ‘for its bearing on any matter to which it is relevant’ permits the use of evidence to show a defendant’s character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes.” _People v Watkins (Watkins II)_ , 491 Mich 450, 470 (2012). “MCL 768.27a irreconcilably conflicts with MRE 404(b) and . . . the statute prevails over the court rule.” _Watkins II_, 491

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[16] “Listed offenses” are contained in MCL 28.722. See MCL 768.27a(2)(a).
Mich at 496. Because MCL 768.27a “does not principally regulate the operation or administration of the courts,” it is a substantive rule of evidence and prevails over MRE 404(b). People v Watkins (Watkins I), 277 Mich App 358, 363-364 (2007), aff’d 491 Mich 450 (2012), quoting People v Pattison, 276 Mich App 613, 619 (2007). “MCL 768.27a does not run afoul of [separation-of-powers principles], and in cases in which the statute applies, it supersedes MRE 404(b).” Watkins II, 491 Mich at 476-477.

“[W]hile MCL 768.27a prevails over MRE 404(b) as to evidence that falls within the statute’s scope, the statute does not mandate the admission of all such evidence, but rather ‘the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the [non-MRE 404(b)] rules of evidence,’ including MRE 403 and the ‘other ordinary rules of evidence, such as those pertaining to hearsay and privilege.’” People v Uribe, 499 Mich 921, 922 (2016), quoting Watkins II, 491 Mich at 484-485. While evidence admissible under MCL 768.27a remains subject to MRE 403, “courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” Watkins II, 491 Mich at 496.

When deciding whether MRE 403 requires exclusion of other-acts evidence admissible under MCL 768.27a, a court’s considerations may include:

“(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant’s and the defendant’s testimony.” Watkins II, 491 Mich at 487-488. See also Uribe, 499 Mich at 922 (noting “there are ‘several considerations’ that may properly inform a court’s decision to exclude [MCL 768.27a] evidence under MRE 403, including but not limited to ‘the dissimilarity between the other acts and the charged crime’ and ‘the lack of reliability of the evidence supporting the occurrence of the other acts[,]’”), citing Watkins II, 491 Mich at 487-488.
A court may also “consider whether charges were filed or a conviction rendered when weighing the evidence under MRE 403.” Watkins II, 491 Mich at 489.

“The list of ‘considerations’ in Watkins provides a tool to facilitate, not a standard to supplant, [the] proper MRE 403 analysis, and it remains the court’s ‘responsibility’ to carry out such an analysis in determining whether to exclude MCL 768.27a evidence under that rule.” Uribe, 499 Mich at 922 (citation omitted). The trial court abused its discretion by excluding MCL 768.27a evidence where it failed to conduct an MRE 403 analysis and instead focused only on the considerations listed in Watkins II. Uribe, 499 Mich at 922. “In ruling the proposed testimony inadmissible under MRE 403, the trial court, citing the illustrative list of ‘considerations’ in Watkins, expressed concern regarding apparent inconsistencies between the proposed testimony and prior statements made by the witness, and certain dissimilarities between the other act and the charged offenses[, but] . . . failed to explain[.] . . . how or why these concerns were sufficient . . . to render the ‘probative value [of the proposed testimony] . . . substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,’ as required for exclusion under MRE 403.” Uribe, 499 Mich at 922.

3. Case Law

The following appellate cases address the admissibility of other acts evidence under MCL 768.27a.


The defendant was charged with five counts of CSC-I and one count of CSC-II for the alleged sexual abuse of a 12-year-old girl in his neighborhood. The prosecutor sought to admit evidence of similar acts through the testimony of a woman who was sexually assaulted by the defendant when she was 15 years old, and who continued in a sexual relationship with the defendant for two additional years. Watkins I, 277 Mich App at 361. The trial court held that the woman’s testimony was not admissible under either MRE 404(b) or MCL 768.27a because the proposed testimony was too different from the victim’s description of the charged acts to justify the use of the testimony to prove a common plan or scheme. Watkins I, 277 Mich App at 362, 365. The Court of Appeals resolved the conflict between MCL 768.27a and MRE 404(b) by determining
that MCL 768.27a controls “[b]ecause [it] is a substantive rule of evidence deeply rooted in weighty policy considerations[,]” Watkins I, 277 Mich App at 365. Because some of the conduct described by the woman constituted the commission of at least one of the offenses to which MCL 768.27a applied, the Court found the evidence “plainly relevant” to the likelihood that the defendant committed the charged offenses, and therefore, admissible under MCL 768.27a. Watkins I, 277 Mich App at 364-365. Although the woman’s testimony was inadmissible under MRE 404(b) because of the dissimilarities between the defendant’s conduct with her and the defendant’s conduct with the victim, similarity is not a consideration under MCL 768.27a. Watkins I, 277 Mich App at 365. The Court instructed the trial court, on remand, to determine which aspects of the woman’s testimony were related to the commission of an offense to which MCL 768.27a applied, and to admit those aspects of the woman’s testimony at the defendant’s trial. Watkins I, 277 Mich App at 365.

The Michigan Supreme Court affirmed. Watkins II, 491 Mich at 456. Noting that “the language in MCL 768.27a allowing admission of another listed offense ‘for its bearing on any matter to which it is relevant’ permits the use of evidence to show a defendant’s character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes[,]” the Court held that the statute and court rule “irreconcilably conflict.” Watkins II, 491 Mich at 467-470. The Court further concluded that, because MCL 768.27a “reflects a substantive legislative determination that juries should be privy to a defendant’s behavioral history in cases charging the defendant with sexual misconduct against a minor[,]” rather than a “policy consideration[] limited to ‘the orderly dispatch of judicial business[,]’” the statute “does not run afoul of [separation-of-powers principles], and in cases in which the statute applies, it supersedes MRE 404(b).” Watkins II, 491 Mich at 472-481.

The Watkins II Court additionally held that “evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403 if ‘its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” Watkins II, 491 Mich at 481. Moreover, noting that “[t]o weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL
768.27a[,]” the Court held that, “when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect[.] . . . other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference.” Watkins II, 491 Mich at 4.


Where the defendant was on trial for first-degree criminal sexual conduct against his then-nine-year-old son, the trial court did not abuse its discretion by admitting evidence under MCL 768.27a that the defendant inappropriately touched his nephew when his nephew was nine years old and living with the defendant. Solloway, 316 Mich App at 196. The Court held that the other-acts evidence was relevant because evidence that the defendant previously assaulted a nine-year-old relative made it more probable that he committed the charged offense against his son, who was also related to the defendant and nine years old. *Id.* at 193. Further, the evidence was relevant to the victim’s credibility because “[t]he fact that [the] defendant committed a similar crime against his nephew made it more probable that [his son] was telling the truth.” *Id.* Additionally, MRE 403 did not bar admission of the other acts evidence where the six Watkins considerations favored admission. First, the other acts and the charged crime were similar – the victims were the same age, defendant was related to both of them, the offenses occurred at a time when the victims were living with the defendant, and both offenses “involved [the] defendant entering the victim’s bedroom in the middle of the night, climbing on top of him, and engaging in some sort of inappropriate touching.” Solloway, 316 Mich App at 194-195. Second, the fact that the acts occurred 12 years apart did not bar admission under MRE 403 in light of the similarity of the acts. Solloway, 316 Mich App at 195. Third, the defendant’s nephew testified that the inappropriate touching occurred multiple times; “[t]herefore, it cannot be said that the other acts occurred so infrequently to support exclusion of the evidence.” *Id.* at 195. Fourth, there were no intervening acts that weighed against admissibility. *Id.* Fifth, the defendant did not challenge the credibility of the witness offering the other acts evidence, and the witness’s credibility was bolstered by the fact that the defendant pleaded guilty to CSC IV with respect to his conduct against the witness. *Id.* at 195-196. Sixth, “because there were no eyewitnesses to corroborate [the victim’s] testimony and to refute [the] defendant’s theories in regard to the physical
evidence of the crime, there was a need for evidence beyond [the victim’s] and [the] defendant’s testimony.” *Id.* at 196.


Where the defendant was on trial for various counts of criminal sexual conduct against a child who was almost eight years old, the trial court did not abuse its discretion by admitting evidence under MCL 768.27a that the defendant allegedly assaulted his 13-year-old stepdaughter a few months earlier and was convicted in Arizona of child molestation against a different child after the abuse in this case occurred. Specifically, “the trial court correctly found that these [other acts against the defendant’s stepdaughter] were similar to the present crimes[]” where the defendant’s assault on his stepdaughter was similar to the crime for which he was on trial because both crimes involved anal and vaginal penetration, the defendant threatened both victims with harm to their families if they discussed the assault, the age difference was not material, and less than six months elapsed between the two crimes. *Id.* at 100. The evidence of the defendant’s previous conviction was also properly admitted because although details of the offense were not disclosed, it was a conviction of a crime of the same general category (involving sex crimes against a child), it tended to make the victim’s story more believable, and it was not “too far removed temporally from the instant offenses in Michigan.” *Id.* at 101,


In a case in which charges involving three different child victims were consolidated for trial, the trial court did not abuse its discretion in admitting evidence of uncharged offenses involving each of the victims. *Id.* at 292-293, 303. “[I]n each case [the] defendant formed a relationship with a much-younger girl at his high school[, and t]hey used cell phones and text messaging to communicate[; additionally, the d]efendant’s pursuit of all three victims occurred in close together in time[].” *Id.* at 303 (noting that “[t]he other-acts evidence was also reliable because much of it was confirmed by the messages exchanged between [the] defendant and the victims[]”).

- **People v Mann (Jacob)**, 288 Mich App 114 (2010):

In the defendant’s trial for several counts of CSC-I and CSC-II against two minors, evidence that he previously committed another listed offense (attempted CSC-I against a minor) was properly admitted under MCL 768.27a. *People v Mann (Jacob)*,
The challenged evidence was relevant because it tended to show that it was more probable than not that the two minors in this case were telling the truth when they indicated that [the defendant] had committed CSC offenses against them. The challenged evidence also made the likelihood of [the defendant’s] behavior toward the minors at issue in this case more probable.

In addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Whether the minors in this case were telling the truth had significant probative value because it underlies whether [the defendant] should be convicted of the crimes for which he was charged. Further, the trial court specifically instructed the jury on two occasions that the only purpose for which the evidence could be considered was to help them judge the believability of the testimony regarding the acts for which [the defendant] was on trial. And jurors are presumed to follow their instructions. Moreover, the trial court took precautions to limit any prejudicial effect by ensuring that the videotape of [the defendant’s] guilty plea to the prior offense was not played for the jury. Instead, the trial court allowed a stipulation that [the defendant] committed the act to be entered into evidence.”

Mann (Jacob), 288 Mich App at 118-119.

D. Admissibility of Evidence That Defendant Committed Other Acts of Domestic Violence

Evidence that a defendant committed other acts of domestic violence may be admissible in a criminal action against a defendant accused of committing an offense involving domestic violence.17 MCL 768.27b(1).18 If admissible, such evidence may be introduced “for any purpose for which it is relevant, if it is not otherwise

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17 For purposes of MCL 768.27b, and as relevant to the content of the benchbook, the definition of domestic violence includes “[c]ausing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.” MCL 768.27b[5][a][iii].

18 Applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006. MCL 768.27b(6).
excluded under [MRE] 403.” MCL 768.27b(1). The statutory provisions of MCL 768.27b “do[ ] not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law.” MCL 768.27b(3).


MCL 768.27b “does not impose upon the administration of the courts; rather, it reflects a ‘policy decision that, in certain cases, juries should have the opportunity to weigh a defendant’s behavioral history and view the case’s facts in the larger context that the defendant’s background affords.’” People v Schultz (Gordon), 278 Mich App 776, 779 (2008), quoting Pattison, 276 Mich App 613, 620 (2007).

The Court of Appeals also found that the statute did not constitute an ex post facto law because it did not “‘lower the quantum of proof or value of the evidence needed to convict a defendant[,]’” and “does not permit conviction on less evidence or evidence of a lesser quality.” Schultz (Gordon), 276 Mich App at 778, quoting Pattison, 276 Mich App at 619. That is, “MCL 768.27b did not change the burden of proof necessary to establish the crime, ease the presumption of innocence, or downgrade the type of evidence necessary to support a conviction.” Schultz (Gordon), supra at 778. The Court rejected the defendant’s ex post facto argument on the ground that MCL 768.27b “affects only the admissibility of a type of evidence,” and “did not turn otherwise innocent behavior into a criminal act.” Schultz (Gordon), supra at 779.

MCL 768.27b contains a temporal requirement: “Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that

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19 In Mack, 493 Mich at 3, the Michigan Supreme Court “conclude[d] that MCL 768.27b d[id] not infringe on [its] authority to establish rules of ‘practice and procedure’ under Const 1963, art 6, § 5” “[f]or the reasons articulated in [People v Watkins (Watkins II), 491 Mich 450 (2012).]” In Watkins II, supra at 472-481, the Court concluded that, because MCL 768.27a “reflects a substantive legislative determination that juries should be privy to a defendant’s behavioral history in cases charging the defendant with sexual misconduct against a minor[,]” rather than a “policy consideration[] limited to ‘the orderly dispatch of judicial business[,]’” the statute “does not run afoul of separation-of-powers principles], and in cases in which the statute applies, it supersedes MRE 404(b),” Watkins II, supra at 472-481.
admitting this evidence is in the interest of justice.” MCL 768.27b(4). “[E]vidence of prior acts that occurred more than 10 years before the charged offense is admissible under MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence.” People v Rosa, 322 Mich App 726, 733-734 (2018) (stating that MCL 768.27b “does not define ‘interest of justice,’” and that “[t]o avoid rendering the 10-year limit nugatory, the [interest of justice] exception should be narrowly construed”; merely showing that the evidence “would be admissible had it occurred within the 10-year window” is insufficient).

1. Procedure for Determining Admissibility of Other Acts of Domestic Violence

A prosecutor intending to introduce evidence under MCL 768.27b(2) “shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.” MCL 768.27b(2).

2. Case Law

The following appellate cases address the admissibility of other acts evidence under MCL 768.27b.

• People v Rosa, 322 Mich App 726 (2018):

“[E]vidence of prior acts that occurred more than 10 years before the charged offense is admissible under MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence.” Rosa, 322 Mich App at 733-734. In Rosa, “[the victim’s] testimony laid out a detailed and compelling picture of defendant as an abusive and violent husband.” Similarly, the defendant’s first wife “described repeated verbal abuse, multiple beatings, and a rape.” Id. at 734. These prior bad acts “were neither uniquely probative nor were they needed to ensure that the jury was not misled; instead, the acts were consistent with and cumulative to [the victim’s] testimony regarding defendant’s character and propensity for violence.”

• People v Daniels, 311 Mich App 257 (2015):

“MCL 768.27b require[s] the trial court to admit [evidence that the defendant committed other acts of domestic violence
when: (1) it is relevant; (2) it describes acts of ‘domestic violence’ under [MCL 768.27b(5)(a)]; and (3) its probative value is not outweighed by the risk of unfair prejudice under MRE 403." People v Daniels, 311 Mich App at 274 (in the defendant’s trial for molesting and abusing two of his children, the trial court properly “admitted the testimony of [the defendant’s other children] regarding the physical violence he committed against them[]” where “[e]ach of the acts of physical violence to which the [children] testified [were] relevant, because they [made] ‘a material fact at issue’—i.e. whether [the] defendant physically and sexually abused [the named victims in the case]—‘more probable or less probable than [the material fact] would be’ without the testimony[. . .][t]he testimony also involve[d] acts of ‘domestic violence’ under MCL 768.27b, because the children described instances in which [the] defendant either ‘cause[d] or attempt[ed] to cause physical or mental harm to a family or household member’ through actual physical abuse[, and] . . . [t]he testimony [was] “highly probative, because it demonstrate[d] the defendant’s violent and aggressive tendencies, as well as his repeated history of committing physical abuse of all his children—not just [the named victims in the case]”). (Internal citations omitted).

• People v Meissner, 294 Mich App 438 (2011):

   “Prior acts of domestic violence can be admissible under MCL 768.27b regardless of whether the acts were identical to the charged offense.” Meissner, 294 Mich App at 452 (holding that the trial court properly admitted evidence of “prior acts of domestic violence [that] illustrated the nature of [the] defendant’s relationship with [the victim] and provided information to assist the jury in assessing [the victim’s] credibility[,]” and noting that “[a]ny potential unfair prejudice to [the] defendant was substantially outweighed by the evidence’s probative value”).

• People v Cameron (Stanley), 291 Mich App 599 (2011):

   The defendant was convicted of domestic violence resulting from an assault and battery against his ex-girlfriend. Cameron (Stanley), 291 Mich App at 601. The trial court permitted the prosecutor to introduce evidence under MCL 768.27b of prior bad acts involving the defendant’s actions against the

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20 This balancing test differs from the one in MRE 403. In MRE 403, the concern is whether the evidence’s probative value is substantially outweighed by unfair prejudice, while the test in MCL 768.27b requires that the evidence’s probative value substantially outweighs the evidence’s potential unfair prejudice.
defendant’s ex-girlfriend as well as against another former girlfriend. *Cameron (Stanley)*, *supra* at 605-607. On appeal, the Court of Appeals found that “[P]rior[]bad[]acts evidence [under MCL 768.27b may] be introduced at trial as long as the evidence satisfies the ‘more probative than prejudicial’ balancing test of MRE 403[.]” *Cameron (Stanley)*, *supra* at 610. “[A] court must make two distinct inquiries under the balancing test of MRE 403[.]

First, [the court] must decide whether introduction of [the defendant’s] prior[]bad[]acts evidence at trial [is] unfairly prejudicial.

[Second, the court] must apply the [MRE 403] balancing test and ‘weigh the probativeness or relevance of the evidence’ against the unfair prejudice. . . .

Under the first inquiry, [the Court of Appeals] conclude[d] that the trial court’s decision to allow evidence of [the defendant’s] prior bad acts did not unfairly prejudice [the defendant] at trial. The ‘unfair prejudice’ language of MRE 403 “‘refers to the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.’” Moreover, admission of ‘[e]vidence is unfairly prejudicial when . . . [the danger exists] that marginally probative evidence will be given undue or preemptive weight by the jury.’ However, the Michigan Supreme Court also recognizes that the prosecution does not have to use the least prejudicial evidence to make out its case. In this case, the prejudicial effect of other[]acts evidence did not stir such passion as to divert the jury from rational consideration of [the defendant’s] guilt or innocence of the charged offenses. In fact, the trial court minimized the prejudicial effect of the bad[]acts evidence by instructing the jury that the issue in this case was whether [the defendant] committed the charged offense.

Under the second inquiry, [the Court of Appeals] conclude[d] that any prejudicial effect of the trial court’s decision to allow evidence of [the defendant’s] prior bad acts did not substantially outweigh the probative value of the evidence. A
trial court admits relevant evidence to provide the trier of fact with as much useful information as possible. Here, the trial court found that [the defendant’s] prior bad acts were relevant and therefore admissible to establish [the ex-girlfriend’s] credibility. The trial court also found that [the defendant’s] actions were relevant to show that he acted violently toward [the ex-girlfriend] and that his actions were not ‘accidental’ at the time of the incident. Additionally, the evidence of [the defendant’s] actions on six separate occasions with [the ex-girlfriend] and on three separate occasions with [a former girlfriend] demonstrated [the defendant’s] propensity to commit acts of violence against women who were or had been romantically involved with him.

Therefore, [the defendant’s] prior bad acts were relevant to the prosecutor’s domestic violence charge under MCL 768.27b. Any prejudicial effect of admitting the bad acts evidence did not substantially outweigh the probative value of the evidence, and the trial court did not abuse its discretion when it allowed [the defendant’s] prior bad acts evidence to be introduced under MCL 768.27b.” Cameron (Stanley), 291 Mich App at 611-612.

- People v Pattison, 276 Mich App 613 (2007):

The defendant was charged with four counts of CSC-I for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. Pattison, 276 Mich App at 615. In an interlocutory appeal, the Court of Appeals affirmed the trial court’s order allowing the prosecutor to introduce evidence of the defendant’s other alleged sexual assaults against his ex-fiancée. Pattison, supra at 615-616. However, rather than reviewing the evidence’s admissibility under MRE 404(b) as did the trial court, the Court of Appeals relied on MCL 768.27b21 in making this determination. Pattison, supra at 615-616. The Court concluded that evidence of CSC-I against the defendant’s ex-fiancée was admissible under MCL 768.27b because the evidence was

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21 MCL 768.27b permits trial courts to “admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403.” Pattison, 276 Mich App at 615.
“probative of whether he used those same tactics to gain sexual favors from his daughter.” *Pattison*, *supra* at 616. The prosecution also sought to introduce evidence of the defendant’s alleged misconduct with a coworker but the Court disagreed with the trial court’s order permitting this evidence because there was no evidence of a “personal or familial relationship” between the defendant and his coworker. *Id.* at 616. Furthermore, the defendant’s conduct directed at his coworker involved “surprise, ambush, and force[,]” while the defendant’s conduct directed at his daughter involved “manipulation and abuse of parental authority.” *Id.* at 617.

### 7.5 Sexually Abused Child Syndrome–Expert Testimony

“‘[C]ourts should be particularly insistent in protecting innocent defendants in child sexual abuse cases’ given ‘the concerns of suggestibility and the prejudicial effect an expert’s testimony may have on a jury.’” *People v Musser*, 494 Mich App 337, 362-363 (2013) (holding that a detective who was not qualified as an expert witness was still subject to the same limitations as an expert because he “‘gave . . . the same aura of superior knowledge that accompanies expert witnesses in other trials’” and because, as a police officer, jurors may have been inclined to place undue weight on his testimony), quoting *People v Peterson (Peterson I)*, 450 Mich 349, 371 (1995), modified *People v Peterson (Peterson II)*, 450 Mich 1212. Accordingly, an expert witness’s testimony is limited. *Peterson (Peterson I)*, 450 Mich at 352. The expert witness may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of the victim, or (3) testify to the defendant’s guilt. *Peterson (Peterson I), supra* at 352.

Despite these limitations, “(1) an expert may testify in the prosecutor’s case-in-chief [(rather than only in rebuttal)] regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim’s credibility.” *Peterson (Peterson I)*, 450 Mich at 352-353.

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22 For more information on this specific topic, as well as on expert testimony in general, see the Michigan Judicial Institute’s *Evidence Benchbook*, Chapter 3.
7.6 Confrontation Clause Issues in Sexual Assault Cases

The admission of prior testimonial statements violates a defendant’s constitutional right to confrontation unless the prior statements were subject to cross-examination by the defendant and the person who made the statements is unavailable to testify. *Crawford v Washington*, 541 US 36, 53-54, 68 (2004). For Confrontation Clause purposes, the reliability of prior testimonial statements must not be determined by reference to rules of evidence governing admissibility of hearsay evidence, or by whether the statements bear particularized guarantees of trustworthiness. “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Crawford*, *supra* at 68-69. In *Crawford*, *supra* at 42, 67-68, the United States Supreme Court overruled *Ohio v Roberts*, 448 US 56 (1980), which held that admission of an unavailable witness’s prior statements did not violate the Sixth Amendment if the statements bear “adequate indicia of reliability.” The Court declined to provide a comprehensive definition of “testimonial statement”; however, the Court stated:

> “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 US at 68.

The admission of an unavailable witness’s former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, 263 Mich App 124, 133-134 (2004). In *McPherson*, *supra* at 126-127, the defendant was convicted of murder. A codefendant made a statement to police that identified the defendant as the shooter. *Id.* at 126. Before trial, the codefendant was murdered but his statement was admitted at trial. *Id.* at 132-133. In applying the United States Supreme Court’s holding in *Crawford*, 541 US 36, the Court of Appeals found the codefendant’s statement to police was testimonial. *McPherson*, *supra* at 132. However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *McPherson*, *supra* at 133. In *McPherson*, the statement of the codefendant was admitted not for its substance, but to impeach the defendant. *Id.* at 133-134. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford*, *supra*, or the Confrontation Clause. *McPherson*, *supra* at 134-135.

A. What Constitutes a Testimonial Statement

> “[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial;[23] ‘[w]here no such primary purpose exists, the admissibility of a statement is the concern of [the

Whether hearsay evidence constitutes a testimonial statement barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US 813, 822 (2006). Although the United States Supreme Court did not “produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial,” the Court expressly stated:

> “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 US at 822.

1. **Statements Made to SANE**

> “[I]n order to determine whether a sexual abuse victim’s statements to a SANE [(Sexual Assault Nurse Examiner)] are testimonial, the reviewing court must consider the totality of the circumstances of the victim’s statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE’s questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency.” *People v Spangler*, 285 Mich App 136, 154 (2009). The Court set out the following nonexhaustive list of factual indicia to assist in deciding whether a victim’s statements are testimonial:

> “(1) the reason for the victim’s presentation to the SANE, e.g., to be checked for injuries or for signs of abuse;

> (2) the length of time between the abuse and the presentation;

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23 For a thorough discussion of what constitutes a testimonial statement, see the Michigan Judicial Institute’s *Evidence Benchbook*, Chapter 3.
(3) what, if any, preliminary questions were asked of the victim or the victim’s representative, or what preliminary conversations took place, before the official interview or examination;

(4) where the interview or examination took place, e.g., a hospital emergency room, another location in the hospital, or an off-site location;

(5) the manner in which the interview or examination was conducted;

(6) whether the SANE conducted a medical examination and, if so, the extent of the examination and whether the SANE provided or recommended any medical treatment;

(7) whether the SANE took photographs or collected any other evidence;

(8) whether the victim’s statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made;

(9) whether the SANE completed a forensic form during or after the interview or examination;

(10) whether the victim or the victim’s representative signed release or authorization forms, or was privy to any portion of the forensic form, before or during the interview or examination;

(11) whether individuals other than the victim and the SANE were involved in the interview or examination and, if so, the level of their involvement;

(12) if and when law enforcement became involved in the case, how they became involved, and the level of their involvement; and

(13) how SANEs are used by the particular hospital or facility where the interview or examination took place.” Spangler, 285 Mich App at 155-156.

In Spangler, 285 Mich App at 156, the Court remanded the case because the trial court erred in excluding the victim’s statements to the SANE based solely on the forensic form completed by the SANE, and in “failing to consider whether
the circumstances of the [victim’s] statements, viewed objectively and in their totality, indicated that the statements were testimonial.”

2. **Statements Made During 911 Call**

*Davis*, 547 US 813 involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which a defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim’s statement was admitted as evidence against the defendant. *Davis*, 547 US at 817-818, 819-821.

In *Davis v Washington*, the statements at issue arose from the victim’s conversation with a 911 operator during the assault. *Davis*, *supra* at 817, After objectively considering the circumstances under which the 911 operator “interrogated” the victim, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. *Id.* at 828. According to the Court:

“[T]he circumstances of [the victim’s] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying.” *Davis*, 547 US at 828.

3. **Statements Made to Law Enforcement Official**

*Davis*, 547 US 813 involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which a defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim’s statement was admitted as evidence against the defendant. *Davis*, 547 US at 817-818, 819-821. In *Hammon v Indiana*, the statement at issue arose from answers the victim gave to one of the police officers who responded to a “reported domestic disturbance” call at the victim’s home. *Davis (Hammon)*, 547 US at 819. The victim summarized her responses in a written statement and swore to the truth of the statement. *Davis (Hammon)*, *supra* at 820. In this case, the Court concluded that the circumstances surrounding the victim’s interrogation closely resembled the circumstances in *Crawford*, 541 US 36, and that the “battery affidavit” containing the victim’s statement was testimonial evidence not admissible against the defendant absent the defendant’s opportunity to
cross-examine the victim. *Davis (Hammon)*, *supra* at 829-830. The Court summarized the similarities between the instant case and *Crawford*:

“Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.” *Davis (Hammon)*, 547 US at 830.

### 4. Statements Made to Mandatory Reporter

“[T]he Sixth Amendment’s Confrontation Clause [did not] prohibit[] prosecutors from introducing . . . [a young child’s] statements” to his teachers in which he “identified [the defendant] as his abuser[;]” because “mandatory reporting statutes[24] alone cannot convert a conversation between a concerned teacher and [his or] her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution[,]” and in this case, “neither the child nor his teachers had the primary purpose of assisting in [the defendant]’s prosecution, the child’s statements [did] not implicate the Confrontation Clause and therefore were admissible at trial[]” when “the child was not available to be cross-examined.” *Ohio v Clark*, 576 US __, ___ (2015) (“declining] to adopt a categorical rule excluding [statements to persons other than law enforcement officers] from the Sixth Amendment’s reach[,]” but noting that “such statements are much less likely to be testimonial than statements to law enforcement officers[,]” and further noting that “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause[]”).

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24 MCL 722.623(1) requires certain individuals to report suspected child abuse or child neglect if he or she has reasonable cause to suspect that a child is being abused or neglected. For a detailed discussion of MCL 722.623, see the Michigan Judicial Institute, *Child Protective Proceedings Benchbook*, Chapter 2.
5. **Lab Reports**

A non-testifying serologist’s notes and lab report are “testimonial statements” under *Crawford*, 541 US 36. *People v Lonsby*, 268 Mich App 375, 390, 392-393 (2005). In *Lonsby*, supra at 380, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. *Id.* at 380-381. In *Crawford*, “the Court stated that pretrial statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if the statement is made ‘under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]’” *Lonsby*, supra at 377, quoting *Crawford*, *supra* at 51-52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford’s* definition of a testimonial statement and should not have been admitted in the absence of the defendant’s opportunity for cross-examination. *Lonsby*, *supra* at 388-389.

The admission of expert testimony based on a report prepared by nontestifying forensic analysts violated the defendant’s Sixth Amendment right to confrontation because “the testing . . . was performed in anticipation of a criminal trial, after the medical examiner’s original findings had been challenged.” *People v Dendel (On Second Remand)*, 289 Mich App 445, 468 (2010). Specifically, “[t]he medical examiner did not merely delegate to the . . . laboratory an ordinary duty imposed by law: he sought from the lab specific information to investigate the possibility of criminal activity. Under th[o]se circumstances, any statements made in relation to th[e] investigation took on a testimonial character.” *Dendel, supra* at 468.

The Confrontation Clause was not violated by a forensic specialist’s testimony “that a DNA profile produced by an outside laboratory, [using semen from vaginal swabs taken from the victim,] . . . matched a profile produced by the state police lab using a sample of [the] petitioner’s blood[,] . . . that [the outside laboratory] provided the police with a DNA

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25 MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See the Michigan Judicial Institute’s *Evidence Benchbook*, Chapter 3, for more information on forensic laboratory reports and certificates.
profile[; and that] . . . notations on documents admitted as business records [indicated] that, according to the records, vaginal swabs taken from the victim were sent to and received back from [the outside laboratory].” *Williams v Illinois*, 567 US 50 (2012) (plurality opinion by Alito, J.). Noting that, “[u]nder settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true[,]” the *Williams* plurality concluded that “[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.” *Williams*, 567 US at 57-58. Where the forensic expert “did not testify to the truth of any other matter concerning [the outside laboratory]; . . . made no other reference to the [outside laboratory’s] report, which was not admitted into evidence and was not seen by the trier of fact[.]. . . did [not] . . . testify to anything that was done at the . . . [outside] lab[; and did not] . . . vouch for the quality of [its] work[,]” her testimony did not run afoul of the Confrontation Clause. *Id.* at 70-71.

In addition, the *Williams* plurality expressed the view that, “even if the report produced by [the outside laboratory] had been admitted into evidence, there would have been no Confrontation Clause violation[,]” because the report “was produced before any suspect was identified[ and] . . . was sought not for the purpose of obtaining evidence to be used against [the] petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose.” *Williams*, 567 US at 58. The plurality explained:

“The . . . report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. . . . [T]he profile that [the lab] provided was not inherently inculpatory[; o]n the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less
reliable. . . . The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.” Williams, 567 US at 58-59.

6. Medical Reports

A non-testifying psychiatrist’s out-of-court medical report that “memorialized [the] defendant’s medical history and the events that led to his admittance to the hospital, provided [an] all-important diagnosis, and outlined a plan for treatment[]” constituted a testimonial statement that was used as substantive evidence of the defendant’s sanity in violation of his Sixth Amendment right of confrontation.26 People v Fackelman, 489 Mich 515, 518-519, 532, 564 (2011). In Fackelman, supra at 519-520, 523, the defendant was found guilty but mentally ill of charges stemming from his armed assault of a man that the defendant believed had caused his son’s death. At trial, the prosecutor revealed the hospital psychiatrist’s diagnosis of “‘[m]ajor depression, single episode, severe without psychosis[,]’” the prosecutor subsequently referred to the report in his examination of the prosecution’s expert witness, who testified that she agreed with the diagnosis. Id. at 518, 522-523, 530.

The Michigan Supreme Court held that the report, which was made following the defendant’s arrest and “expressly focused on [the] defendant’s alleged crime and the charges pending against him[,]” constituted testimonial evidence because it “was ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[,]’” Fackelman, 489 Mich at 532-533, quoting Crawford, 541 US at 52. Moreover, “the prosecutor’s improper introduction and repeated use of [the] diagnosis that [the] defendant was not, in fact, experiencing psychosis fully rendered the [psychiatrist] a witness against [the] defendant.” Fackelman, supra at 530. Because the diagnosis “provided a tiebreaking expert opinion” by “the only expert unaffiliated with either party . . . [and] the only doctor who had personal knowledge concerning [the]

26 No reason was given for the witness’s failure to attend trial. Fackelman, 489 Mich at 541
dispositive issue[,]” its use at trial constituted plain error requiring reversal of the defendant’s convictions. *Id.* at 538, 564.

**B. “Language Conduit” Rule**

Under the “language conduit” rule, “an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter’s statements are regarded as the statements of the declarant without creating an additional layer of hearsay[,]” thus, where a defendant has a full opportunity to cross-examine the declarant, he or she has no additional constitutional right to confront the interpreter. *People v Jackson (Andre)*, 292 Mich App 583, 595 (2011). In *Jackson (Andre)*, *supra* at 593, a hospitalized shooting victim was questioned by a police officer. Because the victim was unable to speak at the time of the interview, he answered the questions by either squeezing the hand of an attending nurse (to indicate “yes”) or not squeezing the nurse’s hand (to indicate “no”). *Id.* at 593-594. The Court stated that the following factors should be examined when determining whether statements made through an interpreter are admissible under the language conduit rule:

“(1) whether actions taken after the conversation were consistent with the statements translated, (2) the interpreter’s qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter.” *Jackson (Andre)*, 292 Mich App at 596, citing *United States v Nazemian*, 948 F2d 522, 527-528 (CA 9, 1991), and *People v Gutierrez*, 916 P2d 598, 600-601 (Colo App, 1995).

Concluding that none of these factors militated against application of the language conduit rule, the Court held that although the victim’s nonverbal answers qualified as testimonial statements, the defendant did not have a constitutional right to confront the nurse, “because what she reported were properly considered to be [the victim’s] statements.” *Jackson (Andre)*, 292 Mich App at 597. Because he “had a full opportunity to cross-examine [the victim],” the defendant’s Confrontation Clause rights were satisfied. *Id.* at 597.

### 7.7 Selected Hearsay Rules and Exceptions

**A. Hearsay Rules**

*MRE 801(c)* defines *hearsay* as “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A *statement* is
“(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” MRE 801(a).

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. Exceptions to the rule against the admission of hearsay are found in MRE 803, MRE 803A, and MRE 804. This section discusses hearsay issues as they relate to cases involving sexual assault. For a more detailed discussion of hearsay rules and exceptions, see the Michigan Judicial Institute’s Evidence Benchbook, Chapter 5.

B. Exceptions Where Availability of Declarant Is Immaterial

1. Excited Utterance Exception

An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” MRE 803(2). An excited utterance is admissible even if the declarant is available as a witness. Id.

The prerequisites to the admission of evidence under the excited utterance exception to the hearsay rule were first summarized in People v Straight, 430 Mich 418, 424 (1988), citing People v Gee, 406 Mich 279, 282 (1979), and are reiterated in People v Smith (Larry), 456 Mich 543, 550 (1998), as follows:

- The statement must arise from a startling event.
- The statement must be made while under the excitement caused by the startling event.

A sexual assault is a startling event. See Straight, 430 Mich at 425 (“Few could quarrel with the conclusion that a sexual assault is a startling event.”). The focus of MRE 803(2) is whether the declarant spoke while under the stress caused by the startling event. Straight, 430 Mich at 425-426 (the statements “made approximately one month after the alleged assault, immediately after a medical examination of the child’s pelvic area, and after repeated questioning by her parents” were inadmissible hearsay). The justification for the rule is lack of capacity to fabricate, not lack of time to fabricate. Straight, 430 Mich at 425. “[T]here is no express time limit for excited utterances.” Smith (Larry), 456 Mich at 551. In Smith (Larry), 456

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27 MRE 803 contains other hearsay exceptions that are outside the scope of this benchbook’s subject matter. See the Michigan Judicial Institute’s Evidence Benchbook, Chapter 5, for more information.
Mich at 551-553, the Supreme Court held that a CSC-I victim’s statement made ten hours after the sexual assault was admissible as an excited utterance because it was made while the victim was still under the overwhelming influence of the assault.

Admission of an excited utterance under MRE 803(2) “does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted. Rather, MRE 1101(b)(1) [(rules do not apply to preliminary questions of fact)] and MRE 104(a) [(preliminary questions)] instruct that when a trial court makes a determination under MRE 803(2) about the existence of a startling event or condition, the court may consider the out-of-court statement itself in concluding whether the startling event or condition has been established.” People v Barrett, 480 Mich 125, 139 (2008).

In People v Layher, 238 Mich App 573, 583-584 (1999), the Court of Appeals found that a 15-year-old sexual assault victim was in a continuing state of emotional shock precipitated by the assault when she made statements during therapy one week after the alleged assault. Layher, 238 Mich App at 575, 584. According to the Court: “The[ ] circumstances, combined with the complainant’s young age, mental deficiency, and the relatively short interval between the assault and the statement, militate against the possibility of fabrication and support an inference that the statement was made out of a continuing state of emotional shock precipitated by the assault.” Id. at 584. See also People v Soles, 143 Mich App 433, 438 (1985), where the Court admitted evidence under MRE 803(2), and the time between the event and the victim’s description of the event was five days; there, the Court stated: “where such a heinous assault is committed upon a child so young [(6 years old)], it is not beyond reason to suggest that she could remain so traumatized by the incident as to be incapable of contriving or misrepresenting the crimes committed to her person for a period of five days or longer.” Soles, 143 Mich App at 438.

But see Gee, 406 Mich at 283, where the Michigan Supreme Court found reversible error in the admission of the complainant’s statements made 12-20 hours after the CSC incident, because the “lapse between event and statement was enough time for consideration of self-interest[.]” and there was “no plausible explanation for the delay which would excuse the delay and permit an extension of the excited utterance exception to the hearsay rule to these facts.” Id.
2. **Statements Made for Purposes of Medical Treatment or Medical Diagnosis**

MRE 803(4) provides an exception to the hearsay rule, regardless of the declarant’s availability as a witness, for statements that are:

“made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.”

“Particularly in cases of sexual assault, in which the injuries might be latent . . . a victim’s complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment.” *People v Johnson (Jordan)*, 315 Mich App 163, 193 (2016), quoting *People v Mahone*, 294 Mich App 208, 215 (2011).

The rationale for admitting statements under MRE 803(4) is: “(1) the self-interested motivation to speak truthfully to treating physicians in order to receive proper medical care; and (2) the reasonable necessity of the statement to the patient’s diagnosis and treatment.” *Merrow v Bofferding*, 458 Mich 617, 629 (1998) (the declarant’s statement that his wound occurred after his arm went through a glass window was necessary to his treatment, but his statement that the incident occurred after “a fight with his girlfriend” was not reasonably necessary for diagnosis and treatment and so was inadmissible under MRE 803[4]), quoting *Solomon v Shuell*, 435 Mich 104, 119 (1990). See also *People v Shaw*, 316 Mich App 668, 675 (2016) (holding that the victim’s statements to a pediatrician regarding alleged sexual abuse were not admissible under MRE 803(4) where the pediatrician’s examination “did not occur until seven years after the last alleged instance of abuse, thereby minimizing the likelihood that the complainant required treatment[,]” and “the complainant did not seek out [the pediatrician] for gynecological services; r]ather, she was specifically referred to [the pediatrician] by the police in conjunction with the police investigation into the allegations of abuse by [the] defendant[)].
a. **Trustworthiness of Statements Based on Declarant’s Age**

In assessing the trustworthiness of a declarant’s statements, Michigan appellate courts have drawn a distinction based upon the declarant’s age. For declarants over the age of ten, a rebuttable presumption arises that they understand the need to speak truthfully to medical personnel. *People v Garland (Edward)*, 286 Mich App 1, 9 (2009). For declarants ten and younger, a trial court must inquire into the declarant’s understanding of the need to be truthful with medical personnel. *People v Meeboer (After Remand)*, 439 Mich 310, 326 (1992).

“The [court’s] inquiry into [the] trustworthiness [of statements made by a declarant ten years and younger] should . . . consider the totality of circumstances surrounding the declaration of the out-of-court statement.” *Meeboer (After Remand)*, 439 Mich at 324. In *Meeboer*, the Michigan Supreme Court established ten factors to address when considering the totality of the circumstances in cases involving declarants ten years and younger:

- The age and maturity of the child;

- The manner in which the statement is elicited—leading questions can undermine a statement’s trustworthiness;

- The manner in which the statement is phrased—childlike terminology can be evidence of truthfulness;

- The use of terminology unexpected of a child of similar age;

- The circumstances surrounding initiation of the examination—an examination initiated by the prosecution may indicate it was not intended for medical diagnosis or treatment;

- The timing of the examination in relation to the assault or trial—whether the child is still suffering or in distress;

- The type of examination—a statement made during psychological treatment for a disorder may not be as reliable;
• The relation of the declarant to the person identified as the assailant—may provide evidence that the child is not mistaken as to identity; and

• The existence of, or lack of, motive to fabricate.  
  *Meeboer (After Remand)*, 439 Mich at 325-326.

“In addition to the *Meeboer* ten-factor test, the reliability of the hearsay is strengthened when it is supported by other evidence, including the resulting diagnosis and treatment.” *People v McElhaney*, 215 Mich App 269, 282 (1996) (finding results from a physical examination that showed “numerous abrasions and the complainant[-victim]’s vaginal and rectal areas [being] red, swollen, and tender[, ]corroborated the complainant[-victim]’s account of [her sexual abuse]”), citing *Meeboer (After Remand)*, 439 Mich at 325-326.

**APPLICATION OF THE MEEBOER FACTORS.** The following case law applies the *Meeboer* factors in assessing the trustworthiness of statements made by declarants ten years of age or younger:

• People v Johnson (Jordan), 315 Mich App 163, 193, 194 (2016):

In applying the *Meeboer* factors, the court found a six-year-old declarant’s statements to a sexual assault nurse examiner (SANE) about being sexually assaulted were trustworthy and thus admissible under MRE 803(4) for prosecution of the defendant for CSC-I and CSC-II where the defendant “admitted that the [declarant-victim] was ‘smart,’ indicating the maturity of the declarant[-victim,]” the SANE asked “open ended questions when eliciting the statements from the [declarant-victim[.]] and . . . the purpose of the [medical] examination was to make sure the [declarant-victim] was ‘healthy’ and safe in her home[,.] . . . the [declarant-victim] phrased her statements in a childlike manner because she emphasized the fact that [the] defendant did not wash his penis before putting it in her mouth, . . . the [declarant-victim] may have still been under distress of the sexual acts because she initially did not want to discuss the acts with [the SANE, t]he [medical] examination was held . . . less than one month after the [declarant-victim’s] disclosure, and more than four months prior to trial, . . . [and t]here was . . . no evidence that the [declarant-victim] made a mistake in identification because the person identified as the
perpetrator was her uncle, someone with whom she was familiar.”


In applying the Meeboer factors, a court found the eight-year-old declarant’s statements to a board-certified emergency physician and medical director of a Child Advocacy Center were trustworthy and thus admissible under MRE 803(4) for prosecution of the defendant for CSC-I and CSC-II where the declarant-victim “was mature enough to relate the details to the [emergency physician] . . . [the emergency physician] did not use leading questions to elicit the [declarant-victim’s] statements, the [declarant-victim] . . . phrased her statements in childlike terms such as, ‘[my stepfather] put his pee-pee in her, um, butt and in her private part, and that . . . it hurt[,]’ . . . [the emergency physician’s] examination of the [declarant-victim] was done when the child was still suffering from emotional pain and distress from the incident[, t]he examination was medical, not psychological, and nothing indicate[d] that the [declarant-victim] mistook [the] defendant’s identity or had a motive to fabricate.”


In applying the Meeboer factors, the Court found the nine-year-old declarant’s statements to a physician’s assistant about being sexually assaulted were trustworthy and thus admissible under MRE 803(4) for prosecution of the defendant for CSC-I where there was no evidence to show immaturity, the declarant-victim was asked only neutral questions about her injuries, the declarant-victim’s responses “were not elicited in a manner that would

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28 In Johnson (Jordan), 315 Mich App at 195, the Court noted two of the Meeboer factors that “weigh[ed] against a finding that the [declarant-victim’s] statements to [the SANE] were trustworthy[,] [1] the record indicate[d] that [Child Protective Services (CPS)] initiated the [medical] examination, which could demonstrate that the medical examination was not intended for medical treatment or diagnosis[,] and 2] testimony was presented that the [declarant-victim] did not like it when [the] defendant babysat because he would make them clean and do chores, thus suggesting a motive to fabricate.” In applying all of the Meeboer factors, the Court found that “the totality of the circumstances support[ed] the admission of the [declarant-victim’s] statements because they were trustworthy[.]”

29 In Duenaz, 306 Mich App at 96, the Court noted that “[a]lthough the prosecution initiated the [medical] examination [of the declarant-victim] and it may have been at least in part to investigate an alleged sexual assault, this factor [was] not dispositive.”
undermine their credibility[,] . . . [t]he [declarant-victim’s] use of the words ‘front’ and ‘bottom’ were not scientifically complex and do not indicate that [the declarant-victim’s] statements were influenced by an adult[,] . . . [medical] examination [of the declarant-victim] was [by way of an emergency room visit and] for purposes of medical treatment[,] . . . [t]he [declarant-victim] was brought to the hospital within hours of the assault and before any suspect had been identified[,] . . . [and the] physical examination [was performed] in a hospital’s emergency room[.]


b. Statements Identifying Defendant as Perpetrator

Generally, statements of identification are not admissible under MRE 803(4) if “the identity of an assailant cannot be fairly characterized as the ‘general cause’ of an injury.” People v LaLone, 432 Mich 103, 111-113 (1989). In LaLone, the statement of identification to a psychologist was not admissible because it was not necessary to the declarant’s medical diagnosis or treatment, and the statement was not sufficiently reliable because it was made to a psychologist, not a physician. LaLone, 432 Mich at 113-114.

However, in People v Meeboer (After Remand), 439 Mich 310, 322 (1992), three consolidated cases all involving criminal sexual conduct against children aged seven and under, the Michigan Supreme Court determined that statements of identification from a child-declarant alleging sexual abuse are “necessary to adequate medical diagnosis and treatment.” (Emphasis added.) Identification statements from a child allow the medical health care provider to (1) assess and treat any sexually transmitted diseases or potential pregnancy, (2) structure an appropriate examination in relation to the declarant’s pain, (3) prescribe any necessary psychological treatment, and (4) know whether the child will be returning to an abusive home or will be given an opportunity to heal from the trauma. Meeboer (After Remand), 439 Mich at 328-329.
C. Exceptions Where Declarant Is Unavailable

The hearsay rule precludes admission into evidence the contents of police and medical records unless an exception under MRE 803 applies. See, e.g., MRE 803(8)(B). This section discusses three hearsay exceptions that may apply to such records—the exception for records of a regularly conducted activity under MRE 803(6), the exception under MRE 803(7) for the absence of an entry in certain records, and the exception for public records and reports under MRE 803(8). These exceptions apply regardless of the declarant’s availability as a witness. MRE 803.

1. Records of a Regularly Conducted Activity

MRE 803(6) contains a hearsay exception for records of a regularly conducted activity. Such records are described as follows:

“A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

Under MRE 803(6), a properly authenticated record may be introduced into evidence without requiring the record’s custodian to appear and testify. MRE 902(11) governs the authentication of a business record by the written certification of the custodian or other qualified person:

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30 MRE 804 contains other hearsay exceptions that are outside the scope of this benchbook. See the Michigan Judicial Institute’s Evidence Benchbook, Chapter 5, for more information.
“Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

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(11) Certified Records of Regularly Conducted Activity. The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that—

(A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) The record was kept in the course of the regularly conducted business activity; and

(C) It was the regular practice of the business activity to make the record.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.”

In People v Jobson, 205 Mich App 708, 713 (1994), police records were admitted into evidence under MRE 803(6). In that case, a police officer took part in unauthorized police raids at two homes and was convicted of entering a building without the owner’s permission. Jobson, supra at 709. On appeal, the officer challenged the trial court’s decision to admit into evidence his activity log, which made no reference to the raids in question. Id. at 710. The Court of Appeals noted that police officers are required to record all patrol activity in an activity log, and held that the defendant’s log was admissible into evidence under MRE 803(6) and MRE 803(7). Jobson, supra at 710, 713.

For an example of a case in which a medical record was admitted into evidence under MRE 803(6), see Merrow v
Bofferding, 458 Mich 617, 626-628 (1998), where the Michigan Supreme Court held that part of the plaintiff’s “History and Physical” hospital record was admissible under MRE 803(6) because it was compiled and kept by the hospital in the regular course of business.

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence when the record was prepared in anticipation of litigation because the circumstances of preparation undermine the record’s trustworthiness. The following cases discuss trustworthiness as it relates to admission of evidence under MRE 803(6).

- **People v McDaniel, 469 Mich 409 (2003):**

  The defendant was convicted of selling a packet of heroin to an undercover police officer. McDaniel, 469 Mich at 410. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. McDaniel, supra at 410. At trial, the chemist did not testify because he had retired. Id. However, the trial court admitted the lab report into evidence because the prosecution presented the testimony of a police department chemist with 31 years of experience even though the chemist had no personal knowledge of the tests performed by the retired chemist. Id. at 410-411. On appeal, the defendant argued that the lab report was inadmissible hearsay and could not have been admitted under MRE 803(6). Id. at 413. The Michigan Supreme Court indicated that the hearsay exception in MRE 803(6) is based on the inherent trustworthiness of business records, and that trustworthiness is undermined when records are prepared in anticipation of litigation. McDaniel, supra at 414. The Court concluded that “the police laboratory report is inadmissible hearsay because ‘the source of information or the method or circumstances of preparation indicate lack of trustworthiness.’” Id.

- **People v Huyser, 221 Mich App 293 (1997):**

  The defendant was convicted of CSC-II against his former girlfriend’s daughter. Huyser, 221 Mich App at 294. The prosecution retained Dr. David Hickok as an expert witness, who examined the victim and prepared a report stating his finding that the evidence was consistent with vaginal penetration. Huyser, supra at 295. Dr. Hickok was named on the

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31 MRE 803(7) concerns the absence of an entry in a record described in MRE 803(6). For additional information on MRE 803(7), see Section 7.7(C)(2).
prosecution’s witness list but died before trial. *Id.* at 295. A subsequent examination of the victim by a different physician revealed no evidence of vaginal penetration. *Id.* Over the defendant’s objection, the trial court ruled that Dr. Hickok’s report was admissible under MRE 803(6), and one of Dr. Hickok’s employees read portions of the report into evidence. *Huyser, supra* at 295-296. On appeal, the defendant challenged the admission of the report into evidence. *Id.* at 296. The Court of Appeals found that because Dr. Hickok had prepared the report in contemplation of the criminal trial, the report lacked the trustworthiness of a report generated exclusively for business purposes. *Id.* at 298. According to the Court, “[T]he report prepared by Dr. Hickok is not a ‘hospital record,’ and, more significantly, was not generated for purposes of medical treatment.” *Id.* at 298-299. The report’s trustworthiness was also undermined by the results of the subsequent physical examination that did not find any evidence of penetration. *Id.* at 298.

Even if a document is admissible under MRE 803(6), every statement contained in the document may not be admissible. See MRE 805. If the document contains a hearsay statement, that statement is admissible only if it qualifies under an exception to the hearsay rule or is admissible as nonhearsay. MRE 805.

2. Absence of Record

MRE 803(7) contains a hearsay exception for the absence of an entry in certain records:

“Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of [MRE 803(6)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.”

MRE 803(7) permits admission of evidence that there were no recorded reports of an allegation of sexual assault because such evidence is “of a kind of which a memorandum, report, record, or data compilation [is] regularly made and preserved,’ . . . [and] evidence that no report was ever made was admissible ‘to prove the nonoccurrence or nonexistence of the

3. Public Records and Reports

MRE 803(8) contains a hearsay exception for public records and reports:

“Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.”

MRE 803(8) expressly precludes the admission, in criminal cases, of “matters observed by police officers and other law enforcement personnel.” The rule does not, however, exclude routine, nonadversarial observations recorded in police records. See MRE 803(8). The following cases illustrate this distinction.


A jury convicted the defendant of arson of a dwelling. Stacy, 193 Mich App at 21. At trial, the prosecutor sought to establish that the police officer in charge of the arson investigation had explored, and rejected, the possibility that another individual may have set the fire. Stacy, supra at 32. The Court of Appeals rejected the defendant’s argument that the officer’s police report was erroneously admitted into evidence under MRE 803(8)(B):

“The literal terms of MRE 803(8)(B) would appear to exclude, in all criminal cases, reports containing matters observed by police officers. FRE 803(8)(B) has not, however, been so broadly read. In Solomon v Shuell, 435 Mich 104 (1990), four justices of our Supreme Court appeared to suggest that the Court might, at some future date, find ‘routine police reports made in a nonadversarial setting . . . admissible in criminal cases . . . .'”

32 MCL 257.624 prohibits the use in a court action of a report required by Chapter VI of the Motor Vehicle Code (Obedience to and Effect of Traffic Laws).
145, n 9 (opinion of Justice Boyle; two other justices signed the opinion and Justice Griffin concurred in this part of Justice Boyle’s opinion, 435 Mich at 153). See also United States v Hayes, 861 F2d 1225, 1229 (CA 10, 1988) (citing cases for the proposition that ‘the exclusionary provision of [Federal] Rule 803[8][B] was only intended to apply to observations made by law enforcement officials at the scene of a crime or while investigating a crime, and not to reports of routine matters made in non-adversarial settings’); We find this interpretation persuasive and applicable to the Michigan Rules of Evidence.” Stacy, 193 Mich App at 33 (some internal citations omitted).

• People v McDaniel, 469 Mich 409 (2003):

The defendant was convicted of selling a packet of heroin to an undercover police officer. McDaniel, 469 Mich at 410. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. McDaniel, supra at 410. At trial, the chemist did not testify because he had retired. Id. However, the trial court admitted the lab report into evidence under MRE 803(8). Id. The Court of Appeals upheld the admission and in doing so relied upon Stacy, 193 Mich App 19. McDaniel, supra at 411-412. The Michigan Supreme Court reversed the Court of Appeals and stated:

“[T]he Stacy Court held that the exclusion of hearsay observations by police officers was intended to apply only to observations made at the scene of the crime or while investigating a crime. The import of that holding is that MRE 803(8) allows admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant. We do not deal with such a situation here. The report at issue, prepared by a police officer, was adversarial. It was destined to establish the identity of the substance—an element of the crime for which [the] defendant was charged . . . . Thus, the Court of Appeals erred in applying Stacy. Because the report helped establish an element of the crime by use of hearsay observations made by police officers investigating the crime, the report cannot be admitted under MRE 803(8). Further, the error cannot be harmless because this was the only evidence that established an element of the crime
for which [the] defendant was charged.” *McDaniel*, 469 Mich at 413 (internal citations omitted).

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805.

**D. “Catch-All” Hearsay Exceptions**

In cases involving allegations of sexual assault, the victim is sometimes unavailable to testify at trial or other court proceedings. In such cases, a party may seek admission of the witness’s earlier testimony or other statement as substantive evidence under hearsay exceptions contained in MRE 804(b)(1) and MRE 804(b)(6).

MRE 804(b) states in part:

“(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

See also MCL 768.26, which states:

“Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.”

MRE 804(a) defines “unavailability” as including situations where the declarant:

“(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
(3) has a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.33

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.”

Note: The plain language of MRE 804(a) “mandates that the court consider whether the conduct of the proponent of the statement was for the purpose of causing the declarant to be unavailable.” People v Lopez, 501 Mich 1044, 1044 (2018) (although the trial court “found that the witness was unavailable because he felt threatened by the prosecutor,” it “did not consider whether the prosecutor intended to cause the declarant to refuse to testify when engaging in that conduct”) (emphasis added).

By invoking MRE 803(24) or MRE 804(b)(7), commonly known as “catch-all” hearsay exceptions, a party may seek admission of hearsay statements not covered under one of the firmly established exceptions in MRE 803(1)-(23) or MRE 804(b)(1)-(6).

MRE 803(24) provides that the evidence may be admissible regardless whether the declarant is available; MRE 804(b)(7) provides that the evidence may be admissible if the declarant is unavailable. Under these catch-all provisions, the following is not excluded by the hearsay rule:

“Other Exceptions. A statement not specifically covered by [MRE 803(1)-(23) or MRE 804(b)(1)-(6)] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more

33 A diligent, good faith effort to procure the declarant’s attendance is required under MRE 804(a)(5). People v Bean, 457 Mich 677, 684 (1998).
probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.”

A statement is admissible under MRE 803(24) or MRE 804(b)(7) upon a showing that: (1) the statement bears circumstantial guarantees of trustworthiness equivalent to those of the established hearsay exceptions, (2) the statement constitutes evidence of a material fact, (3) the statement’s probative value is greater than that of other reasonably available evidence, (4) the statement serves the interests of justice and the purposes of the rules of evidence, and (5) sufficient notice of the statement is given to the adverse party.

The following cases discuss the “catch-all” hearsay exceptions:

• *People v Douglas (Jeffery) (Douglas II), 496 Mich 557 (2014)*

The defendant was convicted of CSC-I and CSC-II for sexually abusing his then-three-year-old daughter. *Douglas II*, 496 Mich at 561-563. The trial court admitted, over the defendant’s objection, the victim’s out-of-court statements during the forensic interview, which came into evidence through both the testimony of the forensic interviewer and the video recording of the interview. Id. at 573. The defendant argued that the statements were not admissible under MRE 803A because they were not the victim’s first corroborative statements regarding the sexual abuse, and the Court agreed, holding that a child-victim’s disclosure to a forensic interviewer of a sexual act that is inadmissible under MRE 803A because it was not the child’s first corroborative statement “does not become admissible under MRE 803A simply because her first disclosure of [a separate] incident followed shortly after it.” *Douglas II*, 496 Mich at 574-576. The prosecution argued that the statements were nonetheless admissible under MRE 803(24). *Douglas II*, 496 Mich at 576. The Court rejected the prosecution’s argument and held that the statements contained in both the testimony and the video did not meet the admissibility criteria of MRE 803(24) because the statements were not the most probative evidence reasonably available in light of the fact that the statements made to the interviewer were not the first corroborative statements made by the
victim; rather, the victim’s statements to her mother made prior to the forensic interview constituted the “best evidence.” Douglas II, 496 Mich at 576-577. Moreover, the testimony about the victim’s statements during the interview did not demonstrate circumstantial guarantees of trustworthiness because the statements were not the first corroborative statements, they were delayed, and were not spontaneous, but rather, were given in response to questions posed in order to investigate the victim’s prior disclosure of sexual abuse. Id. at 577-579.

- People v Katt (Katt I), 248 Mich App 282 (2001); People v Katt (Katt II), 468 Mich 272 (2003):

The defendant was convicted of three counts of CSC-I against a seven-year-old boy and the boy’s five-year-old sister. Katt I, 248 Mich App at 285. On appeal, the defendant claimed the trial court erred by admitting under MRE 803(24) testimony from a child protective services (CPS) specialist detailing hearsay statements made by the seven-year-old boy. Katt I, supra at 285. These statements implicated the defendant in numerous incidents of sexual abuse against both the boy and the boy’s sister. Id. at 286-287. The defendant claimed that the hearsay exception in MRE 803(24) was inapplicable because it was intended only to apply to statements “not specifically covered” by other hearsay exceptions. Katt I, supra at 289-290. The defendant claimed that since the statements were not admissible under MRE 803A because they were not the first corroborative statements, the statements were also not admissible under MRE 803(24) because MRE 803A “covered the field.” Katt I, supra at 288. Federal courts have characterized the defendant’s argument as the “near miss” theory, “which maintains that a hearsay statement that is close to, but that does not fit precisely into, a recognized hearsay exception is not admissible under [the residual hearsay exception].” Katt I, supra at 290, quoting United States v Deeb, 13 F3d 1532, 1536 (CA 11, 1994).

The Court of Appeals rejected the defendant’s narrow interpretation of MRE 803(24), holding that “where a hearsay statement is inadmissible under one of the established exceptions to the hearsay rule, it is not automatically removed from consideration under MRE 803(24).” Katt I, 248 Mich App at 294. To be admissible, the statements must still possess “the requisite particularized guarantee[s] of trustworthiness and otherwise meet[] the requirements of MRE 803(24)].” Katt I, supra at 294 (internal citations omitted). In this case, the Court found the boy’s statements trustworthy because he voluntarily and spontaneously told the CPS specialist about the sexual abuse against himself and his sister, his recitation of facts remained consistent, he had personal knowledge of the sexual abuse, he freely recounted the circumstances without
leading questions or coaxing, he was not shown to have a motive to fabricate, and he and his sister testified at trial and were subject to extensive cross-examination. *Id.* at 297-298.

The Michigan Supreme Court “decline[d] to adopt the near-miss theory as part of [its] method for determining when hearsay statements may be admissible under MRE 803(24).” *Katt II*, 468 Mich at 286. The Court stated:

“We stress that this interpretation of the residual exception does not subvert the purpose of the hearsay rules. Each of the categorical exceptions requires a quantum of trustworthiness and each reflects instances in which courts have historically recognized that the required trustworthiness is present. The residual exceptions require equivalent guarantees of trustworthiness. Thus, if a near-miss statement is deficient in one or more requirements of a categorical exception, those deficiencies must be made up by alternate indicia of trustworthiness. To be admitted, residual hearsay must reach the same quantum of reliability as categorical hearsay; simply, it must do so in different ways.” *Katt II*, 468 Mich at 289-290.

The Michigan Supreme Court agreed with the Court of Appeals and concluded that the lower court had properly applied MRE 803(24) to the circumstances of the case. *Katt II*, 468 Mich at 294-297.

- **People v Geno, 261 Mich App 624 (2004):**

The defendant was convicted of CSC-I for sexually penetrating the defendant’s girlfriend’s two-year-old daughter. *Geno*, 261 Mich App at 625. During an assessment and interview at a children’s assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child’s pull-up. *Geno, supra* at 625. The interviewer asked the child if she “had an owie,” and the child answered, “yes, Dale [the defendant] hurts me here” and pointed to her vaginal area. *Id.* The defendant argued that the child’s statement was improperly admitted under MRE 803(24). *Geno, supra* at 629. The Court of Appeals held that it was not error to admit the child’s statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the requirements outlined in *Katt II*, 468 Mich 272 (2003). *Geno, supra* at 632.

The defendant also argued that pursuant to *Crawford v Washington*, 541 US 36 (2004), the defendant’s right to confrontation was violated by the admission of the victim’s statements. *Geno*, 261 Mich App at 629-630. The Court of Appeals stated:
We recognize that with respect to ‘testimonial evidence,’ Crawford has overruled the holding of Ohio v Roberts, 448 US 56 (1980), permitting introduction of an unavailable witness’s statement—despite the defendant’s inability to confront the declarant—if the statement bears adequate indicia of reliability, i.e., it falls within a ‘firmly rooted hearsay exception’ or it bears ‘particularized guarantees of trustworthiness.’ [Roberts, supra] at 66. However, we conclude that the child’s statement did not constitute testimonial evidence under Crawford, and therefore was not barred by the Confrontation Clause. . . .” Geno, 261 Mich App at 630-631.

- People v Smith (Steven), 243 Mich App 657 (2000):

The Court of Appeals found that the trial court erred in concluding that hearsay statements to the police and to the declarant’s friend were trustworthy and admissible under the former MRE 804(b)(6)—now MRE 804(b)(7). Smith (Steven), 243 Mich App at 688. At the time of her statements to the police, the declarant had been accused of a crime and had good reason to incriminate the defendant to avoid prosecution herself. Smith (Steven), supra at 688-689. Addressing the declarant’s statement to her friend, the Court found that the prosecution wrongfully sought to establish its trustworthiness “by showing that the statement was proved true at a different time or place.” Id. at 689. Because there was no showing that the statement was trustworthy based on the circumstances surrounding its making, the Court of Appeals ruled that the trial court erred in finding that the statement was trustworthy. Id. at 690-691.

7.8 Testimonial Evidence of Threats Against a Crime Victim or a Witness to a Crime

- A threat may be a non-assertive “verbal act” and not hearsay if it is not offered to prove the truth of the matter asserted. Such a threat may, for example, be circumstantial evidence of the declarant’s state of mind, including consciousness of guilt, or it may explain a witness’s inability to identify the defendant in court. See MRE 801(a).

- A threat may be non-hearsay if it is an admission by a party-opponent under MRE 801(d)(2).

- A witness’s account of a threat may be admissible as an excited utterance under MRE 803(2).
• Evidence of a threat may be admissible as a statement of the declarant’s then existing mental, emotional or physical condition under MRE 803(3).

A. Threats That Are Not Hearsay

In the following cases, a threat against a crime victim or witness was ruled admissible either as an admission by a party-opponent or as evidence offered for a purpose other than to show the truth of the matter asserted.

• People v Sholl, 453 Mich 730 (1996) (statements showing consciousness of guilt):

The defendant was convicted of CSC-III against a woman with whom he was in a dating relationship. Sholl, 453 Mich at 731. At trial, the investigating officer testified outside the presence of the jury that, after the trial started, the complainant called him to report that the defendant had threatened her. Sholl, supra at 739. The officer further testified outside the jury’s presence that he asked the defendant if he had talked about killing the complainant, in response to which the defendant acknowledged that, while intoxicated, he “probably did say something like that.” Id. The trial court ruled that the officer could testify as to statements made to him by the defendant. Id. The officer then testified in the presence of the jury that he asked the defendant if he had threatened to shoot the complainant and that the defendant responded that he “probably would have said something like that.” Id. The Supreme Court found no error in admission of this evidence, holding:

“A defendant’s threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt.

As the circuit court observed, a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case.” Sholl, 453 Mich at 740 (internal citations omitted).


The defendant was charged with first-degree murder for killing his 82-year-old mother. Kowalak, 215 Mich App at 555. At the defendant’s preliminary examination, a witness testified that she
had spoken with the victim both by telephone and in person shortly before her death. *Kowalak, supra* at 555-556. During these conversations, according to the witness, the victim was “petrified” because the defendant had threatened to kill her. *Id.* at 556. Applying *MRE 801(d)(2)*, the Court of Appeals concluded that the defendant’s threat was an admission by a party opponent and thus not hearsay. *Kowalak, supra* at 556-557.

**B. Exceptions to the Hearsay Rule**

Michigan appellate courts have found that testimony regarding a defendant’s threats may be admissible under *MRE 803(2)* (excited utterance) and *MRE 803(3)* (then existing mental, emotional, or physical condition). These exceptions are discussed in the following cases:

* • *People v Kowalak (On Remand)*, 215 Mich App 554 (1996) (excited utterance):

The defendant was charged with first-degree murder for killing his 82-year-old mother. *Kowalak*, 215 Mich App at 555. On the day of her death, the victim had testified against the defendant at a child custody/visitation hearing. *Kowalak, supra* at 555-556. At the defendant’s preliminary examination, a witness testified that she spoke with the victim “shortly after” the visitation hearing and that the victim was “petrified” because the defendant had threatened to kill her. *Id.* at 556. The trial court ruled that the testimony was admissible as an excited utterance under *MRE 803(2)* (or as evidence of then existing mental, emotional, or physical condition under *MRE 803[3]*). *Kowalak, supra* at 556. The Court of Appeals first found that the defendant’s alleged statement to his mother that he was going to kill her was an admission by a party-opponent and thus not hearsay. *Id.* at 556-557; *MRE 801(d)(2)*. Second, it found that the witness’s testimony regarding the victim’s statement about the threat was admissible under *MRE 803(2)* as an excited utterance. *Kowalak, supra* at 557.

**C. Statements Made by Child Under Age 10**

*MRE 803A* codifies the Michigan common-law hearsay exception known as the “tender years” rule. Although a prosecutor need not corroborate the victim’s testimony under the CSC Act, *MRE 803A* permits corroborative testimony in cases where the sexual assault victim is under age ten at the time the statement was made. *MRE 803A* states:

“A statement describing an incident that included a sexual act performed with or on the declarant by the
defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

(1) the declarant was under the age of ten when the statement was made;

(2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.”

“MRE 803A . . . permits only the first corroborative statement as to each ‘incident that included a sexual act performed with or on the declarant by the defendant.’ Though the [rule] does not define the term ‘incident,’ it is commonly understood to mean ‘an occurrence or event,’ or ‘a distinct piece of action, as in a story.’” People v Douglas (Jeffery) (Douglas II), 496 Mich 557, 575 (2014) aff’g in part and rev’g in part 296 Mich App 186 (2012) (citation omitted). Consequently, a child-victim’s disclosure to a forensic interviewer of a sexual act that is inadmissible under MRE 803A because it was not the child’s first corroborative statement “does not become admissible under MRE 803A simply because her first disclosure of [a separate] incident followed shortly after it.” Douglas II, 496 Mich at 575-576 (also holding that the evidence was inadmissible under the residual hearsay exception, MRE 803(24), and ultimately concluding that the evidentiary errors required reversal and a new trial).
“MRE 803A generally requires the declarant-victim to initiate the subject of sexual abuse.” People v Gursky, 486 Mich 596, 613 (2010). “[T]he mere fact that questioning occurred is not incompatible with a ruling that the child produced a spontaneous statement. However, for such statements to be admissible, the child must broach the subject of sexual abuse, and any questioning or prompts from adults must be nonleading or open-ended in order for the statement to be considered the creation of the child.” Gursky, supra at 614. In Gursky, supra at 598, the defendant was charged with and convicted of four counts of CSC-I for sexually abusing his girlfriend’s daughter. At trial, the child’s hearsay statements containing details of the sexual assaults, and made in response to questioning by her mother’s friend, were used to corroborate the child’s testimony. Id. at 598-604. The child’s identification of the defendant as the perpetrator resulted when the mother’s friend, who was the first to learn of the abuse, verbally listed the names of all the males known by the victim until the victim reacted; the defendant’s name was the last name mentioned. Id. at 600. The Michigan Supreme Court held that “the child’s statements were not ‘spontaneous’ and . . . should not have been admitted under the limited ‘tender years’ hearsay exception created by MRE 803A.” Gursky, supra at 598-599. The Court explained:

“To be clear, we do not hold that any questioning by an adult automatically renders a statement ‘nonsensative’ and thus inadmissible under MRE 803A. Open-ended, nonleading questions that do not specifically suggest sexual abuse do not pose a problem with eliciting potentially false claims of sexual abuse. But where the initial questioning focuses on possible sexual abuse, the resultant answers are not spontaneous because they do not arise without external cause. When questioning is involved, trial courts must look specifically at the questions posed in order to determine whether the questioning shaped, prompted, suggested, or otherwise implied the answers.

This approach requires that trial courts review the totality of the circumstances surrounding the statement in order to determine the issue of spontaneity. Even though courts should look at the surrounding circumstances and larger context in order to understand whether the statement was spontaneously made . . . this

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34 The Court nevertheless affirmed the defendant’s convictions because the improper admission of the hearsay statements constituted harmless error because they were only used to show consistency in the victim’s testimony, were cumulative to the victim’s testimony, and other evidence corroborating the defendant’s guilt existed. Gursky, 486 Mich at 626.
review is not solely determinative of the question of admissibility. As MRE 803A requires, the statement must be ‘shown to have been spontaneous and without indication of manufacture.’ The language of MRE 803A(2) clearly demonstrates that spontaneity is an independent requirement of admissibility rather than one factor that weighs in favor of reliability or admissibility. Thus, even if, considering the totality of the circumstances, the trial court determines that a statement is spontaneous for the purposes of MRE 803A(2), it must nevertheless also conduct the separate analyses necessary to determine whether the statement meets the other independent requirements of MRE 803A.” Gursky, 486 Mich at 614-616.

In People v Dunham, 220 Mich App 268, 271 (1996), the Court of Appeals upheld the admission of testimony from a Friend of the Court mediator corroborating the six-year-old victim’s statements. The Court of Appeals concluded that the statements were spontaneous. Dunham, supra at 271-272. The mediator testified that the victim’s statements were in response to open-ended questions typically asked of the children of divorcing parents. Id. at 272. The eight- or nine-month delay in reporting the alleged sexual abuse was justified given the victim’s fear of the defendant. Id. The Court of Appeals also concluded that the defendant was not prejudiced by receiving notice of the prosecutor’s intent to offer the testimony one day before trial started. Id. The defendant should have anticipated the testimony because the victim’s mother testified at the preliminary examination that she became aware of the abuse after the victim spoke with the mediator, and the mediator’s name appeared on the witness list for trial. Id. at 272-273.

D. Statutory Authority for the Admission of Threat Evidence in Cases Involving Domestic Violence

MCL 768.27c provides statutory authority for the admission under certain circumstances of a declarant’s statement pertaining to injuries sustained by, or threats of injury to, the declarant. A declarant’s threat may be admitted under MCL 768.27c if all of the following circumstances exist:

“(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.
[Note: MCL 768.27c(5)(b)(iii) defines domestic violence to include “[c]ausing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force or duress.”]

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement’s trustworthiness.

(e) The statement was made to a law enforcement officer.” MCL 768.27c(1).

“[MCL 768.27c](1)(a) places a factual limitation on the admissibility of statements[, and MCL 768.27c](1)(c) places a temporal limitation on admissibility[;]” however, “[n]either subsection requires that the statements at issue describe the charged domestic violence offense.” People v Meissner, 294 Mich App 438, 446 (2011). Together, these provisions “direct that a hearsay statement can be admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury.” Meissner, supra at 447. In Meissner, supra at 447-448, the defendant was charged with domestic violence and home invasion after he “forced entry into [the victim’s] apartment, pushed her shoulder, and tossed coins at her.” While reporting this incident to the police later on the day it occurred, the victim provided verbal and written statements describing text messages that she had received the day on which the defendant threatened her with physical violence; additionally, the victim described confrontations with the defendant over the prior months, including an incident in which he had choked her. Id. at 443. The Court of Appeals held that the victim’s “descriptions of the [prior] choking injury and of the charged offense fulfilled both the factual requirement in [MCL 768.27c](1)(a) and the temporal requirement in [MCL 768.27c](1)(c)[,]” and that her descriptions of the text messages “met [MCL 768.27c](1)(a) because the statements described text messages that threatened physical injury, and met [MCL 768.27c](1)(c) because [the victim] made the statements at or very near the time she received one or more of the threatening text messages.” Meissner, supra at 448.

35 See Section 7.17(A) for detailed information about the statutory provisions governing conduct involving family or household members.
MCL 768.27c includes, but does not limit, factors for determining whether a declarant’s statement is trustworthy for purposes of MCL 768.27c(1)(d). To determine whether a statement is trustworthy, a trial court should consider such relevant circumstances as:

“(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.” MCL 768.27c(2).

MCL 768.27c(2) “expressly states that the circumstances relevant to trustworthiness are not limited to the three examples given in [MCL 768.27c](2)(a), (b), and (c)[;] instead, these factors are “a non-exclusive list of possible circumstances that may demonstrate trustworthiness.” Meissner, 294 Mich App at 449.

“[W]hen the declarant is an alleged domestic violence victim, [MCL 768.27c(2)(a)]’s reference to statements in contemplation of litigation does not pertain to the victim’s report of the charged offense.” Meissner, 294 Mich App at 450. “Rather, [MCL 768.27c(2)(a)] pertains to litigation in which the declarant could gain a property, financial, or similar advantage, such as divorce, child custody, or tort litigation.” Meissner, supra at 450 (rejecting the defendant’s contention that the trial court was required “to disregard or discredit [the victim’s] statements [to police] on the ground that they were made in contemplation of litigation”).

Notice requirements apply if a prosecutor intends to introduce evidence of a declarant’s statement under MCL 768.27c:

“(3) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.”
7.9 Prosecutorial Discretion and the Nonparticipating Witness

The prosecutor has exclusive authority to decide whether to go forward with a case when the complaining witness is absent or does not want to participate. People v Morrow, 214 Mich App 158, 165 (1995). In Morrow, supra at 159, the Court of Appeals found that the trial court exceeded its authority in dismissing, at the pretrial conference, four counts of CSC-I and one count of CSC-II. The complainant testified at the preliminary examination that the defendant repeatedly raped her. Id. However, at the pretrial conference, the complainant testified that she lied during the preliminary examination and that she actually had consensual sex with the defendant at the time of the incident. Id. The trial court sua sponte dismissed the case with prejudice. Id. The Court of Appeals found that under the “unique facts of this case,” the trial court, in dismissing the information, impinged on the prosecutor’s executive branch powers. Id. at 165-166. It also found that the complainant’s decision to recant her previous testimony before trial should not alone preclude the prosecution from reaching the jury:

“It is the province of the jury to determine which of the victim’s accounts is the truth, and there is no abuse of power in the prosecutor relying upon and arguing for the victim’s earlier sworn testimony in support of the criminal charges against [the] defendant.” Morrow, 214 Mich App at 165.

A trial court usurped a prosecutor’s exclusive authority when it dismissed a case after the complaining witness stated repeatedly that she did not want the defendant prosecuted. People v Williams (Anteriorio), 244 Mich App 249, 252-253 (2001). In Williams (Anteriorio), supra at 250, the defendant was charged with assault with intent to do great bodily harm and third-offense habitual offender. The complainant, the defendant’s girlfriend, testified at the preliminary examination that she was severely beaten in the parking lot of a bar and sustained a broken nose, broken jaw, and fractures of numerous other facial bones. Id. Although she did not see her attacker, she believed it was the defendant, because he had physically abused her in the past, and she saw him waiting outside the bar after she refused to leave the bar with him. Id. The complainant also testified at a pretrial evidentiary hearing, describing two prior incidents when the defendant had beaten her. Id. at 251-252. During that testimony, she stated repeatedly that she did not want the defendant prosecuted. Id. at 251. She was subpoenaed for trial but failed to appear. Id. The prosecutor requested a continuance (and a bench warrant for the complainant) or, alternatively, permission to use her former testimony. Id. The trial court denied both requests and dismissed the case, concluding that the circumstances amounted to a private crime, not a public one, and that the complainant had a right not to prosecute the case. Id. The Court
of Appeals reversed, finding that the trial court usurped the prosecutor’s exclusive authority to decide whom to prosecute:

“The trial court relied on the notion that because the victim and [the] defendant were involved in a personal relationship, this assault amounted to a private, rather than a public, crime. The trial court further opined that it was the victim’s right to have the charges dismissed because she had evidenced a desire not to prosecute. This is a notion that has pervaded those criminal cases that are commonly known as domestic assaults, but is a rationale that is unsupported by the law.

Our Legislature enacted the Michigan Penal Code to . . . define crimes and prescribe the penalties for crimes. In other words, as a matter of public policy, the code defines what acts are offenses against the state. The authority to prosecute for violations of those offenses is vested solely and exclusively with the prosecuting attorney. Const 1963, art 7, § 4; MCL 49.153. A prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute or what charges to file. The prosecution is not for the benefit of the injured party, but for the public good. Crimes not only injure the victim, but society in general, and the conviction of a crime results not only in a sentence enumerating the punishment in quantitative amounts, but also carries with it society’s formal moral condemnation.”

Williams (Antiero), 244 Mich App at 252-253 (some internal citations omitted).

In so holding, the Court of Appeals acknowledged that crime victims have statutory and constitutional rights under Const 1963, art 1, § 24 and MCL 780.751 et seq. However these rights do not encompass the authority to “determine whether [the Penal Code] has been violated or whether the prosecution of a crime should go forward or be dismissed.” Id. at 254.

At a preliminary examination, the prosecutor need not place the complaining witness on the stand to testify. Although MCL 766.4(6) provides in part that “[a]t the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution . . .,” the Court of Appeals has held that the complainant is not required to testify at a preliminary examination if other sufficient evidence is produced. People v Meadows, 175 Mich App 355, 357-359 (1989).

7.10 Competency of Witnesses

Every person is presumed competent to be a witness. MRE 601 states:
“Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence].”

Competency to testify is a matter within the discretion of the trial court, and the trial court may conduct an examination to determine a witness’s competency. People v Bedford, 78 Mich App 696, 705 (1977). If an examination is conducted, the court may question the proposed witness or allow counsel to do so. People v Garland (Gerald), 152 Mich App 301, 309 (1986). The court’s examination of the witness may be, but is not required to be, outside the jury’s presence. See People v Wright (Gregory), 149 Mich App 73, 74 (1986); People v Washington (Willie), 130 Mich App 579, 581-582 (1983). A defendant’s constitutional right to confront witnesses is not necessarily violated by the defendant’s exclusion from a competency hearing, Kentucky v Stincer, 482 US 730, 739-744 (1987).

“The test of competency is [] whether the witness has the capacity and sense of obligation to testify truthfully and understandably. Where a trial court examines a child witness and determines that the child is competent to testify, ‘a later showing of the child’s inability to testify truthfully reflects on credibility, not competency.” People v Watson (David), 245 Mich App 572, 583 (2001), quoting People v Coddington, 188 Mich App 584, 597 (1991) (internal citations omitted).


### Section 7.11 Corroboration of Victim’s Testimony in CSC Cases

“The testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b to MCL 750.520g].”36 MCL 750.520h.

See, e.g., People v Phelps, 288 Mich App 123, 133 (2010), quoting MCL 750.520h, where the Court of Appeals held that “[e]ven without additional evidence, the [victim]’s testimony that she did not give [the defendant] permission to have penile-vaginal intercourse, was engaged in a different consensual act with him, and was surprised when he

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36 The cited statutes describe offenses under the CSC Act. See Chapter 2.
inserted his penis into her vagina was sufficient to sustain a conviction of CSC I because, “[t]he testimony of a victim need not be corroborated . . . .”

The noncorroboration rule is also expressed in a criminal jury instruction. See M Crim JI 20.25.

The purpose of the noncorroboration rule was explained by the Court of Appeals in People v Norwood, 70 Mich App 53, 57 (1976):

“The purpose of the anti-corroboration rule is not to save verdicts in which inadmissible corroborating evidence is introduced. It is designed to permit a verdict to withstand a challenge to the sufficiency of the evidence in a case in which the only testimony against the defendant is that of the complainant.”

7.12 Resistance to Perpetrator in CSC Cases

“A victim need not resist the actor in prosecution[s] under [MCL 750.520b to MCL 750.520g].”37 MCL 750.520i.

See, e.g., People v Phelps, 288 Mich App 123, 135 (2010), quoting MCL 750.520i, where the Court of Appeals held that “[a]lthough the [victim] did not testify that she tried to physically resist [the defendant] or try to get up from the bed, ‘[a] victim need not resist the actor in a prosecution [for criminal sexual conduct].’”

For three additional Michigan cases addressing CSC victims who did not resist the actions of the sexual assault, see People v Carlson (Eric), 466 Mich 130, 132-133 (2002) (a CSC-III case where the victim did not physically restrain or push the defendant away, but told him “no” and “I don’t want to” many times before he sexually penetrated her vagina); People v Makela, 147 Mich App 674, 677-678 (1985) (a CSC-IV case where the victim was too scared and frightened to try to get away from the defendant); People v Jansson, 116 Mich App 674, 678-679 (1982) (a CSC-III case where the victim was unwilling to engage in intercourse with the defendant but was so frightened and panicked that she did not know what action to take to prevent the forcible sexual intercourse).

37 The cited statutes describe offenses under the CSC Act. See Chapter 2.
7.13 Audiotaped Evidence

This section addresses the admissibility of audiotapes, with particular emphasis on 911 tapes. The discussion concerns three issues that commonly arise when such evidence is introduced at trial:

- Authentication (MRE 901).
- Hearsay objections (MRE 801–MRE 806).
- Relevancy questions (MRE 401 and MRE 403).

A. Authentication

Authentication of evidence is governed by MRE 901(a), which states that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901(b) provides a nonexhaustive list of authentication techniques that meet the requirements of MRE 901(a). Two of the listed techniques apply directly to audiotaped evidence:

“(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

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(10) Methods Provided by Statute or Rule. Any method of authentication or identification provided by the Supreme Court of Michigan or by a Michigan statute.” MRE 901(b)(5)-(6), (10).

“[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been authenticated—whether there is sufficient reason to believe
that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is actually authentic or genuine — whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability.” Mitchell v Kalamazoo Anesthesiology, PC, 321 Mich App 144, 154 (2017).

The first question, whether the evidence has been authenticated, “is reserved solely for the trial judge.” Mitchell, 321 Mich App at 154. The proponent of the evidence bears the burden of presenting evidence “sufficient to support a finding that the matter in question is what its proponent claims.” Id. at 155 (quotation marks and citation omitted). The proponent is not required “to sustain this burden in any particular fashion[,]” and “evidence supporting authentication may be direct or circumstantial and need not be free of all doubt.” Id. at 155. The proponent is required “only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be.” Id. at 155. “Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury. Mitchell, 321 Mich App at 155. Authentication may be opposed “by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be[,]” however, “this argument must be made on the basis of the proponent’s proffer; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage.” Id. at 155.

“[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]” Mitchell, 321 Mich App at 156. “When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court.” Id. at 156. “Accordingly, the parties may submit evidence and argument, pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable.” Id. at 156.

In People v Berkey, 437 Mich 40, 41 (1991), the Supreme Court considered the admissibility of audiotapes recorded by a murder victim several months before her death. The tapes contained recordings of conversations between the victim and her husband, who was convicted of her murder. Berkey, 437 Mich at 41. Outside the jury’s presence, the victim’s neighbor identified the voices on the tapes as those of the victim, the defendant, and their children and also testified that she was not present when the tapes were made and did not know what tape recorder was used, who made the tapes, whether the tapes contained entire conversations, whether the tapes had been changed, or whether the recorded statements
were made voluntarily. *Id.* at 46. Applying MRE 901(a), the Supreme Court found that the audiotapes had been sufficiently authenticated, holding that “[A] tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more.” *Berkey*, *supra* at 50.

### B. Hearsay Objections to Audiotaped Evidence

In some cases, information on an audiotape does not constitute hearsay, either because the statement was not offered to prove the truth of the matter asserted or because the information was not a statement. In *City of Westland v Okopski*, 208 Mich App 66, 77 (1994), admission of a tape-recorded 911 call was not prohibited by the hearsay rule because it was offered to show why the police responded rather than to prove the truth of the matter asserted. Also, in *People v Slaton*, 135 Mich App 328, 335 (1984), the Court of Appeals found that background noises in a 911 tape were not statements and thus did not satisfy the definition of hearsay.

In cases where audiotaped evidence falls within the definition of hearsay, Michigan appellate courts have upheld the admission of 911 tapes under the present sense impression, excited utterance, and dying declaration exceptions to the hearsay rule.38

### C. Weighing Probative Value of Audiotaped Evidence

MRE 403 permits exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

The following case addresses MRE 403 as it relates to audiotaped evidence.


At the defendant’s trial for felony murder, a 911 operator testified regarding a call from the victim. *Slaton*, 135 Mich App at 330. During the call, the victim reported that someone had broken into his home. *Slaton, supra* at 330. The operator spoke to the victim for approximately five minutes, heard the telephone drop, and then heard banging noises, the victim yelling, and two voices demanding money. *Id.* Portions of the 911 tape were admitted into evidence.

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38 See Section 7.7 for more information on hearsay and hearsay exceptions as they relate to sexual assault cases. For a comprehensive discussion of hearsay, see the Michigan Judicial Institute’s *Evidence Benchbook*, Chapter 5.
under the excited utterance and present sense impression exceptions to the hearsay rule. *Id.* at 332. On appeal, the defendant argued that the tape was irrelevant, that its prejudicial value was reduced by the availability of the operator’s in-court testimony, and that the prejudicial effect of the tape outweighed its probative value. *Id.* The Court of Appeals disagreed, finding that the tape was relevant to whether the victim’s injuries were inflicted by those who broke into his home, and of the credibility the defendant’s alibi. *Id.* at 332-334.

The Court further found that the probative value of the tape was not outweighed by its potentially prejudicial effect:

> “Included in the edited portions of the 911 tape heard by the jury were [the victim’s] calls for help and pleas not to be hurt, followed by his muffled moans. We agree with [the] defendant that these sounds were likely to elicit an emotional response from the jury. We do not, however, agree that the effect of these sounds upon the jury was so prejudicial to the issue of [the] defendant’s guilt or innocence as to require exclusion of this otherwise highly probative evidence. [The defendant’s] voice was not identified as one of the voices on the tape, leaving the question of [the] defendant’s involvement in the crime to be decided in light of other evidence. We cannot say that the trial court abused its discretion in its balancing of the probative value and prejudicial effect of the 911 tape as evidence.” *Slaton*, 135 Mich App at 334.

### 7.14 Photographic Evidence

The admissibility of photographic evidence, which includes digital and analog images, concerns two issues that commonly arise when such evidence is introduced at trial:

- Authentication (MRE 901).
- Relevancy questions (MRE 401 and MRE 403).

#### A. Authentication

Authentication of photographic evidence is governed by MRE 901(a), which states:

> “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by
evidence sufficient to support a finding that the matter
in question is what its proponent claims.”

MRE 901(b)(1)-(10) provides a noneexhaustive list of examples of appropriate means of authentication. Those relevant to photographic material are listed below:

“(1) **Testimony of Witness With Knowledge.** Testimony that a matter is what it is claimed to be.

(2) **Nonexpert Opinion on Handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by Trier or Expert Witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive Characteristics and the Like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

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(7) **Public Records or Reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient Documents or Data Compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or System.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods Provided by Statute or Rule.** Any method of authentication or identification provided by the Supreme Court of Michigan or by a Michigan statute.”

“[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been authenticated—whether there is sufficient reason to believe
that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is actually authentic or genuine—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability.” *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017).

The first question, whether the evidence has been authenticated, “is reserved solely for the trial judge.” *Mitchell*, 321 Mich App at 154. The proponent of the evidence bears the burden of presenting evidence “sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* at 155 (quotation marks and citation omitted). The proponent is not required “to sustain this burden in any particular fashion[.]” and “evidence supporting authentication may be direct or circumstantial and need not be free of all doubt.” *Id.* at 155. The proponent is required “only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be.” *Id.* at 155. “Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury. *Mitchell*, 321 Mich App at 155. Authentication may be opposed “by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be[;]” however, “this argument must be made on the basis of the proponent’s proffer; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage.” *Id.* at 155.

“[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]” *Mitchell*, 321 Mich App at 156. “When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court.” *Id.* at 156. “Accordingly, the parties may submit evidence and argument, pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable.” *Id.* at 156.

A videotape depicting a three-year-old girl and a one-year-old boy who were forced to engage in sexual acts was properly authenticated under MRE 901(a) by the testimony of two witnesses who stated that it reflected events they had seen on the day in question. *People v Hack (Christopher)*, 219 Mich App 299, 308-310 (1996).

For a case addressing a photograph of a sexual assault victim, see *People v Riley (Montgomery)*, 67 Mich App 320 (1976), rev’d on other grounds 406 Mich 1016 (1979) (trial court failed to define in jury instructions the offense with which the defendant was charged),
where the Court of Appeals upheld the trial court’s decision to allow into evidence a photograph of the victim’s “bruised backside.” Riley (Montgomery), 67 Mich App at 322. The victim testified that the photograph accurately reflected the condition of her body at the time the picture was taken. Id. at 322. The Court of Appeals found that this testimony was sufficient authentication, and that the photographer’s testimony was not required:

“All that is required for the admission of a photograph is testimony of an individual familiar with the scene photographed that it accurately reflects the scene photographed. We believe that a person is familiar with the appearance of one’s own body, and therefore [the victim] was qualified to identify the picture in question.” Riley (Montgomery), 67 Mich App at 322-323. (Internal citations omitted.)

B. Relevancy Questions Under Michigan Rules of Evidence 401 and 403

“‘Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403.’” People v Brown (Eddie), ___ Mich App ___, ___ (2018), quoting People v Gayheart, 285 Mich App 202, 227 (2009). MRE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Generally, “[a]ll relevant evidence is admissible, . . . [and e]vidence which is not relevant is not admissible.” MRE 402. However, exceptions exist in the state and federal constitutions, the Michigan Court Rules, and other rules adopted by the Supreme Court. See id. For example, MRE 403 states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

“Because application of MRE 403 to any photographs that a party seeks to admit requires a balancing act of factors, . . . sexually explicit photographs used as evidence of a sexual assault of a minor

39“A prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.
cannot be unfairly prejudicial per se”; “trial courts must weigh the [probative] value against the danger of any unfair prejudice that admission might cause,” and “[a] decision on the admissibility of photographs in such cases cannot be based solely on the graphic nature of the photographs.” Brown (Eddie), ___ Mich App at ___ (“[d]efendant [was not] denied a fair trial by the admission of indecent photographs depicting the 12-year-old victim’s vagina, breasts, and buttocks,” because “any prejudicial taint [was] more than overcome by their probative value, regardless of how lurid and despicable the photographs themselves [were]”; while “[t]he photographs . . . [were] shocking, indecent, and unsettling,” they were “illustrative of not only the acts depicted, but of the propensities of the individual who took them, and they were not introduced merely to shock or inflame the jurors,” but rather “corroborated the victim’s testimony that defendant took the photographs, given the victim’s ability to identify defendant’s hands, and that defendant had a clear sexual interest in the victim”).

In People v Watson (David), 245 Mich App 572, 573 (2001), the defendant was convicted of sexually assaulting his stepdaughter. On appeal, he challenged the trial court’s admission into evidence of a cropped photograph, and an 8” x 10” enlargement of the photograph, showing the victim’s naked buttocks. Watson, supra at 575. There was evidence that the defendant carried the cropped photograph in his wallet. Id. at 579. He argued that the photograph was inadmissible “because it was offered simply to show that the defendant was a sexual pervert, which made it more likely that the victim’s allegations of sexual abuse were true.” Id. at 577. The Court of Appeals disagreed, finding that the evidence was admissible under MRE 404(b) to show the defendant’s motive to have sexual relations with his stepdaughter. Watson (David), supra at 578. Rejecting the defendant’s argument that the evidence was inflammatory, the Court noted that the evidence had strong probative value and that the defendant had not shown that the danger of unfair prejudice substantially outweighed that value. Id. at 581-582. In addition, the Court found that the enlargement was properly admitted to show the entire photograph and that there was no reversible error in the admission of an 8” x 10” print instead of a smaller print. Id. at 582.

7.15 Polygraphs

In criminal sexual conduct cases, the rights, duties, and notice requirements governing the requesting and taking of polygraph examinations are governed by MCL 776.21.
A. Testing Rights

1. Defendants Charged With Criminal Sexual Conduct Offenses

Under MCL 776.21(5), “[a] defendant who allegedly has committed [any of the following criminal offenses] shall be given a polygraph examination or lie detector test if the defendant requests it[:]

- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

A defendant who “allegedly has committed” an enumerated CSC violation does not lose the right to request a polygraph examination until a finding of guilt. See People v Phillips (Keith), 469 Mich 390, 396 (2003) (holding that a defendant who requests a polygraph after the conclusion of proofs but before the jury returns a verdict does not forfeit the right to a polygraph examination).

2. Victims of Criminal Sexual Conduct Offenses

Under MCL 776.21(2), “[a] law enforcement officer shall not request or order a victim [of crimes listed in MCL 750.520b to MCL 750.520e or MCL 750.520g] to submit to a polygraph examination or lie detector test.” Additionally, MCL 776.21(2)-(3) prohibit a law enforcement officer from even informing such a victim of the option of taking a polygraph examination or lie detector test, unless:

- The victim inquires about such a test; or
- The victim is told by a law enforcement officer that the defendant voluntarily submitted to a polygraph examination or lie detector test and the results indicated that the defendant “may not have committed the crime.”

A law enforcement officer means “a police officer of a county, city, village, township, or this state; a college or university public safety officer; a prosecuting attorney, assistant prosecuting
attorney, or an investigator for the office of prosecuting attorney; or any other person whose duty is to enforce the laws of this state.” MCL 776.21(1)(a).

B. Admissibility at Trial

The results of a polygraph examination are inadmissible in a civil or criminal case, even by stipulation of the parties. People v Barbara, 400 Mich 352, 364 (1977). While the exclusion is based partly on the rationale that polygraphs have not gained the required degree of acceptance or standardization among scientists, it is also based “upon the judicial estimate that the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence.” People v Ray (Daniel), 431 Mich 260, 265 (1988).

Notwithstanding this policy of exclusion, a defendant’s statements made before, during, or after the administration of a polygraph examination are not excludable per se as evidence under federal or state law or public policy. Ray (Daniel), 431 Mich at 266. However, such statements must be voluntary and not violate a defendant’s Fifth Amendment or Sixth Amendment right to counsel. Ray (Daniel), supra at 268.

C. Polygraph Results Must Not Be Considered at Sentencing

“[G]enerally, a court may neither solicit nor consider polygraph-examination results for sentencing, People v Towns, 69 Mich App 475, 478 (1976), and the consideration of polygraph results is generally considered error that requires resentencing, People v Allen (Louis), 49 Mich App 148, 151-152 (1973).” People v Anderson (Jeffry), 284 Mich App 11, 16 (2009).

D. Polygraph Results in Postconviction Hearings for New Trial and in Pretrial Motions to Suppress

Under limited circumstances, a court may exercise its discretion and consider polygraph results at a postconviction hearing on a motion for new trial based on newly discovered evidence. People v Barbara, 400 Mich 352, 412 (1977). The Barbara Court enumerated nine conditions that must be met before a court may consider the results of a defendant’s polygraph examination at a postconviction hearing for new trial based on newly discovered evidence:

“(1) The results of the polygraph tests are offered on behalf of the defendant.

(2) The polygraph test was taken voluntarily.
(3) The professional qualifications of the polygraph examiner are approved.

(4) The quality of the polygraph equipment is approved.

(5) The procedures employed are approved.

(6) Either the prosecutor or the court may ask the subject of the polygraph examination to be examined by a polygraph operator of the court’s choice or such operator may be asked to review the offered data with the original operator, or both.

(7) The test results shall be considered only with regard to the general credibility of the examinee not as to the truth or falsehood of any particular statement.

(8) The affidavits or testimony of the polygraph operator shall be a separate record and shall not be used in any way at any subsequent trial.

(9) A judge granting a new trial on the basis of polygraph tests shall not thereafter act as a trier of fact in that case but may preside with a jury. A substitute judge as trier of fact shall not be privy to the polygraph examination or results, or to the fact that a polygraph examination was taken or was in any way involved.”

Barbara, 400 Mich at 412-413.

The requirements above also apply when considering polygraph examination evidence at pretrial motions to suppress. People v McKinney (Darryl), 137 Mich App 110, 116-117 (1984) (trial court did not abuse its discretion in considering the defendant’s polygraph examination results in a motion to suppress a short-barreled shotgun found in a duffel bag in the defendant’s automobile, where the court’s decision rested on a credibility determination between the defendant and a police officer).

E. References to Polygraph Examinations at Trial

Ordinarily, reference to a polygraph examination is not admissible at trial before a jury. People v Nash, 244 Mich App 93, 97 (2000). “Indeed, it is a bright-line rule that reference to taking or passing a polygraph test is error.” Nash, supra at 97. However, mentioning polygraph examination results is not always grounds for reversal. Id. at 98.

In Nash, 244 Mich App at 95, in response to the prosecutor’s question, “So, then, why should we believe you?” a key prosecution witness, the only witness who directly implicated the defendant
during a jury trial for murder and felony firearm, stated, “That’s up to you. I took a lie detector test.” To determine whether the witness’s mention of taking a polygraph examination to imply he was being truthful, the Court of Appeals analyzed the following factors first outlined in People v Rocha, 110 Mich App 1, 9 (1981):

- Whether the defendant objected to the mention of a polygraph examination and/or its results and whether he or she sought a cautionary instruction after mention was made of the examination and/or its results;

- Whether reference to the polygraph examination and/or its results was inadvertently made;

- Whether repeated references were made to the polygraph examination and/or its results;

- Whether reference to the polygraph examination and/or its results was made in an attempt to bolster a witness’s credibility; and

- Whether the results of the test were admitted into evidence or simply the fact that a test had been conducted was made known.

“Where the reference to the polygraph test was brought out by the prosecutor, not as a matter of defense strategy, and where the key prosecution witness, who was involved in the crime and was the crucial witness against [the] defendant, gave a responsive answer to the prosecutor’s question that was posed with the intent of bolstering the witness'[s] credibility and was later repeated before the jury during deliberations, we believe that prejudice to [the] defendant occurred.” Nash, 244 Mich App at 101.

In People v Smith (Kerry), 211 Mich App 233, 234 (1995), the prosecutor in a CSC-II bench trial mentioned that the defendant took a polygraph. Additionally, a copy of a detective’s report regarding the interview of the defendant, titled “polygraph examination,” was filed in the circuit court’s record. Smith (Kerry), supra at 234. Although the prosecutor did not mention the results of the polygraph, the Court of Appeals found that the defendant’s failure of the polygraph was apparent from the officer’s testimony and from the timing of the polygraph examination, which was administered before the defendant was charged with CSC-II. Id. at 234-235. The Court of Appeals held that, despite the circuit court’s finding that it was not influenced by this information, the defendant was still unfairly prejudiced by the prosecutor’s injection of the
polygraph and results “because it provided supposedly scientific evidence of [the] defendant’s lack of credibility.” *Id.* at 235.

### F. Privileged Communications

In Michigan, there is a polygraph operator privilege. *MCL 338.1728(2)* states, in pertinent part:

> “Any communications, oral or written, furnished by a professional man or client to a licensed [polygraph] examiner, or any information secured in connection with an assignment for a client, shall be deemed privileged with the same authority and dignity as are other privileged communications recognized by the courts of this state.”

In addition, *MCL 338.1728(3)* provides that “[a]ny recipient of information, report or results from a polygraph examiner, except for the person tested, shall not provide, disclose or convey such information, report or results to a third party except as may be required by law and the rules promulgated by the board in accordance with [MCL 338.1707, the statute governing promulgation of rules by the state board of forensic polygraph examiners].” Where “polygraph reports are exempt from disclosure by [MCL 338.1728(3)], they are likewise exempt under the [Freedom of Information Act (FOIA), MCL 15.243(1)(d)].” *King v Michigan State Police Dep’t*, 303 Mich App 162, 178-179 (2013) (plaintiffs did not identify any law or rules that would otherwise require disclosure).

A licensed polygraph examiner who examines a criminal defendant at the request of the defendant’s attorney also comes within the protection of the attorney-client privilege. *In re Petition of the State of Delaware (People v Marcy)*, 91 Mich App 399, 407 (1979).

### 7.16 Privileges Arising From a Marital Relationship

“The spousal privileges established in [MCL 600.2162](1) and [MCL 600.2162](2) and the confidential communications privilege established in [MCL 600.2162](7) do not apply . . . [i]n a cause of action that grows out of a personal wrong or injury done by one to the other or that grows out of the refusal or neglect to furnish the spouse or children with suitable support.” *MCL 600.2162(3)(d)*.

- **Spousal privilege**

*MCL 600.2162(2)* states:
“In a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent, except as provided in [MCL 600.2162](3).”

“[T]he legal right not to testify[ established] in [MCL 600.2162(2)] . . . is specifically limited by [MCL 600.2162(3)], which states that the spousal privilege established in subsection (2) ‘do[es] not apply’ in certain cases[.]”

People v Szabo, 303 Mich App 737, 747 (2014). “When such an ‘exception’ exists the effect, then, is not that the ownership of the spousal privilege transfers from the one spouse to the other . . . ; rather, the effect is that no spousal privilege exists at all[,]” and the victim-spouse may be compelled to testify against his or her defendant-spouse. Id. at 748-749.

- **Confidential communication privilege**

MCL 600.2162(7) states:

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

### 7.17 Privileged Communications with Care Providers

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

#### A. Sexual Assault and Domestic Violence Counselors

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

“[A] confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor are protected under MCL 600.2157a(2):”

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40 MCL 600.2162(3) lists situations in which the spousal and confidential communication privileges do not apply.

41 In Szabo, 303 Mich App at 747, 749, quoting MCL 600.2162(3)(d), a victim-wife “was not vested with a spousal privilege [under MCL 600.2162(2)]” and could be compelled to testify where “[the] defendant[-husband] was charged with felonious assault and felony-firearm arising from criminal actions he allegedly committed against [her]” because those actions gave rise to “‘a cause of action that [grew] out of a personal wrong or injury done by one [spouse] to the other.’”
domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim.”

The scope of this privilege is determined by MCL 600.2157a(1), which provides the following definitions:

“(a) ‘Confidential communication’ means information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim.

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(c) ‘Sexual assault’ means assault with intent to commit criminal sexual conduct.

(d) ‘Sexual assault or domestic violence counselor’ means a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling, or other assistance to victims of sexual assault or domestic violence and their families.

(e) ‘Sexual assault or domestic violence crisis center’ means an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling.

(f) ‘Victim’ means a person who was or who alleges to have been the subject of a sexual assault or of domestic violence.”

MCL 600.2157a(1)(b) defines domestic violence as it is defined in MCL 400.1501(d):

“(d) ‘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.”

For purposes of this definition of domestic violence, a family or household member includes:

“(i) A spouse or former spouse.

(ii) An individual with whom the person resides or has resided.

(iii) An individual with whom the person has or has had a dating relationship.42

(iv) An individual with whom the person is or has engaged in a sexual relationship.

(v) An individual to whom the person is related or was formerly related by marriage.

(vi) An individual with whom the person has a child in common.

(vii) The minor child of an individual described in subparagraphs (i) to (vi).” MCL 400.1501(e).

The privilege in MCL 600.2157a is abrogated in child protective proceedings. See MCL 722.631. It is also abrogated if the sexual assault or domestic violence counselor has a duty to report suspected child abuse or child neglect under MCL 722.623(1).

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

- Social workers, MCL 333.18513;
- Psychiatrists and psychologists, MCL 330.1750;

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42 Dating relationship means “frequent, intimate associations primarily characterized by the expectation of affectional involvement.” MCL 400.1501(b). It does not include “a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.” Id.
• Psychologists, MCL 333.18237;
• Physicians, MCL 600.2157; and
• Clergy,43 MCL 767.5a(2).44

With the exception of a member of the clergy acting in that capacity, or the protected communication between an attorney and his or her client, these privileges are abrogated in child protective proceedings, MCL 722.631.

B. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Child Neglect45

MCL 722.623(1) states, in part:

“(1) An individual is required to report under [the Child Protection Law] as follows:

(a) A physician, dentist, physician’s assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master’s social worker, licensed bachelor’s social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or child neglect46 shall make an immediate report to centralized intake47 by telephone, or, if available, through the online reporting system48 of the suspected child abuse or child neglect. Within 72 hours after making an oral report by telephone to centralized

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43 A member of the clergy is defined as “a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization.” MCL 722.622(n).

44 MCL 600.2156 (a provision often cited as one of the clergy-penitent privileges) “does not qualify as an evidentiary privilege.” People v Bragg, 296 Mich App 433, 436-437, 453 (2012) (holding that the defendant’s admission to his pastor that the defendant had sexually assaulted his young cousin was “privileged and confidential under MCL 767.5a(2),” notwithstanding that the pastor had initiated the conversation and that the defendant’s mother was present). For discussion of the clergy-penitent privilege and Bragg, supra, see the Michigan Judicial Institute’s Crime Victim Rights Benchbook, Chapter 3.

45 See the Michigan Judicial Institute’s Child Protective Proceedings Benchbook for detailed information.
intake, the reporting person shall file a written report as required in [the Child Protection Law]. If the immediate report has been made using the online reporting system and that report includes the information required in a written report under [MCL 722.623(2)], that report is considered a written report for the purposes of this section and no additional written report is required.” MCL 722.623(1).

In conjunction with the reporting requirements above, MCL 722.631 states:

“Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy[^49] in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623].”

“[A] communication [between a member of the clergy and a church member] [was] within the meaning of ‘similarly confidential

[^46]: For purposes of the Child Protection Law, MCL 722.621 et seq., child abuse is “harm or threatened harm to a child’s health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child’s health or welfare or by a teacher, a teacher’s aide, or a member of the clergy,” MCL 722.622(g), and child neglect is “harm or threatened harm to a child’s health or welfare by a parent, legal guardian, or any other person responsible for the child’s health or welfare that occurs through either of the following: (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or by the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care. (ii) Placing a child at an unreasonable risk to the child’s health or welfare by failure of the parent, legal guardian, or other person responsible for the child’s health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk,” MCL 722.622(k).

[^47]: MCL 722.622(e) defines centralized intake as “the Department[ of Health and Human Services’s (DHHS)] statewide centralized processing center for reports of suspected child abuse and child neglect.”

[^48]: MCL722.622(w) defines online reporting system as “the electronic system established by the [DHHS] for individuals identified in [MCL 722.623(1)] to report suspected child abuse or child neglect.”

[^49]: MCL 722.622(n) defines a member of the clergy as “a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization.”
communication’ when the church member d[id] not make an admission, but ha[d] a similar expectation that the information [would] be kept private and secret.” *People v Prominski*, 302 Mich App 327, 328, 336-337 (2013) (where the parishioner “went to [her pastor] ‘for guidance[ and] advice’” to discuss “her concerns that her husband was abusing her daughters” and “expected that the conversation be kept private[,]” the parishioner’s communication with the pastor was a confidential communication as contemplated by **MCL 722.631**, and the pastor was not required to report the suspected child abuse under the mandatory reporting statute, **MCL 722.623(1)(a)**).
Chapter 8: Expert Testimony & Scientific Evidence

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8.1 Chapter Overview

This chapter discusses various scientific evidentiary issues that may arise in cases involving sexual assault. It provides a general introduction to various scientific methods or topics, including DNA testing, hair sample analysis, blood-typing evidence, bite-mark evidence, and expert testimony.

8.2 Expert Testimony in Sexual Assault Cases

A. General Requirements for Admissibility of Expert Testimony

1. Standard of Admissibility

MRE 702 provides the standard for admissibility of expert testimony:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

“MRE 702 does not require that an expert be certified by the state in the area in which the expert is qualified. Rather, an expert may be qualified based on ‘knowledge, skill, experience, training, or education.” People v Brown (Eddie), ___ Mich App ___, ___ (2018). Accordingly, “[t]he fact that [a certified nurse with significant experience as a sexual assault nurse examiner (SANE)] had yet to receive her SANE certification does not render her incompetent as a medical professional,” and “[t]o require some form of certification in a specific subfield of a larger profession in order to serve as an expert witness would cause not only absurd results, but mandate the creation of new certifications any time a novel or rare issue were before a trial court.” Id. at ___ (the trial court did not abuse its discretion in qualifying the prosecution’s witness as an expert in forensic nursing where she “held an associate’s degree in nursing and a nursing license, received sexual assault training through an online course, had worked
at [a program that assists sexual assault victims] since 2009, and had performed approximately 30 examinations as a sexual assault nurse examiner").

2. Bases of Opinion

MRE 703 governs the bases of opinion testimony:

“The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.”

3. Opinion on Ultimate Issue

MRE 704 governs opinions on ultimate issues:

“Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

4. Disclosure of Facts or Data Underlying Opinion

MRE 705 governs disclosure of facts or data underlying an expert’s opinion:

“The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”

B. History of Determining the Admissibility of Expert Testimony

1. Davis-Frye and Daubert

_Frye v United States_, 293 F 1013, 1014 (54 App DC, 1923), first indicated that the admissibility of scientific evidence depended

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1 Michigan adheres to a hybrid Davis-Frye and Daubert test for the admissibility of scientific or technical evidence.
on whether the expert’s testimony was based on a “well-recognized scientific principle . . . [that] ha[s] gained general acceptance in the particular field in which it belongs[,]” and that became the standard for determining whether a party’s novel scientific evidence could be admitted at trial via expert testimony. In Frye, supra at 1013, defense counsel attempted to present the expert testimony of a scientist who conducted a “deception test” on the defendant.

The Frye Court explained its reasoning for adopting the general acceptance standard:

“Just when a scientific principle or discovery crosses the line between the experimental and demonstrateable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” Frye, 293 F at 1014.

Some twenty years after Frye, 293 F 1013, the Michigan Supreme Court was presented with a similar situation in People v Davis (Thomas), 343 Mich 348 (1955) (case involving a defendant charged with first-degree murder). In Davis (Thomas), supra at 369, defense counsel offered into evidence the results of the defendant’s lie detector test, and the trial court sustained an objection to their admission. The Davis (Thomas) Court stated that “it was not error for the trial court to have refused to admit the results of a polygraph test [where] ‘[t]here was no testimony offered which would indicate that there is at this time a general scientific recognition of such tests. Until it is established that reasonable certainty follows from such tests, it would be error to admit in evidence the result thereof.’” Davis (Thomas), supra at 370, quoting People v Becker, 300 Mich 562, 566 (1942). Like the Frye Court, 293 F at 1014, noted, the Davis (Thomas) Court, supra at 372, declined to admit as evidence the results of a defendant’s polygraph examination “before its general reliability and acceptability have been proven . . . [and] before its accuracy and general scientific acceptance and standardization are clearly shown.”

The decisions in Frye, 293 F 1013, and Davis (Thomas), 343 Mich 348, became known as the Davis-Frye test for the admissibility of scientific evidence.
The United States Supreme Court, in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 585 (1993) (case involving allegations that a drug caused birth defects), recognized that “In the 70 years since its formation in the *Frye* case, the ‘general acceptance’ test has been the dominant standard for determining the admissibility of novel scientific evidence at trial.” In *Daubert, supra* at 587, 588, the Supreme Court agreed with the respondent that FRE 702\(^2\) had superseded *Frye*: “Nothing in the text of [FRE 702] establishes ‘general acceptance’ as an absolute prerequisite to admissibility.” However, the Court also noted: “That the *Frye* test was displaced by the Rules of Evidence does not mean . . . that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert, supra* at 589.

The *Daubert* Court set forth guidelines for the trial court’s consideration of scientific evidence in light of FRE 702:

> “Faced with a proffer of expert scientific testimony, . . . the trial judge must determine at the outset, pursuant to [FRE] 104(a),\(^3\) whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 US at 592-593.

> “Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.” *Daubert*, 509 US at 593.

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\(^2\) MRE 702 is substantially similar to FRE 702 with the exception of the introductory phrase in MRE 702—“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . .” The language of MRE 702 requires trial judges to act as gatekeepers to exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993).

\(^3\) FRE 104(a) concerns the trial court’s obligation to determine “[p]reliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence[.]” FRE 104(a) is substantially similar to MRE 104(a).
“Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.” *Daubert*, 509 US at 593. The Court noted that publication is only a single element of peer review and does not itself determine admissibility—publication also itself does not equate with reliability. *Daubert*, *supra* at 593. The Court also recognized that some scientific propositions “are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Id.* The Court concluded that publication, or the lack of publication, of scientific theory in a journal subject to peer review is a relevant, but not dispositive, consideration when assessing the validity of a specific technique or methodology on which an opinion is based. *Id.* at 593-594.

Generally, a court should also consider the known or potential rate of error possible in a case involving a specific scientific technique offered for admission. *Daubert*, 509 US at 594. In addition, a court should consider whether standards for controlling the scientific technique’s operation exist and are maintained. *Daubert*, *supra* at 594.

“Finally, ‘general acceptance’ can yet have a bearing on the inquiry. A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.’ Widespread acceptance can be an important factor in ruling particular evidence admissible, and ‘a known technique which has been able to attract only minimal support within the community,’ may properly be viewed with skepticism.” *Daubert*, 509 US at 594, quoting *United States v Downing*, 753 F2d 1224, 1238 (CA 3, 1985) (other internal citations omitted).

2. **Kumho Tire Co, Ltd v Carmichael**

“*Daubert’s*, [509 US 579,] general holding—setting forth the trial judge’s general ‘gatekeeping’ obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 141 (1999) (case involving a car accident reconstruction).
3. **Gilbert v DaimlerChrysler Corp**

The Michigan Supreme Court concluded that the trial court’s gatekeeping function is no different when the *Davis-Frye* or *Daubert* test is applied. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782 (2004) (case involving sexual harassment):

“The properly understood, the court’s gatekeeper role is the same under *Davis-Frye* and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets the rule’s standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just ‘general acceptance’ in determining whether expert testimony must be excluded.” *Gilbert*, 470 Mich at 782.

The 2004 amendment of MRE 702 expressly incorporated *Daubert’s* standards of reliability; that is, MRE 702’s amendment “change[d] only the factors that a court may consider in determining whether expert opinion is admissible. It [did] not alter[] the court’s fundamental duty of ensuring that all expert testimony—regardless of whether the testimony is based on ‘novel’ science—is reliable.” *Gilbert*, 470 Mich at 781. Simply put, MRE 702’s gatekeeping responsibilities are mandatory without regard to whether the proffered evidence is “novel.” *Gilbert*, supra at 781 n 52.

“MRE 702 [now] requires the trial court to ensure that each aspect of an expert witness’s proffered testimony—including the data underlying the expert’s theories and the methodology by which the expert draws conclusions from that data—is reliable.” *Gilbert*, 470 Mich at 779.

C. **Presenting Expert Testimony Using Video Communication Equipment**

If the court determines “that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony,” and if all the parties consent, the court may allow a qualified expert witness “to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place.” MCL 600.2164a(1).
8.3 Test for Admissibility of Expert TestimonyOutlined in Michigan's Rules of Evidence

MRE 702 first requires a trial court to determine whether expert testimony is necessary. MRE 702 then sets out a test for determining the admissibility of expert testimony in all cases:

A. Expert Testimony Must Assist the Trier of Fact

The trial court must determine that expert testimony is necessary to “assist the trier of fact to understand the evidence or to determine a fact in issue[.]” MRE 702. MRE 702 establishes the trial court’s duty of being a gatekeeper to assure that expert testimony is properly admitted in a case. That is, the court must consider whether “scientific, technical, or other specialized knowledge” will assist the trier of fact in carrying out its obligation to determine facts at issue in a case, which itself requires that the trier of fact understand the evidence admitted for or against the factual issue. See MRE 702.

In childhood sexual abuse cases, expert testimony may be admissible to explain common postincident behaviors of children who have been sexually abused if the testimony is helpful and relevant to the jury. People v Peterson (Peterson I), 450 Mich 349, 373 (1995), lv gtd 447 Mich 1041 (1994) (to determine whether the Court of Appeals correctly admitted challenged testimony under People v Beckley, 434 Mich 691 (1990), rehearing denied 450 Mich 1212 (1995) (on remand, trial judge determined that Beckley, 434 Mich 691, was not violated).

In Peterson (Peterson I, 450 Mich at 352, the Michigan Supreme Court affirmed its holding in Beckley, 434 Mich 691 (discussing the use of expert testimony in childhood sexual abuse cases), that “(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty.” The Peterson (Peterson I) Court, supra at 352-353, clarified its decision in Beckley and held “that (1) an expert may testify in the prosecution’s case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim

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4 The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party “initiat[ing] the use of video communication equipment” must pay the cost for its use, unless the court directs otherwise. MCL 600.2164a(3). “A verbatim record of the testimony shall be taken in the same manner as for other testimony.” MCL 600.2164a(1).
and other victims of child sexual abuse to rebut an attack on the victim’s credibility.”

However, an expert may not render an opinion that a complainant’s particular behavior or set of behaviors indicates that a sexual assault in fact occurred. *Beckley*, 434 Mich at 729. “The conclusion whether abuse occurred is outside the scope of expertise, and therefore not a proper subject for expert testimony. The jury must make its own determination from the totality of the evidence whether the complainant was sexually abused.” *Beckley*, supra at 729.

**B. Expert Must Be Qualified**

MRE 702 clearly sets out the characteristics of a witness who qualifies to testify as an expert: “a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise[.]”

According to *Beckley*, 434 Mich at 713-714, quoting MRE 702:

“In addition to assessing a witness’s qualifications, the trial judge must also make a determination as to the relevancy of the evidence. The general test of relevancy is whether the evidence has a tendency to render any fact more probable than it would [be] without the evidence. However, a more specific test is applied to expert testimony. Expert testimony is relevant and therefore admissible [on that basis] if it ‘assist[s] the trier of fact to understand the evidence or to determine a fact in issue . . . .’”

**C. Testimony Must Be Based on Sufficient Facts or Data**

Sufficient facts or data must form the basis for a witness’s expert testimony. MRE 702.

There are two basic types of expert witnesses—those with academic training and those with practical experience. Witnesses with either background may be qualified to testify if they demonstrate understanding of the particular fact situation. *People v Boyd (Michael)*, 65 Mich App 11, 14-15 (1975). Whether a witness’s expertise is as great as that of others in the field is relevant to the weight rather than the admissibility of the testimony and is a question for the jury. See *Grow v W A Thomas Co*, 236 Mich App 696, 713-714 (1999) (the trial court did not err in qualifying a certified social worker to testify regarding post-traumatic stress disorder). In cases involving sexual abuse of children, expert testimony has been

**D. Testimony Is the Product of Reliable Principles**

An expert witness’s testimony must result from reliable principles. *MRE 702*. “The trial court has an obligation under *MRE 702* ‘to ensure that any expert testimony admitted at trial is reliable.’” *People v Dobek*, 274 Mich App 58, 94 (2007), quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 (2004). “While the exercise of the gatekeeper function is within a court’s discretion, the court may neither abandon this obligation nor perform the function inadequately. Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data.” *Dobek*, *supra* at 94 (internal citations omitted) (expert testimony regarding a general sex offender profile not admissible).

**E. Expert’s Application of the Principles Are Reliably Applied to Facts of the Case**

Finally, the principles and methods testified to by the expert witness must be reliably applied to the facts of the case. *MRE 702*.

If the court determines that the expert testimony meets the preliminary tests in *MRE 702*, it must next determine whether the probative value of the expert testimony outweighs the danger of unfair prejudice. See *MRE 403*. However, on request, the trial judge may decide that a limiting instruction is an appropriate alternative to excluding the evidence. *People v Christel*, 449 Mich 578, 587 (1995) (evidence regarding battered women syndrome was not admissible as it related to the victim’s credibility).

**8.4 Expert Testimony by Physicians**

Like other expert testimony, an examining physician’s testimony is admissible if the physician possesses specialized knowledge that will assist the trier of fact in understanding the evidence or determining a fact at issue under *MRE 702*. *People v Smith (Joseph)*, 425 Mich 98, 112 (1986). Such expert testimony, unlike expert testimony concerning the behavioral sciences, may include an expert’s opinion on the ultimate issue of whether the victim was sexually assaulted—as long as the opinion is based on findings within the realm of the expert’s medical capabilities or expertise, and not simply on the emotional state of, or the history given by, the victim. See *Smith (Joseph)*, *supra* at 112-113 (expert’s testimony should not have been admitted: “[the expert’s] opinion that the complainant had been sexually assaulted was based, not on any findings
within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant”); MRE 704.

Generally, “the examining physician in a rape case is a proper witness as long as his [or her] testimony may assist the jury in their determination of the existence of either of two crucial elements of the offense charged, (1) penetration itself and (2) penetration against the will of the victim.” People v McGillen, 392 Mich 278, 284 (1974). “[An examining physician] may not testify that [a] complainant was raped by the defendant on the alleged date, nor may [the physician] render an opinion as to the complainant’s veracity.” People v Byrd, 133 Mich App 767, 779-780 (1984).

“In a criminal sexual conduct case, an examining physician’s testimony is admissible for the narrow purposes of establishing penetration or penetration against the will of the victim.” People v Naugle, 152 Mich App 227, 236 (1986). If a complainant engaged in sexual intercourse before a physical examination after an alleged assault, the examining physician’s testimony concerning whether the complainant was assaulted at a specific time is not admissible absent a proper foundation. Naugle, supra at 236. “A proper foundation requires some evidence as to the condition of the victim’s pelvic area prior to the date of the alleged assault. Without such a foundation, the physician’s testimony must be limited to whether penetration has occurred.” Id. at 236-237.

The following appellate opinions have considered an examining physician’s testimony in criminal sexual conduct cases:


The trial court properly determined that the examining physician was qualified as an expert witness even though the physician had no previous experience with examining sexual assault victims. Swartz, 171 Mich App at 375-376. The Court of Appeals noted that “[the doctor] had studied medicine, graduated from medical school and was licensed to practice medicine in Michigan. [The doctor] had attended a lecture in medical school partially devoted to the examination of sexual assault victims. Moreover, [the doctor] had experience in examining sperm in infertility cases.” Swartz, supra at 375-376.

The physician’s testimony that the victim had been sexually assaulted in Swartz, 171 Mich App at 377, was properly admitted because “he testified that his opinion was based upon what he observed medically. Although his observation of the victim’s emotional state was part of his medical evaluation, [the doctor] did not base his opinion on the victim’s emotional state. [The doctor’s] opinion was based on objective facts obtained from his medical examination of the victim, such as the red mark on her neck and the motile sperm in her body.”
• *People v Vasher*, 167 Mich App 452 (1988)

The defendant was properly bound over for trial based on the examining physician’s testimony that the three-year-old victim had been sexually penetrated. *Vasher*, 167 Mich App at 458. The examining physician’s testimony was properly admitted because it “was confined to the issue of whether penetration occurred. [The doctor] did not express an opinion as to a place, specific time or by whom the rape had occurred. Furthermore, the doctor’s opinion was grounded upon objective evidence within the realm of her expertise as an obstetrician/gynecologist.” *Vasher*, supra at 459-460. Specifically, the examining physician “testified that the physical examination revealed healed tears in the vaginal area as well as lacerations and signs of chronic irritation in the perianal area. In the doctor’s opinion, the three-year-old child had been sexually penetrated.” *Id.* at 458.

• *People v Byrd*, 133 Mich App 767 (1984)

The examining physician’s testimony was properly admitted where the physician “merely testified that in his expert opinion, on the basis of [the] complainant’s emotional state and because of the nature of her physical injuries, [the] complainant had experienced a fairly significant assault.” *Byrd*, 133 Mich App at 780. In *Byrd*, supra at 779, the examining physician testified that the complainant “had fresh blunt force bruises and lacerations all over her body and bleeding in the vaginal area[,]” all of which was consistent with being recently assaulted.

• *People v LaPorte*, 103 Mich App 444 (1981)

An examining physician properly testified that in his opinion the complainant was a “legitimate rape victim,” where “the doctor testified that he always approached with skepticism any victim’s version of an alleged rape [and] based his opinion upon his own independent observations of the victim’s physical and emotional conditions.” *LaPorte*, 103 Mich App at 451, 453. In *LaPorte*, supra at 453, the Court of Appeals emphasized that “most importantly, the physician . . . gave no testimony as to whether or not the victim was raped by the defendant.” Consequently, the Court found “that the testimony of the attending physician that, in his expert opinion based upon the victim’s physical and emotional conditions shortly after the incident, there had been penetration against the will of the victim was admissible testimony.” *Id.*

• *People v Wells (Gerald)*, 102 Mich App 558 (1980)

Where the defendant admitted having sexual intercourse with the complainant, the trial court properly admitted the examining physician’s opinion that the circumstances indicated “a legitimate case of sexual assault.” *Wells (Gerald)*, 102 Mich App at 562. In *Wells (Gerald)*, supra at
562, the examining physician based his opinion on his physical findings, the complainant’s history, the complainant’s emotional condition, and on “his many years of experience and many cases of examining victims of alleged sexual assaults[.]” The Court of Appeals specifically explained:

“[The doctor] did not act as a human lie detector who gave a stamp of scientific legitimacy to the truth of the complainant’s factual testimony concerning the alleged rape. [The doctor] did not testify that he believed that the defendant raped the complainant at a specific time and/or place or that he believed the complainant’s claim. [The doctor] merely stated that in his expert opinion there had been penetration against the will of the victim.” Wells (Gerald), 102 Mich App at 562 (internal citation omitted).

8.5 Expert Testimony by Sexual Assault Nurse Examiners (SANEs)

Sexual Assault Nurse Examiners (SANEs) are typically registered nurses (RNs) or nurse practitioners who have specialized training in the forensic examination of sexual assault victims. SANEs may be called on to provide expert testimony but no published Michigan cases have yet addressed the precise issue.5

In People v McLaughlin, 258 Mich App 635, 657 (2003), the defendant claimed the trial court erred in permitting a SANE to testify as an expert witness because the prosecution failed to identify her as an expert during pretrial discovery. See MCR 6.201(A)(1). However, the Court of Appeals concluded that the SANE’s testimony did not rise to the level of that required of an expert so that any error in the SANE’s classification as an expert was harmless. McLaughlin, supra at 658. The Court noted that “MRE 701 permits lay witnesses to testify about opinions and inferences that are ‘(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’[s] testimony or the determination of a fact in issue[,]’” McLaughlin, supra at 657. The Court further found that the only statements in the SANE’s testimony that could be construed as “specialized knowledge” were her statements that the victim’s physical state and demeanor were consistent with that of a recent rape victim. Id. at 658. The Court of Appeals concluded that these statements did not involve “highly specialized knowledge” and were “largely based on common sense.” Id.

5 The published cases involve whether a victim’s statements to a SANE examiner constitute testimonial statements for purposes of the Sixth Amendment.
8.6 Expert Testimony on Syndrome Evidence

A. Expert Testimony Regarding Victim Behaviors

In some cases, “expert testimony is needed when a witness’[s] actions or responses are incomprehensible to average people. This may include, for example, when a complainant endures prolonged toleration of physical abuse and then attempts to hide or minimize the effect of the abuse, delays reporting the abuse to authorities or friends, or denies or recants the claim of abuse. Only when those or similar facts are at issue and expert testimony would be helpful in evaluating a witness’[s] testimony is it permissible to admit battered woman syndrome evidence in the prosecution’s case in chief.” People v Christel, 449 Mich 578, 592-593 (1995) (case involving battered woman syndrome) (internal citation omitted).

In dicta, where a police officer’s testimony was admitted as lay testimony under MRE 701, the Court of Appeals concluded that if expert testimony had been necessary, “[the officer] was more than qualified to give an expert opinion on delayed disclosure[6] to the extent of the testimony actually presented. [The officer] testified at length about his extensive knowledge, experience, training, and education concerning the sexual abuse of children. [The officer] ha[d] personally participated in the investigation of hundreds of criminal sexual conduct cases involving child victims. And [the officer] had received training in the investigation of cases involving delayed disclosure.” People v Dobek, 274 Mich App 58, 79 (2007).

Expert testimony regarding “rape trauma syndrome”[7] is inadmissible to prove that a sexual assault occurred. People v Pullins, 145 Mich App 414, 419-422 (1985). However, such testimony may be admissible to explain the characteristics of the syndrome and to show “whether the complainant’s behavior is consistent with those traits.” Christel, 449 Mich at 590. In Pullins, supra at 416, a CSC-I case involving a six-year-old victim, the trial court admitted testimony from a therapist regarding the victim’s post-incident behavior as rape trauma syndrome evidence to establish that criminal sexual conduct occurred. Citing a California Appellate Court case, People v Bledsoe, 681 P2d 291 (1984), the Court of Appeals held:

“We . . . hold that evidence of rape trauma syndrome is not admissible . . . to prove that a rape in fact occurred. However, we do not mean to imply that evidence of


emotional and psychological trauma suffered by a complaining witness in a rape case is inadmissible. Such evidence is relevant and jurors are fully competent to consider such evidence in determining whether a rape occurred, but it should not be presented with an aura of scientific reliability unless the Frye[, 293 F 1013,] test is met. Pullins, 145 Mich App at 421-422.

A party need not satisfy the Davis-Frye test “where syndrome evidence is merely offered to explain certain behavior[.]” Christel, 449 Mich at 590 (behavior not related to culpability).

Similarly, a majority of justices of the Michigan Supreme Court, in People v Beckley, 434 Mich 691, 724, 729 (1990), concluded that “child sexual abuse accommodation syndrome” evidence is unreliable as an indicator of abuse and, as such, is inadmissible to show that sexual abuse has occurred. According to Beckley:

“A person qualifies as an expert under the scientific study of behavior when there is ‘mastery of a specialized field of knowledge about a group of either children who have been sexually misused, or adults who have sexually misused children.’ In this light, the expertise of the witness does not center upon the complainant in any individual case. Rather the expertise of the testifying expert concerns only whether the specific behavior at issue is commonly or uncommonly associated with sexually abused children as a class.” Beckley, 434 Mich at 726, quoting Lorentzen, The admissibility of expert psychological testimony in cases involving the sexual misuse of a child, 42 Univ Miami L R, n. 16, 1043-1044.

“An expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim’s credibility.” People v Ackerman, 257 Mich App 434, 444 (2003) (case involving the defendant’s convictions of CSC-I, CSC-II, and child sexually abusive activity), quoting People v Peterson (Peterson I), 450 Mich 349, 373 (1995). See also People v Smith (Jeffrey), 450 Mich 349, 357-359 (1995), the case consolidated with Peterson (Peterson I).

Expert testimony is admissible under two circumstances to show that a child victim’s behavior is consistent with the behavior of a sexual abuse victim:

• when a defendant raises the issue of the child victim’s post-incident behavior; or
• when a defendant attacks the child victim’s credibility. 

In **Lukity**, 460 Mich at 486-487, the defendant was convicted of CSC-I against his 14-year-old daughter. The victim testified that the defendant had sexually assaulted her more than 40 times during two years, and that after she reported her father’s conduct to a teacher (a year after the last reported incident of abuse), the victim attempted suicide. **Lukity, supra** at 487-488. The defendant argued that his daughter had serious emotional problems unrelated to the alleged sexual abuse that affected her ability to “recount and describe” the events she claimed had taken place. *Id.* at 501-502.

Because the defendant questioned the victim’s credibility and attributed her suicide attempt to problems other than the alleged abuse, expert testimony was properly admitted to explain the general characteristics of sexual abuse victims, including the expert’s opinion that the victim’s behavior was consistent with other sexual abuse victims. **Lukity**, 460 Mich at 501. The expert also acknowledged that some characteristics of sexual abuse victims—suicide attempts, for example—were also consistent with other types of trauma. **Lukity, supra** at 501.

For a case in which an expert witness improperly vouched for the child’s credibility, see **People v Garrison (On Remand)**, 187 Mich App 657, 659 (1991) (the expert witness testified that “[based on [the expert’s] experience, [the victim’s] reaction to the [anatomically correct] dolls demonstrated that [the victim] had indeed been sexually abused”). See also **People v Draper (Timothy II) (On Remand)**, 188 Mich App 77 (1991), where the Court of Appeals, in light of the Supreme Court’s opinion in **Beckley**, 434 Mich at 691, reversed its previous opinion in **People v Draper (Timothy I)**, 150 Mich App 481 (1986), because the expert testimony went “beyond merely relating whether the victim’s behavior is consistent with that found in other child sexual abuse victims. They are opinions on an ultimate issue of fact, which is for the jury’s determination alone.” **Draper (Timothy II) (On Remand)**, supra at 78-79.

**B. Expert Testimony Regarding Defendant Behaviors**

Where the evidence showed that the defendant routinely engaged in improper conduct in the presence of young females, the trial court properly admitted expert testimony regarding patterns of behavior used by adult sex offenders to desensitize their child victims. **Ackerman**, 257 Mich App at 445. In **Ackerman, supra** at 443, the expert witness was a psychotherapist with a master’s degree in clinical social work who specialized in sexual abuse and trauma.
Significantly, the majority of the expert’s work focused on offenders rather than victims. *Id.*

The expert witness testified that a “‘molestation scenario’ generally unfolds over time and builds in intensity . . . to ‘desensitize’ the child and have some assurance that the child will not disclose the abuse.” *Ackerman*, 257 Mich App at 443. According to the witness, the scenarios often begin with rather innocuous acts aimed at giving the child victim the sense that the victim’s interactions with the offender represent acceptable behavior. *Ackerman, supra* at 443.

In *Dobek*, 274 Mich App at 92, the trial court properly precluded the defendant from introducing expert testimony that the defendant “did not exhibit characteristics or fit the profile of a typical sex offender as determined by psychological testing and interviews.” The trial court excluded the testimony of the defendant’s expert psychologist because it “lack[ed] [] scientific reliability in the process of identifying sex offenders through psychological testing and because the testimony would not assist the jury in its function of deliberating on the issue of guilt or innocence.” *Dobek, supra* at 93. The Court of Appeals explained that the “proffered testimony regarding [the] defendant’s sex-offender profile as developed from psychological testing was neither sufficiently scientifically reliable nor supported by sufficient scientific data to allow [the expert] to testify[,]” and that “the proffered evidence would not assist the trier of fact to understand the evidence or determine a fact in issue.” *Id.* at 94-95. See also *People v Steele (Larry)*, 283 Mich App 472, 482 (2009) (a CSC case in which the trial court did not abuse its discretion in excluding the testimony of a defense expert who examined the defendant and concluded that “[the] defendant did not fit the profile, or display the characteristics, of having a personality consistent with pedophilia or being a sexual predator”).

### 8.7 Bite-Mark Evidence

Bite-mark evidence and its analysis can play a prominent role in sexual assault cases, since bite marks appear frequently on victims in cases involving sexual assault. Bite-mark analysis is part of the field of forensic odontology.9

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8 A process known as “grooming.” See *Ackerman*, 257 Mich App at 438.

9 A detailed discussion of the scientific methods, and definitions of all terms relevant to, the processes involved in forensic science is beyond the scope of this benchbook. For a comprehensive list of terms and their accompanying definitions, see [www.thethruthaboutforensicscience.com/definition-of-forensic-science-terms](http://www.thethruthaboutforensicscience.com/definition-of-forensic-science-terms).
In a case of first impression in Michigan, the Court of Appeals, in *People v Marsh*, 177 Mich App 161, 162 (1989), held “that the science of bite-mark analysis is sufficiently established that a trial court may admit the evidence without holding a Davis-Frye hearing.”

Although *Marsh*, 177 Mich App at 162, determined that bite-mark evidence could be admitted without conducting a *Davis-Frye* hearing, Michigan Supreme Court orders have since been issued remanding cases to the trial court for the express purpose of conducting *Davis-Frye* hearings before bite-mark evidence can properly be admitted against a defendant at trial. See, e.g., *People v Wright (Simon)*, 463 Mich 993 (2001), where the “case was remanded to the trial court to conduct a *Davis-Frye* hearing on the matter of [the expert witness’s] testimony regarding the application of the statistical probabilities to the comparison between [the] defendant’s dentition and the bite marks on the victim.”

### 8.8 Hair Sample Analysis

Hair is classified as trace evidence that can be analyzed, identified, and compared in a criminal investigation to determine its origin. Testing for hair analysis may include measurements of length and diameter, comparisons of color, root structure, ends, cuticles, medulla content, twist, and a determination of blood type.10

The following Michigan appellate cases have addressed the admissibility of microscopic hair analysis:


  “[M]icroscopic hair analysis satisfies the *Davis-Frye* test for admissibility of scientific opinion testimony.” *Vettese*, 195 Mich App at 240-241. In *Vettese, supra* at 241, hair-matching evidence was properly admitted to show “that the pubic hair found in the victim’s bed was similar in all relevant aspects to the defendant’s pubic hair.” In addition to approving the hair-matching analysis as admissible scientific opinion testimony, the *Vettese* Court discussed the hair-matching analysis in terms of its relevancy under *MRE 401*. *Vettese, supra* at 241. The Court noted that the matching hair placed the defendant in the group of persons who could have committed the crime. *Id*. The Court further found that statistical probability was unnecessary where the hair-matching analysis did not eliminate the defendant from the group of individuals from whom the hair could have originated. *Id*. Finally, because there existed additional

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10 A detailed discussion of the scientific methods, and definitions of all terms relevant to, the processes involved in forensic science is beyond the scope of this benchbook. For a comprehensive list of terms and their accompanying definitions, see [www.thetruthaboutforensicscience.com/definition-of-forensic-science-terms](http://www.thetruthaboutforensicscience.com/definition-of-forensic-science-terms).
substantial evidence of the defendant’s guilt, the Court concluded that the probative value of the hair-match was not substantially outweighed by the danger of unfair prejudice as prohibited by MRE 403. Vettese, supra at 241.

- People v Hayden (Michael), 125 Mich App 650 (1983)

Microscopic hair sample analysis was properly admitted against the defendant at trial in Hayden (Michael), 125 Mich App at 658. In Hayden (Michael), supra at 659, “the expert testified that at least 90 percent of the population was excluded by his analysis.” See also People v Browning (Charles), 106 Mich App 516, 524-525 (1981); People v Collins (John), 43 Mich App 259, 266 (1972).

- People v Watkins (Ledura), 78 Mich App 89 (1977)

Expert testimony that the microscopic comparison between hair found on the victim’s pants “matched in 15 points of comparison” with a known sample of the defendant’s hair was properly admitted against the defendant at trial in Watkins (Ledura), 78 Mich App at 95-96. In Watkins (Ledura), supra at 95, “[t]estimony indicated that if any one of the fifteen points failed to match, a conclusion of dissimilarity would be reached.”

### 8.9 Evidence of Blood Type

Forceful physical contact between the perpetrator and victim often involves the transfer of body fluids, including blood, saliva, perspiration, and semen.\(^\text{11}\)

Electrophoresis is a way of determining blood type through the use of electric current to separate important biological proteins. People v Young (Jeffrey) (After Remand), 425 Mich 470, 477-478 (1986). Electrophoresis may be used on a variety of samples, including blood (dried or fresh), semen, and DNA. Evidence of serological electrophoresis of semen is admissible. People v Furman, 158 Mich App 302, 329 (1987).

Electrophoresis of fresh blood is considered generally reliable and is not subject to a Davis-Frye determination. Young (Jeffrey), 425 Mich at 486. Electrophoresis of dried bloodstains using a multi-system process does not meet Davis-Frye requirements. Young (Jeffrey), supra at 501. However, electrophoresis of dried bloodstains using a single-system method does

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\(^{11}\) A detailed discussion of the scientific methods involved in forensic serology is beyond the scope of this benchbook. For a comprehensive discussion of determining blood type and the analysis of other forensic characteristics of blood, see [http://elearning.loyo.edu/masters-nursing-degree-online/resource/modern-forensics](http://elearning.loyo.edu/masters-nursing-degree-online/resource/modern-forensics).

In Michigan, blood typing evidence, “like other pieces of physical evidence that show possible connections between defendants and criminal acts, [is] admissible, the weight to be given the evidence being subject to the jury’s determination.” People v Punga, 186 Mich App 671, 672 (1991). In Punga, supra at 672, the Court of Appeals concluded that the trial court properly admitted blood type evidence indicating that the defendant was among 34 percent of the male population that could have produced the semen found on the victim’s clothing. The Court explained:

“Evidence of blood type that places a defendant within a certain group of the population is relevant according to the definition of relevant evidence contained in MRE 401, in that it has some tendency to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence. We therefore find no abuse of discretion in the trial court’s decision to admit the instant evidence of blood type.” Punga, 186 Mich App at 673.

Persons who are “secretors” are persons whose blood type can be determined from an analysis of body fluids (e.g., semen, saliva, vaginal fluids, and gastric fluids).  

Evidence of the defendant’s blood type and secretor status was properly admitted against the defendant at trial where “[p]hysical evidence overwhelmingly established that the child had been sexually abused and corroborated [the] defendant’s identity as the perpetrator.” People v Hackney, 183 Mich App 516, 529 (1990). The Court explained:

“Sperm was detected on the child’s underpants and on paper towels discarded at the location of the sexual assault. Tests conducted on samples of the sperm indicated that the source, in all likelihood, was a secretor with an AB blood type, which is characteristic of only 3.2% of the fertile male population. Because the victim had type O blood, it was impossible that he could have been the source of the sperm. Tests done on samples of [the] defendant’s blood and saliva indicated he was a type AB secretor.” Hackney, 183 Mich App at 529.

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12 In general, the multi-system process tests for more than one genetic marker at a time using the same gel. Stoughton, 185 Mich App at 222.

8.10 DNA (Deoxyribonucleic Acid) Identification Profiling System Act (DNA Profiling Act)

This section contains a very brief discussion of the DNA Identification Profiling System Act (DNA Profiling Act), MCL 28.171 et seq. For a detailed discussion of this topic, see the Michigan Judicial Institute’s Evidence Benchbook, Chapter 4.

Among other requirements and provisions, the DNA Profiling Act facilitates the collection of a DNA sample\(^{14}\) from (1) certain prisoners;\(^{15}\) (2) anyone arrested for committing or attempting to commit a felony\(^{16}\) or an offense that would be a felony if committed by an adult, and individuals convicted of certain enumerated misdemeanors (e.g., indecent exposure and offenses involving prostitution or houses of prostitution);\(^{17}\) and (3) juvenile offenders.\(^{18}\) See MCL 28.173(a)(i)-(iii); MCL 28.176(1)(a)-(b). The act also sets out requirements for the collection procedures to be employed, the permissible use of collected DNA samples, and the transmission of DNA samples to the Michigan State Police. See MCL 28.175 and MCL 28.176.

8.11 DNA (Deoxyribonucleic Acid) Testing and Admissibility

A discussion of the scientific methods involved in DNA testing and admissibility is beyond the scope of this benchbook. For a discussion on the DNA testing and admissibility, see the Michigan Judicial Institute’s Evidence Benchbook, Chapter 4. For a comprehensive discussion of DNA testing in general, see https://www.fbi.gov/file-repository/handbook-of-forensic-services-pdf.pdf/view.

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14 “‘Sample’ means a portion of an individual’s blood, saliva, or tissue collected from the individual.” MCL 28.172(g).

15 See MCL 791.233d for information on the Department of Corrections’s authority to collect a DNA sample from a prisoner.

16 “‘Felony’ means a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.” MCL 28.172(e).

17 See MCL 750.520m for information on a law enforcement agency’s authority to collect a DNA sample from an adult and certain juveniles.

18 See MCL 803.307a and MCL 803.225a for information on the Department of Health and Human Services’s authority to collect a DNA sample from certain juveniles.
8.12 Sexual Assault Evidence Collection Kits

A. Administration of Sexual Evidence Collection Kit

For purposes of MCL 333.21527, a sexual assault evidence kit is:

“[A] standardized set of equipment and written procedures approved by the department of state police that have been designed to be administered to an individual principally for the purpose of gathering evidence of sexual conduct, which evidence is of the type offered in court by the forensic science division of the department of state police for prosecuting a case of criminal sexual conduct under . . . MCL 750.520a to [MCL] 750.520l.” MCL 324.21527(2).

MCL 333.21527(1) governs the requirements for administration of sexual assault evidence collection kits:

“If an individual alleges to a physician or other member of the attending or admitting staff of a hospital that within the preceding 120 hours the individual has been the victim of criminal sexual conduct under . . . MCL 750.520a to [MCL] 750.520l, the attending health care personnel responsible for examining or treating the individual immediately shall inform the individual of the availability of a sexual assault medical forensic examination, including the administration of a sexual assault evidence kit. If consented to by the individual, the attending health care personnel shall perform or have performed on the individual the sexual assault medical forensic examination, including the procedures required by the sexual assault evidence kit. The attending health care personnel shall also inform the individual of the provisions for payment for the sexual assault medical forensic examination under . . . MCL 18.355a.”

B. Release or Destruction of Sexual Assault Evidence Kit

The Sexual Assault Kit Evidence Submission Act, MCL 752.931 et seq., sets out certain procedures the health care facility19 and the law enforcement agency20 must follow regarding the collection, handling, and disposition of sexual assault kit evidence. For purposes of this Act, sexual assault kit evidence is “evidence collected

19 “‘Health care facility’ includes a hospital, clinic, or urgent care center that is regulated under the public health code, 1978 PA 368, MCL 333.1101 to [MCL] 333.25211, and any other facility that is authorized to provide sexual assault medical forensic exams under that act.” MCL 752.932(d).
from the administration of a sexual assault evidence kit\textsuperscript{21} under \ldots MCL 333.21527.” MCL 752.932(f).

“A health care facility that has obtained written consent to release sexual assault kit evidence shall notify the investigating law enforcement agency, if known, or the law enforcement agency having jurisdiction in that portion of the local unit of government in which the medical facility is located of that fact within 24 hours after obtaining that consent.” MCL 752.933(1).

“A health care facility that has not obtained written consent to release any sexual assault kit evidence shall inform the individual from whom sexual assault kit evidence was obtained of its sexual assault kit evidence storage policy. The information provided under this subsection shall include a statement of the period for which that evidence will be stored before it is destroyed and how the individual can have the evidence released to the investigating law enforcement agency at a later date. Any sexual assault kit evidence that is not released to a law enforcement agency under this section shall be stored for a minimum of 1 year before it is destroyed.” MCL 752.933(2).

1. Release of Sexual Assault Kit Evidence to Law Enforcement Agency

“A law enforcement agency that receives notice under [MCL 752.933] that sexual assault kit evidence has been released to that law enforcement agency shall take possession of the sexual assault kit evidence from the health care facility within 14 days after receiving that notice.” MCL 752.934(1).

\textbf{Note:} “If [the] law enforcement agency [that was notified by a health care facility about sexual assault kit evidence] determines that the alleged sexual assault occurred within the jurisdiction of another law enforcement agency and that it does not otherwise have jurisdiction over that assault, that law enforcement agency shall notify the other law enforcement agency of that fact within 14 days after receiving the kit from the health care facility that collected the sexual assault kit evidence.” MCL 752.934(2). “A law enforcement agency that receives notice under [MCL 752.934(2)] shall take

\textsuperscript{20} “Law enforcement agency’ means the local, county, or state law enforcement agency with the primary responsibility for investigation an alleged sexual assault offense case and includes the employees of that agency.” MCL 752.932(e).

\textsuperscript{21} “Sexual assault evidence kit’ means that term as defined in \ldots MCL 333.21527.” MCL 752.932(g).
possession of the sexual assault kit evidence from
the other law enforcement agency within 14 days
after receiving that notice.” MCL 752.934(3).

“The investigating law enforcement agency that takes possession of
any sexual assault kit evidence shall assign a criminal complaint
number to that evidence in the manner required by that agency and
shall submit that evidence to the department[22] or another
accredited laboratory[23] for analysis within 14 days after that law
enforcement agency takes possession of that evidence under [MCL
752.934].” MCL 752.934(4). “Each submission of sexual assault kit
evidence for analysis under the Sexual Assault Kit Evidence Submission
Act shall be accompanied by the criminal complaint
number required under [MCL 752.934(4)].” MCL 752.934(5).

Note: Sexual assault kit evidence that was received
by a law enforcement agency within 30 days before
[March 31, 201524] shall also be submitted to the
department or other accredited laboratory as
provided in [MCL 752.934].” MCL 752.934(4).

MCL 752.934(6) requires “[a]ll sexual assault kit evidence submitted
to the department or an accredited laboratory on or after [March 31,
201525] to be analyzed within 90 days after all of the necessary
evidence is received by the department or other accredited
laboratory, provided that sufficient staffing and resources are
available to do so.” The DNA profiles of all sexual assault kit
evidence analyzed [under MCL 752.934] on or after [March 31,
201526] shall be uploaded only into those databases at the state and
national levels specified by the department.” MCL 752.934(7).

a. Failure to Comply With Requirements of Act

“The failure of a law enforcement agency to take
possession of sexual assault kit evidence as provided in
this act or to submit that evidence to the department or
other accredited laboratory within the time prescribed

[22] “Department’ means the department of state police, including its forensic science division.” MCL
752.932(c).

[23] “Accredited laboratory’ means a DNA laboratory that has received formal recognition that it meets or
exceeds a list of standards, including the FBI director’s quality assurance standards, to perform specific
tests, established by a nonprofit professional association of persons actively involved in forensic science
that is nationally recognized within the forensic community in accordance with the provisions of the
federal DNA identification act, 42 USC 14132, or subsequent laws.” MCL 752.932(a).

[24] Effective date of 2014 PA 227, which enacted the Sexual Assault Kit Evidence Submission Act.

[25] Effective date of 2014 PA 227, which enacted the Sexual Assault Kit Evidence Submission Act.

[26] Effective date of 2014 PA 227, which enacted the Sexual Assault Kit Evidence Submission Act.
under this act does not alter the authority of the law enforcement agency to take possession of that evidence or to submit that evidence to the department or other accredited laboratory under this act and does not alter the authority of the department or other accredited laboratory to accept and analyze the evidence or to upload the DNA profile obtained from that evidence into state and national DNA databases under this act.” MCL 752.934(8).

“The failure to comply with the requirements of this act does not constitute grounds in any criminal proceeding for challenging the validity of a database match or of any database information, and any evidence of that DNA record shall not be excluded by a court on those grounds.” MCL 752.934(9).

b. No Remedy for Accused or Convicted

“A person accused or convicted of committing a crime against the victim has no standing to object to any failure to comply with the requirements of this act, and the failure to comply with the requirements of this act is not grounds for setting aside the conviction or sentence.” MCL 752.934(10).

2. Notification to Victim of Destruction or Disposal of Sexual Assault Kit Evidence

“If a law enforcement agency intends to destroy or otherwise dispose of any sexual assault kit evidence in a sexual assault offense case before the expiration for the limitation period applicable under . . . MCL 767.24, and its destruction does not otherwise conflict with the requirements of . . . MCL 770.16, the law enforcement agency with the primary responsibility for investigating the case shall notify the victim of that intention in writing at least 60 days before the evidence is destroyed or otherwise disposed of.” MCL 752.935.
Chapter 9: Postconviction and Sentencing Matters

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9.1 Chapter Overview

This chapter discusses issues that a court may have to consider after a sex offender has been convicted, including:

- The potential revocation of the sex offender’s bond.
- Selected rights and duties associated with the sentencing hearing.\(^1\)
- The alternatives or required consequences applicable at the offender’s imposition of sentence, such as probation, imprisonment, delayed, deferred, or conditional sentencing, sex offender registration, and restitution.
- A defendant’s post-sentencing rights, such as DNA testing, the admission of bond or release on the offender’s own recognizance pending an appeal, and setting aside convictions.

9.2 Postconviction Bail

Before conviction, a defendant has a right, with certain exceptions, to reasonable bail. See Const 1963, art 1, § 15; Const 1963, art 1, § 16; MCL 765.5; MCL 765.6; MCR 6.106(1)(b).\(^2\) However, after conviction, a defendant is “no longer entitled to the presumption of innocence and release on bail or bond becomes a matter of discretion not of right.” People v Tate (Daniel), 134 Mich App 682, 693 (1984). See also People v Peters (Louis), 449 Mich 515, 519 (1995).

A. Before Sentencing

1. Convictions For Assaultive Crimes

MCL 770.9a(1) requires a court to deny bail to a defendant convicted of and awaiting sentence for an assaultive crime,\(^3\) “unless the trial court finds by clear and convincing evidence that the defendant is not likely to pose a danger to other persons and that [MCL 770.9b]\(^4\) does not apply.”

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1 For a detailed discussion of felony sentencing, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

2 For a discussion of the applicable laws governing bond/bail determinations before conviction, see Chapter 5.

3 Assaultive crimes are defined in MCL 770.9a(3) and are listed in Section 9.2(C).

4 MCL 770.9b prohibits postconviction bail for defendants convicted of sexually assaulting a minor as defined in MCL 770.9b(3)(a)-(b).
2. **Convictions For Sexual Assault of a Minor**

If a defendant was convicted of sexually assaulting a minor and is awaiting sentence, the court must detain the defendant and deny him or her bail. MCL 770.9b(1). A minor is an individual under the age of 16. MCL 770.9b(3)(a).

- **Sexual assault of a minor** for purposes of MCL 770.9b(3)(b)(i) means the commission of any of the following offenses involving an individual who is less than 16 years of age:
  
  - CSC-I against an individual under the age of 16, MCL 750.520b.
  
  - CSC-II against an individual under the age of 16, MCL 750.520c.
  
  - CSC-III involving force or coercion used to accomplish penetration against an individual under the age of 16, MCL 750.520d(1)(b).
  
  - CSC-III involving penetration of an individual under the age of 16 that the defendant knows or has reason to know is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c).
  
  - CSC-III involving penetration of an individual under the age of 16 who is related to the defendant by blood or affinity to the third degree, and penetration occurs under circumstances not otherwise addressed in the CSC Act. MCL 750.520d(1)(d).
  
  - CSC-III involving an individual who is at least age 16 but less than age 18 and is a student at a public or nonpublic school and the defendant is an individual listed in MCL 750.520d(1)(e)(i)-(ii), MCL 750.520d(1)(e).

  **Note:** MCL 770.9b(3)(b)(i) is inconsistent with MCL 750.520d(1)(e). In order for the defendant to be convicted of MCL 750.520d(1)(e), the victim must be at least 16

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5 For information on sexual assault convictions, see Chapter 2.

6 See Section 2.6(J) for information about force or coercion.

7 See Section 2.6(Y) for information about CSC offenses and schools and a description of the individuals covered by the statutory language prohibiting the conduct discussed here.
years of age but less than 18 years of age. However, pursuant to MCL 770.9b, *sexual assault of a minor* requires that the victim be less than 16 years of age.

- **Sexual assault of a minor** for purposes of MCL 770.9b(3)(b)(ii) means:
  - CSC-III involving penetration of a victim who is at least 13 years old but under the age of 16, MCL 750.520d(1)(a), if the defendant is five or more years older than the victim.

- **Sexual assault of a minor** for purposes of MCL 770.9b(3)(b)(iii) means:
  - Assault with intent to commit criminal sexual conduct described in MCL 770.9b(3)(b)(i)-(ii) against an individual under the age of 16, MCL 750.520g.

**B. After Sentencing and Pending Appeal**

1. **Convictions For Assailtive Crimes**

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

- MCL 770.9b does not apply.
- The defendant is unlikely to be a danger to other persons.
- The defendant’s appeal or application presents a substantial question of law or fact.

Pending a prosecution appeal of a conviction reversed by the Court of Appeals, a defendant’s request for bail must be analyzed under the statutes governing postconviction appeals—MCL 770.8, MCL 770.9, and MCL 770.9a(2)—and

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8 See People v Nevers, 462 Mich 913 (2000).
9 MCL 770.9b prohibits postconviction bail for defendants convicted of sexually assaulting a minor as defined in MCL 770.9b(3)(a)-(b).
10 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, for detailed information.
not the statute governing prosecution appeals, MCL 765.7 (appeal from the court of record),\textsuperscript{11} which would permit a defendant to be released on personal recognizance under certain conditions. \textit{People v Sligh}, 431 Mich 673, 681-682 (1988) (the defendant’s motion for release on personal recognizance was denied).\textsuperscript{12}

\textbf{2. Convictions For Sexual Assault of a Minor}

If a defendant has been convicted and sentenced for committing a sexual assault against a minor and files an appeal or application for leave to appeal, the court must detain the defendant and deny bail. MCL 770.9b(2). See also MCL 770.9.

\textbf{C. Definition of Assaultive Crime}

MCL 770.9a(3) defines \textit{assaultive crime} as any of the following crimes:

- Assault against an employee of the Department of Health and Human Services (DHHS) causing serious bodily impairment, MCL 750.81c(3).
- Felonious assault, MCL 750.82.
- Assault with intent to murder, MCL 750.83.
- Assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation, MCL 750.84.
- Assault with intent to maim, MCL 750.86.
- Assault with intent to commit a felony (not otherwise punished), MCL 750.87.
- Assault with intent to rob (unarmed), MCL 750.88.
- Assault with intent to rob (armed), MCL 750.89.

\textsuperscript{11}MCL 765.7 states:
"If an appeal is taken by or on behalf of the people of the state of Michigan from a court of record, the defendant shall be permitted to post bail on his or her own recognizance, pending the prosecution and determination of the appeal, unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required."

\textsuperscript{12}All statutes cited were written before the Court of Appeals was created, so no original version of the statutes specifically embraces the circumstances involved in the \textit{Sligh} case. \textit{Sligh}, 431 Mich at 677. "[A]mendments of the statutes relied on by [the] plaintiff contain slight but sufficient indications of legislative intent to apply to [the defendant’s] situation." \textit{Sligh, supra} at 677.
• Intentional assaultive conduct against a pregnant individual with intent to cause the miscarriage or death of, or great bodily harm to, the embryo or fetus, or where the defendant acted with wanton and willful disregard of the likelihood of miscarriage, death or great bodily harm, and the defendant’s actions caused the death or miscarriage of the embryo or fetus, MCL 750.90a.

• Intentional assaultive conduct against a pregnant individual that causes the pregnant individual to have a miscarriage or stillbirth, or that causes death to the embryo or fetus, MCL 750.90b(a).

• Intentional assaultive conduct against a pregnant individual that causes great bodily harm to the embryo or fetus, MCL 750.90b(b).

• Attempted murder by any means not constituting the crime of assault with intent to murder, MCL 750.91.

• A violation of MCL 750.200 to MCL 750.212a (governing explosives, bombs, and harmful chemical, biological, or radioactive substances and devices).

• First-degree murder, MCL 750.316.

• Second-degree murder, MCL 750.317.

• Manslaughter, MCL 750.321.

• Kidnapping, MCL 750.349.

• Prisoner taking another as hostage, MCL 750.349a.

• Kidnapping child under the age of 14 with the intent to conceal the child from his or her parent or other individual with lawful charge of the child, MCL 750.350.

• Mayhem, MCL 750.397.

• Stalking an individual under the age of 18 when the defendant is five or more years older than the victim, MCL 750.411h(2)(b).14

• Aggravated stalking, MCL 750.411i.

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13 MCL 750.90a applies to conduct specifically described in MCL 750.81 to MCL 750.89.

14 MCL 750.411h(3) is listed in MCL 770.9a(3) as an assaultive crime, but MCL 750.411h(3) describes the penalties for violating MCL 750.411h.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Armed robbery, MCL 750.529.
- Carjacking, MCL 750.529a.
- Unarmed robbery, MCL 750.530.
- A violation of MCL 750.543a to MCL 750.543z (governing terrorist crimes).

D. Appellate and Trial Courts Have Concurrent Jurisdiction to Decide Bail

Trial courts and appellate courts have concurrent jurisdiction to make bail and release decisions in criminal cases pending appeal or leave to appeal. Two statutes, MCL 770.8 (trial courts) and MCL 770.9 (appellate courts), establish concurrent jurisdiction between these courts for a bailable offense that is not an assaultive crime (i.e., not listed in MCL 770.9a, and is not the sexual assault of a minor, as prohibited by MCL 770.9b). MCL 770.9a establishes concurrent jurisdiction for assaultive crimes, which include non-bailable offenses; MCL 770.9a specifically excludes bail for sexually assaulting a minor. See MCL 770.9b.

MCL 770.8 states:

“During the time between the trial court judgment and the decision of the court to which an appeal is taken, the trial judge may admit the defendant to bail, if the offense charged is bailable and if the offense is not an assaultive crime as defined in [MCL 770.9a(3)].”

MCL 770.9 states:

“During the pendency of an appeal or application for leave to appeal, a justice or judge of the court in which the appeal or application is filed may admit the defendant to bail, if the offense charged is bailable and if the offense is not an assaultive crime as defined in [MCL
770.9a(3)] or sexual assault of a minor as described in [MCL 770.9b].”

• **Note:** An application for a federal writ of habeas corpus does not constitute a criminal “appeal” under MCL 770.8, the statute permitting bail during the process of appeal, because federal courts and state courts “constitute separate systems of justice.”¹⁵ *People v Jones (John V)*, 467 Mich 301, 304-305 (2002). A federal habeas proceeding represents “an original proceeding in a federal court challenging the custody of a person who is detained under a judgment of a state court. . . . In short, [28 USC 2254, the statute governing federal habeas proceedings,] does not provide for direct or appellate review of a state court judgment of conviction and sentence.” *Jones (John V)*, supra at 305, citing 28 USC 2254(a)-(h). “Accordingly, we hold that an application for a writ of habeas corpus does not constitute a criminal ‘appeal’ within the meaning of [MCL 770.8]. A court’s authority to grant a bond under [MCL 770.8] is limited to the time during the appellate process, and federal habeas corpus proceedings are not a continuation of that process.” *Jones (John V)*, supra at 307.

Although trial courts and appellate courts have concurrent jurisdiction under statute to decide criminal bail matters, the following Michigan Court Rules delineate the division of authority when deciding bail matters:

• **MCR 6.106(H), Pretrial Release,** states that “[a] party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision.” The reviewing court may stay, vacate, modify, or reverse the release decision, but *only if* it finds the lower court abused its discretion. *Id.*

• **MCR 7.208(F), Authority of Court or Tribunal Appealed From,** states that “[t]he trial court retains authority over stay and bond matters except as the Court of Appeals otherwise orders.”

• **MCR 7.209(D), Bond; Stay of Proceedings,** states that “[e]xcept as otherwise provided by rule or law, on motion filed in a case pending before it, the Court of Appeals may amend the amount of bond set by the trial court, order an additional or different bond and set the amount, or require different or additional sureties.” Additionally, **MCR**

¹⁵ According to Black’s Law Dictionary (6th ed.), an *appeal* is “‘[r]esort to a superior (i.e., appellate) court to review the decision of an inferior (i.e., trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed.’” *Jones (John V)*, 467 Mich at 304-305.
7.209(D) allows the Court of Appeals to “refer a bond or bail matter to the court from which the appeal is taken.” Finally, MCR 7.209(D) permits the Court of Appeals to “grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just.”

9.3 Testing and Counseling for Sexually Transmitted Infection, Hepatitis, and HIV

This section discusses the statutory provisions requiring a court to order a defendant or juvenile to be tested and counseled for sexually transmitted infection, hepatitis, and HIV (human immunodeficiency virus) after he or she has been convicted of or found responsible for a specified sex offense.\(^\text{16}\)

A. Mandatory Testing and Counseling

Except as provided in MCL 333.5129, a defendant who is convicted of, or a juvenile who is found responsible for, committing any of the enumerated offenses set out in MCL 333.5129(4), must be ordered by the court with jurisdiction over the criminal prosecution or juvenile hearing to be examined or tested for sexually transmitted infection, hepatitis B infection, hepatitis C infection, and the presence of HIV or an antibody to HIV.\(^\text{17}\)

The enumerated offenses set out in MCL 333.5129(4) are:

- Accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Soliciting prostitution, MCL 750.448.
- Receiving a person into a place of prostitution, MCL 750.449.

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\(^\text{16}\) For discussion of the statutory requirements pertaining to preconviction or preadjudication testing and counseling, see Section 6.14.

\(^\text{17}\) See SCAO Form MC 234, Order for Counseling and Testing for Disease/Infection.
• Engaging services for the purpose of prostitution, MCL 750.449a.

• Aiding and abetting certain prostitution offenses, MCL 750.450.

• Keeping a house of prostitution, MCL 750.452.

• Procuring a person for a house of prostitution, MCL 750.455.

• CSC-I, MCL 750.520b.

• CSC-II, MCL 750.520c.

• CSC-III, MCL 750.520d.

• CSC-IV, MCL 750.520e.

• Assault with intent to commit criminal sexual conduct, MCL 750.520g.

• Intravenously using a controlled substance, MCL 333.7404.18

• A local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance.19

Additionally, the court with jurisdiction over the defendant or juvenile must also order the defendant or juvenile to receive counseling about sexually transmitted infection,20 hepatitis B and C infections, HIV infection, and acquired immunodeficiency syndrome (AIDS); the counseling must include, at a minimum, information regarding treatment, transmission, and protective measures. MCL 333.5129(4).

B. Confidentiality of Test Results

Except as provided in MCL 333.5129(5)-(7), discussed below, or as otherwise provided by law, “the [required] examinations and tests

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18 A person charged with or convicted of this crime, or a corresponding local ordinance, is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not sexually transmitted infection. MCL 333.5129(9).

19 A person charged with or convicted of intravenous use of a controlled substance is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not sexually transmitted infection. MCL 333.5129(9).

20 “Sexually transmitted infection’ means syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted infections that the department [of community health] may designate and require to be reported under [MCL 333.5111].” MCL 333.5101(1)[h].
shall be confidentially administered by a licensed physician, the department, or a local health department.” MCL 333.5129(4). Also, the test results or the fact that testing was ordered to determine the presence of HIV infection or AIDS are subject to the physician-patient privilege under MCL 600.2157. MCL 333.5131(2).

C. Disclosure of Test Results

MCL 333.5129(5)-(7) provide three limited exceptions to the confidentiality requirements. Under these exceptions, the person or agency conducting the examination must disclose the defendant’s or juvenile’s examination or test results and other medical information (when specified) to the following persons or entities:

- The victim21 or individual with whom the defendant or juvenile allegedly engaged in sexual penetration22 or sexual contact23 or who was exposed to a body fluid during the course of the crime, if the victim or individual consents.24 MCL 333.5129(5). The court is responsible for providing the person or agency conducting the examination with the name, address, and telephone number of the victim or other individual, if consent is provided.25 Id.

- The court or probate court.26 MCL 333.5129(6). The examination or test results, including any other medical information, must be made part of the court record after the defendant is sentenced or an order of disposition is entered for the juvenile. Id. This information is confidential and may only be disclosed to one or more of the following:
  - The defendant or juvenile. MCL 333.5129(6)(a).
  - The local health department. MCL 333.5129(6)(b).

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21 For purposes of MCL 333.5129, “victim” means that term as defined in . . . MCL 750.520a.” MCL 333.5129(12)(c). See Section 2.6(AB) for MCL 750.520a’s definition of the term.

22 For purposes of MCL 333.5129, “sexual penetration” means that term as defined in . . . MCL 750.520a.” MCL 333.5129(12)(b). See Section 2.6(Z) for MCL 750.520a’s definition of the term.

23 For purposes of MCL 333.5129, “sexual contact” means that term as defined in . . . MCL 750.520a.” MCL 333.5129(12)(a). See Section 2.6(AA) for MCL 750.520a’s definition of the term.

24 The victim or individual is entitled to also receive subsequent testing or examination results “if the defendant or [juvenile] receives appropriate follow up testing for the presence of HIV[.]” MCL 333.5129(5).

25 Where the victim or person is a minor or otherwise incapacitated, “the victim’s or person’s parent, guardian, or person in loco parentis may give consent for purposes of [MCL 333.5129(5)].” MCL 333.5129(5).

26 The probate court no longer has jurisdiction juvenile delinquency matters; they are now subject to the jurisdiction of the family division of circuit court. MCL 333.5129 has not been amended to reflect this change.
• The department of community health. MCL 333.5129(6)(c).

• “The victim or other individual required to be informed of the results . . . or, if the victim or other individual is a minor or otherwise incapacitated, to the victim’s or other individual’s parent, guardian, or person in loco parentis.” MCL 333.5129(6)(d).

• The defendant or juvenile, upon written authorization, or to the juvenile’s parent, guardian, or person in loco parentis.” MCL 333.5129(6)(e).

• As otherwise provided by law. MCL 333.5129(6)(f).

• The department of corrections (for defendants), and the individual related to the juvenile or the director of the public or private agency, institution, or facility (for juveniles), if the defendant or juvenile is placed in the custody of any of these entities. MCL 333.5129(7). The court is responsible for transmitting a copy of the examination and test results, including any other medical information, to these departments, agencies, and facilities. Id.

Under MCL 333.5129(7), a person or agency receiving test results or other medical information obtained pursuant to MCL 333.5129(6) or MCL 333.5129(7) involving an individual found to be infected with HIV or AIDS is prohibited from disclosing the test results or other medical information, except as specifically permitted under MCL 333.5131(3)(a)-(b) (if made pursuant to a subpoena, court order, or consent, or if made to protect the health of the individual, to prevent further transmission of HIV, or to diagnose and care for a patient).27 A person who violates MCL 333.5131 is guilty of a misdemeanor punishable by imprisonment for not more than one year, or a maximum fine of $5,000, or both. MCL 333.5131(8). A person who violates MCL 333.5131 “is [also] liable in a civil action for actual damages or $1,000.00, whichever is greater, and costs and reasonable attorney fees.” Id.

D. Positive Test Results Require Referral for Appropriate Medical Care

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a sexually transmitted infection, hepatitis B, hepatitis C, or HIV must be referred by the agency providing the counseling or testing for appropriate medical care. MCL

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27 MCL 333.5129(7) states, in part: “A person or agency that discloses information in compliance with [MCL 333.5129(6) or MCL 333.5129(7)] is not civilly or criminally liable for making the disclosure.”
333.5129(8). The referring agency is not financially responsible for any medical care received by an individual as a result of the referral. *Id.*

E. Ordering Payment of the Costs of Examination and Testing

Upon conviction or juvenile adjudication, the court may “order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test.” MCL 333.5129(10). MCL 333.5129(11) prescribes the process of paying the costs:

“An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] must be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments must be allocated as provided under the probate code, . . . MCL 710.21 to [MCL] 712B.41[;] the code of criminal procedure, . . . MCL 760.1 to [MCL] 777.69[;] and the William Van Regenmorter crime victim’s rights act, . . . MCL 780.751 to [MCL] 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both.”

9.4 Statutory Sentencing Guidelines

A brief discussion on the statutory sentencing guidelines as it relates to criminal sexual conduct offenses is discussed under this section. For a comprehensive discussion on felony sentencing, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

A. Guideline Framework

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). Previously, sentencing courts were generally required to either impose a minimum sentence within the appropriate minimum range as calculated under the sentencing guidelines, MCL 769.34(2), or to articulate “a substantial and compelling reason” to depart from that range, MCL 769.34(3). However, in 2015, the Michigan Supreme Court, applying Alleyne v United States, 570 US 99 (2013), and Apprendi v New Jersey, 530 US 466 (2000), held that “Michigan’s sentencing guidelines . . . [are] constitutionally deficient[. . . [to] the extent [that they] . . . require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range[.].]” People v Lockridge, 498 Mich 358, 364 (2015), rev’g in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)[.]” further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399, citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis supplied). “[T]he legislative sentencing guidelines are advisory in every case, regardless of whether the case actually involves judicial fact-finding.” People v Rice (Anthony), 318 Mich App 688, 692 (2017). See also People v Steanhouse, 500 Mich 453, 466 (2017) (reaffirming “Lockridge’s remedial holding rendering the guidelines advisory in all applications[.]”). Lockridge does not apply retroactively for purposes of collateral review under MCR 6.500 (motion for relief from judgment). People v Barnes, 502 Mich 265, 268 (2018).

B. Offense Variables (OVs) That Address Criminal Sexual Conduct Offenses

Under the statutory sentencing guidelines, offense variables (OVs) 11 and 13 penalize a defendant for criminal sexual penetration

28 A felony is “a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.” MCL 761.1(f).

29 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.

30 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.
when the conduct is involved in the sentencing offense or is part of a pattern of felonious criminal activity. MCL 777.41; MCL 777.43. Although other OVs are also scored under the statutory sentencing guidelines for sexual assault offenses, OV 11 and OV 13 are the only variables that directly address CSC offenses.31

1. **OV 11—Criminal Sexual Penetration**

   **a. Definitions/Scoring**

   To score OV 11, 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).32

<table>
<thead>
<tr>
<th>Points</th>
<th>Criminal Sexual Penetration</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a).</td>
</tr>
<tr>
<td>0</td>
<td>No criminal sexual penetration occurred. MCL 777.41(1)(c).</td>
</tr>
</tbody>
</table>

   • All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted when scoring OV 11. MCL 777.41(2)(a).33

   • Multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OVs 12 or 13.35 MCL 777.41(2)(b). However, if any conduct is scored

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31 For detailed information on the other OVs scored under circumstances involving sexual assault, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

32 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for information specific to OV 11.

33 Except the one penetration on which a CSC-I or CSC-III is based. MCL 777.41(2)(c).

34 OV 12 assesses points for the number of contemporaneous felonious criminal acts occurring within 24 hours of the sentencing offense. No point values in OV 12 expressly address criminal sexual conduct. See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for information specific to OV 12.

35 OV 13 assesses points for a defendant’s pattern of criminal sexual conduct involving a victim under the age of 13. OV 13 is discussed following the discussion of OV 11.
under OV 11, that conduct must not be scored under OV 12 and may only be scored under OV 13 if the conduct is gang-related or related to membership in an organized criminal group. MCL 777.42(2)(c); MCL 777.43(2)(c).

- The one penetration on which a CSC-I or CSC-III offense is based must not be counted for purposes of scoring OV 11. MCL 777.41(2)(c).

b. 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). See also 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, supra at 671-672, the defendant argued he was improperly scored 50 points for two 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. 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 [even when those penetrations themselves are the basis of separate convictions].” McLaughlin, 258 Mich App at 676.

See also People v Cox (Jeffery), 268 Mich App 440, 455-456 (2005) (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), supra 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), supra, the defendant in Johnson (William) was charged with and convicted of CSC for each penetration. Johnson (William), supra at 98. In Johnson (William), however, the penetrations occurred on different dates, and therefore, neither of the penetrations arose from the same sentencing offense. Johnson (William), supra 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). People v Wilkens, 267 Mich App 728, 742-743 (2005). 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. Wilkens, supra at 743.

See also People v Johnson (Todd), 298 Mich App 128, 132 (2012) (OV 11 was properly scored at 50 points where the “record evidence establish[ed] that two sexual penetrations arose out of the penetrations forming the basis of the sentencing offenses”).36

2. OV 13—Continuing Pattern of Criminal Behavior

Although OV 13 assesses points for various patterns of felonious criminal conduct, the pattern for which 50 points is scored is the only situation addressed in OV 13 that directly addresses criminal sexual conduct. MCL 777.43(1)(a). OV 13 assesses points when a defendant’s sentencing offense is part of a pattern of felonious activity involving three or more sexual penetrations against an individual under the age of 13.37 Id.

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36 In Johnson (Todd), 298 Mich App at 132, “[the victim] testified that she started having sex with [the] defendant when she was 13 years old and that she has been involved with [the] defendant sexually for three years. The first time sexual relations happened between [the victim] and [the] defendant was at [the] defendant’s home. [The victim] also had sex with [the] defendant at her home. However, [the victim] did not recall how many times she had sex with [the] defendant. [The victim] stated that [the] [d]efendant put his penis inside her vagina more than one time, beginning when she was 13 years old. [The] [d]efendant performed cunnilingus on [the victim] more than one time, beginning when [the victim] was 13 years old. [The victim] performed fellatio on [the] defendant more than once. In addition, [the victim’s] statements in [the] defendant’s presentence investigation report indicated that she and [the] defendant engaged in vaginal-penile intercourse almost every time they were together and that they also performed fellatio and cunnilingus on each other during these encounters.”

37 The information about OV 13 appearing in this section is limited to the information relevant to criminal sexual conduct. See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for a complete discussion of the circumstances involved in scoring OV 13, the requirements for scoring points under the circumstances described, and the points prescribed for each circumstance.
a. **Definitions and Scoring**

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 13—Continuing Pattern of Criminal Behavior</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>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).</td>
</tr>
</tbody>
</table>

- To score OV 13, 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).

- 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.

- Score 50 points only if the sentencing offense is first-degree criminal sexual conduct (and the other requirements in MCL 777.43(1)(a) are satisfied). MCL 777.43(2)(d).

b. **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.” People v Bemer, 286 Mich App 26, 28 (2009). That is, “when scoring OV 13, the trial court cannot consider any conduct that was or should have been scored under [OV 12].” Bemer, supra at 35.38

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.”

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

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38 The rationale behind emphasizing that OVs 11, 12, and 13 must be scored in order is to prevent a scorer from not scoring certain circumstances under one of the OVs where a subsequent OV would result in a higher point allocation if the conduct was carried over to that OV.
criminal conviction to score 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.”’” Harverson, supra at 180, quoting People v Luckett, 485 Mich 1076, 1076-1077 (2010).

C. Second or Subsequent CSC Convictions

MCL 750.520f provides the penalty for offenders convicted of a second or subsequent violation of specific criminal sexual conduct offenses. 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).

“Although MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it.” People v Wilcox (Larry II), 486 Mich 60, 69 (2010). Therefore, “the ‘mandatory minimum’ sentence in MCL 750.520f(1) is a flat 5-year term.” Wilcox (Larry II), supra at 62. “[T]he legislative sentencing guidelines apply to minimum sentences in excess of 5 years that are imposed under MCL 750.520f[,]” therefore, a sentence imposed in excess of the five-year minimum sentence must also be viewed in the context of the statutory sentencing guidelines. Wilcox (Larry II), supra at 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 required the trial court to state substantial and compelling reasons to justify the departure. Wilcox (Larry II), supra at 62-63.

39 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 the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3 for additional discussion of Lockridge.
Note: CSC-I, CSC-II, and CSC-III are always 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(f). Thus, CSC-IV may be used as a prior felony conviction to enhance an offender’s sentence under the general habitual offender provisions (MCL 769.10, MCL 769.11, and MCL 769.12).

Because the general 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 Eason, 435 Mich 228, 249 n 35 (1990), citing People v Bailey (Barry), 103 Mich App 619, 627-628 (1981).

9.5 The Sentencing Hearing

This section discusses issues a trial court must consider when sentencing a sex offender.

A defendant’s sentence must be based on accurate information prepared in advance of the hearing so that the trial court can fashion an appropriate sentence; a defendant’s sentence must be imposed “within a reasonably prompt time” after the defendant’s conviction by plea or verdict unless the court has delayed the defendant’s sentencing in a manner provided by law. MCR 6.425(E)(1).

A defendant’s constitutional right to due process is implicated if his or her sentence is based on inaccurate information. US Const, Am XIV; Const 1963, art 1, § 17; Townsend v Burke, 334 US 736, 740-741 (1948);

40 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, for a comprehensive discussion of habitual offender statutes.

41 A comprehensive discussion of sentencing is beyond the scope of this benchbook. For a detailed discussion of sentencing hearings and related topics, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2.

42 See Section 9.14 for information on delayed sentencing.
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 requires 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). 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. Waclawski, supra at 690.

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. 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). However, “a criminal defendant [does not have] an absolute right to be represented at sentencing by the lawyer who represented him at trial.” People v Evans, 156 Mich App 68, 70 (1986).

A. Review of the Presentence Investigation Report (PSIR)

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) requires that the court provide copies of the defendant’s PSIR to the prosecutor, the defendant’s lawyer, or the defendant if he or she is not represented by a lawyer, “at a reasonable time, but not less than two business days, before the day of sentencing.”
MCR 6.425(B) permits

“[t]he court [to] 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 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.”45

1. Objections to Accuracy or Content of the Presentence Investigation Report (PSIR)

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).46 MCL 771.14(6); MCR 6.425(E)(1)(b). Due process requires that a defendant be given an opportunity at sentencing to challenge the accuracy of the information on which his or her sentence will be based. 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).

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).47

45 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.

46 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for more information about specific objections to the contents of a PSIR.
2. **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). 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 sentencing guidelines, the trial court is obligated to address and resolve the challenge. MCR 6.425(E)(1)(b).48

**B. Sentencing Court’s Duty to Remedy Errors**


MCR 6.425(E)(2) sets out the procedure for resolving a PSIR challenge:

“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

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47 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. For a detailed discussion of the process of resolving challenges to the information in a defendant’s PSIR, see the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

48 See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for more information about challenging the constitutional validity of prior convictions.

49 See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for more information about a sentencing court’s duties to remedy errors in an offender’s PSIR.
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 [the] defendant’s lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.”

9.6 Defendant’s Right to Allocution

“Allocution’ generally refers to ‘[a]n unsworn statement from a convicted defendant to the sentencing judge . . . 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).50 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).

A juvenile’s right to allocution. A juvenile defendant who is convicted in a designated case proceeding must be given an opportunity to allocate at his or her sentencing hearing before the court determines whether to impose a juvenile disposition, adult sentence, or blended sentence. Petty, 469 Mich at 121-122. In Petty, supra 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 allocate before the court imposed an adult sentence. The Court explained: “To deny a juvenile a meaningful opportunity to allocate 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).

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50 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for more information about allocution.
9.7 **Crime Victim’s Statement**

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 or disposition hearing. MCL 780.765 (felony convictions); MCL 780.793(1) (juvenile offenses); MCL 780.825 (serious misdemeanor convictions); 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 or disposition 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 (felony convictions); MCL 780.793(1) (juvenile offenses); MCL 780.825 (serious misdemeanor convictions). If the crime victim was “less than 18 years of age at the time of the commission of the crime[,]” the crime victim’s parent, guardian, or custodian may also make an impact statement as long as the parent, guardian, or custodian is neither the defendant nor incarcerated. MCL 780.752(1)(m)(iii) (felony convictions); MCL 780.781(1)(j)(iii) (juvenile offenses); MCL 780.811(1)(h)(iii) (serious misdemeanor convictions).

Under the CVRA, the defendant or juvenile offender is required to be physically present in the courtroom when a victim makes an oral impact statement. MCL 780.765(2) (felony convictions); MCL 780.793(3) (juvenile offenses); MCL 780.825(2) (serious misdemeanor convictions). Specifically, “[u]nless the court has determined, in its discretion, that the [defendant or juvenile] is behaving in a disruptive manner or presents a threat to the safety of any individuals present in the courtroom, the [defendant or juvenile] must be physically present in the courtroom at the time a victim makes an oral impact statement[;]” “[i]n making its determination, . . . the court may consider any relevant statement provided by the victim regarding the [defendant or juvenile] being physically present during that victim’s oral impact statement.” MCL 780.765(2); MCL 780.793(3); MCL 780.825(2).

For purposes of the crime victim’s written and oral impact statements, *victim* is broadly defined in the William Van Regenmorter Crime Victim’s Rights Act (CVRA) as “[a]n individual[] who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a

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51 See the Michigan Judicial Institute’s *Crime Victim Rights Benchbook* for a comprehensive discussion of crime victim statements, and a crime victim’s rights before, during, and after a defendant’s prosecution and conviction.

52 See MCL 780.763(3)(a)-(d) (felony convictions), MCL 780.791(3)(a)-(d) (juvenile offenses), and MCL 780.823(3)(a)-(d) (serious misdemeanor convictions) for detailed information about what content may be included in a crime victim’s statement. However, the statutes do not limit the content of a victim’s statement to the subject matter described.
crime[,]” MCL 780.752(1)(m)(i) (felony convictions). See also MCL 780.781(1)(j)(i) (juvenile offenses) and MCL 780.811(1)(h)(i) (serious misdemeanor convictions), which contain substantially similar language. If the crime victim is deceased, MCL 780.752(1)(m)(ii)(A)-(F) (felony convictions), MCL 780.781(1)(j)(ii)(A)-(F) (juvenile offenses), and MCL 780.811(1)(h)(ii)(A)-(F) (serious misdemeanor convictions) provide a list, in descending order of priority, of individuals who may give a crime victim statement on behalf of the deceased victim.

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. People v Fleming (Franklin), 428 Mich 408, 418-419 (1987).

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 Waclawski, 286 Mich App 634, 691-692 (2009) (trial court properly allowed child victims’ mothers to prepare victim impact statements and properly included references to those statements in defendant’s PSIR).

9.8 Restitution

A. The Victim’s Constitutional Right to Restitution

A crime victim’s right to restitution53 is preserved in Michigan’s Constitution. Const 1963, art 1, §24.

B. Statutory Authority for Ordering Restitution

Restitution is generally authorized under numerous statutes, some of which are included in the William Van Regenmorter Crime Victim’s Rights Act (CVRA), MCL 780.751 et seq.:
• **MCL 780.766–MCL 780.767** (restitution under the felony article of the CVRA).

• **MCL 780.794–MCL 780.795** (restitution under the juvenile article of the CVRA).

• **MCL 780.826** (restitution under the misdemeanor article of the CVRA).

Additionally, the following provisions of the Juvenile Code, the Code of Criminal Procedure, and the Department of Corrections Code deal generally with restitution:

• **MCL 712A.30–MCL 712A.31** (restitution in juvenile delinquency cases under the Juvenile Code);

• **MCL 769.1a** (restitution under the Code of Criminal Procedure);

• **MCL 771.3(1)(e)** (restitution as a condition of probation ordered for criminal defendants); and

• **MCL 791.236(5)** (restitution as a condition of parole where restitution was previously ordered).

### C. Payment for Sexual Assault Evidence Collection Kits

A health care provider may not submit a bill for any portion of the costs of a sexual assault medical forensic examination, including the administration of a sexual assault evidence kit, to the victim of the sexual assault, “including any insurance deductible or co-pay, denial of claim by an insurer, or any other out-of-pocket expense.” MCL 18.355a(2).

A health care provider seeking payment for a sexual assault medical forensic examination must advise the victim, orally and in writing, that a claim will not be submitted to his or her insurance carrier without express written consent, and that he or she may decline consent if he or she believes that submitting a claim would substantially interfere with his or her personal privacy or safety. MCL 18.355a(3).

If reimbursement cannot be obtained from the victim’s insurance or if insurance is not available, a health care provider may seek payment from the Crime Victim Services Commission (CVSC) and/or another entity. MCL 18.355a(4).

A health care provider that is reimbursed by a victim’s insurance carrier or another entity may not submit any portion of the claim
9.9 **Sex Offender Registration Act (SORA)**

For a comprehensive discussion of the SORA and its requirements, see Chapter 10.

9.10 **Concurrent and Consecutive Sentences**

Sentences run concurrently unless otherwise indicated; consecutive sentences may not be imposed unless expressly authorized by law. *People v Gonzalez*, 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).

A. **Discretionary Consecutive Sentence for 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 other term of imprisonment the defendant is serving. MCL 750.422a(2).

B. **Discretionary Consecutive Sentence for CSC-I Conviction**

A trial court may make any sentence imposed for a conviction of CSC-I consecutive to a sentence imposed “for any other criminal offense arising from the same transaction” from which the CSC-I

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54 See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for more information about concurrent and consecutive sentencing.
offense arose. MCL 750.520b(3). Although the decision to impose consecutive sentences under MCL 750.520b(3) is within the trial court’s discretion, “an 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, 723, 725 (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 in ordering that [the defendant’s] mandatory minimum sentence [for one count of CSC-I] be served consecutive 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[,]’”.

9.11 Probation

A. 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 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). MCL 771.2a(7). Subject to the exceptions in MCL 771.2a(8)-(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);

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55 For a comprehensive discussion of probation, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

56 Listed offenses are defined in MCL 28.722 of the SORA. See Chapter 10 for a comprehensive discussion of listed offenses and the SORA.
• 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.”

B. 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:

“(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.[57]

(b) The individual was convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)], 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.”

C. Exceptions From School Safety Zone Prohibitions

There are exceptions to the mandatory probation conditions concerning school safety zones. Under the circumstances described below, the prohibitions required by 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), under any of the following circumstances described in MCL 771.2a(8):

“(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[58] 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 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, the court shall order the individual not to initiate or maintain contact with any minors within that student safety zone.

[58] For purposes of MCL 771.2a, a minor is an individual under the age of 18. MCL 771.2a(13)(c).
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, 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. However, for good cause shown and as specified in the probation order, a court is authorized to allow the probationer contact with any minors named in the probation order. MCL 771.2a(10).

If an individual on probation under MCL 771.2a(6) only intermittently or sporadically enters a student safety zone for work purposes, the court must 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 must 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 probationer contact with any minors named in the probation order. Id.
D. 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; if the court determines it is appropriate, the defendant must 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. MCL 771.2a(2). MCL 750.411i(4) 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;

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59 MCL 771.2(1) states, in part: “Except as provided in [MCL 771.2a] and [MCL 768.36], if the defendant is convicted of a felony, the probation period shall not exceed 5 years.”
• be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; if the court determines it is appropriate, the defendant must receive the indicated counseling at the defendant’s own expense. MCL 750.411i(4)(a)-(c).

E. Reduction in Probation Term

“Except as provided in [MCL 771.2(4)], [MCL 771.2a], and [MCL 768.36], after the defendant has completed 1/2 of the original felony probation period of his or her felony probation, the department or probation department may notify the sentencing court. If, after a hearing to review the case and the defendant’s conduct while on probation, the court determines that the defendant’s behavior warrants a reduction in the probationary term, the court may reduce that term by 100% or less. The victim must be notified of the date and time of the hearing and be given an opportunity to be heard. The court shall consider the impact on the victim and repayment of outstanding restitution caused by reducing the defendant’s probationary term. Not less than 28 days before reducing or terminating a period of probation or conducting a review under [MCL 771.2], the court shall notify the prosecuting attorney, the defendant or, if the defendant has an attorney, the defendant’s attorney. However, this subsection does not apply to a defendant who is subject to a mandatory probation term.” MCL 771.2(2). “If the court reduces a defendant’s probationary term under [MCL 771.2(2)], the period by which that term was reduced must be reported to the department of corrections.” MCL 771.2(5).

MCL 771.2(4) prohibits certain defendants from benefiting from enhanced probation. “A defendant who was convicted of 1 or more of the following crimes is not eligible for reduced probation under [MCL 771.2(2)]:

(A) A violation of [MCL 750.81(5) (domestic assault and/or battery or assault and/or battery on a known pregnant individual with two or more previous convictions)].

(B) A violation of . . . MCL 750.84 (assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation)].

(C) A violation of . . . MCL 750.520c (CSC-III)].

(D) A violation of . . . MCL 750.520e (CSC-IV)].” MCL 771.2(4).
F. Medical Probation and Compassionate Release

Medical Probation. “Subject to [MCL 771.3g(4)]\(^{60}\), a court may enter an order of probation placing a prisoner on medical probation under the charge and supervision of a probation officer if the court finds that the prisoner requires acute long-term medical treatment or services, or that the prisoner is physically or mentally incapacitated with a medical condition that renders the prisoner unable to perform activities of basic daily living and the prisoner requires 24-hour care.” MCL 771.3g(3).

Compassionate Release. “Subject to [MCL 771.3h(3)]\(^{61}\), a court may grant compassionate release to a prisoner if the court finds that the prisoner has a life expectancy of not more than 6 months and that the release of the prisoner would not reasonably pose a threat to public safety or the prisoner. If a court grants a prisoner compassionate release, the court shall enter an amended judgment of sentence specifying that the prisoner is released from the term of imprisonment imposed for the offense for which the prisoner was originally convicted.” MCL 771.3h(2).

For purposes of MCL 771.3g and MCL 771.3h, prisoner is “an individual committed or sentenced to imprisonment under [MCL 769.28].” MCL 771.3g(7)(c).

For a detailed discussion of medical probation and compassionate release, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Section 10.1.

9.12 Youthful Trainee Act—Deferred Adjudication

“The [Holmes Youthful Trainee Act (HYTA), MCL 762.11 et seq.,\(^{62}\) provides a mechanism for individuals who commit certain crimes between the time of their seventeenth and [twenty-fourth\(^{63}\) birthdays[] to be excused from having a criminal record.” People v Rahilly, 247 Mich App 108, 113 (2001). Specifically, MCL 762.11(1) states that in certain circumstances “if an individual pleads guilty to a criminal offense, committed on or after the individual’s seventeenth birthday but before

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\(^{60}\)MCL 771.3g(4) lists preconditions that must be satisfied before a prisoner can be placed on medical probation.

\(^{61}\)MCL 771.3h(3) lists preconditions that must be satisfied before a prisoner can be placed on compassionate release.

\(^{62}\)See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for more information about Youthful Trainee Status.

\(^{63}\)Effective August 18, 2015, 2015 PA 31 amended MCL 762.11(1) to raise the age limit for HYTA eligibility to allow a court to grant youthful trainee status to a person who committed an offense “before his or her twenty-fourth birthday,” rather than his or her twenty-first birthday (emphasis supplied).
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. If 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.”


MCL 762.11(4)-(5) and MCL 762.13 set forth permissible terms and conditions available under HYTA. For a detailed discussion of HYTA, including the terms and conditions available, see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3.

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:

- a felony punishable by life imprisonment. MCL 762.11(2)(a).
- a major controlled substance offense. MCL 762.11(2)(b).
- a traffic offense.64 MCL 762.11(2)(c).
- a violation, attempted violation, or conspiracy to violate MCL 750.520b (CSC-I); MCL 750.520c (CSC-II); MCL 750.520d (CSC-III, other than MCL 750.520d(1)(a));65 or MCL 750.520e (CSC-IV, other than MCL 750.520e(1)(a)).66 MCL 762.11(2)(d).
- a violation, attempted violation, or conspiracy to violate MCL 750.520g, assault with the intent to commit CSC-I, CSC-II, CSC-III (other than MCL 750.520d(1)(a)),67 or CSC-IV (other than MCL 750.520e(1)(a)).68 MCL 762.11(2)(e).

64 MCL 762.11(6)(b) defines traffic offense as “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.”

65 MCL 750.520d(1)(a) involves a victim at least age 13 but less than age 16.

66 MCL 750.520e(1)(a) involves a victim at least age 13 but less than age 16 and an actor that is five or more years older than the victim.

67 MCL 750.520d(1)(a) involves a victim at least age 13 but less than age 16.

68 MCL 750.520e(1)(a) involves a victim at least age 13 but less than age 16 and an actor that is five or more years older than the victim.
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\(^69\) for which registration is required under the Sex Offenders Registration Act (SORA) (MCL 28.721 to MCL 28.736). MCL 762.11(3)(a).

- “[i]f the individual is charged with a listed offense for which registration is required under the [SORA], . . . 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 in MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), MCL 750.520d (CSC-III, other than MCL 750.520(d)(1)(a) or MCL 750.520(d)(1)(f)), or MCL 750.520e (CSC-IV, other than MCL 750.520(e)(1)(a) or MCL 750.520(e)(1)(g)). MCL 762.11(3)(c).

### 9.13 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 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).\(^70\) If the person defaults on payment, the court may impose a sentence otherwise authorized by law. MCL 769.3(1).

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 a sentence otherwise authorized by law. MCL 769.3(2).

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\(^69\) Listed offense is defined in MCL 28.722. MCL762.11(6)(a).

\(^70\) see the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for more information about conditional sentences.
9.14 Delayed Sentencing

Delayed sentencing refers to the process by which a court may elect to delay imposing sentence on a defendant who is eligible for a sentence of probation 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). During the period of delay, the court may require the defendant to comply with any applicable terms and conditions associated with a sentence of probation. See, generally, People v Saylor (Barry), 88 Mich App 270, 274-275 (1979), and MCL 771.1(2).

9.15 Day Parole From Jail Limited for Most Sex Offenders

“As except as otherwise provided in [MCL 801.251(2)] and subject to [MCL 801.251a],” MCL 801.251 (day parole statute) generally permits the release of a person from jail during “necessary and reasonable hours” for work, school, or medical, mental health, psychological, and substance abuse treatment.

MCL 801.251(3) imposes limitations on release privileges for persons sentenced or committed to jail for specific CSC or CSC-related crimes. Under MCL 801.251(3), offenders incarcerated for the following crimes are only eligible for release on day parole for the purpose of medical, mental health, psychological, or substance abuse treatment:

- Child sexually abusive activity, MCL 750.145c.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Murder in connection with sexual misconduct.

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71 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for more information about delayed sentencing.

72 “As used in this act, ‘jail’ means a facility that is operated by a county for the detention of persons charged with, or convicted of, criminal offenses or ordinance violations, or persons found guilty of civil or criminal contempt, for not more than 1 year.” MCL 801.251(4).

73 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 or committed; the court has 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.
• An attempt to commit any of the above crimes.

MCL 801.251a(1) requires the court to take additional steps before releasing a convicted felon from jail under MCL 801.251(1) for the purpose of attending work or school:

“Before an individual convicted of a felony is released from jail under [MCL 801.251(1)] to attend work or school, the court, at the time of sentencing, shall order the department of corrections to verify that the individual is currently employed or currently enrolled in school,\(^7\) as applicable. However, the requirement for verification of employment or school enrollment by the department of corrections does not apply if the county sheriff has provided or will provide that verification. If required, the department of corrections shall provide the verification to the court within 7 days after the order is issued. The court shall not order an individual to be released to attend work or school unless the county sheriff or the department has determined that the individual is currently employed or currently enrolled in school, as applicable. The order of release shall provide that release is contingent at all times upon the approval of the county sheriff.”

### 9.16 Sex Offenders Ineligible for Custodial Incarceration Outside Prison and Jail

MCL 769.2a(1) expressly excludes certain sex offenders from residence in community placements or work camp programs. See *Jansson v Dep’t of Corrections*, 147 Mich App 774, 776-780 (1985). Under MCL 769.2a(1)(a)-(d), a person sentenced to imprisonment (or serving a sentence of imprisonment) for any of the following crimes is not eligible for custodial incarceration outside a state correctional facility\(^75\) or county jail:

- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.

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\(^7\) For purposes of MCL 801.251a, school means “any of the following: (i) [a] school of secondary education; (ii) [a] community college, college, or university; (iii) [a] state-licensed technical or vocational school or program; or (iv) [a] program that prepares the person for the general education development (GED) test.”

\(^75\) “As used in [MCL 769.2a], ‘state correctional facility’ means a facility or institution which is maintained and operated, or contracted for, by the department of corrections, other than a community corrections center, halfway house, resident home, prison farm housing unit, camp, the Cassidy lake technical school, or the Michigan reformatory trustee division, located at Ionia.” MCL 769.2a(2).
• CSC-IV, MCL 750.520e.
• Assault with intent to commit criminal sexual conduct, MCL 750.520g.
• Carnal knowledge constituting a felony, former MCL 750.520 (repealed by 1974 PA 266, effective November 1, 1974).
• Murder in connection with sexual misconduct.
• An attempt to commit any of the above crimes.

### 9.17 Sex Offender Treatment Programs and Management

A detailed discussion of sex offender treatment programs is beyond the scope of this benchbook. See the following resources for information about sex offender treatment:

- **National Sex Offender Resources:** [www.sexoffenderresource.com/national](http://www.sexoffenderresource.com/national)
- **Sex Offender Management:** [http://www.michigan.gov/corrections/0,4551,7-119-1435-187158--,00.html](http://www.michigan.gov/corrections/0,4551,7-119-1435-187158--,00.html)
- **Sex offender treatment, supervision high priority for MDOC:** [www.michigan.gov/corrections/0,1607,7-119--56494--,00.html](http://www.michigan.gov/corrections/0,1607,7-119--56494--,00.html)

### 9.18 Postconviction Request for DNA Testing

This section contains a brief discussion on postconviction requests for DNA testing. For a detailed discussion of this topic, see the Michigan Judicial Institute’s *Evidence Benchbook*, Chapter 4.

A defendant does not have a constitutional due process right to postconviction access to the State’s evidence for DNA testing. *Dist Attorney’s Office for the Third Judicial Dist et al v Osborne*, 557 US 52, 55-56, 73-74 (2009).

A defendant serving a prison sentence for a felony,\(^{76}\) if convicted of that felony at trial and *before* January 8, 2001, may petition the circuit court to

\(^{76}\text{A felony is defined as an offense expressly designated as a felony, or one where the offender is subject to imprisonment for more than one year. MCL 761.1(f).}\)
order two kinds of relief: (1) DNA testing of biological material that was identified during the investigation that led to the defendant’s conviction; and (2) a new trial based on the results of the DNA testing. MCL 770.16(1). See People v Poole, 497 Mich 1022, 1022 (2015) (finding that “no provision set forth in MCL 770.16 prohibits the issuance of an order granting DNA testing of previously tested biological material[”]).

Under certain circumstances, a defendant convicted of a felony at trial on or after January 8, 2001, may also petition the court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that DNA testing. To petition the court, the defendant must show (1) that DNA testing was done in the case, (2) that the results were inconclusive, and (3) that current DNA technology is likely to yield conclusive results. MCL 770.16(1)(a)-(c).

If the victim’s name is known, the prosecutor must send written notice of the defendant’s DNA petition by first-class mail to the victim’s last known address. MCL 770.16(10). Upon a victim’s request, the prosecutor must also give the victim notice of the time and place of any hearing on the petition. Further, the prosecutor must inform the victim of the court’s grant or denial of a new trial based on the petition.

9.19 Parole and Electronic Monitoring

An offender convicted and sentenced for violating MCL 750.520b(2)(b) is eligible only for a grant of parole for life. MCL 791.242(3).

An offender convicted of CSC-I under MCL 750.520b, or an offender 17 years of age or older convicted of CSC-II under MCL 750.520c against a victim who is less than 13 years old, remains subject to mandatory lifetime electronic monitoring pursuant to MCL 750.520n, even if the offender is granted parole for life under MCL 791.242(3). MCL 750.520b(2)(d); MCL 750.520c(2)(b); MCL 750.520n(1).

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77 See MCL 770.16(4)(b)(ii), which specifically requires the trial court to order DNA testing where, among other requirements set out under MCL 770.16(4)(a)-(b), the defendant established that “[t]he identified biological material described in [MCL 770.16(1)] was not previously subjected to DNA testing, or if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.” (Emphasis added.)

78 MCL 750.520b(2)(b) is a CSC-I offense “[f]or a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age[.]” See Section 2.3(A) for more information.

79 See People v Brantley, 296 Mich App 546, 556-557 (2012) (holding that any defendant convicted of CSC-I under MCL 750.520b must be sentenced to lifetime electronic monitoring). For additional discussion of lifetime electronic monitoring sentences for CSC-I convictions, see Section 2.3(A)(12).

80 For additional discussion of lifetime electronic monitoring in CSC-II convictions, see Section 2.4(A)(10).

81 MCL 791.285(3) defines electronic monitoring as “a device by which, through global positioning system satellite or other means, an individual’s movement and location are tracked and recorded.”
Note: “[L]ifetime electronic monitoring applies only to persons who have been released on parole, from prison, 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).

An offender aged 18 or older convicted of CSC-I against an individual under the age of 13 when the offender has a previous conviction involving a victim under the age of 13 for CSC-I, CSC-II, CSC-III, CSC-IV, or assault with intent to commit CSC against a victim under the age of 13 must be sentenced to life imprisonment without the possibility of parole. MCL 791.234(6)(e); MCL 750.520b(2)(c).

An offender convicted of “actual forcible rape” must be granted no less than two years of parole, unless the maximum time remaining on the offender’s sentence of imprisonment is less than two years. MCL 791.242(2).

Where an offender is not already subject to lifetime electronic monitoring pursuant to MCL 750.520n (victim under the age of 13), 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).

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82 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 mandatory 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.” Cole (David), supra at 337.

83 Or a violation of federal law, or the law of another state or political subdivision, that substantially corresponds to a violation listed in MCL 750.520b(2)(c).

84 Note that MCL 750.520b(2)(c), which previously prescribed a mandatory sentence of life imprisonment without the possibility of parole for certain repeat CSC offenders 17 years of age or older against a victim less than 13 years of age, has been amended by 2014 PA 23, effective March 4, 2014, to apply only to offenders 18 years of age or older. A mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon a nonhomicide offender who was under the age of 18 at the time of the sentencing offense. Graham v Florida, 560 US 48, 75 (2010). For additional discussion of Graham v Florida, 560 US 48 (2010), see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 19.
9.20 Additional Requirements for Student Offenders of Criminal Sexual Conduct

“As part of its adjudication order, order of disposition, judgment of sentence, or order of probation a court shall order that an individual who is convicted of or, a juvenile who is adjudicated for, a violation of [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] and who is a student at a school in this state is prohibited from doing either of the following:

(a) Attending the same school building that is attended by the victim of the violation.

(b) Utilizing a school bus for transportation to and from any school if the individual or juvenile will have contact with the victim during use of the school bus.” MCL 750.520o(1).

MCL 750.520o(2)(a) defines school as “a public school as that term is defined in...the revised school code, 1976 PA 451, MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12.”

MCL 750.520o(2)(b) defines school bus as “every motor vehicle, except station wagons, with a manufacturers’ rated seating capacity of 16 or more passengers, including the driver, owned by a public, private, or governmental agency and operated for the transportation of children to or from school, or privately owned and operated for compensation for the transportation of children to and from school.”

9.21 Setting Aside (Expunging) Convictions

This section addresses the requirements and procedures for setting aside or expunging convictions under MCL 780.621 et seq. Setting aside and expunging juvenile adjudications and records is governed by MCL 712A.18e and MCR 3.925(E). For more information on these matters, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 21.

A. Offenses That May Be Set Aside

A person may apply to have a conviction set aside under MCL 780.621 in the following circumstances:

“(1) Except as provided in this section, a person who is convicted of not more than 1 offense may file an application[85] with the convicting court for the entry of

[85] See SCAO Form MC 227, Application to Set Aside Conviction.
an order setting aside 1 or more convictions as follows:[86]

(a) A person who is convicted of not more than 1 felony offense[87] and not more than 2 misdemeanor offenses[88] may petition the convicting court to set aside the felony offense.

(b) Except as provided in subdivision (c), 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.

(c) A person who is convicted of a violation or an attempted violation of . . . MCL 750.520e,[89] before January 12, 2015[,] may petition the convicting court to set aside the conviction if the individual has not been convicted of another offense other than not more than 2 minor offenses. As used in this subdivision, ‘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.

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[86] “A conviction that was deferred and dismissed under any of the following, whether a misdemeanor or a felony, shall be considered a misdemeanor conviction under [MCL 780.621(1)] for purposes of determining whether a person is eligible to have any conviction set aside under this act: (a) . . . MCL 436.1703[]; (b) [MCL 600.1070(1)(b)(i)] or [MCL 600.1209]; (c) . . . MCL 762.13 [or MCL 769.4a]; (d) . . . MCL 333.7411[]; (e) . . . MCL 750.350a [or MCL 750.430]; (f) Any other law or laws of this state or of a political subdivision of this state similar in nature and applicability to those listed in this subsection that provide for the deferral and dismissal of a felony or misdemeanor charge.” MCL 780.621(2).

[87] For purposes of MCL 780.621, “[f]elony’ means either of the following, as applicable: (i) [f]or 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; or (ii) [f]or 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).
(4) A person who is convicted of a violation of . . . MCL 750.448, [MCL] 750.449, [or MCL] 750.450, or a local ordinance substantially corresponding to . . . MCL 750.448, [MCL] 750.449, [or MCL] 750.450, 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 of a human trafficking violation.”

Except as provided in MCL 780.621, a person who has had a conviction successfully set aside may not have a subsequent conviction set aside. MCL 780.624.

**B. Offenses That May Not Be Set Aside**

MCL 780.621(3) provides that a person must not apply to have set aside, and a court must not set aside, any of the following convictions:

- A felony for which the maximum punishment is life imprisonment. MCL 780.621(3)(a). Felonies listed in Chapter 2 and Chapter 3 of this benchbook for which a maximum sentence of life imprisonment may be imposed include:

  - CSC-I, MCL 750.520b. See Section 2.3(A).

  - Human trafficking crimes, MCL 750.462b, MCL 750.462c, or MCL 750.462d, if violation involves kidnapping (or attempted kidnapping), CSC-I (or attempted CSC-I), or the death of an individual (or an attempt to kill an individual), MCL 750.462f(1)(d). See Section 3.18.

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88 For purposes of MCL 780.621, “'[m]isdemeanor’ means a violation of any of the following: (i) [a] penal law of this state, another state, an Indian tribe, or the United States that is not a felony[,] (ii) [a]n 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).

89 For a discussion of MCL 750.520e (CSC-IV), see Section 2.4(B).

90 For purposes of MCL 780.621, “'[v]ictim’ means that term as defined in . . . the William Van Regenmorter crime victim’s rights act, . . . MCL 780.752, [MCL] 780.781, and [MCL] 780.811.” MCL 780.621(16)(i).

91 For purposes of MCL 780.621, “'[h]uman trafficking violation’ means a violation of . . . MCL 750.462a to [MCL] 750.462h.” MCL 780.621(16)(d).

92 Victims of human trafficking may apply to have more than one conviction of certain prostitution offenses set aside. See MCL 780.621(7). See Section 3.17 for more information.
• Inducing a minor to commit a felony if the felony induced is punishable by life imprisonment, MCL 750.157c. See Section 3.21.

• Kidnapping, MCL 750.349. See Section 3.23.

• Sexual delinquency, MCL 767.61. See Section 3.31.

• Sexually delinquent person convicted of a crime against nature, MCL 750.158. See Section 3.10.

• Sexually delinquent person convicted of indecent exposure, MCL 750.335a. See Section 3.19.

• Sexually delinquent person convicted of gross indecency, MCL 750.338, MCL 750.338a, and MCL 750.338b. See Section 3.17.

• An attempt to commit a felony for which the maximum punishment is life imprisonment. MCL 780.621(3)(a).

  Note: MCL 780.621(3) does not specifically prohibit setting aside other inchoate offenses, such as aiding and abetting, MCL 767.39, conspiracy, MCL 750.157a, and solicitation, MCL 750.157b.

• A violation or attempted violation of any of the following offenses:
  
  • Second-degree child abuse, MCL 750.136b(3). MCL 780.621(3)(b).

  • Committing second-degree child abuse in presence of another child, MCL 750.136d(1)(b) or MCL 750.136d(1)(c). MCL 780.621(3)(b).

  • An offense involving child sexually abusive activity or material, MCL 750.145c. MCL 780.621(3)(b).

  • Use of the internet or a computer to make a prohibited communication, MCL 750.145d. MCL 780.621(3)(b).

  • CSC-II, MCL 750.520c. MCL 780.621(3)(b).

  • CSC-III, MCL 750.520d. MCL 780.621(3)(b).

  • Assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 780.621(3)(b).

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93 Inchoate refers to crimes that are, in general, not wholly completed.
• A violation or attempted violation of CSC-IV, MCL 750.520e, if the conviction occurred on or after January 12, 2015. MCL 780.621(3)(c).

• A traffic offense, including a conviction for operation while intoxicated. MCL 780.621(3)(d).

• A felony conviction for domestic violence if individual has previous misdemeanor conviction for domestic violence. MCL 780.621(3)(e).

• Human trafficking offenses, former MCL 750.462i or MCL 750.462j, that occurred before January 14, 2015. MCL 780.621(3)(f).

• Human trafficking offenses, MCL 750.462a to MCL 750.462h. MCL 780.621(3)(f).

• Terrorism offenses, MCL 750.543a to MCL 750.543z. MCL 780.621(3)(f).

C. Filing of 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).

94 For purposes of MCL 780.621, “[operating while intoxicated’ means a violation of any of the following: (i) . . . MCL 257.625 [or MCL 257.625m]; (ii) a local ordinance substantially corresponding to a violation listed in subparagraph (i)]; (iii) a law of an Indian tribe substantially corresponding to a violation listed in subparagraph (i)]; (iv) a law of another state substantially corresponding to a violation listed in subparagraph (i)]; (v) a law of the United States substantially corresponding to a violation listed in subparagraph (i].” MCL 780.621(16)(g).

95 For purposes of MCL 780.621, “[domestic violence’ means that term as defined in . . . MCL 400.1501.” MCL 780.621(16)(b).

96 2014 PA 329 repealed MCL 750.462i and MCL 750.462j effective January 14, 2015.

97 For a discussion on human trafficking offenses, see Section 3.18.
“An application under [MCL 780.621(4)] may be filed at any time following the date of the conviction to be set aside. A person may apply to have more than 1 conviction set aside under [MCL 780.621(4)].” MCL 780.621(7).

“If a petition under this act 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).

D. Contents of Application

MCL 780.621(8)(a)-(h) requires that a valid application under MCL 780.621 must be signed by the applicant under oath and contain all of the following information:

- The applicant’s full name and current address. MCL 780.621(8)(a).

- A certified record of each conviction to be set aside. MCL 780.621(8)(b).

- For an application under MCL 780.621(1), a statement that the applicant has not been convicted of an offense other than the conviction(s) sought to be set aside, and any nondisqualifying misdemeanor convictions described in MCL 780.621(1)(a). MCL 780.621(8)(c).

- A statement listing all actions enumerated in MCL 780.621(2) charged against the applicant that were dismissed. MCL 780.621(8)(d).

- A statement indicating whether the applicant previously filed an application to set aside this or other conviction and, if so, that application’s disposition. MCL 780.621(8)(e).

- A statement indicating whether the applicant has any other criminal charge pending in any court in the United States or another country. MCL 780.621(8)(f).

- “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.” MCL 780.621(8)(g).
E. Submission of Application to State Police

Although the original application must be filed with the convicting court, the applicant must also submit a copy of the application and one set of fingerprints to the State Police. MCL 780.621(9). The State Police must compare the fingerprints with its records, including the nonpublic records created in MCL 780.623, and forward an electronic copy of a complete set of the fingerprints to the Federal Bureau of Investigation for comparison with the records available to that agency. MCL 780.621(9). “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 this subsection to the court.” Id.

To defray the costs of processing the paperwork, a $50 application fee, payable to the State of Michigan, must accompany the copy of the application submitted to the State Police. MCL 780.621(10).

F. Submission of Application to Attorney General and Prosecuting Attorney and Notice to Victim

A copy of the application must be served upon the attorney general and the office of each prosecuting attorney that prosecuted the offense(s) the applicant seeks to set aside. MCL 780.621(11). The attorney general and prosecuting attorney must have the opportunity to contest the application. Id.

If the conviction was for an assaultive crime or serious misdemeanor, and the victim’s name is known to the prosecuting attorney, the prosecuting attorney who prosecuted the crime(s) must notify the victim that the defendant has applied to have the conviction set aside. MCL 780.621(11). Notice must be in writing, accompanied by a copy of the application, and sent “by first-class mail to the victim’s last known address.” See MCL 780.772a (assaultive crime); and MCL 780.827a (serious misdemeanor). The

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98 For purposes of MCL 780.621, “[a]ssaultive crime’ means that term as defined in . . . MCL 770.9a. See Section 9.2(C) for MCL 770.9a ’s definition of that term.

99 For purposes of MCL 780.621, ‘‘serious misdemeanor’ means that term as defined in . . . MCL 780.811.
victim has a right to appear at any proceeding concerning the conviction and to make a written or oral statement. MCL 780.621(11); MCL 780.772a; MCL 780.827a.

G. Court Action and Standard for Setting Aside Convictions

After a hearing on the application, the court may require that affidavits be filed and proofs be taken, as it considers appropriate. MCL 780.621(12).

Having a conviction(s) set aside is a privilege and not a right. MCL 780.621(15). 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.” MCL 780.621(14).

“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)], enter an order setting aside the conviction.” MCL 780.621(13).

The nature of the offense, standing alone, is insufficient to support denial of an individual’s application to set aside a conviction; a court must balance the “circumstances and behavior” of the applicant against the “public welfare.” See People v Rosen, 201 Mich App 621, 623 (1993).

H. Effects and Entitlements of Granting Application

If the court grants the application and sets aside the sole conviction, the applicant must be considered, for purposes of law, not to have been previously convicted, except as provided in MCL 780.622(3) (requiring the State Police to create a nonpublic record of the order setting aside the conviction for use only in specified circumstances, see Section 9.21(I)) and MCL 780.622(2)-(6):

• “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.” MCL 780.622(2).

• “If the conviction set aside under [MCL 780.621(1)] [was] for a listed offense [under] the [S]ex [O]ffenders
Registration Act [(SORA)], . . . MCL 28.722, the applicant is considered to have been convicted of that offense for purposes of [the SORA].” MCL 780.622(3).

• Setting aside a conviction does not affect the right of the applicant to rely on the conviction to bar subsequent proceedings for the same offense. MCL 780.622(4).

• Setting aside a conviction does not affect the right of a victim of the crime to prosecute or defend a civil action for damages. MCL 780.622(5).

• Setting aside a conviction does not create a right to bring an action for damages for incarceration under the sentence the applicant served before the conviction was set aside. MCL 780.622(6).

I. Nonpublic Records: Maintenance and Accessibility

MCL 780.623 governs the maintenance of, and access to, nonpublic records of the State Police. Once the court grants an application to set aside a conviction, the court must send a copy of the order to the arresting agency and the State Police. MCL 780.623(1).

The State Police must maintain a nonpublic record of any order setting aside a conviction, the record of the arrest, fingerprints, conviction, and sentence of the applicant involved in the conviction that was set aside. MCL 780.623(2). Under MCL 780.623(2), the availability of this nonpublic record is limited. Availability of the nonpublic record is available on request and only to the following entities for the following purposes:

“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[,]”

(a) [For c]onsideration in a licensing function conducted by an agency of the judicial branch of state government.

100 But see Nelson v Colorado, 581 US ___ (2017) (holding that a Colorado statute requiring a petitioner to “prove [his or] her innocence by clear and convincing evidence to obtain [a] refund of costs, fees, and restitution paid pursuant to an invalid conviction[,] . . . does not comport with [the Fourteenth Amendment’s guarantee of due process]). It is unclear whether the Nelson holding applies to the setting aside of a conviction under MCL 780.622(2). See SCAO Memorandum, Refunding of Assessments if Conviction Invalidated, for additional discussion.
(b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside under this act.

(c) [For t]he 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.

(d) [For c]onsideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.

(e) [For c]onsideration 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) [For c]onsideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the [SORA] . . . MCL 28.721 to [MCL] 28.736, has violated that act, or for use in a prosecution for violating that act.” MCL 780.623(2).

The applicant has a right to secure a copy of the nonpublic record for payment of a fee to the State Police in the same manner as the fee prescribed in MCL 15.234 (Freedom of Information Act). MCL 780.623(3). However, the nonpublic record maintained by the State Police is exempt from disclosure under the Freedom of Information Act. MCL 780.623(4).

Except for the persons and agencies authorized to access the nonpublic record pursuant to MCL 780.623(2), “a person other than the applicant or a victim,101 who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section 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.” MCL 780.623(5).

101 For purposes of 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).
J. Pertinent Case Law

The expungement statute is remedial and may be applied retroactively. *People v Link (David)*, 225 Mich App 211, 218 (1997) (the defendant was precluded from expunging his CSC-III conviction even when the conviction and filing of the application for expungement occurred before the effective date of the statutory amendment that made CSC-III an ineligible offense).

A defendant sentenced to lifetime probation may not expunge the underlying conviction, unless the court reduces the sentence by a revocation of probation that results in imprisonment under MCL 771.3(9). *People v Jones (Frank)*, 217 Mich App 106, 108 (1996) (MCL 771.2 implies that “once a sentence of lifetime probation is imposed, the court can change it (reduce it) only by imposing imprisonment.”). See also *People v Cohen*, 217 Mich App 75, 79-80 (1996).

An unconditional and absolute pardon of a person’s previous convictions renders that person “innocent” as a matter of law and makes that person, under the plain language of MCL 780.621(1), eligible for expungement of a subsequent conviction as one “who is convicted of not more than one offense.” See *People v Vanheck*, 252 Mich App 207, 215-216 (2002) (the trial court erred in concluding that the defendant’s previous Connecticut pardons for five misdemeanors were the functional equivalent of expungements under Michigan law and thus, precluded the defendant from having his Michigan conviction for felonious assault expunged in Michigan).
Chapter 10: Sex Offenders Registration Act (SORA)

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10.1 Chapter Overview

This chapter discusses in detail the statutory provisions of the Sex Offenders Registration Act (SORA),\(^1\) the offenses for which an offender is required to comply with the SORA’s registration and reporting requirements, and the processes by which the information is compiled for the computerized law enforcement database and the public internet website. Also examined in this chapter are exceptions to registration, student safety zone requirements, and the process by which an offender may petition to discontinue registration. In short, this chapter presents a comprehensive discussion of the SORA in its entirety.

A. Purpose of the SORA

The purpose of the SORA is stated in MCL 28.721a:

“The legislature declares that the sex offenders registration act was enacted pursuant to the legislature’s exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by [the SORA] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of [the SORA] are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.”

1. Title-Object Clause:\(^2\) Change of Purpose Challenge

“[I]n amending SORA in 2011 to in part add the crime of unlawful imprisonment[,] . . . of a minor[,] as a ‘listed offense,’ the Michigan Legislature was [not] required to ‘so reflect’ in the ‘title’ of the act that it had ‘expand[ed] the nature of offenses for which registration is to be required[,]’” and this

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\(^1\) Effective July 1, 2011, PAs 17 and 18 made significant changes to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA).

\(^2\) The Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, provides that “[n]o law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.”
amendment did not “change[] SORA’s original purpose[;]” rather, “the title of SORA . . . has always provided for registration by persons convicted of ‘certain offenses[,] and] . . . while . . . SORA was amended from time to time to add additional offenses requiring registration, those amendments did not change the ‘purpose’ of SORA in any fundamental or material way.” People v Bosca, 310 Mich App 1, 85-86, 90 (2015), citing MCL 28.721a.

2. **Title-Object Clause:**

   A defendant’s title-body challenge to the inclusion within SORA of the crime of unlawful imprisonment of a minor fails, because “[t]he title of SORA . . . nowhere refers, or limits SORA’s application, to ‘sexual’ offenses; instead it broadly provides that SORA applies to ‘certain offenses,’ which then are identified in the body of the act as ‘listed offenses,’ one of which is unlawful imprisonment[ . . . of a minor.” People v Bosca, 310 Mich App 1, 84 (2015) (citing 1994 PA 295 and noting that “sex offenders registration act[,] MCL 28.721,] is merely the ‘short title’ of SORA[”].

B. **Constitutionality of the SORA**

   1. **Ex Post Facto Clauses**


      However, in Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), the Sixth Circuit Court of Appeals concluded that because SORA “severely restricts where people can live, work, and ‘loiter[,] . . . categorizes [people] into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and . . . requires time-consuming and cumbersome in-

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3 The Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, provides that “[n]o law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.”

4 This case is included in this benchbook because it calls into question the constitutionality of SORA; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).
person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe,” it “imposes punishment[,]” and “[t]he retroactive application of SORA’s 2006 and 2011 amendments[5] . . . is unconstitutional[7]” under the Ex Post Facto Clause. “[W]hile many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased.” Does, 834 F3d at 705. But see People v Patton, ___ Mich App ___, ___ (2018), declining to adopt the analysis in Snyder where the “defendant in this case only challenge[d the part of SORA’s 2011 amendments on] the registration requirements for telephone numbers [under MCL 28.727(1)(h)] and e-mail addresses[ under MCL 28.727(1)(i)], as opposed to the living and working restrictions and the tier system as did the plaintiffs in Snyder, and finding that “although MCL 28.727(1)(h) and [MCL 28.727(1)(i)] applied retroactively to defendant, those provisions further a civil regulatory scheme [of providing law enforcement and the public with tools to help monitor an offender’s behavior] and are not punitive in effect”; therefore, “the ‘registered to’ and ‘assigned to’ provisions of MCL 28.727(1)(h) and [MCL 28.727(1)(i)] do not violate the Ex Post Facto Clauses of the federal and state Constitutions.”6

2. Due Process

The SORA does not violate a defendant’s due process rights. Golba, 273 Mich App at 619. According to the Golba Court:

“A defendant does not have a legitimate privacy interest in preventing the compilation and dissemination of truthful information that is already a matter of public record. Further, [the]
SORA does not violate a defendant’s substantive due process rights. [The] SORA ‘advances a legitimate government interest in protecting the community by promoting awareness of the presence of convicted sex offenders from whom certain members of the community may face a danger.’” Golba, 273 Mich App at 619-620, quoting Akella v Mich Dep’t of State Police, 67 F Supp 2d 716, 733 (ED Mich, 1999) (other internal citations omitted).

See also In re Tiemann, 297 Mich App 250, 268 (2012) (“[b]ecause the effects of SORA do not implicate a liberty or property interest, the Due Process Clause does not provide [a defendant] with procedural safeguards[, and] . . . any safeguards would be those afforded by the statute”).

But see People v Temelkoski, 501 Mich 960, 960-961 (2018) (reversing People v Temelkoski, 307 Mich App 241 (2014) and reinstating the trial court’s order “removing defendant from the sex offender registry on the basis that requiring him to register violates due process” where “defendant pleaded guilty on the basis of the inducement provided in [the Holmes Youthful Trainee Act (HYTA)] as effective in 1994[7] (i.e., before SORA’s effective date), was assigned to HYTA training by the trial judge, and successfully completed his HYTA training”; thus, “retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process”).

3. **Apprendi-Blakely**

The judicial fact-finding that occurs before a court orders a defendant to register under the SORA does not violate the Apprendi-Blakely\(^8\) rule:

“[The] SORA does not impose a penalty in the form in which criminal statutes generally express

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\(^{7}\) “The statute in effect at the time of defendant’s plea . . . provided that ’[a]n assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime, and the 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), as amended by 1993 PA 293 (emphasis added).” People v Temelkoski, 501 Mich 960, 960-961 (2018).

\(^{8}\) The Apprendi-Blakely rule requires a court to submit to a jury “any fact that increases the penalty for a crime beyond the prescribed statutory maximum[.]” Apprendi v New Jersey, 530 US 466, 490 (2000); Blakely v Washington, 542 US 296, 301 (2004). See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 2, Chapter 3, for more information.
maximum penalties. That is, [the] SORA does not affect a person’s liberty by imposing additional confinement beyond the statutorily authorized maximum penalty. Nor does [the] SORA improperly deprive a person convicted of a listed offense of property by imposing an additional fine beyond the statutorily authorized maximum penalty. Second, the prior decisions of this Court, which we must follow, and the federal courts’ analyses that this Court has adopted have concluded that [the] SORA does not impose a penalty or punishment as a sanction for a criminal violation . . . . Rather, [the] SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public; it was not designed to punish sex offenders. Consequently, we conclude that judicial fact-finding in applying [the] SORA does not violate [a] defendant’s constitutional rights to a jury trial and due process of law[.]” Golbu, 273 Mich App at 620 (internal citations omitted).

4. Cruel or Unusual Punishment

When analyzing whether an act has the purpose or effect of being punitive, “the Court looks to the seven factors enunciated in Kennedy v Mendoza-Martinez, 372 US 144 (1963). Those factors are as follows: ‘[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.’ These seven factors serve as ‘useful guideposts’ and are ‘neither exhaustive nor dispositive.’” People v Tucker, 312 Mich App 645, 660 (2015), quoting Earl, 495 Mich at 44 (additional citations omitted).

“[T]he SORA registration requirement does not constitute cruel and unusual punishment even when the underlying offense has no sexual component.” People v Bosca, 310 Mich App 1, 72 (2015), citing People v Fonville, 291 Mich App 363, 380-381 (2011).
5. Confrontation

“[B]ecause SORA is a regulatory statute and not a criminal statute, a ‘criminal prosecution’ is not at issue and neither [the state nor the federal] Confrontation Clause applies.” In re Tiemann, 297 Mich App 250, 266, 269-270 (2012) (rejecting the 15-year-old respondent’s contention that his “Sixth Amendment right of confrontation was violated when [he] was not allowed to cross-examine [the 14-year-old victim]” during a hearing to determine whether the victim consented to the sexual contact such that the respondent was excused from SORA registration requirements).

10.2 Definition of Terms in the SORA

A. Convicted

Convicted means any of the following:

- A judgment of conviction or an order of probation entered in any court with jurisdiction over criminal offenses, including, but not limited to, a tribal or military court, and including convictions subsequently set aside under MCL 780.621 to MCL 780.624.9 MCL 28.722(b)(i).

- Either of the following:

  - Assignment to youthful trainee status under MCL 762.11 to MCL 762.15 before October 1, 2004.10 This does not apply if a petition was granted under MCL 28.728c at any time that allowed the individual to discontinue registration under the SORA, including a reduced registration period extending to or past July 1, 2011, without regard to the offense’s tier designation on or after July 1, 2011. MCL 28.722(b)(ii)(A).

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9 See Section 9.19 for more information about setting aside convictions.
10 But see People v Temekoski, 501 Mich 960, 960-961 (2018) (reversing People v Temekoski, 307 Mich App 241 (2014) and reinstating the trial court’s order “removing defendant from the sex offender registry on the basis that requiring him to register violates due process” where “defendant pleaded guilty on the basis of the inducement provided in [the Holmes Youthful Trainee Act (HYTA)] as effective in 1994 (i.e., before SORA’s effective date), was assigned to HYTA training by the trial judge, and successfully completed his HYTA training”; thus, “retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process”).
• Assignment to youthful trainee status under MCL 762.11 to MCL 762.15 before October 1, 2004, if the individual is convicted of any other felony on or after July 1, 2001. MCL 28.722(b)(ii)(B).

• Having an order of disposition entered under MCL 712A.18 that is open to the general public under MCL 712A.28, if both of the following apply:

  • Individual was age 14 or older at the time of the offense. MCL 28.722(b)(iii)(A).

  • Order of disposition is for an offense that would classify the offender as a tier III offender. MCL 28.722(b)(iii)(B).

• Having an order of disposition or other adjudication in a juvenile matter in another state or country if both of the following apply:

  • Individual is age 14 or older at the time of the offense. MCL 28.722(b)(iv)(A).

  • Order of disposition or other adjudication is for an offense that would classify the offender as a tier III offender. MCL 28.722(b)(iv)(B).

**B. Custodial Authority**

*Custodial authority* means one or more of the following:

• Actor was a member of the same household as the victim. MCL 28.722(c)(i).

• Actor was related to the victim by blood or affinity to the fourth degree. MCL 28.722(c)(ii).

• Actor was in a position of authority over the victim and used that authority to coerce the victim’s submission. MCL 28.722(c)(iii).

• Actor was a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which the victim was enrolled. MCL 28.722(c)(iv).

• Actor was an employee or contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which the victim was enrolled, or was a volunteer who was not a student at any public or nonpublic
school, or was an employee of the state, of a local unit of government of this state, or of the United States, assigned to provide any service to that public or nonpublic school, school district, or intermediate school district, and the actor used his or her status as an employee, contractual worker, or volunteer to gain access to, or to establish a relationship with, the victim. MCL 28.722(c)(v).

- Victim was under the jurisdiction of the department of corrections (DOC) and the actor was an employee or contractual employee of, or a volunteer with, the DOC, and the actor knew the victim was under the DOC’s jurisdiction and used his or her position of authority over the victim to gain access to or to coerce or otherwise encourage the victim to engage in sexual contact. MCL 28.722(c)(vi).

- Victim was under the jurisdiction of the DOC and the actor was an employee or a contractual employee of, or a volunteer with, a private vendor that operated a youth correctional facility under MCL 791.220g, who knew that the other person was under the jurisdiction of the DOC. MCL 28.722(c)(vii).

- Victim was a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program, and the actor was an employee or contractual employee of, or a volunteer with, the county or the DOC, and the actor knew that the victim was under the county’s jurisdiction and used his or her position of authority over the victim to gain access to or to coerce or otherwise encourage the victim to engage in sexual contact. MCL 28.722(c)(viii).

- Actor knew or had reason to know that a court had detained the victim in a facility while the victim awaited a trial or a hearing, or committed the victim to a facility after the victim was found responsible for committing an act that would be a crime if committed by an adult, and the actor was an employee or contractual employee of, or a volunteer with, the facility in which the victim was detained or committed. MCL 28.722(c)(ix).

C. Department

*Department* is the department of state police. MCL 28.722(d).
D. Employee

Employee is a self-employed individual or a person who works for any other entity as a full- or part-time employee, contractual provider, or volunteer, without regard to whether he or she is financially compensated. MCL 28.722(e).

E. Felony

Felony means the term as it is defined in MCL 761.1. MCL 28.722(f).

F. Immediately

Immediately means within three business days. MCL 28.722(g).

G. Indigent

Indigent is a person to whom one or more of the following apply:

- A court has found the individual to be indigent within the past six months. MCL 28.722(h)(i).
- The person qualifies for and receives assistance from the department of health and human services (DHHS) food assistance program. MCL 28.722(h)(ii).
- The person shows an annual income below the current federal poverty guidelines. MCL 28.722(h)(iii).

H. Institution of Higher Education

Institution of higher education is one or more of the following:

- A public or private university, college, or community college. MCL 28.722(i)(i).
- A public or private occupational, vocational, or trade school. MCL 28.722(i)(ii).

11 MCL 761.1(f) defines felony as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.”

12 2011 PA 17 added the definition of immediately to the list of definitions in MCL 28.722. Immediately is defined as within three business days. MCL 28.722(g). Wherever immediately appears in the text of the SORA provisions, as amended, within three business days also appears to emphasize/clarify immediately’s intended meaning.
I. Local Law Enforcement Agency

Local law enforcement agency is a municipality’s police department. MCL 28.722(k).

J. Listed Offense

See Section 10.4 for a discussion of listed offenses.

K. Minor

Minor is a victim of a listed offense who was under the age of 18 at the time of the offense. MCL 28.722(l).

L. Municipality

Municipality is a city, village, or township of Michigan. MCL 28.722(m).

M. Registering Authority

Registering authority means the local law enforcement agency or sheriff’s office with jurisdiction over the offender’s residence, place of employment, or institution of higher education, or the nearest department of state police post designated to receive or enter sex offender registration information within a registration jurisdiction. MCL 28.722(n).

N. Registration Jurisdiction

Registration jurisdiction is each of the 50 states, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the United States Virgin Islands, American Samoa, and the Indian tribes within the United States that function as a registration jurisdiction. MCL 28.722(o).

O. Residence

Residence, for registration and voting purposes means the place at which an offender habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. MCL 28.722(p). If an individual has more than one residence or if one spouse has a residence separate from the other, the place at which the person resides most of the time is that person’s official residence. Id. If an

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individual is homeless or otherwise does not have a fixed or temporary residence, residence means the village, city, or township where the person spends most of his or her time. Id. The definition of residence in this subparagraph applies only to the SORA and shall not be construed to affect any existing judicial interpretation of the term. Id.

**P. Student**

*Student* is a person enrolled on a full-time or part-time basis in a public or private educational institution, including, but not limited to, a secondary school, trade school, professional institution, or institution of higher education. MCL 28.722(q).

**Q. Tier I Offender**

*Tier I offender* is an offender convicted of a tier I offense14 who is not a tier II or tier III offender. MCL 28.722(r).

**R. Tier II Offender**

*Tier II offender* is either:

- a tier I offender who is subsequently convicted of another tier I offense, or

- an offender convicted of a tier II offense15 who is not a tier III offender. MCL 28.722(t)(i)-(ii).

**S. Tier III Offender**

*Tier III offender* is either:

- a tier II offender subsequently convicted of a tier I or tier II offense, or


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14 See Section 10.4(A).
15 See Section 10.1(B).
16 See Section 10.1(C).
10.3 Required Notice to Registered Offenders of Duties Under the Amended SORA\textsuperscript{17}

With the exception of individuals in a state correctional facility, the department of state police must mail a notice to each individual registered under the SORA to explain the individual’s duties under the SORA as amended. MCL 28.725a(1).

The notification of a registrant’s duties under the SORA “shall contain a written statement that explains the duty of the individual being registered to provide notice of changes in his or her registration information, the procedures for providing that notice, and the verification procedures under [MCL 28.725a].” MCL 28.727(3).

When an individual registered under the SORA is released from a state correctional facility, the Michigan Department of Corrections (DOC) must provide the individual with written notice explaining his or her duties under MCL 28.725a, and under the SORA as amended. MCL 28.725a(2). The DOC must inform the individual of the procedure for registration, notification, verification, and payment of the registration fee required under MCL 28.725a(6) or MCL 28.727(1). MCL 28.725a(2). The individual must sign and date the notice provided by the DOC, and the DOC must keep a copy of the signed and dated notice in the individual’s file. \textit{Id}. The DOC must forward the original notice to the department of state police immediately (within three business days), even if the individual did not sign it. \textit{Id}.

10.4 Current Listed Offenses\textsuperscript{18}

Offenses under the SORA are grouped into three categories (tier I, tier II, and tier III) based on the seriousness of an offense. A listed offense for purposes of the SORA is any of the tier I, tier II, or tier III offenses. MCL 28.722(j). See MCL 28.722(s) (tier I offenses); MCL 28.722(u) (tier II offenses); MCL 28.722(w) (tier III offenses).

\textsuperscript{17} Effective July 1, 2011, 2011 PAs 17 and 18 made significant amendments to Michigan’s Sex Offenders Registration Act (SORA) in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA).

\textsuperscript{18} The listed offenses formerly described in MCL 28.722(e) were replaced with a new structure of listed offenses (tier I, tier II, and tier III offenses) by 2011 PA 17. The reorganized structure of listed offenses eliminated a third or subsequent violation of any combination of MCL 750.167 (disorderly person descriptions), MCL 750.335a(2)(a) (open or indecent exposure), or a substantially corresponding local ordinance of a municipality. See the table in Section for a complete history of listed offenses from the time that the SORA was enacted.
A. Tier I Offenses

Tier I offenses are listed in MCL 28.722(s):

- Violation of MCL 750.145c(4) (knowing possession of child sexually abusive material). MCL 28.722(s)(i).

- Violation of MCL 750.335a(2)(b) (open or indecent exposure involving fondling) if the victim is a minor. MCL 28.722(s)(ii).

- Violation of MCL 750.349b (unlawful imprisonment) if the victim is a minor. MCL 28.722(s)(iii).

- Violation of MCL 750.449a(2) (engaging or offering to engage a person under 18 years old and who is not the defendant’s spouse for prostitution). MCL 28.722(s)(iv).

- Violation of MCL 750.520e (CSC-IV) or MCL 750.520g(2) (assault with intent to commit CSC-II) if the victim is age 18 or older. MCL 28.722(s)(v).

- Violation of MCL 750.539j (voyeurism) if the victim is a minor. MCL 28.722(s)(vi).

- Any other violation of Michigan law or a local ordinance of a municipality, other than a tier II or tier III offense, that by its nature constitutes a sexual offense against a minor. MCL 28.722(s)(vii).

- Offense committed by a person who was a sexually delinquent person (MCL 750.10a) at the time the offense was committed. MCL 28.722(s)(viii).

- Attempt or conspiracy to commit a tier I offense. MCL 28.722(s)(ix).

- Offense substantially similar to a tier I offense that is specifically enumerated under federal law in 42 USC 16911, under the law of any state or any country, or under tribal or military law. MCL 28.722(s)(x).

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19 This listed offense was added by 2011 PA 17. It was not included in previous versions of the SORA’s listed offenses. See the table in Section for a complete history of listed offenses from the time of the SORA was enacted.

20 This listed offense was added by 2014 PA 328. It was not included in previous versions of the SORA’s listed offenses. See the table in Section for a complete history of listed offenses from the time of the SORA was enacted.

21 This listed offense was added by 2011 PA 17. It was not included in previous versions of the SORA’s listed offenses. See the table in Section for a complete history of listed offenses from the time of the SORA was enacted.
B. Tier II Offenses

Tier II offenses are listed in MCL 28.722(u):

- Violation of MCL 750.145a (soliciting a minor under the age of 16 for an immoral purpose). MCL 28.722(u)(i).

- Violation of MCL 750.145b (soliciting a minor under the age of 16 for an immoral purpose—second offense). MCL 28.722(u)(ii).

- Violation of MCL 750.145c(2) (creation/production/financing of child sexually abusive activity or material, or attempt to do so) or MCL 750.145c(3) (distribution/promotion of child sexually abusive material). MCL 28.722(u)(iii).

- Violation of MCL 750.158 (sodomy) if the victim is a minor, unless either of the following applies:23
  - All of the following:
    - Victim consented to conduct constituting the violation. MCL 28.722(u)(v)(A)(I).
    - Victim was at least age 13 but less than age 16 at the time of the violation. MCL 28.722(u)(v)(A)(II).
    - Actor is not more than four years older than the victim. MCL 28.722(u)(v)(A)(III).
  - All of the following:
    - Victim consented to conduct constituting the violation. MCL 28.722(u)(v)(B)(I).
    - Victim was age 16 or age 17 at the time of the violation. MCL 28.722(u)(v)(B)(II).

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22 This listed offense was added by 2011 PA 17. It was not included in previous versions of the SORA's listed offenses. See the table in Section for a complete history of listed offenses from the time of the SORA was enacted.

23 See Section 10.8(A)(1).
• Victim was not under the custodial authority of the actor at the time of the violation. MCL 28.722(u)(v)(B)(III).

• Violation of MCL 750.338 (gross indecency—males), MCL 750.338a (gross indecency—females), or MCL 750.338b (gross indecency—males/females) if the victim was at least age 13 but less than age 18 at the time of the violation. This provision does not apply if the court determines either:\24

  • All of the following:

    • Victim consented to conduct constituting the violation. MCL 28.722(u)(vi)(A)(I).

    • Victim was at least age 13 but less than age 16 at the time of the violation. MCL 28.722(u)(vi)(A)(II).

    • Actor is not more than four years older than the victim. MCL 28.722(u)(vi)(A)(III).

  • All of the following:

    • Victim consented to conduct constituting the violation. MCL 28.722(u)(vi)(B)(I).

    • Victim was age 16 or age 17 at the time of the violation. MCL 28.722(u)(vi)(B)(II).

    • Victim was not under the custodial authority of the actor at the time of the violation. MCL 28.722(u)(vi)(B)(III).

• Violation of MCL 750.462e(a) (prohibited conduct involving the use of a minor for commercial sexual activity).\25 MCL 28.722(u)(vii).

• Violation of MCL 750.448 (soliciting prostitution or immoral act) if the victim is a minor. MCL 28.722(u)(viii).

• Violation of MCL 750.455 (procuring or attempting to procure person for prostitution). MCL 28.722(u)(ix).

• Violation of MCL 750.520c (CSC-II), MCL 750.520e (CSC-IV), or MCL 750.520g(2) (assault with intent to commit

\24 See Section 10.8(A)(2).

\25 This listed offense was added by 2014 PA 328. It was not included in previous versions of the SORA’s listed offenses. See the table in Section for a complete history of listed offenses from the time of the SORA was enacted.
CSC-II) if the victim is at least age 13 but under age 18. MCL 28.722(u)(x) MCL 28.722(u)(x).

• Violation of MCL 750.520c (CSC-II) if the victim is age 18 or older. MCL 28.722(u)(xi).

• Attempt or conspiracy to commit a tier II offense. MCL 28.722(u)(xii).

• Offense substantially similar to a tier II offense that is specifically enumerated under federal law in 42 USC 16911, under the law of any state or any country, or under tribal or military law. MCL 28.722(u)(xiii).

C. Tier III Offenses

Tier III offenses are listed in MCL 28.722(w):

• Violation of MCL 750.338 (gross indecency—males), MCL 750.338a (gross indecency—females), or MCL 750.338b (gross indecency—males/females) if the victim is under age 13. MCL 28.722(w)(i).

• Violation of MCL 750.349 (kidnapping) if the victim is a minor. MCL 28.722(w)(ii).

• Violation of MCL 750.350 (enticing a child under age 14 with intent to detain or conceal the child from his or her parent, guardian, or adoptive parent). MCL 28.722(w)(iii).

• Violation of MCL 750.520b (CSC-I), MCL 750.520d (CSC-III), or MCL 750.520g(1) (assault with intent to commit CSC involving penetration). MCL 28.722(w)(iv). This provision does not apply if the court determines that:26

  • Victim consented to conduct constituting the offense,

  • Victim was at least age 13 but under age 16 at the time of the offense, and

  • Actor is not more than four years older than the victim.

• Violation of MCL 750.520c (CSC-II) or MCL 750.520g(2) (assault with intent to commit CSC-II) if the victim is under age 13. MCL 28.722(w)(v).

• Violation of MCL 750.520e (CSC-IV) if the actor is age 17 or older and the victim is under age 13. MCL 28.722(w)(vi).

26 See Section 10.1(B).
• Attempt or conspiracy to commit a tier III offense. MCL 28.722(w)(vii).

• Offense substantially similar to a tier III offense that is specifically enumerated under federal law in 42 USC 16911, under the law of any state or any country, or under tribal or military law. MCL 28.722(w)(viii).

10.5 Who Must Register?27

A. Convictions and Penalties: October 1, 199528

Subject to MCL 28.723(2), individuals who (1) are domiciled or temporarily reside in Michigan, (2) work with or without compensation, or (3) are students in Michigan must register under the SORA if:29

• Individual was convicted of a listed offense after October 1, 1995. MCL 28.723(1)(a).

• Individual was convicted of a listed offense on or before October 1, 1995, if on October 1, 1995, that individual was on probation or parole, committed to jail or to the jurisdiction of the department of corrections (DOC), or under the jurisdiction of the family division of circuit court or the department of health and human services (DHHS) for that offense, or that individual is placed on probation or parole, committed to jail or to the jurisdiction of the DOC, placed under the jurisdiction of the family division of circuit court, or committed to the DHHS after October 1, 1995, for that offense. MCL 28.723(1)(b).

• Individual was convicted on or before October 1, 1995, of an offense described in MCL 28.722(d)(vi)30 (as added by 1994 PA 295), if on October 1, 1995, that individual is on probation or parole that was transferred to Michigan for

27 Some individuals may be exempt from SORA registration. MCL 28.723a. See Section 10.7 for more information.

28 See the table in Section for the listed offenses effective on October 1, 1995.

29 Effective July 1, 2011, 2011 PA 17 eliminated the former time requirements of 14 or more consecutive days or 30 or more total days in a calendar year for domicile or residence or employment or student status.

30 1994 PA 295, effective October 1, 1995 – MCL 28.722(d)(vi) stated, “An offense substantially similar to an offense described in subparagraphs (i) to (v) under a law of the United States, any state, or any country.” These offenses included violations of MCL 750.145a, MCL 750.145b, or MCL 750.145c (MCL 28.722(d)(i)); a third or subsequent violation of any combination of MCL 750.167(1)(f), MCL 750.335a, or a local ordinance substantially corresponding to MCL 750.167(1)(f), or MCL 750.335a (MCL 28.722(d)(ii)(A)-(C)); a violation of MCL 750.455 (MCL 28.722(d)(iii)); a violation of MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, MCL 750.520g (MCL 28.722(d)(iv)); or an attempt or conspiracy to commit an offense described in subparagraphs (i) to (iv) (MCL 28.722(d)(v)).
that offense, or that individual’s probation or parole is transferred to Michigan after October 1, 1995, for that offense. MCL 28.723(1)(c).

- Individual is from a state other than Michigan who is required to register or is otherwise required to be identified as a sex offender or child offender or predator under a comparable statute of that state. MCL 28.723(1)(d).

- Individual was previously convicted of a listed offense and was not required to register under the SORA, and individual is convicted of any other felony on or after July 1, 2011. MCL 28.723(1)(e).31

B. Convictions and Penalties: September 1, 199932

An individual who was convicted of a listed offense added on September 1, 1999, is not required to register solely on the basis of that offense unless one of the following applies:

- The individual was convicted of the listed offense on or after September 1, 1999. MCL 28.723(2)(a).

- On September 1, 1999, the individual was on probation or parole, in jail, in prison, under the jurisdiction of the family division of circuit court, or committed to the DHHS for the offense, or the individual was placed on probation or parole, put in jail, put in prison, placed under the jurisdiction of the family division of circuit court, or committed to the DHHS for the offense on or after September 1, 1999. MCL 28.723(2)(b).

- On September 1, 1999, the individual was in Michigan and his or her probation or parole for that offense was transferred to Michigan, or the individual’s probation or parole for that offense is transferred to Michigan after September 1, 1999. MCL 28.723(2)(c).

- On September 1, 1999, an individual in another state or country was on probation or parole, in jail, in prison “or a similar type of state agency,” under the jurisdiction of a court responsible for handling cases similar to cases

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31 “[T]he recapture provision found in MCL 28.723(1)(e) does not violate the Ex Post Facto Clauses of the state and federal constitutions.” People v Tucker, 312 Mich App 645, 653 (2015) (noting that “there is no retroactive application of [a] law where a prior conviction is used to enhance the penalty for a new offense committed after the effective date of the statute[,]” and “although MCL 28.723(1)(e) is not a traditional recidivist statute, . . . registration [is] not required until [a defendant] commit[s] another felony[,]” accordingly, no “new legal consequences [are] added to [the prior] conviction[.]”, quoting People v Callon, 256 Mich App 312, 321 (2003).

32 See the table in Section for the listed offenses effective on September 1, 1999.
handled by the family division of circuit court in Michigan, or, in that other state or country, was committed to an agency having the same authority as the DHHS in Michigan for that offense. MCL 28.723(2)(d).

C. Nonresident Offenders

A nonresident, not otherwise described in MCL 28.723(1), who is convicted in Michigan of a listed offense on or after July 1, 2011, must register under the SORA. MCL 28.723(3). Notwithstanding the offender’s duty to register under the SORA, the continued reporting requirements of the SORA do not apply to the offender while he or she is a nonresident, and while he or she is not otherwise required to report under the SORA. Id. However, the nonresident must have his or her photograph taken as provided in MCL 28.725a. MCL 28.723(3).

10.6 Initial Registration and Duties

A. Convicted and Sentenced On or Before October 1, 1995

An individual who was convicted of a listed offense on or before October 1, 1995, and who was sentenced for the offense, had a disposition entered for the offense, or was assigned to youthful trainee status on or before October 1, 1995, must have been registered by December 31, 1995, by the appropriate authority:

- By the individual’s probation agent if the individual was placed on probation for the listed offense. MCL 28.724(2)(a).

- By the sheriff or his or her designee if the individual was sentenced to jail for the listed offense. MCL 28.724(2)(b).

- By the department of corrections (DOC) if the individual was placed under the DOC’s jurisdiction for the listed offense. MCL 28.724(2)(c).

- By the offender’s parole agent if the offender was on parole for the listed offense. MCL 28.724(2)(d).

- By the family division of circuit court or department of health and human services (DHHS) if an order of disposition for the listed offense placed a juvenile offender under the jurisdiction of the family division of circuit court or the DHHS. MCL 28.724(2)(e).
B. Convicted On or Before October 1, 1995, and Sentenced or Transferred After October 1, 1995

Except as provided in MCL 28.724(4), an individual convicted of a listed offense on or before October 1, 1995, whose penalty was not imposed until after October 1, 1995, must have been registered by the appropriate authority:

• By the individual’s probation agent before sentencing or assignment to youthful trainee status if the individual was sentenced for the offense or assigned to the status of youthful trainee after October 1, 1995. MCL 28.724(3)(a).

• By the individual’s probation or parole agent immediately (within three business days) after the transfer if the individual’s probation or parole is transferred to Michigan after October 1, 1995. MCL 28.724(3)(b).

• By the family division of circuit court before the order of disposition is entered if an order of disposition entered after October 1, 1995, placed the individual under the jurisdiction of the family division of circuit court, or committed the individual to the DHHS. MCL 28.724(3)(c).

C. Convicted On or Before September 1, 1999, for a Listed Offense Added on September 1, 1999

An individual convicted on or before September 1, 1999, for a listed offense added on September 1, 1999, must have been registered by the appropriate authority:

• By the individual’s probation or parole agent no later than September 12, 1999, if, on September 1, 1999, the individual was on probation or parole for the listed offense. MCL 28.724(4)(a).

• By the sheriff or his or her designee no later than September 12, 1999, if, on September 1, 1999, the individual was in jail for the listed offense. MCL 28.724(4)(b).

• By the DOC no later than November 30, 1999, if, on September 1, 1999, the individual was under the DOC’s jurisdiction for the listed offense. MCL 28.724(4)(c).

• By the family division of circuit court, the DHHS, or the county juvenile agency no later than November 30, 1999, if,
on September 1, 1999, the individual was under the jurisdiction of the family division of circuit court or committed to the DHHS or county juvenile agency under an order of disposition for the listed offense. MCL 28.724(4)(d).

• By the individual’s probation agent before sentencing or assignment to youthful trainee status, if, after September 1, 1999, the individual was sentenced or assigned to youthful trainee status for the listed offense. MCL 28.724(4)(e).

• By the individual’s probation or parole agent within 14 days of the transfer, if, after September 1, 1999, the individual’s probation or parole for the listed offense was transferred to Michigan. MCL 28.724(4)(f).

• By the family division of circuit court before the order of disposition is entered, if, after September 1, 1999, the individual was placed under the jurisdiction of the family division of circuit court or committed to the DHHS for the listed offense. MCL 28.724(4)(g).

D. Conviction After October 1, 1995, Previous Conviction of Listed Offense, and Conviction of Any Other Felony On or After July 1, 2011

MCL 28.724(5) states:

“Subject to [MCL 28.723],[34] an individual convicted of a listed offense in this state after October 1, 1995 and an individual who was previously convicted of a listed offense for which he or she was not required to register under [the SORA], but who is convicted of any other felony on or after July 1, 2011, shall register before sentencing, entry of the order of disposition, or assignment to youthful trainee status for that listed offense or that other felony. The probation agent or the family division of circuit court shall give the individual the registration form after the individual is convicted, explain the duty to register and accept the completed registration for processing under [MCL 28.726]. The court shall not impose sentence, enter the order of disposition, or assign the individual to youthful trainee status, until it determines that the individual’s registration was forwarded to the department [of state police] as required under [MCL 28.726].”

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[34] Registration requirements for offenders convicted on or before October 1, 1995, and September 1, 1999.
E. Individuals Convicted or Registered Out-of-State

The following individuals who become domiciled in Michigan, or who temporarily reside, work, or go to school in Michigan, must register with the local law enforcement agency, sheriff’s department, or the department of state police immediately (within three business days\textsuperscript{35}) after establishing their domicile, temporary residence, employment, or after being a student in Michigan. MCL 28.724(6). But see \textit{Does v Snyder}, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added the requirement that all registrants appear in person \textit{immediately} to update information and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.\textsuperscript{36}

According to MCL 28.724(6), the following individuals who are convicted or registered out-of-state must register as a sex offender in Michigan:

“(a) Subject to [MCL 28.723(1)],\textsuperscript{37} an individual convicted in another state or country on or after October 1, 1995 of a listed offense as defined before September 1, 1999.\textsuperscript{38}

(b) Subject to [MCL 28.723(2)],\textsuperscript{39} an individual convicted in another state or country of an offense added on September 1, 1999 to the definition of listed offenses.

(c) Subject to [MCL 28.723(1)],\textsuperscript{40} an individual convicted in another state or country of a listed offense before October 1, 1995 and, subject to [MCL 28.723(2)],\textsuperscript{41} an individual convicted in another state or

\textsuperscript{35} See MCL 28.722(g).

\textsuperscript{36} This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See \textit{People v Gillam}, 479 Mich 253, 261 (2007); \textit{Abela v Gen Motors Corp}, 469 Mich 603, 606-607 (2004); \textit{People v Bosco}, 310 Mich App 1, 76 n 25 (2015).

\textsuperscript{37} Registration requirements for offenders living or temporarily residing, working, or going to school in Michigan who were convicted of a listed offense before, on, or after October 1, 1999.

\textsuperscript{38} See the table in \textit{Section} for the listed offenses effective before September 1, 1999.

\textsuperscript{39} Exceptions to registration solely on the basis of an offense added to the definition of \textit{listed offenses} on September 1, 1999.

\textsuperscript{40} Registration requirements for offenders living or temporarily residing, working, or going to school in Michigan who were convicted of a listed offense before, on, or after October 1, 1999.

\textsuperscript{41} Exceptions to registration solely on the basis of an offense added to the definition of \textit{listed offenses} on September 1, 1999.
country of an offense added on September 1, 1999 to the definition of listed offenses, who is convicted of any other felony on or after July 1, 2011.

(d) An individual required to be registered as a sex offender in another state or country regardless of when the conviction was entered.”

F. Cases Pending on July 1, 2011

“If a prosecution or juvenile proceeding is pending on July 1, 2011, whether the defendant in a criminal case or the minor in a juvenile proceeding is required to register under [the SORA] shall be determined on the basis of the law in effect on July 1, 2011.” MCL 28.724(7).

10.7 Hearing to Determine Whether Exemption From Registration Applies

MCL 28.723a outlines a hearing procedure for an individual who “alleges that he or she is not required to register under [the SORA]” because one of the exceptions specified in MCL 28.722(u)(v), MCL 28.722(u)(vi), and MCL 28.722(w)(iv) involving specific tier II and tier III offenses apply.42

The process in MCL 28.723a by which an individual may claim an exemption from registration under the circumstances described in MCL 28.722(u)(v), MCL 28.722(u)(vi), and MCL 28.722(w)(iv) is as follows:

• An individual pleads guilty to or is found guilty of a listed offense, or

• A juvenile is adjudicated as being responsible for a listed offense.

• The individual or juvenile claims that one of the exceptions described in MCL 28.722(u)(v), MCL 28.722(u)(vi), and MCL 28.722(w)(iv) applies to the offense and that he or she is not required to register under the SORA.

• If the prosecutor disputes the individual’s or the juvenile’s claim to the exception, the court must hold a hearing on the matter.

• The hearing must occur before sentencing or disposition.

42 These exceptions are often referred to as the Romeo & Juliet exceptions. See Section 10.8 for more information on these exceptions.
• The court must determine at the hearing whether the exception applies and whether the individual or juvenile is required to register under the SORA.

A. Burden of proof

The individual or the juvenile must establish by a preponderance of the evidence at the hearing “that his or her conduct falls within the exceptions described in [MCL 28.722(u)(v), MCL 28.722(u)(vi), or MCL 28.722(w)(iv)] and that he or she is therefore not required to register under [the SORA].” MCL 28.723a(2).

B. Rules of Evidence

Except for the rules regarding privileges and protections provided in MCL 750.520j (Rape Shield Statute), the rules of evidence do not apply to the hearing. MCL 28.723a(3).

C. Procedure

• The prosecutor must notify the victim of the date, time, and place of the hearing. MCL 28.723a(4).

• The victim may exercise the following rights at the hearing:
  • The victim may submit a written statement to the court. MCL 28.723a(5)(a).
  • The victim may attend the hearing and make a written or oral statement at the hearing. MCL 28.723a(5)(b).
  • The victim may refuse to attend the hearing. MCL 28.723a(5)(c).
  • The victim may attend the hearing and refuse to testify or make a statement. MCL 28.723a(5)(d).
  • “The court’s decision excusing or requiring the individual to register is a final order of the court and may be appealed by the prosecuting attorney or the individual as a matter of right.” MCL 28.723a(6).

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43 See Section 7.2.
D. Cases Pending on July 1, 2011

The hearing provided for by MCL 28.723a applies to cases, both juvenile and adult, pending on July 1, 2011, and to juvenile and adult criminal cases initiated on or after July 1, 2011. MCL 28.723a(7).

10.8 “Romeo & Juliet” Provisions

A. Romeo & Juliet Exceptions to Select Tier II Offenses

1. Sodomy

Under two specific circumstances, an individual may claim an exception to registering under the SORA for a violation of MCL 750.158 (sodomy) involving a minor. To successfully claim a registration exception under MCL 28.722(u)(v) for a violation of MCL 750.158 involving a minor, the individual must satisfy either of two conditions:

• All of the following:

  • The victim consented to the conduct that constituted the violation. MCL 28.722(u)(v)(A)(I).
  • The victim was at least age 13 but was less than age 16 at the time of the violation. MCL 28.722(u)(v)(A)(II).
  • The individual was not more than four years older than the victim. MCL 28.722(u)(v)(A)(III).

OR,

• All of the following:

  • The victim consented to the conduct that constituted the violation. MCL 28.722(u)(v)(B)(I).
  • The victim was age 16 or age 17 at the time of the violation. MCL 28.722(u)(v)(B)(II).

44 Sodomy is defined at common law as “carnal copulation between human beings in an unnatural manner.” People v Askar, 8 Mich App 95, 99 (1967). Sodomy is more commonly known as anal intercourse. See People v Dexter (Harvey), 6 Mich App 247, 250 (1967).
• The victim was not under the custodial authority of the individual at the time of the violation. MCL 28.722(u)(v)(B)(III).

2. **Gross Indecency Violations**

Under two specific circumstances, an individual may claim an exception to registering under the SORA for a violation of MCL 750.338 (gross indecency between males), MCL 750.338a (gross indecency between females), or MCL 750.338b (gross indecency between males and females) involving a minor who was at least age 13 but less than age 18 at the time of the violation. To successfully claim an exception, the individual must satisfy either of two conditions:

• All of the following:
  
  • The victim consented to the conduct constituting the violation. MCL 28.722(u)(vi)(A)(I).
  
  • The victim was at least age 13 but was less than age 16 at the time of the violation. MCL 28.722(u)(vi)(A)(II).
  
  • The individual was not more than four years older than the victim. MCL 28.722(u)(vi)(A)(III).

OR,

• All of the following:
  
  • The victim consented to the conduct constituting the violation. MCL 28.722(u)(vi)(B)(I).
  
  • The victim was age 16 or age 17 at the time of the violation. MCL 28.722(u)(vi)(B)(II).
  
  • The victim was not under the custodial authority of the individual at the time of the violation. MCL 28.722(u)(vi)(B)(III).

B. **Romeo & Juliet Exception to Select Tier III Offenses**

Under two specific circumstances, an individual may claim an exception to registration under the SORA for a violation of MCL

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45 See Section 10.1(B) for the definition of custodial authority.
46 See Section 3.17 for information about gross indecency.
47 See Section 10.1(B) for the definition of custodial authority.
750.520b (CSC-I), MCL 750.520d (CSC-III), or MCL 750.520g(1) (assault with intent to commit criminal sexual conduct involving penetration) involving a victim who was at least age 13 but less than age 16 at the time of the violation. MCL 28.722(w)(iv). To successfully claim an exception under MCL 28.722(w)(iv), the individual must satisfy the following conditions:

- The victim consented to conduct constituting the offense.
- The victim was at least age 13 but under age 16 at the time of the offense.
- The individual was not more than four years older than the victim.

10.9 Reporting Requirements Specific to Student Offenders

A. Nonresidents

An individual who is not a resident of Michigan but who is required to register under the SORA must report in person to the registering authority with jurisdiction over a campus of higher education if either of the following occurs:

- The individual is a student or enrolls as a student at that institution of higher education or if the student withdraws from his or her enrollment at the institution; or
- The individual, as part of his or her studies at that institution of higher education, is present at another location in Michigan, another state, or a United States territory or possession, or the individual withdraws from his or her studies at that location. MCL 28.724a(1)(a)-(b).

B. Residents

An individual who is a resident of Michigan and is required to register under the SORA, must report in person to the registering authority with jurisdiction over the area where his or her new residence or domicile is located, if any of the events described in MCL 28.724a(1)48 occur. MCL 28.724a(2).

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48 MCL 28.724a(1) addresses the reporting requirements under changed circumstances of nonresident students required to be registered under the SORA.
C. General Reporting Requirements

The following requirements apply to the report required under MCL 28.724a(1) (nonresident students) and MCL 28.724a(2) (resident students):

- An individual who registered under the SORA before October 1, 2002, and who was required to make his or her first report under MCL 28.724a(1) or MCL 28.724a(2), must have reported not later than January 15, 2003. MCL 28.724a(3)(a).

- An individual who is required to be registered under the SORA and who is required to report under MCL 28.724a(1) or MCL 28.724a(2), must report immediately (within three business days) after his or her enrollment or withdrawal from enrollment as a student on that campus including study in Michigan, in another state, or a United States territory or possession, or another country. MCL 28.724a(3)(b). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added the requirement that all registrants appear in person immediately to update information and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment. 49

Additional registration reports required under MCL 28.724a must be made by the deadlines described in MCL 28.725a(3)(a)-(c). 50 MCL 28.724a(4).

MCL 28.724a(5) states:

“The local law enforcement agency, sheriff’s department, or department [of state police] post to which an individual reports under [MCL 28.724a] shall require the individual to pay the registration fee required under [MCL 28.725a] or [MCL 28.727(1)] and

49 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

50 Subject to MCL 28.725a(4) (setting out which day of the month an offender must annually, biannually, or quarterly report), MCL 28.725a(3) sets out the number of times each year a tier I, tier II, and tier III offender must report and indicates the appropriate months in which the verification and report must be made. See Section 10.11. Note: MCL 28.725a(2)(a)-(c), cited in MCL 28.724a(4), must refer to MCL 28.725a(3) because MCL 28.725a(2) has no subsections and is limited to individuals released from incarceration. Therefore, the benchbook refers to MCL 28.725a(3), rather than to MCL 28.725a(2), as the statutory language in MCL 28.724a(4) indicates.
to present written documentation of employment status, contractual relationship, volunteer status, or student status. Written documentation under this subsection may include, but need not be limited to, any of the following:

(a) A W-2 form, pay stub, or written statement by an employer.

(b) A contract.

(c) A student identification card or student transcript.”

MCL 28.724a does not apply to a student “whose enrollment and participation at an institution of higher education is solely through the mail or the internet from a remote location.” MCL 28.724a(6).

10.10 Registration and Notification Duties

A. Form and Contents

1. Registration Form

Registration information obtained under the SORA must be forwarded to the department of state police in the format prescribed by the department of state police. MCL 28.727(1). Unless an offender is indigent and qualifies for the waiver under MCL 28.725b(3), an offender must pay a $50 registration fee with each original registration. MCL 28.727(1).

2. Notification of Duties

The form used for notification of duties under the SORA must contain written information explaining the registrant’s duty to provide notice of any change in his or her registration information. MCL 28.727(3). The form must also explain the procedures involved in providing notice of any post-registration changes, as well as information about the required verification procedures under MCL 28.725a. MCL 28.727(3).

51 MCL 28.725b(3) states: “If an individual required to pay a registration fee under [the SORA] is indigent, the registration fee shall be waived for a period of 90 days. The burden is on the individual claiming indigence to prove the fact of indigence to the satisfaction of the local law enforcement agency, sheriff’s department, or department [of state police] post where the individual is reporting.” See Section 10.1(G).
3. **In-Person Reporting**

“The department [of state police] shall prescribe the form for a notification required under [MCL 28.725][52] and the format for forwarding the notification to the department [of state police].” MCL 28.727(7).

B. **Information Required in Registration**

The registration must contain the following information about the registrant:

- Legal name and any aliases, nicknames, ethnic or tribal names, or any other names by which the registrant is known or has been known. MCL 28.727(1)(a).

  **Note:** When registering under the SORA, a registrant in a witness identification and relocation program must provide only the name and identifying information reflecting the registrant’s new identity. Information identifying the registrant’s former identity or location must not be contained in the registration or compilation databases. MCL 28.727(1)(a).

- Social security number and any social security numbers the registrant previously used. MCL 28.727(1)(b).

- Date of birth and any other dates of birth the registrant previously used. MCL 28.727(1)(c).

- Address where the registrant resides or will reside. MCL 28.727(1)(d). If the registrant does not have a residential address, the registration must identify the location or area that will be used by the registrant instead of a residence, or if the registrant is homeless, the registration must identify the village, city, or township where the registrant will spend the majority of his or her time. *Id.*

- If the registrant is away or expected to be away from his or her residence for more than seven days, the registrant must provide the name and address of the registrant’s place of temporary lodging, including the dates the lodging is used or is to be used. MCL 28.727(1)(e).

- Name and address of each of the registrant’s employers. MCL 28.727(1)(f). For purposes of MCL 28.727(1)(f), *employer* includes “a contractor and any individual who has agreed to hire or contract with the individual for his or

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[52] MCL 28.725 addresses the circumstances under which an offender is required to report in person.
her services.” If the registrant will be working at a location or address that is different from the address of the employer, the registration must contain that address or location. \textit{Id}. If there is no fixed employment location, the registration must include the general areas where the registrant works and the ordinary routes the registrant travels in the course of his or her employment. \textit{Id}.

- Name and address of any school the registrant attends and any school the registrant plans to attend at which he or she has been accepted as a student. \textit{MCL 28.727(1)(g)}. For purposes of \textit{MCL 28.727(1)(g)}, \textit{school} means “a public or private postsecondary school or school of higher education, including a trade school.”

- All telephone numbers registered to the registrant or telephone numbers that the registrant routinely uses. \textit{MCL 28.727(1)(h)}. Note that a portion of this provision has been held to be unconstitutionally vague. See \textit{People v Solloway}, 316 Mich App 174, 185-187 (2016) and \textit{People v Patton, ___ Mich App ___} (2018) (although the requirement of SORA that a registrant report “‘[a]ll telephone numbers registered to the individual or \textit{routinely used} by the individual[,]’” \textit{MCL 28.727(1)(h)} is unconstitutionally vague, \textit{Solloway}, 316 Mich App at 185-187, the “‘\textit{registered to}’” language in \textit{MCL 28.727(1)(h)} is not unconstitutionally vague because it “provide[s] fair notice of the conduct proscribed, do[es] not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and [its] scope is not so overly broad as to infringe on constitutional rights,” \textit{Patton, ___ Mich App at ___} (emphasis added).\textsuperscript{53}

- All of the electronic mail and instant message addresses assigned to the registrant or that the registrant routinely uses, and all of the registrant’s login names or other identifiers that the registrant uses when using electronic mail or instant messaging. \textit{MCL 28.727(1)(i)}. Note that a portion of this provision has been held to be unconstitutionally vague. See \textit{People v Solloway, 316 Mich App 174, 185-187} (2016) and \textit{People v Patton, ___ Mich App ___} (2018) (although the requirement of SORA that a registrant report “‘[a]ll telephone numbers registered to the individual or \textit{routinely used} by the individual[,]’” \textit{MCL 28.727(1)(h)} is unconstitutionally vague, \textit{Solloway}, 316 Mich App at 185-187, the “‘\textit{registered to}’” language in \textit{MCL 28.727(1)(h)} is not unconstitutionally vague because it “provide[s] fair notice of the conduct proscribed, do[es] not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and [its] scope is not so overly broad as to infringe on constitutional rights,” \textit{Patton, ___ Mich App at ___} (emphasis added).\textsuperscript{53}

\textsuperscript{53} “\textit{The phrase ‘routinely used’ as found in \textit{MCL 28.727(1)(h)} . . . renders th[is] statutory provision[] vague};” under “the dictionary definition of ‘routinely,’ as discussed in [\textit{Does v Snyder, 101 F Supp 3d 672, 686-691, 713 (ED Mich, 2015)}], abrogated on other grounds \textit{834 F3d 696 (CA 6, 2016)}], it is evident that law enforcement officers and judges could hold different views of how often a telephone number . . . must be used by an individual to be ‘routinely used’ under the statute.” \textit{Solloway, 316 Mich App at 187}. But see \textit{Patton, ___ Mich App at ___}, which found that “the \textit{Solloway} Court only held unconstitutionally vague the alternative part of \textit{MCL 28.727(1)(h)} . . . requiring registration of ‘telephone numbers’ . . . that are ‘routinely used’ by the person subject to the requirements of SORA”; it “did not address or hold unconstitutionally vague the parts of \textit{MCL 28.727(1)(h)} . . . requiring registration of ‘telephone numbers’ . . . that are ‘registered to’ . . . the person subject to the requirements of SORA.” Because “[t]he invalid portion is not so interconnected with the [‘registered to’] portion[] as to render [it] also invalid,” that portion of the statute is constitutionally valid. \textit{Patton, Mich App at ___}.\textsuperscript{53}
App 174, 185-187 (2016) and People v Patton, ___ Mich App ___ (2018) (although the requirement of SORA that a registrant report ‘[a]ll electronic mail addresses and instant message addresses assigned to the individual or 
**routinely used** by the individual[,]’ MCL 28.727(1)(i) is 
unconstitutionally vague, Solloway, 316 Mich App at 185-
187, the ‘‘registered to’’ language in MCL 28.727(1)(i) is not 
unconstitutionally vague because it ‘‘provide[s] fair notice 
of the conduct proscribed, do[es] not confer on the trier of 
fact unstructured and unlimited discretion to determine 
whether an offense has been committed, and [its] scope is 
not so overly broad as to infringe on constitutional rights,’’ 
**Patton, ___ Mich App at ___**) (emphasis added).54

• A description of any motor vehicle,55 aircraft,56 or vessel57 
owned by the registrant or that the registrant regularly 
operates, including the license plate number or registration 
number and the location where the vehicle, aircraft, or 
vessel is regularly stored or kept. MCL 28.727(1)(j).

• Registrant’s driver’s license number or state personal 
identification card number. MCL 28.727(1)(k).

• Digital copy of the registrant’s passport and any other 
immigration documents belonging to the registrant. MCL 
28.727(1)(l).

• Occupational and professional licensing information, 
including any licenses that authorize the registrant to 
engage in any occupation, profession, trade, or business. 
MCL 28.727(1)(m).

• Brief summary of the registrant’s convictions for listed 
offenses without regard to when the convictions occurred. 
MCL 28.727(1)(n). The summary should indicate where the

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54 “[T]he phrase ‘routinely used’ as found in MCL 28.727(1)(i) . . . renders th[is] statutory provision[]
vague”; under “the dictionary definition of ‘routinely,’ as discussed in [Does v Snyder, 101 F Supp 3d 672, 
686-691, 713 (ED Mich, 2015), abrogated on other grounds 834 F3d 696 (CA 6, 2016)], it is evident that law 
enforcement officers and judges could hold different views of how often . . . [an] e-mail address must be 
used by an individual to be ‘routinely used’ under the statute.” Solloway, 316 Mich App at 187. But see 
**Patton, ___ Mich App at ___** which found that “the Solloway Court only held unconstitutionally vague the 
alternative part of . . . [MCL 28.727(1)(i)] requiring registration of . . . ‘electronic mail addresses and instant 
message addresses’ that are ‘routinely used’ by the person subject to the requirements of SORA,” it “did 
not address or hold unconstitutionally vague the parts of . . . [MCL 28.727(1)(i)] requiring registration of . . . 
‘electronic mail addresses and instant message addresses’ that are . . . ‘assigned to’ the person subject to 
the requirements of SORA.” Because “[t]he invalid portion is not so interconnected with the [‘assigned to’] 
portion[] as to render [it] also invalid,” that portion of the statute is constitutionally valid. **Patton, ___ Mich 
App at ___**.

55 **Vehicle**, for purposes of the SORA, is defined in MCL 257.79. MCL 28.722(x).

56 **Aircraft**, for purposes of the SORA, is defined in MCL 259.2. MCL 28.722(a).

57 **Vessel**, for purposes of the SORA, is defined in MCL 324.44501. MCL 28.722(y).
offense occurred and the original charge if the registrant was convicted of a lesser offense. Id.

• Complete description of the registrant’s physical appearance. MCL 28.727(1)(o).

• Photograph of the registrant as required under MCL 28.725a. MCL 28.727(1)(p).

• Registrant’s fingerprints (if not already on file) and the registrant’s palm prints. MCL 28.727(1)(q). An individual who must register under the SORA must have his or her fingerprints, palm prints, or both taken no later than September 12, 2011, if the individual’s fingerprints or palm prints are not already on file with the department of state police. Id. If the individual’s fingerprints and palm prints are not already on file with the federal bureau of investigation (FBI), the department of state police must forward the FBI a copy of those prints. Id.


• Information that must be reported under MCL 28.724a (registrant’s status as a student and location of educational institution). MCL 28.727(1)(r).

C. Additional Registration Information Required

A registration must also contain all of the following:

• Electronic copy of the registrant’s Michigan driver’s license or Michigan personal identification card, including the photograph required under the SORA. MCL 28.727(2)(a).

• Language of the statutory provision that defines the offense for which the sex offender must register. MCL 28.727(2)(b).

• Outstanding arrest warrant information, if any. MCL 28.727(2)(c).

• Whether the registrant is a tier I, tier II, or tier III offender. MCL 28.727(2)(d). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction]” and which applies retroactively to all
those required to register under SORA) constitutes an unconstitutional ex post facto punishment.  

- Whether a sample of the registrant’s DNA has been obtained, and whether the registrant’s DNA profile has been entered into the federal combined DNA index system (CODIS). \(^{59}\) **MCL 28.727(2)(e)**.

- Registrant’s complete criminal history, including the dates of each arrest and conviction. **MCL 28.727(2)(f)**.

- Registrant’s department of corrections (DOC) number and whether the registrant is on parole, probation, or supervised release. **MCL 28.727(2)(g)**.

- Registrant’s FBI number. **MCL 28.727(2)(h)**.

**D. Signatures Required\(^{60}\) and Registrant’s Duty to Provide Truthful Information\(^{61}\)**

An individual registering under the SORA must sign the registration and notice. **MCL 28.727(4)**. However, even if the registration is unsigned or the registration fee is unpaid, the registration and notice must be forwarded to the department of state police. *Id.*

“The officer, court, or an employee of the agency registering the individual or receiving or accepting a registration under [MCL 28.724] shall sign the registration form.” **MCL 28.727(5)**.

An individual registering under **MCL 28.724** or giving notification under **MCL 28.725(1)** must be given a copy of the registration or notification at the time he or she registers or gives notice. **MCL 28.726(1)**. The officer, court, or agency with whom the individual registers or notifies of a change of address must “forward the registration or notification to the department [of state police] in a manner prescribed by the department [of state police] immediately

\(^{58}\) This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See *People v Gillam*, 479 Mich 253, 261 (2007); *Abela v Gen Motors Corp*, 469 Mich 603, 606-607 (2004); *People v Bosca*, 310 Mich App 1, 76 n 25 (2015).

\(^{59}\) The CODIS unit manages the Combined DNA Index System and the National DNA Index System (NDIS). For detailed information about these databases, see [www.fbi.gov/about-us/lab/codis/codis-and-ndis-factsheet](http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-factsheet).

\(^{60}\) See **M Crim JI 20.39f**, *Sex Offenders Registration Act Violations – Failure to Sign Registration and Notice*.

\(^{61}\) See **M Crim JI 20.39c**, *Sex Offenders Registration Act Violations – Providing False or Misleading Information*. 
[(within three business days)] after registration or notification.” MCL 28.726(2).

An individual registering under the SORA “shall not knowingly provide false or misleading information concerning a registration, notice, or verification.” MCL 28.727(6).

“The department [of state police] shall promptly provide registration, notice, and verification information to the [FBI] and to local law enforcement agencies, sheriff’s departments, department [of state police] posts, and other registering jurisdictions, as provided by law.” MCL 28.727(8).

E. Registration Fee

Except as indicated in MCL 28.725b(3) (an indigent individual may have his or her registration fee waived for up to 90 days based on proof of indigence), an individual must pay a $50 fee for his or her original registration. MCL 28.727(1).

“Except as otherwise provided in [MCL 28.725b], an individual who reports as prescribed under [MCL 28.725a(3) (requiring regular verification of an individual’s domicile or residence)] shall pay a $50.00 registration fee as follows:

(a) Upon initial registration.

(b) Annually following the year of initial registration.

The payment of the registration fee under this subdivision shall be made at the time the individual reports in the first reporting month for that individual as set forth in [MCL 28.725a(3)] of each year in which the fee applies, unless an individual elects to prepay an annual registration fee for any future year for which an annual registration fee is required. Prepaying any annual registration fee shall not change or alter the requirement of an individual to report as set forth in [MCL 28.725a(3)]. The payment of the registration fee under this subdivision is not required to be made for any registration year that has expired before January 1, 2014 or to be made by any individual initially required to register under this act after January 1, 2019. The registration fee required to be paid under this subdivision shall not be prorated on grounds that the individual will complete his or her registration period after the month in which the fee is due.

62 See M Crim JI 20.39g, Sex Offenders Registration Act Violations – Failure to Pay Registration Fee.
(c) The sum of the amounts required to be paid under subdivisions (a) and (b) shall not exceed $550.00.” MCL 28.725a(6).

“Payment of the registration fee prescribed under [the SORA] shall be made in the form and by means prescribed by the department [of state police]. Upon payment of the registration fee prescribed under [the SORA], the officer or employee shall forward verification of the payment to the department [of state police] in the manner the department [of state police] prescribes. The department [of state police] shall revise the law enforcement database and public internet website . . . as necessary and shall indicate verification of payment in the law enforcement database[.]” MCL 28.725b(4).

Allocation of fees. Of the $50 registration fee collected from each registration, the department of state police receives $30 and the remaining $20 is to be retained by the court, local law enforcement agency, sheriff’s department, or department of state police post. The $30 amount allocated to the department of state police must be deposited in the sex offenders registration fund, a separate fund in the department of treasury (MCL 28.725b(2)). MCL 28.725b(1). The department of corrections does not collect any portion of the registration fee. MCL 28.725c.

10.11 Verification of Domicile or Residence

An offender who is not incarcerated and who is required to register under the SORA must verify his or her domicile or residence by reporting in person to the registering authority with jurisdiction over the location of the offender’s domicile or residence. MCL 28.725a(3).

“A report under [MCL 28.725a(3)] shall be made no earlier than the first day or later than the last day of the month in which the individual is required to report. However, if the registration period for that individual expires during the month in which he or she is required to report under this section, the individual shall report during that month on or before the date his or her registration period expires.” MCL 28.725a(4).

A. Yearly Verification (Tier I Offenders)

Subject to MCL 28.725a(4) (setting out dates on which an offender must annually report), MCL 28.725a(3)(a) requires tier I offenders to
report “once each year during the individual’s month of birth.” But see *Does v Snyder*, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.64

B. Semi-Annual Verification (Tier II Offenders)

Subject to MCL 28.725a(4) (setting out dates on which an offender must biannually report), MCL 28.725a(3)(b) requires tier II offenders to report “twice each year according to the following schedule:

<table>
<thead>
<tr>
<th>Birth Month</th>
<th>Reporting Months</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>January and July</td>
</tr>
<tr>
<td>February</td>
<td>February and August</td>
</tr>
<tr>
<td>March</td>
<td>March and September</td>
</tr>
<tr>
<td>April</td>
<td>April and October</td>
</tr>
<tr>
<td>May</td>
<td>May and November</td>
</tr>
<tr>
<td>June</td>
<td>June and December</td>
</tr>
<tr>
<td>July</td>
<td>January and July</td>
</tr>
<tr>
<td>August</td>
<td>February and August</td>
</tr>
<tr>
<td>September</td>
<td>March and September</td>
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<tr>
<td>October</td>
<td>April and October</td>
</tr>
<tr>
<td>November</td>
<td>May and November</td>
</tr>
<tr>
<td>December</td>
<td>June and December</td>
</tr>
</tbody>
</table>

But see *Does v Snyder*, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of

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64 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See *People v Gillam*, 479 Mich 253, 261 (2007); *Abela v Gen Motors Corp*, 469 Mich 603, 606-607 (2004); *People v Bosca*, 310 Mich App 1, 76 n 25 (2015).
conviction[“] and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.65

C. Quarterly Verification (Tier III Offenders)

Subject to MCL 28.725a(4) (setting out dates on which an offender must quarterly report), MCL 28.725a(3)(c) requires tier III offenders to report “4 times each year according to the following schedule:

<table>
<thead>
<tr>
<th>Birth Month</th>
<th>Reporting Months</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>January, April, July, and October</td>
</tr>
<tr>
<td>February</td>
<td>February, May, August, and November</td>
</tr>
<tr>
<td>March</td>
<td>March, June, September, and December</td>
</tr>
<tr>
<td>April</td>
<td>April, July, October, and January</td>
</tr>
<tr>
<td>May</td>
<td>May, August, November, and February</td>
</tr>
<tr>
<td>June</td>
<td>June, September, December, and March</td>
</tr>
<tr>
<td>July</td>
<td>July, October, January, and April</td>
</tr>
<tr>
<td>August</td>
<td>August, November, February, and May</td>
</tr>
<tr>
<td>September</td>
<td>September, December, March, and June</td>
</tr>
<tr>
<td>October</td>
<td>October, January, April, and July</td>
</tr>
<tr>
<td>November</td>
<td>November, February, May, and August</td>
</tr>
<tr>
<td>December</td>
<td>December, March, June, and September</td>
</tr>
</tbody>
</table>

But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of

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65 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosco, 310 Mich App 1, 76 n 25 (2015).
conviction[]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.66

D. Registrant’s Duty to Review Information for Accuracy

A registrant who reports as required by MCL 28.725a(3) must review all of his or her registration information for accuracy. MCL 28.725a(4). According to MCL 28.725a(5):

“When an individual reports under [MCL 28.725a(3)], an officer or authorized employee of the registering authority shall verify the individual’s residence or domicile and any information required to be reported under [MCL 28.724a]. The officer or authorized employee shall also determine whether the individual’s photograph required under [the SORA] matches the appearance of the individual sufficiently to properly identify him or her from that photograph. If not, the officer or authorized employee shall require the individual to immediately [(within three business days68)] obtain a current photograph under this section. When all of the verification information has been provided, the officer or authorized employee shall review that information with the individual and make any corrections, additions, or deletions the officer or authorized employee determines are necessary based on the review. The officer or authorized employee shall sign and date a verification receipt. The officer or authorized employee shall give a copy of the signed receipt showing the date of verification to the individual. The officer or authorized employee shall forward verification information to the department [of state police] in the manner the department [of state police] prescribes. The department [of state police] shall revise the law enforcement database and public internet website maintained under [MCL 28.728] as necessary and shall indicate verification in the public internet website maintained under [MCL 28.728(2)].”69

66 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

67 See Section 10.9 for information about resident and nonresident student requirements under MCL 28.724a.

68 See MCL 28.722(g).
E. Registration Fee

Unless a registrant is indigent and qualifies under MCL 28.725b for a 90-day waiver of the registration fee, “an individual who reports as prescribed under [MCL 28.725a(3) (requiring regular verification of an individual’s domicile or residence)] shall pay a $50.00 registration fee as follows:

(a) Upon initial registration.

(b) Annually following the year of initial registration. The payment of the registration fee under this subdivision shall be made at the time the individual reports in the first reporting month for that individual as set forth in [MCL 28.725a(3)] of each year in which the fee applies, unless an individual elects to prepay an annual registration fee for any future year for which an annual registration fee is required. Prepaying any annual registration fee shall not change or alter the requirement of an individual to report as set forth in [MCL 28.725a(3)]. The payment of the registration fee under this subdivision is not required to be made for any registration year that has expired before January 1, 2014 or to be made by any individual initially required to register under this act after January 1, 2019. The registration fee required to be paid under this subdivision shall not be prorated on grounds that the individual will complete his or her registration period after the month in which the fee is due.

(c) The sum of the amounts required to be paid under subdivisions (a) and (b) shall not exceed $550.00.” MCL 28.725a(6).

F. Required Identification

1. Residents

An individual required to register under the SORA must maintain either a valid Michigan driver’s or chauffeur’s license, or an official Michigan personal identification card with the individual’s current address. MCL 28.725a(7). An individual may use the license or card as proof of domicile or residence. Id. The officer or authorized employee may also require the

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69 For information about the computerized law enforcement database and the public internet website, see Section 10.15 and Section 10.16, respectively.

70 See M Crim JI 20.39d, Sex Offenders Registration Act Violations – Identification Requirements.
individual to produce an additional document showing the individual’s name and address, including, but not limited to, an individual’s voter registration card, a utility bill, or other bill. *Id.* Other satisfactory proof of domicile or residence may be specified by the department of state police. *Id.*

2. **Released Prisoners**

Immediately (within three business days) after the release of an incarcerated individual who is registered under the SORA, he or she must report to the secretary of state to have his or her digitized photograph taken. MCL 28.725a(8). If the individual had a digitized photograph taken for a driver’s or chauffeur’s license, or an official state personal identification card before January 1, 2000, or within two years before he or she was released, that individual is not required to report under this subsection, unless the individual’s appearance has changed from the date of that photograph. *Id.* The photograph shall be used on the individual’s license or state identification card, unless he or she is a nonresident. *Id.* When an individual renews his or her license or identification card as required by law, or as otherwise provided under the SORA, the individual must have a new photograph taken. *Id.* The digitized photograph must be made available by the secretary of state to the department of state police for registration under the SORA. *Id.*

G. **Failure to Report**

If an individual fails to report under MCL 28.725a or under MCL 28.724a, the department of state police must notify all registering authorities as indicated in MCL 28.728a and initiate enforcement action according to MCL 28.728a.\(^7\) MCL 28.725a(9).

\(^7\) See Section 10.18.
10.12 In-Person Reporting for Post-Registration Changes of Status

A. In-State Changes\textsuperscript{72}

1. Residents

According to MCL 28.725(1), a resident of Michigan who is required to register under the SORA must report \textit{in person} and notify the registering authority with jurisdiction over the area where his or her residence\textsuperscript{73} or domicile is located immediately (within three business days) after any of the following:

“(a) The individual changes or vacates his or her residence or domicile.

(b) The individual changes his or her place of employment, or employment is discontinued.

(c) The individual enrolls as a student with an institution of higher education, or enrollment is discontinued.

(d) The individual changes his or her name.

(e) The individual intends to temporarily reside at any place other than his or her residence for more than 7 days.

(f) The individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings.

(g) The individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.

(h) Any change required to be reported under [MCL 28.724a].”\textsuperscript{74}

\textsuperscript{72} See M Crim JI 20.39a, Sex Offenders Registration Act Violations – Failure to Notify, M Crim JI 20.39j, Sex Offenders Registration Act Violations – Venue, M Crim JI 20.39k, Sex Offenders Registration Act Violations – Registration / Notification / Verification, and M Crim JI 20.39l, Sex Offenders Registration Act Violations – Definitions – Residence / Domicile.

\textsuperscript{73} For SORA’s definition of the term residence, see Section 10.1(0).

\textsuperscript{74} See Section 10.9 for information about resident and nonresident student requirements under MCL 28.724a.
“Although the reporting requirements [under MCL 28.725(1)] are undeniably burdensome, their restraining effect is not absolute. Registrants are not precluded from many activities, such as changing residences or jobs, but are merely required to report them.” People v Tucker, 312 Mich App 645, 682 (2015). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added the requirement that all registrants appear in person immediately to update information and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.75

See People v Allen (Floyd), 310 Mich App 328, 338 (2015), rev’d on other grounds 499 Mich 307 (2016),76 (finding that “there was substantial evidence to support that defendant changed or vacated his registered residence or intended to reside at a place other than his residence for more than seven days, and that he failed to appear in person to the registering authority to report his new address [as is required under MCL 28.725(1)(a) and MCL 28.725(1)(e)]” where “defendant’s registered address appeared uninhabitable” for nine straight days, the defendant admitted to staying at another location “for the previous two weeks,” and there was witness testimony supporting the defendant having only slept at the registered residence twice in a five-month period).

2. Nonresident Employees

A nonresident who is required to be registered under the SORA and who has his or her place of employment in Michigan must report in person and notify the registering authority with jurisdiction over the area in which his or her place of employment is located or the department of state police post in the location of the individual’s place of employment immediately (within three business days) after the individual’s employment changes or is discontinued. MCL 28.725(2). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6,

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75 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 26 n 25 (2015).

76 “A prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . Where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262 (2002). See also MCR 7.215(J)(1). However, its analysis may still be persuasive. See generally Dunn, 254 Mich App at 263-266.
2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added the requirement that all registrants appear in person immediately to update information and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.77

B. Out-of-State Changes78

1. Change to Another State

A resident of Michigan who is required to be registered under the SORA must report in person and notify the registering authority with jurisdiction over the area where his or her residence or domicile is located immediately (within three business days) before changing his or her residence or domicile to another state. MCL 28.725(6). The individual must indicate the state to which he or she will be relocating, and if known, the new address in that state. Id. “The department [of state police] shall update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state.” Id. But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added the requirement that all registrants appear in person immediately to update information and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.79

77 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

78 See M Crim JI 20.39b, Sex Offenders Registration Act Violations – Failure to Report Before Moving to Another State or Moving to Another Country for More Than Seven Days, M Crim JI 20.39, Sex Offenders Registration Act Violations – Venue, M Crim JI 20.39k, Sex Offenders Registration Act Violations – Failure to Register / Notification / Verification In-person Requirement, and M Crim JI 20.39l, Sex Offenders Registration Act Violations – Definitions – Residence / Domicile.

79 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).
2. Change to Another Country

A Michigan resident who is required to be registered under the SORA must report in person and notify the registering authority with jurisdiction over the area where his or her residence or domicile is located no later than 21 days before changing his or her residence or domicile to another country, or before traveling to another country for more than 7 days. MCL 28.725(7). The individual must indicate the new country of residence or travel and the address of his or her new residence or domicile or place of stay, if known. Id. “The department [of state police] shall update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority.” Id.

C. Constitutionality of In-Person Reporting Requirements

SORA’s in-person reporting requirements, MCL 28.725(1) and MCL 28.725a, “do not constitute punishment[]” and therefore “necessarily cannot constitute cruel or unusual punishment.” People v Tucker, 312 Mich App 645, 683 (2015). Applying “the seven factors enunciated in” Kennedy v Mendoza-Martinez, 372 US 144 (1963),80 “[t]he requirements impose affirmative restraints and arguably resemble conditions of supervised probation or parole[; h]owever, the reporting requirements do not necessarily promote deterrence or retribution, they are rationally connected to the nonpunitive purpose of protecting the public by ensuring that the registry is accurate, and they are not excessive.” Tucker, 312 Mich App at 682. Accordingly, “we conclude that there is not the clearest proof that the in-person reporting requirements are so punitive in purpose or effect as to negate the Legislature’s intent to deem them civil.” Id. at 683.

But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added the requirement that all registrants appear in person immediately to update information and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment. SORA is “[a] regulatory regime that . . . requires time-consuming and cumbersome in-person reporting . . . supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe[]”81 Id. at 705.

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80 For a list of the seven Mendoza-Martinez factors, see Section 10.1(B)(4).
10.13 Notice of Registrant’s Release or Change in Incarceration

A. Individuals in Prison

“If an individual who is incarcerated in a state correctional facility and is required to be registered under [the SORA] is granted parole or is due to be released upon completion of his or her maximum sentence, the department of corrections [(DOC)], before releasing the individual, shall provide notice of the location of the individual’s proposed place of residence or domicile to the department of state police.” MCL 28.725(3).

B. Individuals in County Jail

“If an individual who is incarcerated in a county jail and is required to be registered under [the SORA] is due to be released from custody, the sheriff’s department, before releasing the individual, shall provide notice of the location of the individual’s proposed place of residence or domicile to the department of state police.” MCL 28.725(4).

C. Correctional Facility Transfers

MCL 28.725(5) states:

“Immediately [(within three business days)] after either of the following occurs, the [DOC] shall notify the local law enforcement agency or sheriff’s department having jurisdiction over the area to which the individual is transferred or the department [of state police] post of the transferred residence or domicile of an individual required to be registered under [the SORA]:

(a) The individual is transferred to a community residential program.

(b) The individual is transferred into a level 1 correctional facility of any kind, including a correctional camp or work camp.”

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81 This case is included in this benchbook because of the questions it raises regarding the applicability of these provisions; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosco, 310 Mich App 1, 76 n 25 (2015).
D. Transfer of Probation or Parole

“If the probation or parole of an individual required to be registered under [the SORA] is transferred to another state or an individual required to be registered under [the SORA] is transferred from a state correctional facility to any correctional facility or probation or parole in another state, the [DOC] shall promptly notify the department [of state police] and the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. The department [of state police] shall update the registration and compilation databases.” MCL 28.725(8).

10.14 Length of Registration Period

An individual registered under the SORA must comply with the verification and proof of residence procedures prescribed in MCL 28.724a and MCL 28.725a. MCL 28.725(9).

The length of a registration period under MCL 28.725 does not include any term of incarceration imposed for committing a crime or any term of civil commitment. MCL 28.725(13).

“For an individual who was previously convicted of a listed offense for which he or she was not required to register under [the SORA] but who is convicted of any felony on or after July 1, 2011, any period of time that he or she was not incarcerated for that listed offense or that other felony and was not civilly committed counts toward satisfying the registration period for that listed offense as described in this section. If those periods equal or exceed the registration period described in [MCL 28.725], the individual has satisfied his or her registration period for the listed offense and is not required to register under [the SORA]. If those periods are less than the registration period described in [MCL 28.725] for that listed offense, the individual shall comply with this section for the period of the time remaining.” MCL 28.725(14).

A. Tier I Offenders

Except as otherwise provided in MCL 28.725 and MCL 28.728c, a tier I offender must comply with the SORA registration requirements for 15 years. MCL 28.725(10). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing]
to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[,]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.82

B. Tier II Offenders

Except as otherwise provided in MCL 28.725 and MCL 28.728c, a tier II offender must comply with the SORA registration requirements for 25 years. MCL 28.725(11). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[,]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.83

C. Tier III Offenders

Except as otherwise provided in MCL 28.725 and MCL 28.728c, a tier III offender must comply with the SORA registration requirements for life. MCL 28.725(12). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[,]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.84

82 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

83 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

84 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).
10.15 Computerized Law Enforcement Database

A computerized law enforcement database of registrations and notices required under the SORA must be maintained by the department of state police. MCL 28.728(1). This law enforcement database must contain all of the following information for each individual who registers under the SORA:

A. Required Information

• Legal name and any other names by which the registrant is known or has been known, including aliases, nicknames, and ethnic or tribal names. MCL 28.728(1)(a).

• Social security number and any social security numbers the registrant previously used. MCL 28.728(1)(b).

• Date of birth and any other dates of birth the registrant previously used. MCL 28.728(1)(c).

• Address where the registrant resides or will reside. MCL 28.728(1)(d). If the registrant does not have a residential address, the registration must identify the location or area that will be used by the registrant instead of a residence, or if the registrant is homeless, the registration must identify the village, city, or township where the registrant will spend the majority of his or her time. Id.

• If the registrant is away or expected to be away from his or her residence for more than seven days, the registrant must provide the name and address of the registrant’s place of temporary lodging, including the dates the lodging is to be used. MCL 28.728(1)(e).

• Name and address of each of the registrant’s employers. MCL 28.728(1)(f). For purposes of MCL 28.727(1)(f), employer includes “a contractor and any individual who has agreed to hire or contract with the individual for his or her services.” If the registrant will be working at a location or address that is different from the address of the employer, the registration must contain that address or location. Id.

• Name and address of any school the registrant attends and any school the registrant plans to attend at which he or she has been accepted as a student. MCL 28.728(1)(g). For purposes of MCL 28.727(1)(g), school means “a public or private postsecondary school or school of higher education, including a trade school.”
• All telephone numbers registered to the registrant or telephone numbers that the registrant routinely uses. MCL 28.728(1)(h).

• All of the electronic mail and instant message addresses assigned to the registrant or that the registrant routinely uses, and all of the registrant’s login names or other identifiers that the registrant uses when using electronic mail or instant messaging. MCL 28.728(1)(i).

• A description of any motor vehicle, aircraft, or vessel owned by the registrant or that the registrant regularly operates, including its license plate number or registration number and the location where it is regularly stored or kept. MCL 28.728(1)(j).

• Driver’s license number or the number of the registrant’s state personal identification number. MCL 28.728(1)(k).

• Digital copy of the registrant’s passport and any immigration documents. MCL 28.728(1)(l).

• Occupational and professional licensing information, including any licenses that authorize the registrant to engage in any occupation, profession, trade, or business. MCL 28.728(1)(m).

• Brief summary of the registrant’s convictions for listed offenses without regard to when the convictions occurred. MCL 28.728(1)(n). The summary should indicate where the offense occurred and the original charge if the registrant was convicted of a lesser offense. Id.

• Complete description of the registrant’s physical appearance. MCL 28.728(1)(o).

• Photograph of the registrant as required under MCL 28.725a. MCL 28.728(1)(p).

• Fingerprints and palm prints of the registrant. MCL 28.728(1)(q).

• Electronic copy of the registrant’s Michigan driver’s license or Michigan personal identification card, including the photograph required under the SORA. MCL 28.728(1)(r).

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85 Vehicle, for purposes of the SORA, is defined in MCL 257.79. MCL 28.722(x).
86 Aircraft, for purposes of the SORA, is defined in MCL 259.2. MCL 28.722(a).
87 Vessel, for purposes of the SORA, is defined in MCL 324.44501. MCL 28.722(y).
• Language of the statutory provision that defines the offense for which the sex offender must be registered. MCL 28.728(1)(s).

• Outstanding arrest warrant information, if any. MCL 28.728(1)(t).

• Whether the registrant is a tier I, tier II, or tier III offender, and the registrant’s registration status. MCL 28.728(1)(u). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[“] and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment. 88

• Whether a sample of the registrant’s DNA has been obtained, and whether the registrant’s DNA profile has been entered into the federal combined DNA index system (CODIS). 89 MCL 28.728(1)(v).

• Registrant’s complete criminal history, including the dates of each arrest and conviction. MCL 28.728(1)(w).

• Registrant’s department of corrections (DOC) number and whether registrant is on parole, probation, or supervised release. MCL 28.728(1)(x).

• Registrant’s federal bureau of investigation (FBI) number. MCL 28.728(1)(y).

B. Distribution of the Law Enforcement Database

“The department [of state police] shall make the law enforcement database available to each department [of state police] post, local law enforcement agency, and sheriff’s department by the law enforcement information network. Upon request by a department [of state police] post, local law enforcement agency, or sheriff’s department, the department [of state police] shall provide to that

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88 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

89 The CODIS unit manages the Combined DNA Index System and the National DNA Index System (NDIS). For detailed information about these databases, see www.fbi.gov/about-us/lab/codis/codis-and-ndis-factsheet.
post, agency, or sheriff’s department the information from the law enforcement database in printed form for the designated areas located in whole or in part within the post’s, agency’s, or sheriff’s department’s jurisdiction.” MCL 28.728(6).

1. **In Electronic Form**

“The department [of state police] shall make the law enforcement database available to a department [of state police] post, local law enforcement agency, or sheriff’s department by electronic, computerized, or other similar means accessible to the post, agency, or sheriff’s department.” MCL 28.728(7).

2. **Database Search Options**

“The department [of state police] shall provide the ability to conduct a computerized search of the law enforcement database . . . based upon the name and campus location of an institution of higher education.” MCL 28.728(6).

C. **Organization of Law Enforcement Database**

“The compilation of individuals [on the law enforcement database] shall be indexed alphabetically by village, city, township, and county, numerically by zip code area, and geographically as determined appropriate by the department [of state police].” MCL 28.728(5).

D. **Removing Individuals from the Database**

“If the department [of state police] determines that an individual has completed his or her registration period, including a registration period reduced by law under 2011 PA 18, or that he or she otherwise is no longer required to register under [the SORA], the department [of state police] shall remove the individual’s registration information from . . . the law enforcement database . . . within 7 days after making that determination.” MCL 28.728(9).

10.16 **Public Internet Website**

Separate from the law enforcement database in MCL 28.728(1), the department of state police must also maintain a public internet website to implement MCL 28.730(2) and MCL 28.730(3). MCL 28.728(2). “The department [of state police] shall make the public internet website available to the public by electronic, computerized, or other similar means accessible to the public.” MCL 28.728(7).
A. **Required Public Website Information**

With the exception of the individuals described in MCL 28.728(4), the public internet website must contain all of the following information for each individual registered under the SORA:

- **Legal name and any other names by which the registrant is or has been known, including any aliases, nicknames, and ethnic or tribal names.** MCL 28.728(2)(a).

- **Date of birth.** MCL 28.728(2)(b).

- **Address of the registrant’s residence.** MCL 28.728(2)(c). If the registrant does not have a residential address, the public internet website must identify the village, city, or township the registrant uses in lieu of a residence. Id.

- **Address of each of the registrant’s employers.** MCL 28.728(2)(d). For purposes of MCL 28.728(2)(d), employer includes “a contractor and any individual who has agreed to hire or contract with the individual for his or her services.” If the registrant will be working at a location or address that is different from the address of the employer, the public internet website must contain that address or location. Id.

- **Address of any school the registrant attends and any school the registrant plans to attend at which he or she has been accepted as a student.** MCL 28.728(2)(e). For purposes of MCL 28.728(2)(e), school means “a public or private postsecondary school or school of higher education, including a trade school.”

- **Description of any motor vehicle, aircraft, or vessel owned or regularly operated by the registrant, including its license plate number or registration number.** MCL 28.728(2)(f).

- **Brief summary of the registrant’s convictions for listed offenses without regard to when the conviction(s) occurred.** MCL 28.728(2)(g).

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90 MCL 28.730(2) and MCL 28.730(3) require that a state police post, a local law enforcement agency, or a sheriff's department make the information on the public internet website available for public inspection during regular business hours.

91 See Section 10.1(C) for a description of these individuals.

92 *Vehicle*, for purposes of the SORA, is defined in MCL 257.79. MCL 28.722(x).

93 *Aircraft*, for purposes of the SORA, is defined in MCL 259.2. MCL 28.722(a).

94 *Vessel*, for purposes of the SORA, is defined in MCL 324.44501. MCL 28.722(y).
• Complete description of the registrant’s physical appearance. MCL 28.728(2)(h).

• Photograph as required under MCL 28.725a. MCL 28.728(2)(i). If no photograph is available, the department of state police must use a registrant’s arrest photograph or a registrant’s department of corrections (DOC) photograph until the photograph required under MCL 28.725a becomes available. Id.

• Language of the statutory provision that defines the offense for which the sex offender must be registered. MCL 28.728(2)(j).

• Status of the individual’s registration. MCL 28.728(2)(k).

• Whether the registrant is a tier I, tier II, or tier III offender. MCL 28.728(2)(l). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[“]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.95

B. Information Not Contained on the Public Website

The information listed below must not be available on the public internet website:

• Identity of the victim(s) of the offense. MCL 28.728(3)(a).

• Registrant’s social security number. MCL 28.728(3)(b).

• Arrest(s) not resulting in a conviction. MCL 28.728(3)(c).

• Numbers of any travel or immigration documents. MCL 28.728(3)(d).

• Electronic mail or instant message addresses assigned to the registrant or regularly used by the registrant, and login name(s) or other identifiers used by the registrant during

95 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosco, 310 Mich App 1, 76 n 25 (2015).
use of any electronic mail address or instant messaging system. MCL 28.728(3)(e).

• Registrant’s driver license number or state personal identification card number. MCL 28.728(3)(f).

C. Individuals Not Included on the Public Website

The individuals listed below must not be included on the public internet website:

• “An individual registered solely because he or she had 1 or more dispositions for a listed offense entered under . . . MCL 712A.18, in a case that was not designated as a case in which the individual was to be tried in the same manner as an adult under . . . MCL 712A.2d.” MCL 28.728(4)(a).

• “An individual registered solely because he or she was the subject of an order of disposition or other adjudication in a juvenile matter in another state or country.” MCL 28.728(4)(b).

• “An individual registered solely because he or she was convicted of a single tier I offense, other than an individual who was convicted of a violation of any of the following:

  (i) [MCL 750.145c(4)].

  (ii) A violation of [MCL 750.335a(2)(b)], if a victim is a minor.

  (iii) [MCL 750.349b], if the victim is a minor.

  (iv) [MCL 750.539j], if a victim is a minor.

  (v) An offense substantially similar to an offense described in subparagraphs (i) to (v) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law.” MCL 28.728(4)(c). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[“] and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.96
D. Organization of Public Website

“The compilation of individuals [on the public internet website] shall be indexed alphabetically by village, city, township, and county, numerically by zip code area, and geographically as determined appropriate by the department [of state police].” MCL 28.728(5).

E. Search Options

“The department [of state police] shall provide the ability to conduct a computerized search of . . . the public internet website based upon the name and campus location of an institution of higher education.” MCL 28.728(6).

In addition, “[t]he [public internet website] shall [be searchable] by name, village, city, township, and county designation, zip code, and geographical area.” MCL 28.728(7).

F. Updating the Public Website

The public internet website must be updated by the department of state police with new registrations, deleted registrations, and changes of address, “at the same time those changes are made to the law enforcement database described in [MCL 28.728(1)].” MCL 28.728(6).

G. Removing Individuals from the Public Website

“If the department [of state police] determines that an individual has completed his or her registration period, including a registration period reduced by law under 2011 PA 18, or that he or she otherwise is no longer required to register under [the SORA], the department [of state police] shall remove the individual’s registration information from . . . the public internet website within 7 days after making that determination.” MCL 28.728(9).

H. Violations Set Aside or Expunged

“If the individual provides the department [of state police] with documentation showing that he or she is required to register under [the SORA] for a violation that has been set aside under . . . MCL...

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96 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosco, 310 Mich App 1, 76 n 25 (2015).
to [MCL] 780.624, or that has been otherwise expunged, the department [of state police] shall note on the public internet website that the violation has been set aside or expunged.” 97 MCL 28.728(10).

I. Constitutional Issues

“If a court determines that the public availability under [MCL 28.730] of any information concerning individuals registered under [the SORA] violates the constitution of the United States or this state, the department [of state police] shall revise the public internet website described in [MCL 28.728(2)] so that it does not contain that information.” MCL 28.728(8).

10.17 General Public Notification and Computerized Database Requirements

A. Confidentiality

Except as otherwise indicated in the SORA, information contained in an offender’s registration or reporting form is confidential. MCL 28.730(1). The registration or report information is not open to the public and may be inspected only for law enforcement purposes. Id. The forms and all included materials are exempt from disclosure under the Freedom of Information Act (FOIA), MCL 15.243. MCL 28.730(1).

B. Public Inspection at Law Enforcement Agencies During Regular Business Hours

A registering authority must make available for public inspection during regular business hours the information on the public internet website for the designated areas, in whole or in part, within a registering authority’s jurisdiction. MCL 28.730(2). The registering authority is not required to provide a member of the public with a copy of the information. Id.

C. Notification to Specific Members of the Public

Members of the public may subscribe to be notified by electronic or computerized means for information about an individual appearing on the public internet website. MCL 28.730(3). The department of state police must notify these subscribers whenever an offender

97 See Section 9.21 for more information on setting aside or expunging convictions.
initially registers under the SORA, or when the offender changes his or her registration under the SORA to a location within the area or geographic radius designated by the subscriber. *Id.*

**D. Unauthorized Disclosure of Information**

Unless otherwise permitted under the SORA, any person other than a registrant, with knowledge of a registration or report under the SORA, must not disclose the information. *MCL 28.730(4).* A person “who divulges, uses, or publishes nonpublic information concerning the registration or report in violation of [the SORA] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.” *Id.*

If an individual’s registration or report is revealed in violation of the SORA, that individual may bring a civil cause of action for treble damages against the responsible party. *MCL 28.730(5).*

The prohibition against revealing information about a registration or report does not apply to the public internet website or information from the website expressly made available under the SORA. *MCL 28.730(6).*

### 10.18 Failure to Register or Comply with the SORA

**A. Failure to Register**

1. **Duties of the Registering Authority**

   *MCL 28.728a* states:

   “(1) If an individual fails to register or to update his or her registration information as required under [the SORA], the local law enforcement agency, sheriff’s office, or department [of state police] post responsible for registering the individual or for verifying and updating his or her registration information shall do all of the following immediately [(within three business days)] after the date the individual was required to

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98 See *M Crim JI 20.39h*, *Sex Offenders Registration Act Violations – Registering Agent Offenses.*

99 See *M Crim JI 20.39*, *Sex Offenders Registration Act Violations – Failure to Register, M Crim JI 20.39j*, *Sex Offenders Registration Act Violations – Venue, M Crim JI 20.39k*, *Sex Offenders Registration Act Violations – Failure to Register / Notification / Verification In-person Requirement*, and *M Crim JI 20.39l*, *Sex Offenders Registration Act Violations – Definitions – Residence / Domicile.*
register or to update his or her registration information:

(a) Determine whether the individual has absconded or is otherwise unlocatable.

(b) If the registering authority was notified by a registration jurisdiction that the individual was to appear in order to register or update his or her registration information in the jurisdiction of the registering authority, notify the department [of state police] in a manner prescribed by the department [of state police] that the individual failed to appear as required.

(c) Revise the information in the registry to reflect that the individual has absconded or is otherwise unlocatable.

(d) Seek a warrant for the individual’s arrest if the legal requirements for obtaining a warrant are satisfied.

(e) Enter the individual into the national crime information center wanted person file if the requirements for entering information into that file are met.”100

2. Duties of the Department of State Police

MCL 28.728a(2) states:

“If an individual fails to register or to update his or her registration information as required under [the SORA], the department [of state police] shall do all of the following immediately [(within three business days)] after being notified by the registering authority that the individual failed to appear as required:

(a) Notify that other registration jurisdiction that the individual failed to appear as required.

(b) Notify the United States marshal’s service in the manner required by the United States

100 See https://www.fbi.gov/services/cjis/ncic.
marshal’s service of the individual’s failure to appear as required.

(c) Update the national sex offender registry to reflect the individual’s status as an absconder or as unlocatable.”

B. Penalties for Failure to Comply with SORA Requirements

1. In General

MCL 28.729(1) states:

“Except as provided in [MCL 28.729(2), MCL 28.729(3), and MCL 28.729(4)], an individual required to be registered under [the SORA] who willfully violates [the SORA] is guilty of a felony punishable as follows:

(a) If the individual has no prior convictions for a violation of [the SORA], by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(b) If the individual has 1 prior conviction for a violation of [the 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 [the SORA], by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.”

MCL 28.729(2) states:

“An individual who fails to comply with [MCL 28.725a], other than payment of the fee required under [MCL 28.725a(6)], is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.”

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101 For more information on the national sex offender registry, see www.nsopw.gov and www.mipsor.state.mi.us.

102 Failing to register as a sex offender under MCL 28.729(2) “is a strict liability offense that does not require a ‘willful’ mental state—or any other mental state—for violation[,]” People v McFall, 309 Mich App 377, 385 (2015) (holding that “the trial court correctly denied [the defendant’s] request to include a ‘willful’ mental state in the jury instructions[]”).
MCL 28.729(3) states:

“An individual who willfully fails to sign a registration and notice as provided in [MCL 28.727(4)] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.”

MCL 28.729(4) states:

“An individual who willfully refuses or fails to pay the registration fee prescribed in [MCL 28.725a(6)103 or MCL 28.727(1)] within 90 days of the date the individual reports under [MCL 28.724a or MCL 28.725a] is guilty of a misdemeanor punishable by imprisonment for not more than 90 days.”

2. Sentence Enhancement

“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[;]” therefore, a sentence imposed for a conviction of a second-offense SORA violation (SORA-2) “may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a).” People v Allen (Floyd), 499 Mich 307, 322, 326-327 (2016), rev’d 310 Mich App 328 (2015) (“conclud[ing] that the Court of Appeals erred by interpreting MCL 28.729(1) and MCL 769.10 as directly conflicting[.]”).

Because “[n]othing in SORA or the [Habitual Offender Act (HOA)] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute[,]” “[t]he trial court can sentence [a] defendant under SORA-2 as a second-offense habitual offender using his [or her] SORA-1 conviction.” Allen (Floyd), 499 Mich at 311, 322-323, 326 (finding 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) and, as a result, [the] defendant’s maximum sentence as a second-offense habitual offender would be 6 years[; r]ather, [the] defendant was subject to a 7-year maximum term

103 Note that, effective April 1, 2014, MCL 28.725a(6) eliminated the phrase “who has not already paid the fee prescribed under [MCL 28.727(1)]” from its statutory language, and eliminated payment of a one-time only $50.00 registration fee and instead require payment of a $50.00 registration fee “upon initial registration” and then annually, for a total not exceeding $550.00.
of imprisonment, and the trial court appropriately exercised its discretion in sentencing [the] defendant to 1½ times that statutory maximum, i.e., 10.5 years[”].

3. **Mandatory Revocation of Probation, Parole, and Youthful Trainee Status**

An individual’s probation must be revoked if he or she willfully violates the SORA. MCL 28.729(5).

An individual’s youthful trainee status must be revoked if he or she willfully violates the SORA. MCL 28.729(6).

An individual’s parole must be rescinded if he or she willfully violates the SORA. MCL 28.729(7).

4. **Venue for Enforcement**

An individual who fails to register as required by the SORA or who violates MCL 28.725 may be prosecuted in the following judicial districts:

- The offender’s last residence or registered address.
- The offender’s actual residence or address.
- The location at which the offender was arrested for the SORA violation. MCL 28.729(8).

### 10.19 Prohibitions and Exemptions Involving Student Safety Zones

Subject to certain exceptions (discussed below), registered sex offenders are prohibited from specific activities in student safety zones. But see *Does v Snyder*, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2006 amendment (which added the prohibition of registered sex offenders from living, working, or loitering within 1,000 feet of a school and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.

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104 See M Crim JI 20.39i, *Sex Offenders Registration Act Violations – Student Safety Zone Offenses.*

105 See Section 9.11(A).
A. Relevant Definitions

1. Listed Offense

“‘Listed offense’ means that term as defined in [MCL 28.722].” MCL 28.733(a).

2. Loiter

“‘Loiter’ means to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors.” MCL 28.733(b).

3. Minor

“‘Minor’ means an individual less than 18 years of age.” MCL 28.733(c).

4. School

“‘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.” MCL 28.733(d).

5. School Property

“‘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.” MCL 28.733(e).

106 This case is included in this benchbook because of the questions it raises regarding the applicability of these provisions; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).
6. Student Safety Zone

“‘Student safety zone’ means the area that lies 1,000 feet or less from school property.” MCL 28.733(f).

B. Prohibitions Against Working or Loitering in a Student Safety Zone

Except as otherwise provided (exceptions discussed below), an offender who is required to be registered under the SORA must not work or loiter within a student safety zone. MCL 28.734(1)(a)-(b).

1. Penalties for Violation

- “For the first violation, the individual is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.” MCL 28.734(2)(a).

- “An individual who violates [MCL 28.734] and has 1 or more prior convictions under [MCL 28.734] is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.” MCL 28.734(2)(b).

An offender charged with violating MCL 28.734(1) may be “charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating [MCL 28.734].” MCL 28.734(4).

2. Exceptions: Registered Offenders Already Employed in a Student Safety Zone107

MCL 28.734(1)(a) does not apply to:

- an offender who was working in a student safety zone on January 1, 2006; however, MCL 28.734(1)(a) does apply to an offender “who initiates or maintains contact with a minor within that student safety zone.” MCL 28.734(3)(a).

- an offender whose place of employment comes within a student safety zone solely because a school is relocated or first established 1,000 feet or less from the offender’s place of employment; however, MCL 28.734(1)(a) does apply to an offender “who initiates

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107 See also Section 10.1(E) for another list of individuals also exempt from the prohibitions in MCL 28.734.
or maintains contact with a minor within that student safety zone.” MCL 28.734(3)(b).

• an offender “who only intermittently or sporadically enters a student safety zone for the purpose of work.” MCL 28.734(3)(c). However, MCL 28.734(1)(a) does apply to an offender “who initiates or maintains contact with a minor within that student safety zone.” MCL 28.734(3)(c).

Note, however, that MCL 28.734 does not prohibit an offender from the exercise of his or her right to vote. MCL 28.734(5).

C. Prohibitions Against Residing in a Student Safety Zone

Subject to specific exceptions (discussed below), an offender who is required to be registered under the SORA must not live within a student safety zone. MCL 28.735(1).

1. Penalties for Violations

• “For the first violation of [MCL 28.735(1)], the individual is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.” MCL 28.735(2)(a).

• “An individual who violates [MCL 28.735(1)] and has 1 or more prior convictions under [MCL 28.735] is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.” MCL 28.735(2)(b).

An offender charged with violating MCL 28.735 may be “charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating [MCL 28.735].” MCL 28.735(5).

2. Exceptions: Registered Offenders Already Residing in a Student Safety Zone

MCL 28.735 does not apply to the following individuals:

• an offender who is not older than age 19, attends secondary or postsecondary school, and lives with his or her parent or guardian. MCL 28.735(3)(a). However, MCL 28.735(1) does apply to an offender “who initiates or maintains contact with a minor

108See also Section 10.1(E) for another list of individuals also exempt from the prohibitions in MCL 28.734.
within that student safety zone[,]” unless the contact is initiated or maintained in conjunction with the offender’s school attendance and involves a minor with whom the offender attends secondary or postsecondary school. MCL 28.735(3)(a).

• an offender who is not older than age 26, attends a special education program, and lives with his or her parent or guardian or in a group home or assisted living facility. MCL 28.735(3)(b). The offender must not initiate or maintain contact with a minor in that student safety zone but may, in conjunction with his or her attendance in the special education program, be permitted to initiate or maintain contact with a minor attending school with the offender. Id.

• An offender who was living in the student safety zone on January 1, 2006. MCL 28.735(3)(c). However, the exception does not apply if the offender initiates or maintains contact with a minor in the student safety zone, id., even if this contact occurred during the commission of the offense requiring registration under the SORA, People v Mineau, 306 Mich App 325, 330-331 (2014) (holding that “the ‘exception to the exception’ set forth in the second sentence of MCL 28.735(3)(c) can be satisfied by the very conduct that causes an individual to have to register as a sex offender,” and is not “limit[ed] . . . to conduct that occurs after an individual is required to register”).

• An offender who is a patient in a hospital or hospice located in a student safety zone. MCL 28.735(3)(d). However, MCL 28.735(1) does apply to an offender “who initiates or maintains contact with a minor in the student safety zone.” Id.

• An offender living in a student safety zone because he or she is incarcerated in a prison, a jail, a juvenile facility, or other correctional facility, or because he or she is a patient who was committed to a mental health facility in a student safety zone. MCL 28.735(3)(e). However, MCL 28.735(1) does apply to an offender “who initiates or maintains contact with a minor in the student safety zone.” Id.

D. Offenders Living in a Student Safety Zone Who Subsequently Must Register Under the SORA

“An individual who resides within a student safety zone and who is subsequently required to register under [the SORA] shall change his or her residence to a location outside the student safety zone not
more than 90 days after he or she is sentenced for the conviction that
gives rise to the obligation to register under [the SORA]. However,
this exception does not apply to an individual who initiates or
maintains contact with a minor within that student safety zone
during the 90-day period described in this subsection.” MCL 28.735(4).

An individual who is required to be registered under the SORA,
who lives in a student safety zone, and who is required to change
his or her residence under MCL 28.735 “is subject to MCL 28.735(4)[]” and therefore “generally . . . [has] a 90-day time period
within which to change his or her residence[,]. . . even if[] . . . the
offense [requiring registration] involved ‘contact with a minor
within th[e] student safety zone[]’” as set out in MCL 28.735(3)(c).
“However, if the individual ‘initiates or maintains contact with a
minor within [that] student safety zone during the 90-day period,’
MCL 28.735(4), he or she loses the benefit of the 90-day period
otherwise allowed to effect the change of residence.” Mineau, 306
Mich App at 334.

“[MCL 28.735] does not prohibit an individual from being charged
with, convicted of, or punished for any other violation of law that is
committed by that individual while violating this section.” MCL 28.735(5).

E. Specific Juvenile and Other Young Offenders Exempt
from Prohibitions Against Living, Loitering, or Working
in Student Safety Zones

Note: An individual who has been convicted of more
than one offense described in MCL 28.736(1) is not
eligible for the exemptions listed below: MCL 28.736(2).

Individuals that qualify for the exemption from the prohibitions in
MCL 28.734 and MCL 28.735 are as follows:

• A juvenile convicted of committing, attempting to commit,
or conspiring to commit MCL 750.520b(1)(a), MCL 750.520c(1)(a), or MCL 750.520d(1)(a) if:109

  • “The individual was under 13 years of age when he or
she committed the offense and is not more than 5
years older than the victim[,]” MCL 28.736(1)(a)(i), or

109 See Section 2.3 and Section 2.4 for more information.
• “The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.” MCL 28.736(1)(a)(ii).

• A juvenile charged with committing, attempting to commit, or conspiring to commit MCL 750.520b(1)(a), MCL 750.520c(1)(a), or MCL 750.520d(1)(a) but who is convicted of violating, attempting to violate, or conspiring to violate MCL 750.520e\(^{110}\) or MCL 750.520g\(^{111}\) if:
  
  • “The individual was under 13 years of age when he or she committed the offense and is not more than 5 years older than the victim[,]” MCL 28.736(1)(b)(i), or

  • “The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.” MCL 28.736(1)(b)(ii).

• “An individual who has successfully completed his or her probationary period under [MCL 762.11 to MCL 762.15] for committing a listed offense and has been discharged from youthful trainee status.” MCL 28.736(1)(c).

• “An individual convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)], who at the time of the violation was 17 years of age or older but less than 21 years of age and who is not more than 5 years older than the victim.” MCL 28.736(1)(d).

F. Constitutionality of School Safety Zones

SORA’s school safety zone provisions, MCL 28.734 and MCL 28.735, “do not constitute punishment[]” and therefore “necessarily cannot constitute cruel or unusual punishment.” People v Tucker, 312 Mich App 645, 683 (2015). Applying “the seven factors enunciated in” Kennedy v Mendoza-Martinez, 372 US 144 (1963),\(^ {112}\) school safety “zones impose affirmative restraints, resemble historical punishments, and promote deterrence[; h]owever, . . . they are rationally connected to the nonpunitive purpose of public safety and . . . they are not excessive, because the Legislature is permitted to make the categorical judgment that sex offenders should not live, work, or loiter near schools.” Tucker, 312 Mich App at 681.

\(^{110}\) CSC-IV. See Section 2.4 for more information.

\(^{111}\) Assault with intent to commit CSC. See Section 2.5 for more information.

\(^{112}\) For a list of the seven Mendoza-Martinez factors, see Section 10.1(B)(4).
Accordingly, “there is not the clearest proof that the student safety zone restrictions are so punitive in purpose or effect as to negate the Legislature’s intent to deem them civil.” Id. at 682.

But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2006 amendment (which added the prohibition of registered sex offenders from living, working, or loitering within 1,000 feet of a school and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment. SORA is “[a] regulatory regime that severely restricts where people can live, work, and ‘loiter,’ . . . supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe[.]” 113 Id. at 705.

10.20 Petition to Discontinue Registration

A. Who May Petition the Court

1. Tier I Offenders

A tier I offender who satisfies the requirements of MCL 28.728c(12) 114 may petition the court for an order permitting him or her to discontinue registration under the SORA. MCL 28.728c(1). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[ ]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment. 115

113 This case is included in this benchbook because of the questions it raises regarding the applicability of these provisions; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

114 See Section 10.1(F)(1).

115 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).
2. Tier III Offenders

A tier III offender who satisfies the requirements of MCL 28.728c(13)\textsuperscript{116} may petition the court for an order permitting him or her to discontinue registration under the SORA. MCL 28.728c(2). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[“] and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.\textsuperscript{117}

3. Tier I, Tier II, and Tier III Offenders

A tier I, tier II, or tier III offender who satisfies the requirements of MCL 28.728c(14) or MCL 28.728c(15)\textsuperscript{118} may petition the court for an order permitting him or her to discontinue registration under the SORA. MCL 28.728c(3). But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[“] and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.\textsuperscript{119}

B. Filing the Petition

MCL 28.728c is the only means by which an offender may obtain judicial review of his or her registration requirements under the SORA. MCL 28.728c(4). MCL 28.728c(4) does not proscribe an

\textsuperscript{116} See Section 10.1(F)(2).

\textsuperscript{117} This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

\textsuperscript{118} See Section 10.1(F)(3).

\textsuperscript{119} This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).
appeal of the conviction or sentence as otherwise permitted by law or court rule. \textit{Id.}

With the exception of convictions that occur in another state or country, a petition filed under MCL 28.728c must be filed in the court in which the offender was convicted of the listed offense. MCL 28.728c(4). If an individual was convicted in another state or country and the individual is a Michigan resident, the individual may file the petition to discontinue his or her registration under the SORA only in the circuit court of the county in which he or she resides. \textit{Id.}

An individual may not file a petition if he or she previously filed a petition under MCL 28.728c, and after a hearing, the court denied the petition. MCL 28.728c(4).

At least 30 days before a hearing is held on the petition, a copy of the petition must be filed with the prosecutor’s office that prosecuted the case against the offender. MCL 28.728c(7). If the conviction occurred in another state or country, then the petition must be filed with the prosecutor’s office in the county where the offender resides. \textit{Id.} The prosecutor may participate in all proceedings involving the petition, and the prosecutor may appeal any decision made on the petition. \textit{Id.}

\section*{C. Contents of the Petition}

The petition must be made under oath and include all of the following information:

- Petitioner’s name and address. MCL 28.728c(5)(a).

- Identification of the offense for which the petitioner is requesting to discontinue his or her registration. MCL 28.728c(5)(b).

- Statement indicating whether the petitioner has a previous conviction for a listed offense requiring him or her to register under the SORA. MCL 28.728c(5)(c).

An individual is guilty of perjury, MCL 750.423(1), if he or she knowingly makes a false statement in a petition under MCL 28.728c. MCL 28.728c(6).

\section*{D. Victim Notification}

If the prosecutor knows the name of the victim involved in the offense, the prosecutor must provide the victim with written notice that a petition was filed and must provide the victim with a copy of the petition. MCL 28.728c(8). The prosecutor must send the notice
by first-class mail to the victim’s last known address. *Id.* The notice must include information about the victim’s rights as described in MCL 28.728c(10). MCL 28.728c(8).

Before the court makes any decision on the petition, the victim has the right to attend any proceeding held on the petition and to present a written or oral statement to the court. MCL 28.728c(10). A victim shall not be required, against his or her will, to attend any hearing on the petition. *Id.*

**E. Hearing on the Petition**

If the petition is properly filed with the court, the court must conduct a hearing on the petition. MCL 28.728c(9).

In deciding whether to permit the petitioner to discontinue registration as provided in MCL 28.728c(12) (tier I offenders) or MCL 28.728c(13) (tier III offenders), MCL 28.728c(11) requires the court to consider all of the following:

“(a) The individual’s age and level of maturity at the time of the offense.

(b) The victim’s age and level of maturity at the time of the offense.

(c) The nature of the offense.

(d) The severity of the offense.

(e) The individual’s prior juvenile or criminal history.

(f) The individual’s likelihood to commit further listed offenses.

(g) Any impact statement submitted by the victim under the William Van Regenmorter crime victim’s rights act, . . . MCL 780.751 to [MCL] 780.834, or under [MCL 28.728c].

(h) Any other information considered relevant by the court.” MCL 28.728c(11).

Notwithstanding the court’s consideration of these factors, if the court determines that the petitioner presents a continuing threat to the public, the court must not grant the petition. MCL 28.728c(11).
F. Determining Whether to Grant the Petition

1. Tier I Offenders

MCL 28.728c(12) states that a properly filed petition under MCL 28.728c(1) (tier I offenders) may be granted if all of the following apply:

“(a) Ten or more years have elapsed since the date of his or her conviction for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.

(b) The petitioner has not been convicted of any felony since the date described in subdivision (a).

(c) The petitioner has not been convicted of any listed offense since the date described in subdivision (a).

(d) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.

(e) The petitioner successfully completed a sex offender treatment program certified by the United States Attorney General under 42 USC 16915(b)(1), or another appropriate sex offender treatment program. The court may waive the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner’s confinement, release, probation, or parole.”

But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.120
2. Tier III Offenders

MCL 28.728c(13) states that a properly filed petition under MCL 28.728c(2) (tier III offenders) may be granted if all of the following apply:

“(a) The petitioner is required to register based on an order of disposition entered under . . . MCL 712A.18, that is open to the general public under . . . MCL 712A.28.

(b) Twenty-five or more years have elapsed since the date of his or her adjudication for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.

(c) The petitioner has not been convicted of any felony since the date described in subdivision (b).

(d) The petitioner has not been convicted of any listed offense since the date described in subdivision (b).

(e) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.

(f) The court determines that the petitioner successfully completed a sex offender treatment program certified by the United States attorney general under 42 USC 16915(b)(1), or another appropriate sex offender treatment program. The court may waive the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner’s confinement, release, probation, or parole.”

But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current

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120 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosco, 310 Mich App 1, 76 n 25 (2015).
dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.121

3. Tier I, Tier II, or Tier III Offenders

MCL 28.728c(14) states that a properly filed petition under MCL 28.728c(3) (tier I, tier II, or tier III offenders) must be granted “if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim and any of the following apply”:

“(a) All of the following:

(i) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.

(ii) The petitioner is not more than 4 years older than the victim.[122]

(b) All of the following:

(i) The individual was convicted of a violation of . . . MCL 750.158, [MCL] 750.338, [MCL] 750.338a, [or MCL] 750.338b.

(ii) The victim was 13 years of age or older but less than 16 years of age at the time of the violation.

(iii) The individual is not more than 4 years older than the victim.

(c) All of the following:

121 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).

122 “[O]ne who is even one day past the 4-year or 48-month eligibility limit described in MCL 28.728c(14)(a)(ii) is ineligible to obtain relief under that statute.” People v Costner, 309 Mich App 220, 232 (2015). “[W]hen [MCL 28.728c(14)(a)(ii)] inquires into whether a defendant ‘is not more than 4 years older than the victim,’ it is using the commonly understood definition of a ‘year’ as a measure of time, and a ‘year’ is commonly understood as being 12 months in duration.” Costner, 309 Mich App at 231 (holding that MCL 8.3j, defining “year” as “a calendar year[,]” does not apply “when referencing . . . a unit or measure of time[,]” and concluding that “[t]he defendant[,] being 4 years and 23 days older than the victim[, was] . . . ‘more than 4 years older’ than the victim[]” and was therefore ineligible for removal from the registry) (citation and emphasis omitted).
(i) The individual was convicted of a violation of . . . MCL 750.158, [MCL] 750.338, [MCL] 750.338a, [MCL] 750.338b, [or MCL] 750.520c.

(ii) The victim was 16 years of age or older at the time of the violation.

(iii) The victim was not under the custodial authority of the individual at the time of the violation.”

MCL 28.728c(15) states that a properly filed petition under MCL 28.728c(3) (tier I, tier II, or tier III offenders) must be granted if either of the following applies:

“(a) Both of the following:

(i) The petitioner was adjudicated as a juvenile.

(ii) The petitioner was less than 14 years of age at the time of the offense.

(b) The individual was registered under [the SORA] before July 1, 2011 for an offense that required registration but for which registration is not required on or after July 1, 2011.”

But see Does v Snyder, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.123

G. If the Petition Is Granted

If a petition is granted pursuant to MCL 28.728c, the court must promptly provide the department of state police and the petitioner with a copy of the order. MCL 28.728d. The department of state police must promptly remove the petitioner’s registration from the database maintained pursuant to MCL 28.728(1). MCL 28.728d.

123 This case is included in this benchbook because of the questions it raises regarding the applicability of this provision; however, decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See People v Gillam, 479 Mich 253, 261 (2007); Abela v Gen Motors Corp, 469 Mich 603, 606-607 (2004); People v Bosca, 310 Mich App 1, 76 n 25 (2015).
### History of Listed Offenses

Amendments or additions to the listed offenses from year-to-year are indicated in **bold type**.

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<th>Act</th>
<th>Effective Date</th>
<th>Listed Offenses Appeared in MCL</th>
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<tr>
<td>2011 PA 17</td>
<td>7/1/2011</td>
<td>Listed offenses are described as tier I, tier II, or tier III offenses and appear in MCL 28.722(s)(i)-(ix), (u)(i)-(xiii), and (w)(i)-(viii), respectively.</td>
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See Section 10.4(A).
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### Legal Text

3rd/subsequent violation of any combination of:
- MCL 750.167(1)(f), if victim is a minor, tier I.
- MCL 750.335a(2)(b), if victim is a minor, tier I.

Listed offenses are described as tier I, tier II, or tier III offenses and appear in MCL 28.722(s)(i)-(ix), (u)(i)-(xii), and (w)(i)-(viii), respectively.

- Eliminated MCL 750.167(1)(f)
- Eliminated MCL 750.335a(2)(b), if victim is a minor, tier I
<p>| eff. 10/1/1995 | eff. 9/1/1999 | eff. 10/1/2002 | eff. 10/1/2004 | eff. 2/1/2006 | eff. 7/1/2011 | eff. 1/14/2015 |
| MCL 750.520b | MCL 750.520b | MCL 750.520b | MCL 750.520b | MCL 750.520b with exceptions - tier III. See Section 10.1(C) and Section 10.1(B). | MCL 750.520b with exceptions - tier III. See Section 10.1(C) and Section 10.1(B). |
| MCL 750.520c | MCL 750.520c | MCL 750.520c | MCL 750.520c | MCL 750.520c against a victim age 13 or older but under age 18 - tier II. See Section 10.1(B). | MCL 750.520c against a victim age 13 or older but under age 18 - tier II. See Section 10.1(B). |
| MCL 750.520c | MCL 750.520c | MCL 750.520c | MCL 750.520c | MCL 750.520c against a victim age 18 or older - tier II. See Section 10.1(B). | MCL 750.520c against a victim age 18 or older - tier II. See Section 10.1(B). |
| MCL 750.520c | MCL 750.520c | MCL 750.520c | MCL 750.520c | MCL 750.520c against a victim under age 13 - tier III. See Section 10.1(C). | MCL 750.520c against a victim under age 13 - tier III. See Section 10.1(C). |</p>
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<th>1994 PA 295</th>
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- MCL 750.520g(2) against a victim age 18 or older - tier I. See Section 10.4(A).
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**2011 PA 171**

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**2014 PA 328**

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MCL 750.338, MCL 750.338a, and MCL 750.338b if victim is a minor - tier III. See Section 10.1(C).
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<td>eff. 10/1/1995</td>
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<td>MCL 750.350</td>
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<td>Other violation of MI law or local ordinance of municipality that by its nature constitutes a sexual offense against a victim under age 18.</td>
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<td>Other violation of MI law or local ordinance of municipality that by its nature constitutes a sexual offense against a minor and offense is not a tier II or tier III offense - tier I.</td>
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**Notes:**
- Offense committed by a person who at the time of the offense was a sexually delinquent person under MCL 750.10a.
- MCL 750.335a(2)(b) if prior conviction for MCL 750.335a.
- MCL 750.335a(2)(b) if victim is a minor - tier I. See Section 10.4(A).
<table>
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<th>1994 PA 295 eff. 10/1/1995</th>
<th>1999 PA 85 eff. 9/1/1999</th>
<th>2002 PA 542 eff. 10/1/2002</th>
<th>2004 PA 240 eff. 10/1/2004</th>
<th>2005 PA 301 eff. 2/1/2006</th>
<th>2011 PA 17(^1) eff. 7/1/2011</th>
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</thead>
</table>

- **MCL 750.349b** if victim is a minor - tier I.
  - See Section 10.4(A).
- **MCL 750.539j** if victim is a minor - tier I.
  - See Section 10.4(A).
- **MCL 750.145d(1)(a)** except if violation arose from violation of MCL 750.157c - tier II.
  - See Section 10.1(B).
- **MCL 750.449a(2)** if victim is a minor - tier I.
  - See Section 10.4(A).
- **MCL 750.462e(a)** if victim is a minor - tier II.
  - See Section 10.1(B).
1. But see *Does v Snyder*, 834 F3d 696, 705-706 (CA 6, 2016), where the Sixth Circuit Court of Appeals concluded that SORA imposes punishment and that the retroactive application of SORA’s 2011 amendment (which added a division of the registrants into three tiers, “ostensibly correlat[ing] to current dangerousness,” but not based on individual assessments, rather solely on the crime of conviction[]” and which applies retroactively to all those required to register under SORA) constitutes an unconstitutional ex post facto punishment.
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