**DISTRICT COURT SENTENCING**

Compiled by

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## I. OVERVIEW

1.1 Importance. Sentencing is probably the most important function of a district court judge. In many cases, it will be the last time you will see a defendant, so it can be vitally important that you try to make an impression. That can be difficult. But judges need to avail themselves of the tremendous opportunities they have to make a real difference in the lives of troubled people who come before them. The possibility of jail can be very effective to change behavior. Judges also need to take into account the rights of victims and the safety of society. Finding the right sentence for each defendant requires the judge to know the defendant's history and circumstances, receive input from any victim, and maintain updated information about available resources. Judges should work closely with probation officers to craft an appropriate and effective sentence for each drunk driving, drug-related and other serious misdemeanor offense. The good news is that district judges have a lot of discretion in sentencing: they are not bound by sentencing guidelines and other rules that restrict circuit court judges' discretion.

1.2 Problem Defendants. These include primarily alcoholics, drug addicts, people who are mentally ill, and people who speak limited English. It is a constant struggle to craft effective sentences for problem defendants, and they take up a disproportionate amount of the court's time. But it's worth the effort when you're able to keep an alcoholic sober, a drug addict clean, or get a mentally ill person the treatment he or she needs.

1.3 Resources. The number of available jail beds for misdemeanants, and resources for treatment, in some Michigan counties is shrinking, and that trend is likely to continue. This requires affected courts to be more creative and persistent when fashioning a sentence. District court judges need to be aware of the many alternatives to jail and resources for treatment that are available. See Section 3.17, *infra*.

## II. PRESENTENCE

2.1 The Presentence Interview (PSI). This is a conference between the defendant and a probation officer, ordered by the judge. In most courts, the PSI is not usually conducted on the date of plea or finding of guilt. Separate dates are scheduled by the clerk for both the PSI and the sentencing hearing. Any required screening and assessments (see below) are performed at the same time. The purpose of the PSI is to provide the probation officer with the information needed to prepare the presentence report (PSR). In addition to meeting with the defendant, the probation officer should run the defendant's driving record and criminal history.

2.2 The Presentence Investigation Report (PSIR).

A. *Overview*. The PSIR is a comprehensive report prepared by a probation officer following the PSI. Your role is to make sure the PSIR contains all required data (see below) and any other information you need to fashion a sentence. Many courts insist that the BAC (breath or blood alcohol content) at the time of the offense be included on the PSIR, along with any sentence bargain (see Section 2.3 *infra*). The PSIR will include a sentence recommendation along with justifying rationale. Most district judges do NOT require a PSI and PSIR for every misdemeanor case. For example, it is common for district court judges to forego a PSI and PSIR for Driving While License Suspended and certain other traffic misdemeanors, unless there is some indication that the defendant has substance abuse and/or mental health issues.

B. *Purpose Per Case Law*. The PSIR is an integral part of the sentencing process, designed to facilitate informed, individualized sentences that are appropriate for the defendant and the offense. *People v. Lee*, 391 Mich. 618 (1974). The report must be complete, accurate and reliable. *People v. Triplett*, 407 Mich. 510 (1980).

C. *Is It Required in District Court?* Generally, no, unless (1) directed by the Court, (2) the defendant is licensed under Article 15 of the Public Health Code (MCL 333.16101 - 333.18838), MCL 771.14(1)–also see Section 3.10 *infra,* or (3) the offense is a two-year "high" misdemeanor which is actually a felony.[1] Also, the Court of Appeals has held that a judge should not deny a request by a defendant for a presentence report in a misdemeanor case without good cause. *People v. Shackelford,* 146 Mich. App. 330 (1985).

1. Exception: Screening and Assessment for Certain Alcohol and Drug Offenses. MCL 257.625b(5) requires the court to order screening and/or assessment to determine whether the defendant will possibly benefit from rehabilitative services, including the level of substance abuse treatment. A screening and assessment is almost always conducted in conjunction with a PSI. NOTE: the qualification requirements for screening and assessment providers have changed. See Exhibit 6.6, Court Designation Clarification Memo dated Oct. 22, 2013, regarding the Screening, Assessment, Referral, Follow-up License now required.

2. Victim Considerations. MCL 780.764 provides that "The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant . . . A victims' written statement shall upon the victim's request, be included in the presentence investigation report." You should require a PSIR whenever there is a victim, unless the prosecutor and defendant or defense attorney agree to immediate sentencing, and the victim is present to make an oral impact statement at the sentencing hearing (see Section 4.7 *infra*).

[1] Additionally, "[a]s part of a concurrent jurisdiction plan, the circuit court and district court may enter into an agreement for district court probation officers to prepare the [PSIR] and supervise on probation defendants who either plead guilty to, or are found guilty of, a misdemeanor in circuit court[ following bindover on a felony charge]. The case remains under the jurisdiction of the circuit court." MCR 6.008(E).

D. *Contents Requirements*. MCR 6.425(A) requires that, if a PSIR is ordered, the report must be succinct, and, depending on the circumstances, include:

1. A description of the defendant's prior criminal convictions and juvenile adjudications. A juvenile criminal record that has been expunged can be referenced in the report. *People v. Smith*, 437 Mich. 293 (1991). However, a judge may not consider a defendant's prior juvenile delinquency adjudication or adult conviction obtained without benefit of counsel or valid waiver of counsel. *People v. Moore*, 391 Mich. 426 (1974); *People v. Leary* (On Rem), 198 Mich. App. 282 (1993); *United States v. Tucker*, 404 US 443, 449 (1972). The defendant bears the initial burden of proof in asserting the invalidity of a prior juvenile adjudication. *People v. Carpentier*, 446 Mich. 19 (1994); *People v. Love* (Aft. Rem.), 214 Mich. App. 296 (1995).

2. A complete description of the offense and circumstances surrounding it. Per the Court of Appeals, the report must include (1) an objective description of the offense, and (2) the defendant's version of the offense. *People v. Anderson*, 107 Mich. App. 62 (1981).

3. A brief description of the defendant's vocational background and work history, including military record and present employment.

4. A brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data. *People v. Anderson, supra*, also requires a "personal profile" of the defendant.

5. The defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report.

6. Information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim.

7. If provided and requested by the victim, a written victim's impact statement as provided by law.

8. Any statement the defendant wishes to make.

9. A statement prepared by the prosecutor on the availability of any consecutive sentencing provision.

10. An evaluation and prognosis for the defendant's adjustment in the community based on factual information in the report.

11. A specific recommendation for disposition. Also see MCL 771.14(1) (complete text of MCL 771.14 provided as Exhibit 6.3).

(a) Alternative recommendations for a sentence (i.e., jail or probation) do not comply. *People v. Green,* 123 Mich. App. 563 (1983).

(b) A simple recommendation of incarceration, or that the defendant be placed on probation, is sufficient. *People v. Joseph,* 114 Mich. App. 70 (1982); *People v. Perkins,* 114 Mich. App. 186 (1985).

12. Any other information that may aid the court in sentencing. The report may contain opinions and/or conclusions of the probation officer. *People v. Green,* 116 Mich. App. 205 (1982).

MCL 771.14(2) (see Exhibit 6.3) contains requirements similar to MCR 6.425(A); additional mandates therein deal with the use of scoring in sentencing guidelines, which do not apply in district court.

E. *Hearsay, Inadmissible Information, Etc.*. The report may contain hearsay information, and may also contain information about the defendant that was not admissible nor admitted at defendant's trial or plea, including hearsay, character evidence, prior convictions or alleged criminal activity for which defendant was not charged or convicted, and the defendant's version of the offense. *People v. Fleming,* 408 Mich. 408 (1987). The report may also contain hearsay information from a former spouse of the defendant about communications made during the marriage. The marital privilege contained in MCL 600.2162 is testimony privilege that is limited to the situation where the spouse or ex-spouse testifies in a court proceeding. It does not apply to the introduction of the communications into the PSIR. *People v. Fisher,* 442 Mich. 560 (1993).

F. *Timeliness*. The report must be current and updated. *People v. Triplett, supra.* The age of the report does not render it defective; rather, a report is defective if it is so old that it does not reflect changed circumstances. *People v. Crook,* 123 Mich. App. 500 (1983). However, see *People v. Hamphill,* 439 Mich. 576 (1992). Unless a prior PSIR is manifestly outdated, the defendant and the prosecutor may waive the right to a reasonably updated PSR at resentencing when each believes the previously prepared report is accurate.

G. *Disclosure of Report*. Courts are required to provide copies of the PSIR to the defendant or his attorney and the prosecutor at least 2 business days before sentencing unless that period is waived by the defendant. The parties may retain a copy of the report. In practice, most attorneys or defendants will waive the 2-day time period if given the opportunity at the time the plea is taken; and the court can then provide a copy of the PSIR to keep if requested on the date of sentencing. See Exhibit 6.1, Pre-Sentence Scheduling Form, for language re: defendant's right to obtain a copy of the Pre-Sentence Report from the court. The court may also withhold disclosure of letters addressed to the court from the victim and family members. *People v. McAllister,* 241 Mich. App. 466 (2000).

H.. *Challenges to the Report*. Each party must be given the opportunity to explain or challenge the accuracy or relevancy of any information in the PSIR. MCL 771.14(6). After giving an opportunity for each party to challenge the accuracy or relevancy of any information, the judge must make a finding in regard to that information that is challenged. The court may also determine that a finding is not necessary because it will not take the challenged information into account or if the court finds merit to the challenge, the probation officer will be directed to correct or delete the challenged information in the report. MCL 771.14(6). The court is required to respond to any inaccuracies in the report. *People v. Daniels,* 192 Mich. App. 568 (1992). This is not required if the alleged inaccuracies would have no determinative effect on the sentence; any failure to respond would be considered harmless error. *People v. McAllister, supra.* If the court finds the challenged information to be inaccurate or irrelevant, it must strike that information from the PSIR. *People v. Stanke,* 254 Mich. App. 642, 648 (2003). If no objection is raised at sentencing to the information contained in the PSIR, it could preclude appellate review. *People v. Kimble,* 470 Mich. App. 453 (2004). *People v. Lawrence,* 206 Mich. App. 378 (1994).

2.3 Sentence Bargains, a/k/a Plea Agreements. Detail about the process of taking a plea is beyond the scope of these materials. However, plea agreements and sentence bargains are integral to the sentencing process. See Exhibit 6.4 for a sample Plea Agreement form. Sentence bargaining may or may not include the prosecution but always involves the judge, because the ultimate authority to determine and impose sentence rests with the court. Most reported cases dealing with plea agreements are for felony offenses, but may have some application for misdemeanor offenses. Subchapter 6.300 of the Michigan Court Rules governs pleas in felony cases, and some rules are also followed in district court. MCR 6.610(E) contains rules regarding pleas in district court. The three types of sentence bargains are (1) sentence agreements, (2) sentence recommendations, and (3) "preliminary evaluations of sentence length"–commonly referred to as *Cobbs* evaluations or agreements (under *People v. Cobbs,* 443 Mich. 276 (1993)).

A. *Sentence Agreements*. Sentence agreements (e.g., counseling, work release, deferred or delayed sentencing under MCL 771.1, 333.7411, 769.4a, or Holmes Youthful Trainee Act (HYTA)) arise from a bargain between the prosecution and defense for a sentence with particular terms and conditions or a cap on the length of incarceration. They are authorized by *People v. Killebrew,* 416 Mich. 189 (1982), effectively superseded in part by ADM File No. 2011-19.[2] A judge has the discretion to refuse to take a plea based on a sentence agreement or can accept the plea conditionally and determine at sentencing if he or she believes the sentence agreement will result in an appropriate sentence. MCR 6.302(C)(3). The sentence bargain is contractual in nature, and both parties have a right to have the plea set aside if the court determines to impose a sentence outside the parameters of the agreement. MCR 6.302(B)(2)(a). Although the rule speaks only to the defendant's right to withdraw his or her plea, courts have recognized the prosecution's right to have the plea set aside if a judge decides to impose a lesser sentence. See *People v. Siebert,* 450 Mich. 500 (1995); *People v. Smith,* ___ Mich ___, ___ (2018). Additionally, "[a] criminal defendant may be entitled to withdraw his or her guilty plea if the bargain on which the guilty plea was based was illusory, i.e., the defendant received

[2] See 495 Mich lxxix (2013).

no benefit from the agreement." *People v. Pointer-Bey*, ___ Mich. App. ___, ___ (2017), citing *People v. Harris*, 224 Mich. App. 130, 132 (1997).

B. *Sentence Recommendations*. In some jurisdictions, the prosecution policy is to only enter into sentence recommendations rather than sentence agreements. Sentence recommendations are also authorized by *People v. Killebrew, supra*, and arise from an agreement between the prosecution and the defense that the prosecution will recommend that the sentence not exceed a certain length or range (i.e., no jail). As with sentence agreements, a judge has the discretion to refuse to accept the plea or to accept the plea conditionally and determine at sentencing if he or she believes the recommendations will result in an appropriate sentence. MCR 6.302(C)(3). However, "[a] judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea." MCR 6.302(C)(3).[3] Bargained-for sentence recommendations by the prosecution act as a "cap" on the maximum possible sentence, and the defense is free to argue at sentencing for a punishment less than that recommended by the probation department.

C. *"Cobbs" Evaluations or Agreements*. Normally, defendants plead guilty without any legal expectation of a specific sentence, and judges are not bound by a sentencing agreement between the parties. But in a "*Cobbs* agreement," the judge is asked to advise the parties before the plea is entered what an appropriate sentence range would be (based on case facts and the defendant's criminal history known to the judge at that time). The judge announces a sentencing "preview," but the prosecutor is not a party to the terms of this possible sentence. If the defendant is induced to plead by this expected sentence, he may withdraw his plea if he does not receive that sentence. MCR 6.310(B)(2)(b). The judge is only bound by the terms of a *Cobbs* plea stated on the record or on a plea form used by the court.

Where a "defendant violate[s] a precondition of [a] plea and *Cobbs* evaluation[,]" he or she "is not entitled to the benefit of [the] bargain[,]" and "the trial court [is neither] bound by the preliminary sentencing evaluation[ nor] . . . required to afford [the] defendant an opportunity to withdraw [the] plea." *People v. White (Rickey)*, ___ Mich. App. ___, ___ (2014) (holding that where the defendant failed to make a restitution payment that "was a specific precondition of [his] *Cobbs* evaluation[,]" he was not entitled to withdraw his plea on the ground that the sentence imposed exceeded the preliminary evaluation) (citation omitted).

Where a "prosecutor's motion [to vacate a plea is] not based on [the] defendant failing to comply with the terms of the plea agreement[ and t]he record shows that [the] defendant fully complied with his [or her] part of the plea bargain[,]" neither "MCR 6.310(B)(1) nor MCR 6.310(E) permit[s] the trial court to vacate [the] plea on its own motion or that of

[3] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013). But see *People v. Foster (Michael)*, ___ Mich. App. ___, ___, ___ n 2 (2017) (holding that where the trial court imposed a $500 fine that "was not a part of [the prosecutorial] sentence recommendation" contained in the parties' sentencing agreement and was "not contemplated by the parties in relation to the . . . charge for which it was assessed, . . . the trial court plainly erred by not giving [the] defendant an opportunity to affirm or withdraw his plea after the fine was imposed[]").

the prosecutor[.]" *People v. Martinez (Gilbert)*, ___ Mich. App. ___, ___ (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

D. *Cut-Off Date*. A court may impose a cut-off date for taking of a plea/sentence bargain. It is not an abuse of discretion for a judge to set a "cut-off" date prior to trial and to refuse to accept an agreement reached after that date. *People v. Grove*, 455 Mich. 439 (1997).

E. *Is the Judge Bound by the Sentence Agreement*? Not until he or she accepts the agreement at sentencing. Until then, the judge may reject the sentence bargain. *Killebrew, supra*. *Cobbs, supra*. Also, if the prosecutor refuses to make a sentence recommendation or enter into a sentence agreement, the judge may then enter into a sentence agreement with the defendant over the objection of the prosecutor. *Cobbs, supra* at 283.

F. *Procedure When Judge Rejects Sentence Bargain*. The judge should first give the defendant his or her right of allocution, by asking the defendant to tell the court of any circumstances that defendant believes the court should consider in imposing sentence. The judge should then inform the defendant that his or her sentence will be greater than that which was recommended by the prosecutor pursuant to the sentence bargain. Finally, the court should give the defendant an opportunity to either withdraw the plea (except in the case of a prosecutorial sentence recommendation) or affirm the plea. *People v. Shuler*, 188 Mich. App. 548 (1991). It is not enough for the judge to simply tell the defendant that the sentence agreement has been rejected. The judge must advise the defendant of the specific sentence the judge intends to impose. *People v. Scott*, 197 Mich. App. 28 (1992).

G. *Additional Requirements of Probation.* The imposition of conditions of probation in addition to those specified in a sentence bargain do not, alone, allow withdrawal of a plea or specific performance per *Killebrew, supra*. A court may impose other lawful conditions logically and lawfully relate to the defendant's rehabilitation. *People v. Johnson*, 210 Mich. App. 630 (1995).

H. *Defendant's Rights When Prosecutor Does Not Comply With Sentence Bargain.* If a prosecutor recommends a higher sentence than what was agreed to in the sentence bargain, the judge has the discretion of allowing the defendant the opportunity of withdrawing the plea or ordering specific performance of the sentence bargain. *People v. Nixten*, 183 Mich. App. 95 (1990). Once a defendant withdraws his plea and proceeds to trial, he is not entitled to specific performance of the rejected sentence bargain. *People v. Ruter*, 177 Mich. App. 19 (1980). A defendant who reaffirms his guilty plea waives any objection to a prosecutor's noncompliance with a sentence agreement. *People v. Shuler, supra*.

I. *Plea "Under Advisement."* To take a case under advisement is to take a plea of guilty and place the individual under the supervision of the court, without conviction or sentence, for a specified period of time. No statutes or court rules have been identified that authorize district courts to take a plea of guilty under advisement.

MCL 257.732(21), as amended,[4] explicitly *prohibits* courts from taking under advisement any traffic offense that requires reporting to the Secretary of State:

> "Notwithstanding any other law of this state, a court shall not take under advisement an offense committed by a person while operating a motor vehicle for which [the Michigan Vehicle Code] requires a conviction or civil infraction determination to be reported to the secretary of state. A conviction or civil infraction determination that is the subject of this subsection shall not be masked, delayed, diverted, suspended, or suppressed by a court. Upon a conviction or civil infraction determination, the conviction or civil infraction determination shall immediately be reported to the secretary of state in accordance with this section."[5]

NOTE: Taking a plea "under advisement" is distinguishable from delayed or deferred *sentencing*. See Sections 3.3-3.11, *infra*, for discussion of such provisions.

2.4 Judicial Pre-Sentence Conferences.

A. *In-Chambers*. The Supreme Court has found that a judge may conduct an in-chambers conference, but it noted that such conferences may denigrate the defendant's right of allocution and detract from the appearance of fairness and reliability so essential to maintaining confidence in the justice system. *People v. Pulley*, 411 Mich. 523 (1981). The defendant is not required to be present. The judge may confer with defense counsel in the absence of the defendant unless the defendant is prejudiced by the process. *People v. Pulley, supra*. The judge may not meet alone with the prosecutor. The communication is considered to be ex-parte if done without the presence of the defense attorney. *People v. Von Everett*, 110 Mich. App. 393 (1981).

B. *With Another Judge*. Two judges may meet alone to discuss the sentence of a defendant. *People v. Sexton*, 113 Mich. App. 145 (1982).

[4] See 2015 PA 11, effective July 8, 2015. Prior to this amendment, MCL 257.732(21) addressed only offenses committed by persons operating *commercial* vehicles (or by persons licensed to drive commercial vehicles).

[5] The State Court Administrative Office (SCAO) has long discouraged courts from taking "under advisement" pleas on traffic misdemeanors and civil infractions. See the *Michigan Supreme Court Report*, October 1998 (noting that "[t]he SCAO recommends that courts discontinue the practice of taking matters under advisement[,]" because courts' inconsistent use of such practices "result[s] in a perception of inconsistent application of justice[, and f]ailure to submit conviction abstracts compromises the accuracy and integrity of Michigan driving records and is a public safety issue[]").

C. *With Police Officers*. A judge may not meet alone with police officers to discuss a defendant's sentence, because the situation invites prejudice. *People v. Vroman*, 148 Mich. App 291 (1985).

D. *With Probation Officer*. A judge may consult with a probation officer outside the presence of defense counsel. *People v. Smith*, 423 Mich. 427 (1985).

E. *With Victim*. The judge may meet alone with the victim, but this is not a recommended procedure. The case on point had no evidence that what was stated to the judge by the victim was any different from what was told by the defendant during the plea taking. *People v. Rodriquez*, 124 Mich. App. 773 (1983).

## III. FASHIONING THE SENTENCE

3.1 Proper and Improper Considerations.

A. *General Requirements*. The sentencing judge should consider all information that is necessary to set a proper individualized sentence. Such a sentence should be tailored to the particular circumstances of the case and the offender, and should balance both society's needs for protection and society's interest in maximizing the offender's rehabilitative potential. *People v. McFarlin*, 389 Mich. 557 (1973). The sentencing judge should consider information that has a logical bearing on any of the four basic considerations for sentence determinations:

(a) the reformation of the offender,
(b) protection of society,
(c) the disciplining of the wrongdoer, and
(d) the deterrence of others from committing like offenses.

*People v. Snow*, 386 Mich. 586 (1972); *People v. Adams*, 430 Mich. 679 (1988).

B. *Examples of Proper Considerations*. This overlaps somewhat with Section 2.2, *supra* (which discusses the PSIR).

1. General Considerations. In sentencing the court can and should consider:

(a) The severity and nature of the crime;
(b) Circumstances surrounding the criminal behavior;
(c) Defendant's attitude toward his or her criminal behavior;
(d) Defendant's social and personal history;
(e) Subsequent offenses.

*People v. Oliver*, 242 Mich. App. 92 (2000).

2. Information Contained in the PSIR. The purpose of the PSIR is to provide information about the defendant to the judge so the judge can craft an appropriate sentence. There is a presumption that the information contained in a presentence

investigation report is accurate, unless the defendant raises an effective challenge. *People v. Lloyd*, 284 Mich. App. 703 (2009).

3. Sentencing Memorandum Prepared by Defense Counsel. A sentencing memorandum can be considered. Similarly, letters of support from family, friends, community leaders, employers and treatment providers can be considered by the sentencing judge. These are rare in district court.

4. Plea Bargain. If a defendant pleads guilty to a lesser offense in exchange for the dismissal of a greater offense, the sentencing judge may consider these factors in sentencing. *People v. Duprey*, 186 Mich. App. 313 (1990). However, the sentencing judge may not conclude that the defendant is guilty of the greater offense when there is no evidence in the record to support the conclusion. *People v. Tyler*, 188 Mich. App. 83 (1991).

> **Common Example**: A charge of Operating a Vehicle While Intoxicated (OWI) is pled down to Reckless Driving because of evidentiary issues dealing with the 15-minute pre-breath test observation period. There's a breath test result of .16, a PBT on the road of .17, and the defendant admitted he drove after consuming a large amount of alcohol at the time the plea was taken. You can, and should, impose probation conditions on this defendant as if he or she was convicted of OWI.

Because a "court lack[s] any authority to award restitution for [a] defendant's uncharged conduct," admissions in a plea concerning dismissed charges do not provide the basis for a restitution award. *People v. Corbin*, ___ Mich. App. ___, ___ (2015) (citing *People v. McKinley*, 496 Mich. 410, 419 (2014), and holding that although the defendant, when tendering his guilty plea with respect to charged criminal sexual conduct involving one victim, admitted to engaging in criminal sexual conduct with a second victim, restitution should not have been ordered with respect to the second victim where the prosecutor had voluntarily dismissed the charge involving that victim because the statute of limitations had expired). However, if the defendant expressly agrees to the imposition of restitution with respect to charges that are dismissed under a plea agreement, the trial court may order restitution based on the defendant's conduct underlying the dismissed charges without violating *McKinley*, 496 Mich. at 419-420, 424, or the defendant's right to due process. *People v. Foster (Michael)*, ___ Mich. App. ___, ___ (2017).

5. Evidence Admitted at Trial. The judge may consider evidence admitted at trial as an aggravating factor in determining an appropriate sentence. The judge may not, however, make an independent finding of guilt and sentence the defendant accordingly. *People v. Gould*, 225 Mich. App. 79 (1997).

6. Hearsay by Former Spouse. The court may consider hearsay statements by a former spouse of the defendant about communications that were made during the marriage from defendant to his wife. *People v. Fisher*, 442 Mich. 560 (1993).

7. Acquittals. Prior charges that have resulted in acquittals may be considered, so long as the information regarding those charges is reliable and accurate and has been established by a preponderance of the evidence. *People v. Ewing*, 435 Mich. 443 (199); *People v. Granderson*, 212 Mich. App. 673 (1995).

8. Juvenile Record.

(a) A defendant is not entitled to a hearing under *United States v. Tucker*, 404 US 443 (1972) to determine the validity of a juvenile adjudication obtained without the benefit of counsel where the adjudication did not result in incarceration. The juvenile record may be used in consideration of the adult sentence. A juvenile is not deprived of his or her constitutional right to counsel in cases where there is no ultimate job loss of liberty at the time of the original adjudication. *People v. Daoust*, 228 Mich. 1 (1998).

(b) A juvenile delinquency record may be considered even though the record has been expunged by the juvenile court. *People v. Smith*, 437 Mich. 293 (1991); *People v. Martinez*, 193 Mich. App. 377 (1992).

9. Perjured Testimony. A defendant's perjured testimony may be considered where the record supports the conclusion that the perjury was willful, material, and flagrant; and where the false statements have a logical bearing on defendant's rehabilitation. *People v. Adams, supra*.

10. Conviction from Foreign Country. A conviction from a foreign country may also be used in a sentencing information report. In *People v. Galvan, 226 Mich. App. 135* (1997), the defendant had been convicted of armed robbery in Canada. The court took judicial notice of the fact that Canada is a democratic society much the same as ours and that its legal system is based upon the same principles derived from the English Common Law traditions. Also see MRE 202(a).

11. Victim. The court may consider the impact on any victim and victim's family. *People v. Jones*, 179 Mich. App. 339 (1989).

C. *Examples of Improper Considerations*:

1. Defendant's Refusal to Admit Guilt. A court cannot base its sentence even in part on defendant's refusal to admit guilt. *People v. Yennoir*, 399 Mich. 892 (1977); *People v. Bradford*, 432 Mich. 904 (1989); *People v. Wesley*, 428 Mich. 708 (1987).

2. Defendant's Exercise of Right to Trial. The sentencing judge may not penalize a defendant for exercising his right to a trial. *People v. Courts*, 401 Mich. 57 (1977); *People v. Bogedain*, 185 Mich. App. 349 (1990). Similarly, the sentencing judge may not take into consideration the fact that defendant pled guilty or waived his right to a jury trial at the last minute, rather than at a pretrial conference that the court had scheduled for taking pleas. *People v. Earegood*, 383 Mich. 82 (1970).

3. Advanced Age. The defendant's advanced age (64) may not be taken into consideration in increasing the defendant's sentence because of the judge's subjective opinion that he was not likely to be rehabilitated. *People v. McKernan*, 185 Mich. App. 780 (1990).

4. Local Policy. A sentencing judge may not set a sentence based upon a local (county) policy calling for mandatory prison or jail terms for certain offenses, because such would violate the principle that sentences should be individualized. *People v. Chapa*, 407 Mich. 309 (1970).

5. Defendant's Exercise of Right to Remain Silent. A sentencing judge may not increase a defendant's sentence because of the judge's belief that the defendant was protecting a co-defendant when defendant exercised his right to remain silent at trial. *People v. Anderson*, 391 Mich. 419 (1974).

6. Arbitrary Classifications. Arbitrary classifications such as race, religion and national origin may not be used. *People v. Gjidoda*, 140 Mich. App. 294 (1985).

7. Polygraphs. Neither the results of a polygraph test taken by a witness in the case, nor the defendant's refusal may be used. *People v. Allen*, 49 Mich. App. 148 (1973).

8. Prior Convictions Without Counsel. Convictions obtained without benefit of counsel may not be used. *People v. Moore* 391 Mich. 426 (1974). However, the defendant who collaterally challenges a prior conviction as being without counsel bears the initial burden of proof. *People v. Love* (Aft. Rem), 214 Mich. App. 296 (1995).

9. Speculative Early Release Provisions or Disciplinary Credits. The judge may not use speculative legislatively-authorized early release provisions, such as the Emergency Power Act, to justify augmenting a sentence. (*People v Humble*, 146 Mich App 198; 379 NW2d 422 (1985)). Also, the judge may not consider the effect of disciplinary credits, which the defendant may or may not receive. (*People v Stack*, 156 Mich App 564; 402 NW2d 7 (1986))

D. *Additional Considerations.*

1. Drunk-Driving Law. District court judges must take into account the special rules regarding drunk driving. See Section 3.18 A. *infra*; and the Criminal Sentencing Administrative Consequences Chart at Exhibit 6.18.

2. Specialty Courts. Courts without specialty courts (i.e. sobriety, drug, mental health, veterans, domestic violence, etc.) should consider transfers to specialty courts in the area for eligible defendants. Specialty courts have been proven to reduce recidivism for problem defendants. It is important to screen defendants early, preferably pre-plea, to determine eligibility and start treatment. Attached as Exhibit 6.19 is a packet of forms used by the 29th District Mental Health Treatment Court for receiving cases from other district courts.

3. Collateral Consequences of a Conviction. These can be severe, depending on the crime. Judges should acquaint themselves with licensing, immigration and housing sanctions. A good resource is *Collateral Consequences of a Criminal Conviction*, edited by Tracy W. Brame, ICLE.

4. Testing for HIV, Hepatitis B Infection, and Sexually Transmitted Disease.

(a) Authority. The authority for testing for disease/infection is MCL 333.5129. A model protocol and forms for this procedure were developed by the Michigan Department of Public Health.

(b) Definition. Cases involving an individual arrested and charged with violating MCL 750.145a, MCL 750.338, MCL 750.338a, MCL 750.338b, MCL 750.448, MCL 750.449, MCL 750.449a, MCL 750.450, MCL 750.452, MCL 750.455, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, MCL 750.520g, MCL 333.7404, or a local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance. Six are misdemeanors, as indicated below, and the rest are felonies. Specific titles are as follows:

(1) MCL 333.7404: Use of controlled substance or controlled substance analogue - MISDEMEANOR
(2) MCL 750.145a: Accosting, enticing, soliciting child for immoral purposes
(3) MCL 750.338: Gross indecency; between male persons
(4) MCL 750.338a: Gross indecency; between female persons
(5) MCL 750.338b: Gross indecency; between male & female persons
(6) MCL 750.448: Soliciting and accosting - MISDEMEANOR
(7) MCL 750.449: Admitting to place for purpose of prostitution - MISDEMEANOR
(8) MCL 750.449a: Engaging services for purpose of prostitution, lewdness, or assignation, offer to engage; penalty - MISDEMEANOR
(9) MCL 750.450: Aiders and abettors - MISDEMEANOR
(10) MCL 750.452: Keeping a house of prostitution
(11) MCL 750.455: Pandering
(12) MCL 750.520b: First-degree criminal sexual conduct
(13) MCL 750.520c: Second-degree criminal sexual conduct

(14) MCL 750.520d: Third-degree criminal sexual conduct
(15) MCL 750.520e: Fourth-degree criminal sexual conduct - MISDEMEANOR
(16) MCL 750.520g Assault with intent to commit criminal sexual conduct

(c) Expedited Testing for Criminal Sexual Conduct Offenses. Expedited testing and follow-up testing are required under certain circumstances if the defendant is charged with first-, second-, third-, or fourth-degree criminal sexual conduct or with assault with intent to commit criminal sexual conduct. MCL 333.5129(3) provides, in relevant part:

> "If a defendant is bound over to or brought before the circuit court for violating . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g, the court shall, upon the victim's request, order the examination or testing [required by MCL 333.5129(3)] 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. The court shall include in its order for expedited examination or testing at the victim's request under this subsection a provision that requires follow-up examination or testing that is considered medically appropriate based on the results of the initial examination or testing."

(d) Responsibility of the Court

(1) At Arraignment (MCL 333.5129(2)). If an individual has been arrested and charged with violating one of the statutes mentioned above, the judge or district court magistrate responsible for setting the individual's conditions of release pending trial shall distribute to the individual the information on disease/infection required to be distributed by county clerks pursuant to MCL 333.5119(1). The judge or district court magistrate shall recommend that the individual obtain additional information and counseling at a local health department testing and counseling center regarding disease/infection. Counseling under this subsection is voluntary on the part of the individual.

(2) Upon Bind Over (MCL 333.5129(3)). If a defendant is bound over to the circuit court and the district court determines there is reason to believe the offense involved sexual penetration or the exposure to a body fluid of the defendant, the district court shall order that

the defendant be examined or tested for disease/infection and receive treatment or, at a minimum, the required information.[6]

(3) Upon Conviction (MCL 333.5129(4)). If a defendant is convicted of (or if a juvenile is adjudicated responsible for) violating any of the above statutes, the court shall order that the defendant be examined or tested for disease/infection. The court shall also order the defendant to receive counseling including, at a minimum, information regarding treatment, transmission, and protective measures.

(4) Notice to Victims (MCL 333.5129(5)) If the victim (or individual with whom the defendant engaged in sexual penetration during the course of the crime) consents, the court shall provide the person or agency administering the test with the name, address, and telephone number of the victim or individual. After the defendant is tested, or if the defendant receives appropriate follow up testing for the presence of HIV, the persons or agency administering the test shall immediately provide the test results to the victim or individual.

(5) Keeping Records Confidential (MCL 333.5129(6); MCL 333.5129(7)). The test results or any other research information obtained by the testing agency must be transmitted to the court and, after the defendant is sentenced, made part of the court record. However, the examination or test results, and any other medical information described in MCL 333.5129, are confidential and may be disclosed only to the defendant, the local health department, the Department of Community Health, and the victim (or other individual required to be informed of the results), except as otherwise provided by law. If the defendant is placed in the custody of the Department of Corrections, the court shall transmit a copy of the defendant's test results and any other medical information to the Department of Corrections. The statute does not address convictions by the district courts which result in jail terms. MCL 791.229 makes circuit court probation records nonpublic. In *Howe v Detroit Free Press*, 440 Mich 203 (1992), the Michigan Supreme Court extended this statute to include district courts.

3.2 Probationary Sentences in General. Probation is available for all misdemeanor offenses, including ordinance violations, as an alternative to jail. MCL 771.1(1). Probation is not required, unless the plea for the offense was taken under a delayed or deferred sentencing statute (see

[6] Additionally, the *circuit* court must "order the examination or testing if the defendant is brought before it by way of indictment for any of the [enumerated offenses]." MCL 333.5129(3). Furthermore, expedited testing and follow-up testing are required under certain circumstances if the defendant is bound over to or brought before the circuit court on a charge of criminal sexual conduct or assault with intent to commit criminal sexual conduct. *Id*. (see Section 3.1(D)(4)(c) above).

Sections 3.3 through 3.11 below). Judges can alter a probationary sentence at any time during the term of probation. MCL 771.2(5). "[A] trial court has the authority to modify and extend probation at any time within the [five-year] statutory maximum period [set out in MCL 771.2(1)], even after the initial probation period expires," because "MCL 771.2(5) allows for modification 'at any time' and does not refer to the 'probation period.'" *People v Vanderpool*, ___ Mich App ___, ___ (2018) (distinguishing the initiation of probation revocation proceedings under MCL 771.4, which must commence during the "probation period" imposed by the sentencing court, from the modification of probation orders under MCL 771.2(5), which may occur "at any time" during the five-year statutory maximum term of probation, and holding that "because the trial court modified [the defendant's] probation within the five-year statutory limit and the revocation occurred while the new probation order was in effect, the trial court had jurisdiction to modify and subsequently revoke [the defendant's] probation"). Probation can be supervised, unsupervised and nonreporting.

A. *Length of Probation*. The maximum term of probation for misdemeanors is generally two years. MCL 771.2(1). However, the maximum term of probation is five years for misdemeanor stalking and misdemeanor child abuse. (MCL 750.411h(3), MCL 750. 136b, MCL 771.2a). A term of probation may be reduced in the discretion of the court at any time. MCL 771.2(5). The probationary period is tolled when a probationer absents himself or herself from the court's jurisdiction and supervision. *People v. Ritter*, 186 Mich. App. 701 (1991). However, a court retains jurisdiction over a probationer after the expiration of the probationary period only if the court commences probation revocation proceedings within the probationary period set by the court. *People v. Glass*, 288 Mich. App. 399 (2010). For example, if the court sentences John Doe to one year of probation starting January 1, 2015 and Mr. Doe fails to comply, the court would have to initiate probation revocation proceedings before January 1, 2016 in order to retain jurisdiction.

B. *Mandatory Conditions Set Forth in MCL 771.3(1)*:

1. The probationer may not violate any criminal laws of the State of Michigan, the United States, any other state or any ordinance of any municipality.

2. The probationer may not leave the State of Michigan without consent of the court.

3. The probationer is required to report to the probation officer assigned to the case either in person or in writing, monthly or as often as required.

4. The probationer must pay (1) restitution if ordered, and (2) any assessments ordered.

5. The probationer must comply with registration under the sex offenders act (1994 PA 295), if applicable. MCL 771.3(1).

6. The probationer must pay the minimum state cost prescribed by MCL 771.3(1).

C. *Discretionary Conditions*. The general rules regarding conditions of probation were described in *People v. Loretta Miller*, 182 Mich. App. 711, 713 (1990): "A sentencing judge is accorded wide discretion in setting conditions of probation. *People v. Gonyo*, 173 Mich. App. 716, 718 (1988); *People v. Garber*, 128 Mich. App. 185, 190, 191 (1983). Only if the conditions are unlawful will the judge's determination be disturbed. *Id.*, p. 191; *People v. Winquest*, 115 Mich. App. 215, 220 (1982). While there is no ultimate catalog of legal terms, *People v. Johnson*, 92 Mich. App. 766, 768 (1979), and the Legislature did not define what constitutes a 'lawful' term of probation, *People v. Branson*, 138 Mich. App. 455, 458 (1984); MCL 771.3(4); MSA 28.1133(4), there must be a rational relationship between the restriction and rehabilitation, *Johnson, supra*; *Branson, supra*."

Permissible conditions:

1. Jail. The defendant may be imprisoned in the county jail for not more than one year, or less if the maximum penalty for the offense is less. MCL 771.3(2). Jail time may be imposed at intervals. For example, the defendant may be ordered to serve the first 6 months immediately and the last 6 months at the conclusion of probation. *People v. Dorsey*, 107 Mich. App. 789 (1981).

2. Pay fines and costs. Note, however, that although "probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not." *People v. Butler-Jackson*, ___ Mich. ___, ___ (2016) (citing *People v. Cunningham (Cunningham II)*, 496 Mich. 145 (2014), and *People v. Juntikka*, 310 Mich. App. 306 (2015), and vacating that part of the Court of Appeals' judgment, 307 Mich. App. 667 (2014), "addressing the propriety of court costs under MCL 771.3(5)[]"). However, see also MCL 769.1k(3) (providing that MCL 769.1k(1) and (2), which authorize the imposition of certain fines, costs, and assessments, including court costs, "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation[]"). (See Section 3.15 for discussion of costs.)

   "The court may not sentence the probationer to prison without having considered a current presentence report and may not or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]." MCR 6.445(G).[7] MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. (See Section 3.15(I) for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.)

[7] MCR 6.001(B) provides that MCR 6.425(E)(3) and MCR 6.445(A)-(G) apply to misdemeanors.

3. Pay assessments (See Section 3.15 D).

4. Engage in community service.

5. Agree to pay by wage assignment or otherwise any restitution, assessment, fine or cost imposed.

6. Participate in outpatient or inpatient drug treatment.

7. Participate in mental health or substance abuse counseling or treatment.

8. Participate in community corrections program.

9. Submit to house arrest.

10. Submit to electronic monitoring.

11. Participate in a residential probation program.

12. Submit to conditions reasonably necessary for the protection of 1 or more named persons. For example, in *People v. Branson,* 138 Mich. App. 455 (1984), the trial court, as a condition of probation, ordered that the defendant, who was convicted of cruelty to children at a religious commune, not reside at this commune because other children were present. They were allowed to visit for limited amounts of time for services only.

13. Reimburse the county for expenses incurred by the county in connection for which probation was ordered as provided in the Prisoner Reimbursement to the County Act (MCL 801.81.)

14. Waiver of the right against search and seizure, where reasonably tailored to a defendant's rehabilitation. *People v. Hellenthal*, 185 Mich. App. 484, 465 (1990).

15. Provide Facebook password. U.S. v. Smalcer, 464 Fed. Appx. 469, C.A. 6 (Ohio), Feb. 29, 2012.

D. *Habitual Offender Considerations*. For the most part, enhanced sentencing occurs for felony offenses. However, the district court can enhance sentences for repeat or habitual offenders who commit misdemeanors, such as the following:

1. OWI/OWVI/OWPD upon prior conviction (MCL 257.625(15)).

2. Driving on a suspended license upon second offense or more (MCL 257.904).

3. Checks without sufficient funds under $50.00 upon second offense or more (MCL 750.131).

4. Prostitution upon second offense (MCL 750.451).

5. Misdemeanor buying, receiving, possessing, or concealing, or aiding in the concealment of, stolen property (MCL 750.535).

6. Minor in possession of alcohol (MIP) upon third offense[8] or more (MCL 436.1703).

7. Non-retail licensee selling or furnishing alcohol to a minor upon second offense or more (MCL 436.1701).

8. Retail fraud 3rd degree with one or more prior convictions (MCL 750.356d).

9. Domestic assault, or assault of a pregnant individual, with one previous conviction (MCL 750.81(4)).

**NOTE:** The defendant may only receive an enhanced sentence if he or she has been specifically charged and convicted as a repeat offender. (*People v Ancksornby*, 231 Mich 271 (1925).)

E. *Intensive Probation*.

1. Authority. Although intensive probation is not specifically mentioned, MCL 771.3 provides that probationers can be ordered to report "monthly, or as often as the probation officer may require."

2. Highlights.

(a) Applicants must first be screened to see if they meet the criteria for eligibility.

(b) Probationers may be subject to close supervision, which may include a variety of conditions, including, but not limited to, employment checks, home visits, daily contact with the probation officer, curfews, and submitting to preliminary breath tests (PBTs) and drug screens.

(c) Supervision is typically implemented during the first phase of a defendant's probation status and may not necessarily continue throughout the complete term of probation.

[8] Note that a first-time MIP violation is a civil infraction, MCL 436.1703(1)(a); a second offense is a misdemeanor, MCL 436.1703(1)(b); and a third or subsequent offense is a misdemeanor subject to enhanced penalties, MCL 436.1703(1)(c).

F. *Oral Orders of Probation*. These are enforceable and may be revoked. It is important for the court to assure that the defendant has notice of the conditions and terms. It may be beneficial to reduce the provisions to writing and serve a copy on the defendant. *People v. Stanley*, 207 Mich. App. 301 (1994); *People v. Valentin*, 220 Mich. App. 401 (1996). As a practical matter, orders of probation should always be in writing.

G. *Violation or Revocation of Probation*. See Section 5.2, *infra*.

H. *New Conditions*. New conditions may be imposed even though there has been no violation of the original order. (*People v Marks*, 340 Mich 495 (1954).)

I. *Suspension, Reinstatement, Termination and Revocation*. A court may suspend probation and then reinstate it as long as it occurs within the statutory maximum period. Probation must end either by revocation or termination at the end of that maximum. (*People v Sherman*, 38 Mich App 219; 196 (1972).)

J. *Medical Probation and Compassionate Release.* A court may order medical probation or compassionate release under certain circumstances.

MCL 771.3g governs medical probation and provides: "Subject to [MCL 771.3g(4), which sets out certain preconditions to granting probation], 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).

MCL 771.3h governs compassionate release and provides: "Subject to [MCL 771.3h(3), which sets out certain preconditions to granting release], 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 a detailed discussion of medical probation and compassionate release, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 10.

3.3. Delayed Sentence Under MCL 771.1(2). Note: despite the name "delayed sentence," convictions under MCL 771.1 are entered on the defendant's public criminal record and remain there unless dismissed.

A. *In General*. MCL 771.1(2) provides district court judges with great discretion in sentencing. A delayed sentence basically places the defendant on a probationary period

not to exceed one year, with limited exceptions. *People v. Dubis*, 158 Mich. App. 504 (1987), overruled in part on other grounds by *People v. Smith (Ryan)*, 496 Mich. 133, 142-143 (2014). If the defendant satisfactorily completes all of the probationary terms and conditions, the case can be dismissed or reduced. When a defendant is sentenced under MCL 771.1(2), the judge should not fill out an Order of Probation (SCAO Approved form DC 243). The court should enter an Order Delaying Sentence (SCAO-Approved form MC 294) and may order supervision during the period of delay. The text of MCL 771.1(2) states as follows:

> (2) In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay.

B. *Eligible Offenses*. MCL 771.1(1) describes offenses eligible for probation as: "felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law[.]"

NOTE, however, that if the sentencing for a traffic offense is delayed under MCL 771.1, abstracting may nevertheless be required under MCL 257.732. A trial court may not require the Secretary of State to amend driving records when a conviction is dismissed following a guilty plea and delayed sentencing under MCL 771.1. *People v. McCann (Marcus)*, ___ Mich. App. ___, ___ (2016). Although MCL 257.732(1)(b) of the Michigan Vehicle Code "requires a trial court to forward abstracts to the Secretary of State following the dismissal of charges, . . . it does not command the secretary to take specific action in response[,]" and MCL 257.732(22) prohibits a court from ordering the expunction of a Secretary of State record of a reportable offense that has been set aside or dismissed. *McCann (Marcus)*, ___ Mich. App. at ___ (citations omitted).

Note also that, unlike other deferred or delayed sentencing statutes, MCL 771.1 does not require that the defendant be a first-time offender.

C. *Need for Prosecutor's Approval*. MCL 771.1 is widely used in plea bargains, where the prosecutor agrees at the outset. The statute itself does not require the prosecutor's

approval. However, *People v. Monday*, 70 Mich. App. 518 (1976) does require it. Thus, the judge can accept a 771.1 plea from the bench without the prosecutor's approval, but the prosecutor's consent would then be required before later dismissal.

D. *Conditions of Delayed Sentences*. A delayed sentence may be conditioned upon requirements that are reasonably well designed to assist the court in determining whether defendant will be eligible for probation or other leniency when the delayed sentence period ends. *People v. Cannon*, 145 Mich. App. 100 (1985); *People v. Saenz*, 173 Mich. App. 405 (1988). The defendant may be required to participate in an in-patient alcohol or drug program. *People v. Cannon, supra.* The defendant may be referred to a drug treatment court program pursuant to MCL 600.1070. The defendant may be required to report to a probation agent, stay away from bars and refrain from drinking alcohol. *People v. Clyne*, 36 Mich. App. 152 (1971). Restitution could be ordered. *People v. Baker*, 120 Mich. App. 89 (1982).

1. Jail Time. Jail may **not** be imposed as a condition of a delayed sentence. *People v. Cannon, supra*; *People v. Saenz, supra*. Jail can, however, be imposed at sentencing upon revocation of 771.1 status.

2. Fines and Costs. District courts may assess fines and costs, including the minimum state cost, probation oversight fee and crime victim fee, for delayed sentences under MCL 771.1. See Exhibit 6.8. Also see Section 3.15 *infra*.

E. *Conclusion of Delayed Sentence Period*.

1. Defendant's Right to a Hearing. The defendant is entitled to a hearing at which he may be given an opportunity to show that he failed to comply with conditions imposed by the court for reasons beyond his control. *People v. Fisher*, 106 Mich. App. 616 (1981); *People v. Baker*, 120 Mich. App. 89 (1982). However, see *People v. Saylor*, 88 Mich. App. 270 (1979), where it was held that defendant was not entitled to a full adversary hearing just because the judge moved up the sentencing date following the defendant's early departure from a drug treatment program.

2. Sentencing or Dismissal Within the One-Year Time Period. The judge can sentence the defendant or grant the dismissal within the one-year time period. If a sentence is imposed, the judge may impose any conditions that could have been imposed at the original sentencing hearing. *People v. Monday*, 70 Mich. App. 518 (1976).

3. Court's Failure to Impose Sentence Within the One-Year Time Limit. "[T]he plain language of MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence[.]" *Smith (Ryan)*, 496 Mich. at 142-143, overruling *People v. Boynton*, 185 Mich. App. 669 (1990), *Dubis*, 158 Mich. App. 504, *People v. Turner (Halbert)*, 92 Mich. App. 485 (1979), and *People v. McLott*, 70 Mich.

App. 524 (1976) ("to the extent they hold that a court loses jurisdiction to sentence a defendant as a remedy for a violation of MCL 771.1(2)[]"). "After the one-year statutory limitation elapses, sentencing may no longer be delayed for the purpose of permitting a defendant the opportunity to prove that he [or she] is worthy of leniency, and the judge is required to sentence [the] defendant as provided by law." *Smith (Ryan)*, 496 Mich. at 142.

3.4 Deferred Judgment of Guilt for Spouse Abuse.

A. *Authority and Definition*. MCL 769.4a gives the authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for certain offenders charged with assault upon a spouse, former spouse, or household member. A defendant placed on probation under a deferred judgment of guilt may be referred to a drug treatment court program pursuant to MCL 600.1070.

B. *Conditions*.

1. The defendant must plead guilty or be found guilty of the offense, but no judgment of guilt is entered.

2. The defendant and the prosecuting attorney, in consultation with the victim, must consent to this status.

3. The only persons eligible are those with no prior convictions for assaultive crimes as defined in MCL 769.4a(7)(a).

4. The defendant must be placed on probation by the judge.

5. The judge may require the defendant to participate in and pay for a mandatory counseling program, and/or participate in a drug treatment court program.

6. The judge may order imprisonment within the period of probation for not more than the maximum penalty authorized for the underlying offense.

7. Discharging the defendant and dismissing charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt.

8. If any of the following terms or conditions of probation are violated, the court may enter an adjudication of guilt:

(a) The defendant commits an assaultive crime during the period of probation;
(b) The defendant fails to attend counseling as ordered.
(c) The defendant violates an order of the court that he or she have no contact with a named individual.

MCL 769.4a(4).

9. There may be only one discharge and dismissal afforded to an offender under this status. A defendant is not eligible for diversion in a domestic violence matter if there is a prior conviction under MCL 750.81 or MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81(2).

10. Upon fulfillment of the terms and conditions of probation, the Michigan State Police Criminal Justice Information Center shall retain a nonpublic record of an arrest and discharge or dismissal. This record shall be furnished to a court or police agency upon request for the purpose of showing that a defendant in a criminal action pursuant to MCL 750.81 or 750.81a has already once availed himself or herself of this section. In addition, in providing required notice to victims, the probation officer may furnish information or records to victims that would otherwise be closed to public inspection. (MCL 780.752a, 780.781a, 780.811b) During the term of probation, the records maintained by the court are non-public, with exceptions. MCL 769.4a(6)

3.5. Deferred Judgment of Guilt for First Time Drug Offenders Under MCL 333.7411.

A. *Authority and Definition*. MCL 333.7411 gives the authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for certain offenders charged with possession or use of certain drugs. A defendant placed on probation under a deferred judgment of guilt may be referred to a drug treatment court program pursuant to MCL 600.1070.

B. *Eligible Offenses Under the Controlled Substances Act of 1971* (MCL 333.7101, et seq.):

1. 7403(2)(a)(v). Possession of less than 25 grams of a schedule 1 or 2 narcotic drug or cocaine.

2. 7403(2)(b). Possession of any amount of a controlled substance classified in schedules 1, 2, 3 or 4, except for a schedule 1 and 2 narcotic drug or cocaine.

3. 7403(2)(c). Possession of any amount of a scheduled 5 drug.

4. 7403(2)(d). Possession of any amount of marihuana.

5. 7404. Use of a controlled substance.

6. 7341. Possession or use of an imitation controlled substance, first or second offense.

Note: When a person pleads guilty or is convicted of two charges simultaneously, 7411 is still an option. Those ineligible are defendants who have a prior conviction. Simultaneous pleas do not constitute prior convictions. *People v. Ware*, 239 Mich. 437 (2000). Also, a person subjected to a

civil fine for a first violation of MCL 333.7341(4) is not considered to have previously been convicted of an offense under this status.

C. *Other Conditions*.

1. The defendant must plead guilty or be found guilty of the offense, but no judgment of guilt is entered.

2. The defendant must consent to this status, but the prosecutor does not.

3. The defendant must be placed on probation by the judge.

4. The judge may require an instruction program on misuse of drugs or a rehabilitation program.

5. Jail time is allowable.

6. Discharging the defendant and dismissing charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt.

7. There may be only one discharge and dismissal afforded to an offender under this status.

8. Upon fulfillment of the terms and conditions of probation, the Michigan State Police Criminal Justice Information Center shall retain a nonpublic record of an arrest and discharge or dismissal. This record shall be furnished to a court or police agency upon request for the purpose of showing that the defendant in a criminal action involving the possession or use of a controlled substance or an imitation controlled substance has previously used this status. During the term of probation, the records maintained by the court are non-public. MCR 8.119(D).

9. If a term or condition of probation is violated, the court may enter an adjudication of guilt and sentence the defendant.

3.6 Deferred Judgment of Guilt for Minor in Possession of Alcohol ("MIP") Under the Liquor Control Act.

A. *Authority and Definition*. MCL 436.1703(3) gives authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for a person who pleads guilty to violating or offers a plea of admission in a juvenile delinquency proceeding for a misdemeanor MIP violation (being a minor who purchases, consumes or possesses alcoholic liquor or attempts to purchase, consume or possess alcoholic liquor, or who has any bodily alcohol content) under MCL 436.1703(1)(b). A deferred judgment of guilt is discretionary by the court if the defendant meets the statutory requirements.

B. *Conditions*:

1. The defendant must plead guilty to the offense but no judgment of guilt is entered.

2. The only persons eligible are those with one prior judgment as defined in MCL 436.1703(18)(d).

3. The defendant must be placed on probation.

4. The court may require participation in substance abuse prevention services or substance abuse treatment and rehabilitation services, community service, and to undergo substance abuse screening and assessment at the defendant's expense, payment of costs including minimum state cost and the cost of probation oversight.

5. In the case of a minor who is under 18 years of age and unemancipated, the parent, guardian, or custodian may request a random or regular preliminary breath test as part of the probation. (MCL 436.1703(5))

6. Jail time is not allowable, even if the probationer violates probation.

7. Discharging the defendant and dismissing the charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt. However, a successful deferment is considered a *prior judgment* for purposes of a subsequent violation under MCL 436.1703(1)(c).

8. If a term or condition of probation is violated or the court finds that the individual is using the same procedure in a different court, the court may enter an adjudication of guilt.

9. There may be only one discharge and dismissal afforded to an offender under this status.

10. Upon placement on deferred sentence and probation, the court shall notify the Michigan Department of State of the deferred sentence and it shall retain a nonpublic record.

11. While on deferred sentence and probation, the court shall retain a nonpublic record. Upon fulfillment of the terms and conditions of probation, the court shall notify the Department of State of the discharge and dismissal. The court and the department shall retain a nonpublic record of the plea and of the discharge or dismissal. This record shall be furnished to a court, prosecutor, or police agency upon request for the purpose of determining if an individual has already utilized this status. The record shall also be available to the Department of Corrections, a prosecutor, or a law enforcement agency upon request if the individual is an employee or applicant for employment of the requesting agency only to determine

whether an employee has violated his or her conditions of employment or whether an applicant meets criteria for employment.

See MCL 436.1703(3)-(5).

C. *Ordinance Violations*. Deferred proceedings are allowed under MCL 436.1703(3) only for a violation of MCL 436.1703(1)(b). Deferred proceedings are not currently allowed for a violation of a substantially corresponding local ordinance.

3.7 Deferred Judgment of Guilt for Holmes Youthful Trainee Act (a/k/a/ HYTA) Sentences.

A. *Authority and Definition*. MCL 762.11 *et seq*. provides the sentencing judge with the means for ordering rehabilitative treatment and/or custodial supervision, without proceeding to an adjudication of guilt and a criminal conviction, for an individual under the age of twenty-four who is charged with an offense other than:

(1) a felony for which the maximum punishment is life imprisonment,
(2) a major controlled substance offense,
(3) a traffic offense, or
(4) an enumerated criminal sexual conduct offense (including an attempt or conspiracy). MCL 762.11(2)(a)-(e).

Certain additional restrictions apply regarding sexual offenses or conduct; for example, an individual is not eligible for HYTA status if he or she was previously convicted of or adjudicated for an offense requiring registration under the Sex Offenders Registration Act (SORA). See MCL 762.11(3).

In general, for an offense punishable by more than one year of imprisonment, the court may commit an offender who was assigned to HYTA status on or after August 18, 2015,[9] to the Department of Corrections (DOC) for up to two years of supervision and training (with or without a period of up to one year of probation following commitment); to the county jail for not more than one year (with or without a period of up to one year of probation following commitment); or to probation for not more than three years. For an offense punishable by one year of imprisonment or less, the court must impose up to two years' probation. Certain exceptions and restrictions apply. See MCL 762.13.

B. *Conditions*:

[9] MCL 762.13 was amended by 2015 PA 33, effective August 18, 2015, and applicable to offenders assigned to HYTA status on or after that date. See 2015 PA 33, enacting section 2. If the underlying charge is an offense punishable by imprisonment for a term of more than one year, and the individual was assigned to HYTA status *before* August 18, 2015, the court must do one of the following: (1) commit the individual, for not more than three years, to the Department of Corrections (DOC) for custodial supervision and training; (2) place the individual on probation for not more than three years, subject to the conditions in MCL 771.3; (3) commit the individual to the county jail for not more than one year. Former MCL 762.13(1).

1. The offense must have been committed on or after the offender's seventeenth birthday but before his or her twenty-fourth birthday.[10] Additionally, juveniles over fourteen years of age who have been waived from circuit court may be eligible for HYTA status.[11]

2. The offender must consent to being placed on youthful trainee status. If the offense was committed on or after the individual's twenty-first birthday, the prosecuting attorney must also consent.

3. The offender must plead guilty.

4. The court may require the offender to maintain (or actively seek) employment or to attend (or actively seek entry into) school. The court, as a condition of a commitment to the county jail or a condition of probation, may authorize work release or release for education purposes. The rights accorded probationers subject to revocation should also be applied to youths under youthful trainee status. See *People v Roberson*, 22 Mich App 664; 177 NW2d 712 (1970).

5. An offender assigned to HYTA status for an offense committed on or after his or her twenty-first birthday may be subject to electronic monitoring during his or her probationary term as provided under MCL 771.3.

6. An assignment to the status of youthful trainee shall not be deemed to be a conviction of a crime and such person shall suffer no civil disability, right or privilege following his or her release from such status because of such assignment as a youthful trainee.

7. All proceedings relative to the disposition of the criminal charge and to the assignment as a youthful trainee shall be closed to public inspection, but open to the courts of the state, the Department of Corrections, the Department of Social Services and law enforcement personnel in the performance of their duties. Also, in providing required notice to victims, the probation officer may furnish information or records to victims that would otherwise be closed to public inspection. (MCL 780.752a, MCL 780.781a, MCL 780.811b).

8. A defendant placed on youthful trainee status may be referred to a drug treatment court program pursuant to MCL 600.1070.

C. *Revocation*:

[10] Although HYTA previously applied to individuals who committed crimes between their seventeenth and twenty-first birthdays, MCL 762.11(1) was amended by 2015 PA 31, effective August 18, 2015, to raise the maximum eligible age for offenders assigned to HYTA status on or after August 18, 2015. See 2015 PA 31, enacting section 2.

[11] MCL 762.15.

1. Upon violation of any term of probation, the court may, after a hearing, terminate the youth's trainee status, enter an adjudication of guilt, and proceed with sentencing as provided by law. Credit must be given against the sentence for time served as a youthful trainee in a county jail.

2. The court *must* revoke HYTA status if the offender pleads guilty to or is convicted of any of certain enumerated offenses (e.g., a felony punishable by life imprisonment or a major controlled substance offense) during the period of HYTA assignment. See MCL 762.12(2).

D. *Ability to Use More than Once*. Current law does not expressly allow or prohibit judges from using HYTA more than once for a youthful offender. House Bill 4294, introduced on February 20, 2013, would expressly allow judges to assign HYTA status to an offender who had previously been assigned that status.

3.8 Deferred Judgment of Guilt for Mental Health Court Participants.

A. Authority and Definition. A mental health treatment court is a court-supervised treatment program for defendants who suffer from a severe and persistent mental illness, developmental disability or co-occurring disorder, and the illness or disorder caused the defendant to commit a crime. See MCL 600.1090-600.1099a. Mental health courts are required to provide:

1. Consistent and close monitoring of the participant and interaction among the court, treatment providers, probation, and the participant.
2. If determined by the mental health court to be necessary or appropriate, periodic and random testing for the presence of any nonprescribed controlled substance or alcohol in a participant's blood, urine, or breath, using to the extent practicable the best available, accepted, and scientifically valid methods.
3. Periodic evaluation assessments of the participant's circumstances and progress in the program.
4. A regimen or strategy of appropriate and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of incarceration or confinement.
5. Mental health services, substance use disorder services, education, and vocational opportunities as appropriate and practicable.

MCL 600.1098 provides, if certain conditions are met, the judgment of guilt is deferred and the proceedings may be discharged and dismissed upon successful completion of the program.

B. *Conditions*. MCL 600.1098(3) provides that, "[e]xcept as provided in subsection (4), the court, with the agreement of the prosecutor and in conformity with the terms and conditions of the memorandum of understanding under section 1091, may discharge and dismiss the proceedings against an individual who meets all of the following criteria:

(a) The individual has participated in a mental health court for the first time.

(b) The individual has successfully completed the terms and conditions of the mental health court program.

(c) The individual is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty.

(d) The individual has not previously been subject to more than 1 of the following:

(i) Assignment to the status of youthful trainee under section 11 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11.

(ii) The dismissal of criminal proceedings against the individual under section 7411 of the public health code, 1978 PA 368, MCL 333.7411, section 4a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.4a, or section 350a or 430 of the Michigan penal code, 1931 PA 328, MCL 750.350a and 750.430."

C. *Non-Public*. MCL 600.1098(5) provides that:

(5) A discharge and dismissal under subsection (3) is 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. There may only be 1 discharge and dismissal under subsection (3) for an individual. The court shall send a record of the discharge and dismissal to the criminal justice information center of the department of state police, and the department of state police shall enter that information into the law enforcement information network with an indication of participation by the individual in a mental health court. All records of the proceedings regarding the participation of the individual in the mental health court under subsection (3) are closed to public inspection from the date of deferral and are exempt from public disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, but must be open to the courts of this state, another state, or the United States, the department of corrections, law enforcement personnel, and prosecutors only for use in the performance of their duties or to determine whether an employee of the court, department, law enforcement agency, or prosecutor's office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, department, law enforcement agency, or prosecutor's office. The records and identifications division of the department of state police shall retain a nonpublic record of an arrest, court proceedings, and the discharge and dismissal under this subsection.

3.9 Deferred Judgment of Guilt for Veterans Court Participants.

A. *Authority and Definition*. A veterans court is a court-supervised treatment program for defendants who are military veterans and who abuse or are dependent upon any controlled substance or alcohol or who suffer from a mental illness. See MCL 600.1200-1212. Veterans courts are required to comply with the modified version of the 10 key components of drug treatment courts, including all of the following essential characteristics:

1. Integration of alcohol, drug treatment, and mental health services with justice system case processing.

2. Use of a nonadversarial approach; prosecution and defense counsel promote public safety while protecting participants' due process rights.

3. Early and prompt identification and placement of eligible participants in the veterans treatment court program.

4. Provision of access to a continuum of alcohol, drug, mental health, and related treatment and rehabilitation services.

5. Monitoring of abstinence by frequent alcohol and other drug testing.

6. A coordinated strategy that governs veterans treatment court responses to participants' compliance.

7. Ongoing judicial interaction with each veteran is essential.

8. Monitoring and evaluation to measure the achievement of program goals and gauge effectiveness.

9. Continuing interdisciplinary education promotes effective veterans treatment court planning, implementation, and operations.

10. Forging of partnerships among veterans treatment court, veterans administration, public agencies, and community-based organizations generates local support and enhances veteran treatment court effectiveness.

B. *Conditions*. MCL 600.1209(4) provides that: "(4) Except as provided in subsection (5), the court, with the agreement of the prosecutor and in conformity with the terms and conditions of the memorandum of understanding under section 1201(2), may discharge and dismiss the proceedings against an individual who meets all of the following criteria:

(a) The individual has participated in a veterans treatment court for the first time.

(b) The individual has successfully completed the terms and conditions of the veterans treatment court program.

(c) The individual is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty.

(d) The individual is not currently charged with and has not pled guilty to a traffic offense.

(e) The individual has not previously been subject to more than 1 of any of the following:

(i) Assignment to the status of youthful trainee under section 11 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11.

(ii) The dismissal of criminal proceedings against him or her under section 7411 of the public health code, 1978 PA 368, MCL 333.7411, section 4a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.4a, or section 350a or 430 of the Michigan penal code, 1931 PA 328, MCL 750.350a and 750.430."

C. *Non-Public*. MCL 600.1209(6) provides that: "A discharge and dismissal under subsection (4) shall 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. There shall be not more than 1 discharge and dismissal under subsection (4) for an individual. The court shall send a record of the discharge and dismissal to the criminal justice information center of the department of state police, and the department of state police shall enter that information into the L.E.I.N. with an indication of participation by the individual in a veterans treatment court. Unless the court enters a judgment of guilt, all records of the proceedings regarding the participation of the individual in the veterans treatment court under subsection (4) are closed to public inspection and are exempt from public disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, but shall be open to the courts of this state, another state, or the United States, the department of corrections, law enforcement personnel, and prosecutors only for use in the performance of their duties or to determine whether an employee of the court, department, law enforcement agency, or prosecutor's office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, department, law enforcement agency, or prosecutor's office. The records and identifications division of the department of state police shall retain a nonpublic record of an arrest and the discharge and dismissal under this subsection."

3.10 Deferred Judgment of Guilt for Health Care Professionals.

A. *Authority and Definition*. MCL 750.430(8) gives the authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for licensed health-care professionals charged with engaging in the practice of his or her health profession with a bodily alcohol content of .05 or more, or while under the influence of a controlled substance causing a visible impairment to his or her ability to safely and skillfully engage in the practice of his or her health profession. A licensed health-care professional means an individual licensed or registered pursuant to article 15 of the Public Health Code, MCL 333.16101-333.18838. A defendant placed on probation under a deferred judgment of guilt may be referred to the drug treatment court program pursuant to MCL 600.1070.

B. *Conditions*:

1. The defendant must be convicted pursuant to MCL 750.430.

2. The defendant and the prosecuting attorney must consent to this status.

3. The only persons eligible are those with no prior convictions pursuant to MCL 750.430.

4. The individual's conduct must not have resulted in physical harm or injury to the patient.

5. The terms and conditions of probation may include participation in a drug treatment court program pursuant to MCL 600.1060-600.1082.

6. The defendant shall be ordered to participate in the health professional recovery program established in MCL 333.16167.

7. Discharging the defendant and dismissing charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt.

8. If a term or a condition of probation is violated, the court may enter an adjudication of guilt.

9. There may be only one discharge and dismissal afforded to an offender under this status.

10. Upon fulfillment of the terms and conditions of probation, the Michigan State Police Criminal Justice Information Center shall retain a nonpublic record of an arrest and discharge or dismissal. This record shall be furnished to a court or police agency upon request for the purpose of showing that a defendant in a criminal action pursuant to MCL 750.430 has already once availed himself or herself of this section. During the term of probation, the records maintained by the Criminal Justice Information Center and the court are public.

3.11 Drug Treatment Court.

A. *Authority and Definition*. A drug treatment court is a court-supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol.[12] MCL 600.1060 *et seq*. An individual may not be admitted to a drug treatment court if he or she is a *violent offender* as defined in MCL 600.1060(g). If an offender is admitted to a drug treatment court, upon agreement with the individual and the prosecutor, adjudication of his or her crime may be deferred; alternatively, if a defendant may not be eligible for a deferred judgment of guilt under the drug treatment court statute or under the agreement with the court and prosecutor, the court may sentence the defendant and impose probation or other court supervision in the drug treatment court program with terms and conditions according to the agreement. MCL 600.1070(1)(a)-(c). The court may also place in drug treatment court a person who is eligible for a deferred judgment of guilt under the Holmes Youthful Trainee Act (MCL 762.11), the Public Health Code (MCL 333.7411), the Spouse Abuse Act (MCL 769.4a), or the Penal Code (health-care professional) (MCL 750.430).

B. *Transfer and Jurisdiction*. A case may be completely transferred from a court of original jurisdiction to a drug treatment court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). MCL 600.1088(1). Unless a memorandum of understanding provides otherwise, "the original court of jurisdiction maintains jurisdiction over the drug treatment court participant . . . until final disposition of the case, but not longer than the probation period fixed under . . . MCL 771.2." MCL 600.1070(2).

C. *Conditions*.

1. The defendant must plead guilty to the offense. A judgment of guilt may be entered, depending on the underlying offense.
2. The court must either defer proceedings as set out in MCL 771.1 or the defendant must be placed on probation.
3. The court must require participation in treatment and prevention services, education, and mandatory periodic and random testing for the presence of any controlled substance or alcohol in blood, urine, or breath.
4. The court must require the defendant to pay certain fines and costs, which may include the costs of treatment.[13]

See MCL 600.1070; MCL 600.1072; MCL 600.1074.

3.12 DWI/Sobriety Court.

[12] A drug treatment court, or a circuit or district court seeking to adopt or institute a drug treatment court, must be certified by the State Court Administrative Office. MCL 600.1062(5).

[13] However, if the court determines that the required payments "would be a substantial hardship for the individual or would interfere with the individual's substance abuse treatment, the court may waive all or part of those" payment requirements. MCL 600.1074(3).

A. *Authority and Definition*. A DWI/sobriety court is a court-supervised treatment program for individuals who abuse or are dependent upon alcohol and who are convicted of certain repeat drunk driving offenses.[14] MCL 600.1084. "Before the secretary of state issues a restricted license to a program participant under . . . MCL 257.304, the DWI/sobriety court judge shall certify to the secretary of state that the individual seeking the restricted license has been admitted into the program and that an interlock device has been placed on each motor vehicle owned or operated, or both, by the individual." MCL 600.1084(6).

B. *Conditions*.

1. The defendant must be convicted of the offense. A judgment of guilt is entered. See MCL 600.1084(4).

2. The defendant must allow an alcohol ignition interlock device to be installed in his/her vehicle before receiving a restricted driver license. MCL 257.304(2); MCL 600.1084(6).

3.13 Suspended Sentence. A suspended sentence is similar to a delayed sentence. A suspended sentence occurs when the judge imposes a specific sentence and then orders that the imposition of the sentence be suspended until after the occurrence of some event in the future. For example, see *People v. Cordell*, 309 Mich. 585 (1944), where defendant was sentenced to 2-5 years in prison, and the judge then suspended the sentence until after the defendant was discharged from the armed forces. The Court of Appeals acknowledged in a footnote that the holding in Cordell was still good law even though the ruling was made prior to the enactment of the delayed sentencing law in 1961. See Section 3.3 for a complete discussion of delayed sentencing under MCL 771.1(2). In *Oakland County Prosecutor v. 52nd District Judge*, 177 Mich. App. 557 (1988), it was held that the sentencing judge did not have authority to suspend the final 60 days of a 90-day jail sentence after defendant had already served the first 30 days. However, in the era of jail overcrowding and programs such as Community Corrections, there is an increased emphasis on offering incentives to get people out of jail early. One possible solution to the problem of losing jurisdiction once sentence is imposed is to keep a jailed defendant on direct probation to the court during a period of incarceration. If a person completes a drug class, achieved a GED or some other positive achievement, then the sentence could be modified. Another reason to maintain the defendant on direct probation to the court would be to allow the person to be released from jail to a rehabilitative program, such as an in-patient substance abuse program.

3.14 Conditional Sentence When Defendant is Not Placed on Probation.

A. *Authority and Definition*. Conditional sentences may be imposed where a fine or imprisonment is authorized by statute, without placing the defendant on probation. MCL 769.3 provides if punishment for an offense is either a fine or imprisonment, a judge may

[14] A DWI/sobriety court, or a circuit or district court seeking to adopt or institute a DWI/sobriety court, must be certified by the State Court Administrative Office. MCL 600.1084(3).

sentence conditionally. The judge can order a fine with or without costs within a specified period of time. The defendant may be incarcerated for failure to pay.

B. *Conditions*:

1. First offenders convicted of offenses carrying less than a five-year maximum may, in the alternative, be sentenced to a jail sentence not to exceed six months. (MCL 750.506).

2. Persons convicted for the first time of unauthorized use of a motor vehicle may have their sentences reduced to three months in the county jail or fined not more than $500.00. (MCL 750.414)

3. The defendant is entitled to a hearing prior to incarceration for his failure to pay a fine and/or costs as part of this type of sentence. (*Reardon v Georgia*, 461 US 660 (1983).)

4. If the court imposes a conditional sentence, any restitution ordered shall be a condition of that sentence. (MCL 769.1a) The conditional sentence statute further states that, "if a person is convicted of an offense punishable by a fine or imprisonment or both, the court may impose a conditional sentence and order the person to pay a fine, with or without the costs of prosecution, and restitution as provided in section MCL 769.1a or the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, within a limited time stated in the sentence and, in default of payment, sentence the person as provided by law. . . . Except for a person who is convicted of criminal sexual conduct in the first or third degree, the court may also place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination in installments with any limited time and may, upon default in any of those payments, impose sentence as provided by law." (MCL 769.3) The court may impose imprisonment under the conditional sentence if the defendant fails to pay restitution. In determining whether to impose imprisonment, the court must take into account the defendant's employment status, earning ability and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay before incarcerating the defendant. (MCL 780.826(11), MCL 769.1a, MCL 771.3(8))

5. When a person has been convicted of domestic violence, or when a prior conviction of domestic violence is included in a criminal history record which meets the definition of domestic violence in 18 USC 922(g)(9), a condition of probation prohibiting the defendant from possessing, carrying, or purchasing a firearm or ammunition should be included. See Exhibit 6.11 for more information.

6. If the court orders conditions reasonably necessary for the protection of one or more named persons, the court or a law enforcement agency within the court's

jurisdiction shall enter the order or amended order of probation into the Law Enforcement Information Network (LEIN). If the order is rescinded or amended, the order in LEIN shall be amended or removed accordingly. (MCL 771.3(2)(o), (4)).

3.15 Financial Penalties and Remedies.

A. *Authority and Definition in General*. Sentences in Michigan can only be imposed in accordance with specific statutory authority. A term or condition of a sentence not expressly authorized by statute or a sentence in excess of that provided by a relevant statute is unlawful and must be vacated. (*People v Neil*, 99 Mich App 677; 299 NW2d 23 (1980)). Michigan law provides four categories of financial penalties for criminal offenses: (1) fine, (2) costs, (3) assessments, and (4) restitution. Costs are limited to those expressly provided by statute (see Section B below). Restitution and special assessments should be ordered as required by MCL 771.3(1)(e) and (f). An order of restitution entered pursuant to the Crime Victim's Rights Act remains effective until it is satisfied in full. (MCL 780.826(13).) The probation statute specifically outlines how costs are to be determined and assessed. Minimum state costs shall be ordered as a condition of probation pursuant to MCL 769.1(j) and MCL 771.3(1)(g). Payment of restitution is regulated by MCL 780.826 and 780.827.

Note: See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for information on fines, costs, and fees; see also MJI's Table of General Costs (listing generally-applicable cost provisions and the categories of offenses to which they apply) and Table of Misdemeanor Costs (listing misdemeanor offenses for which costs are authorized or required).

B. *Costs as a Discretionary Condition of Probation*. MCL 771.3 provides, in part, as follows:

"(2) As a condition of probation, the court may require the probationer to do 1 or more of the following:

* * *

(c) Pay costs pursuant to subsection (5).

* * *

(5) If the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.

(6) If the court imposes costs under subsection (2) as part of a sentence of probation, all of the following apply:

(a) The court shall not require a probationer to pay costs under subsection (2) unless the probationer is or will be able to pay them during the term of probation. In determining the amount

and method of payment of costs under subsection (2), the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.

(b) A probationer who is required to pay costs under subsection (1)(g) [(requiring that a probationer pay the minimum state cost)] or (2)(c) and who is not in willful default of the payment of the costs may petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

(7) If a probationer is required to pay costs as part of a sentence of probation, the court may require payment to be made immediately or the court may provide for payment to be made within a specified period of time or in specified installments."

Note, however, that although "probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not." *People v. Butler-Jackson*, ___ Mich. ___, ___ (2016) (citing *People v. Cunningham (Cunningham II)*, 496 Mich. 145 (2014), and *People v. Juntikka*, 310 Mich. App. 306 (2015), and vacating that part of the Court of Appeals' judgment, 307 Mich. App. 667 (2014), "addressing the propriety of court costs under MCL 771.3(5)[]"). However, see also MCL 769.1k(3) (providing that MCL 769.1k(1) and (2), which authorize the imposition of certain fines, costs, and assessments, including court costs, "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation[]").

The court "may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]." MCR 6.445(G).[15] MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See Section 3.15(I) for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

C. *Fine and Costs.*

[15] MCR 6.001(B) provides that MCR 6.425(E)(3) and MCR 6.445(A)-(G) apply to misdemeanors.

1. Authority. A penal fine and costs may only be imposed when authorized by the specific statute pursuant to which the defendant is convicted. *People v. Cunningham (Cunningham II)*, 496 Mich. 145, 157-158 (2014). Such statutes include MCL 769.3 for conditional sentences and MCL 771.3 for probation. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for information on fines, costs, and fees; see also MJI's Table of General Costs (listing generally-applicable cost provisions and the categories of offenses to which they apply) and Table of Misdemeanor Costs (listing misdemeanor offenses for which costs are authorized or required).

   Effective October 17, 2014,[16] courts are authorized pursuant to MCL 769.1k(1)(b)(*iii*) to impose "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:

   (A) Salaries and benefits for relevant court personnel.
   (B) Goods and services necessary for the operation of the court.
   (C) Necessary expenses for the operation and maintenance of court buildings and facilities."

   MCL 769.1k(1)(b)(*iii*), as amended, "independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense[,]" and court costs may be awarded under this provision. *People v. Konopka*, 309 Mich. App. 345, 358 (2015).[17]

   Beginning January 1, 2015, courts must make available to a defendant information about any fine, cost, or assessment imposed under MCL 769.1k(1). MCL 769.1k(7). Additionally, courts must report any costs imposed under MCL 769.1k(1)(b)(*iii*) to the SCAO yearly. MCL 769.1k(8). NOTE: These provisions will sunset on October 17, 2020, without further action by the legislature. See MCL 769.1k(1)(b)(*iii*).

2. Credits to Fine. Jail time must be credited against a fine if **only** a fine is imposed. The judge must credit the defendant $5.00 for each day previously served in jail in lieu of posting bail prior to conviction. (MCL 780.73).

[16] See 2014 PA 352.

[17] The amended version of MCL 769.1k does not violate a defendant's due process or equal protection rights; nor does it violate the constitutional prohibition on ex post facto punishments or the principle of separation of powers. *Konopka*, 309 Mich. App. at 365, 367-70, 376. Furthermore, "although it imposes a tax, MCL 769.1k(1)(b)(*iii*) is not unconstitutional[.]" *People v. Cameron*, ___ Mich. App. ___, ___ (2017). "Although it does not expressly state that it imposes a tax, [MCL 769.1k(1)(b)(*iii*)] is neither obscure nor deceitful, and thus, it does not run afoul of the Distinct-Statement Clause of Michigan's Constitution[;]" furthermore, "because the trial court must establish a factual basis for its assessment of costs to ensure that the costs imposed are reasonably related to those incurred by the court in cases of the same nature, the legislative delegation to the trial court to impose and collect the tax contains sufficient guidance and parameters such that it does not run afoul of the separation of powers provision of" the Michigan Constitution. *Cameron*, ___ Mich. App. at ___.

3. Crime Victim Fee. This was revised effective April 1, 2012. The court shall order each person charged with a felony, misdemeanor or ordinance violation that is resolved by conviction, assignment to youthful trainee status, delayed sentence or deferred entry of guilt, or in another way that is not an acquittal or dismissal, to pay an assessment of $75.00 for misdemeanors and $130.00 for felonies, which is transmitted to the Crime Victims' Rights Fund. NOTE: If a defendant is convicted of more than one crime arising out of the same incident, the CVF must be assessed on each crime. This fee is in addition to any fine, costs, or other assessments imposed by the court, and cannot be waived, suspended or offset for time served or community service performed. The assessment shall be ordered upon the record, and shall be listed separately in the judgment of sentence or order of probation. See Exhibit 6.12 and MCL 780.811, 780.901 and 780.905.

4. Minimum State Cost. This was revised effective April 1, 2012. The minimum state cost for each misdemeanor is now $50.00. See Exhibit 6.12 and MCL 600.8381, 712A.18m, 769.1k, 780.811, and 780.901.

5. Finding of Ability to Pay. There is no requirement that the sentencing judge consider the defendant's ability to pay before **assessing** fines and costs. *People v. Wallace*, 284 Mich. App. 467 (2009). However, "[a] defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." MCL 769.1k(10). Additionally, MCR 6.610(F)(2) provides that "[t]he court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3)."[18] See Section 3.15(I) for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations. See also SCAO Memorandum (*Ability to Pay Court Rule Amendments*), August 16, 2016.[19]

6. Restrictions. A defendant cannot be sentenced to imprisonment and to pay court costs or face additional jail time. A sentence of this nature is outside the statutory provisions. (*People v Tims*, 127 Mich App 564; 339 NW2d 488 (1982), *People v Watts*, 133 Mich App 80; 348 NW2d 39 (1984))

D. *Restitution*.

1. Authority. At sentencing, the court must "order the dollar amount of restitution that the defendant must pay to make full restitution[.]" MCR 6.601(F)(1)(d). See also MCL 780.826(2), which states, "Except as provided in MCL 780.826(8), when sentencing a defendant convicted of a misdemeanor, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any

[18] See also MCR 6.001(B), providing that MCR 6.425(E)(3) applies to misdemeanor cases.
[19] Accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2016-25.pdf.

victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." Restitution may also be ordered as a condition of probation pursuant to MCL 771.3(1), or pursuant to MCL 769.1a generally. The court may also order restitution pursuant to the Crime Victim's Rights Act. (MCL 780.826)

"[B]oth [the CVRA and MCL 769.1a(2)] impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete." *People v. Garrison*, 495 Mich. 362, 368 (2014) (noting that "the plain meaning of the word 'full' is 'complete; entire; maximum'") (citation omitted). "[T]he standard to be applied when calculating a restitution amount [under the CVRA] is simply one of reasonableness"; if "the evidence provides a reasonably certain factual foundation for a restitution amount, the statutory standard is met." *People v. Corbin*, 312 Mich. App. 352, 365 (2015). There is no "need for absolute precision, mathematical certainty, or a crystal ball[; however,] . . . speculative or conjectural losses are not 'reasonably expected to be incurred.'" *Corbin*, 312 Mich. App. at 365, quoting MCL 780.766(4)(a).

Pursuant to MCL 780.826(11) and (13) and MCL 769.1(11), if the defendant is placed on probation or the court imposes a conditional sentence as provided in MCL 769.3, any restitution ordered shall be a condition of that probation or sentence. An order of restitution entered pursuant to the Crime Victim's Rights Act remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. Because restitution remains in effect until satisfied in full, the order of restitution **must** be specified in the judgment of sentence or in a separate order of restitution. If probation is ordered, the order of restitution **must also** be specified in the order of probation.

"Although courts must order defendants to pay 'full restitution,' their authority to order restitution is not limitless[;] . . . the losses included in a restitution order must be the result of [the] defendant's criminal course of conduct." *Garrison*, 495 Mich. at 372 (noting that MCL 780.766(1) defines "'victim' as 'an individual who suffers *direct* or threatened physical, financial, or emotional harm *as a result* of the commission of a crime'"). Moreover, because MCL 780.766(2) "authorizes the assessment of full restitution only for 'any victim of the defendant's course of conduct that *gives rise to the conviction*,'" trial courts are not "authorize[d] to impose restitution based solely on uncharged conduct"; rather, "MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded." *People v. McKinley*, 496 Mich. 410, 413, 421 (2014), overruling *People v. Gahan*, 456 Mich. 264, 270 (1997), "to the extent that [it] held that MCL 780.766(2) 'authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction.'" See also *People v. Raisbeck*, 312 Mich. App. 759, 772 (2015) (citing *McKinley*, 496 Mich. at 419-424, and holding that where the prosecutor

specifically "charged [the defendant] with committing a single [racketeering] crime against 18 named individuals," rather than "with committing a crime against any and all victims of her scheme," the trial court "erred by ordering restitution for [several additional] individuals who were not named in the information"); *Raisbeck,* 312 Mich. App. at 770-771 (citing *McKinley,* 496 Mich. at 419, and holding that although the defendant, when tendering his guilty plea with respect to charged criminal sexual conduct involving one victim, admitted to engaging in criminal sexual conduct with a second victim, restitution should not have been ordered with respect to the second victim where the prosecutor had voluntarily dismissed the charge involving that victim because the statute of limitations had expired).

However, if the defendant expressly agrees to the imposition of restitution with respect to charges that are dismissed under a plea agreement, the trial court may order restitution based on the defendant's conduct underlying the dismissed charges without violating *McKinley*, 496 Mich. at 419-420, 424, or the defendant's right to due process. *People v. Foster (Michael),* 319 Mich. App. 365, 375-383 (2017). Additionally, if the defendant pleads guilty to an offense in exchange for dismissal of a charge of a predicate offense based on the same course of criminal conduct, restitution may be ordered for losses related to the dismissed predicate offense. *People v. Bryant*, 319 Mich. App. 207, 209, 213 (2017) (where the defendant, who broke into a home and stole items including firearms, pleaded guilty of possession of a firearm during the commission of a felony (felony-firearm) in exchange for the dismissal of a charge of home invasion, he was properly ordered to pay restitution for all of the homeowner's losses associated with the entire course of criminal conduct; "[w]hile the [predicate] home invasion charge was dismissed, its *commission* was part and parcel of the felony-firearm conviction, and the course of conduct for the home invasion included stealing the victim's belongings") (quotation marks omitted; first alteration in original).

2. Objections to Restitution. When restitution is imposed as a condition of probation and the defendant objects, the amount of the loss and the defendant's ability to pay must be presented on the record. (*People v. Music*, *supra*) If restitution is imposed pursuant to the Crime Victim's Rights Act, the court, in determining whether to order restitution, may order the probation officer to obtain relevant information. A dispute must be resolved on the record by a preponderance of the evidence.

"Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." MCR 6.610(F)(1)(d).

3. Failure to Pay. The defendant must be ordered to make regularly-scheduled restitution payments. If two or more payments are missed, the court is required to

order the defendant to execute a wage assignment to pay the restitution. (MCL 780.826(15)). If the court determines that a defendant has failed to pay restitution, before incarcerating the defendant for violating probation, the court must take into account: (1) the defendant's employment status, earning ability, and financial resources, (2) the willfulness of the failure to pay, and (3) any other special circumstances affecting the ability to pay. (MCL 771.3(8), MCL 780.826(11), (14).) See also MCR 6.445(G) (providing that the court "may not sentence [a] probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]"); MCR 6.610(F)(2) (providing that "[t]he court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3)" ).[20] See Section 3.15(I) for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

4. Other. A judge may order that restitution be paid to an insurance company. (MCL 780.766(80) (felony cases only), *People v. Bond*, 99 Mich. App. 86 (1980)).

5. Wage Assignment. The probationer may be asked to agree to pay by wage assignment any restitution, assessment, fine, or cost imposed by the court. (MCL 771.3(2)(f)).

6. Sentencing Requirements. At sentencing the court must order the dollar amount of restitution that the defendant must pay to make full restitution, MCR 6.610(F)(1)(d), and the judgment of sentence must include the dollar amount of restitution that the defendant is ordered to pay, MCR 6.427.

7. Amending Restitution. MCR 6.430 governs postjudgment motions to amend restitution. This rule is applicable in misdemeanor cases. See MCR 6.001(B). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1 for a detailed discussion of MCR 6.430.

E. *Other Assessments*. In addition to fines, costs, and restitution, conviction for some offenses may require other assessments.

1. Reimbursement of Emergency Response Costs. If the defendant is placed on probation, any reimbursement ordered shall be a condition of that probation. The court may revoke probation if the defendant fails to comply with the order and has not made a good-faith effort to comply with the order. In determining whether to revoke probation, the court shall consider: (1) the defendant's employment status, earning ability, number of dependents, and financial resources, (2) the willfulness of the defendant's failure to pay, and (3) any other special circumstances that may have a bearing on the defendant's ability to pay. (MCL 769.1f)

[20] MCR 6.001(B) provides that MCR 6.425(E)(3) and MCR 6.445(A)-(G) apply to misdemeanors.

2. Specialty Court Treatment Program Fee. If a person is placed in a drug treatment, mental health, or veterans court, he or she may be required to pay a reasonable fee that is reasonably related to the cost to the court for administering the court program as provided in the memorandum of understanding pursuant to the authorizing statute. The fee is transferred monthly to the court funding unit.

3. Court-Ordered Testing and/or Programs. Defendants can be required to pay for drug and alcohol testing, MADD impact panel, electronic monitoring devices, etc., as a condition of their probation or sentence.

F. *Payment Due at Sentencing Per Court Rule*. MCR 1.110 provides that:

> Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.

However, most courts have developed their own methods for complying with MCR 1.110, keeping in mind that many defendants do not have the financial means to pay the large sum imposed at sentencing, especially for an offense such as Operating a Vehicle While Intoxicated. Although courts can and do work out payment plans with defendants, the judge is discouraged from doing so from the bench. So, once it is established that the defendant cannot pay all the times and costs at the sentencing hearing, the judge should refer him or her to court staff to arrange a payment plan.

G. *Bail Money*. If the defendant personally paid the bond or bail, the court shall order that when the bond or bail is discharged, that money shall be used to pay restitution, costs, fines, probation supervision fees, and other assessments or court ordered payments. MCL 765(15)(2). See also MCL 765.6c, which states that when defendant personally pays his or her own bond, he or she shall be notified that this money may be used to pay fines, costs, restitution, or other payments ordered by the court. However, the court has no independent authority to apply the bond to fines and costs if a person other than the defendant posted it.

H. *Allocation of Payments*. Under MCL 775.22(5), payments shall be allocated as follows:

1. 50% of all money collected shall be applied to payment of "victims' payment."

2. For violations of state law, the remaining money collected shall be applied in the following order of priority:

   (a) costs;
   (b) fines;
   (c) probation supervision fees;
   (d) assessments and other payments.

3. For violations of local ordinances, the remaining money collected shall be applied to:

(a) fines and costs;
(b) assessments and other payments

Note: MCL 775.22(5) defines "victim payment" as restitution ordered to be paid to the victim or the victim's estate, but not restitution ordered to be paid to an entity that has reimbursed the victim for his or her losses. "Victim payment" also includes assessments ordered to be paid to the Crime Victim's Rights Fund.

I. *Incarceration for Nonpayment of Court-Ordered Financial Obligations; Finding of Ability to Pay*. MCL 769.1k(10) provides that "[a] defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." Additionally, MCR 6.610(F)(2) provides that "[t]he court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3)."[21] MCR 6.425(E)(3) provides as follows:

"(3) Incarceration for Nonpayment.

(a) The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court finds, on the record, that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order.

(b) Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or all of the amount of money owed to the extent permitted by law.

(c) Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:

*(i)* Defendant's employment status and history.

*(ii)* Defendant's employability and earning ability.

*(iii)*The willfulness of the defendant's failure to pay.

*(iv)* Defendant's financial resources.

*(v)* Defendant's basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.

(*vi*) Any other special circumstances that may have bearing on the defendant's ability to pay."

[21] See also MCR 6.001(B), providing that MCR 6.425(E)(3) applies to misdemeanor cases.

The court must comply with the provisions of MCR 6.425(E)(3) before sentencing a probationer to prison or jail for failure to pay a court-ordered financial obligation, MCR 6.445(G), or before sentencing a person to a term of incarceration for nonpayment in a proceeding under MCR 3.606 for contempt of court, MCR 3.606(F).

See the SCAO Ability to Pay Workgroup's *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay*, April 20, 2015,[22] and SCAO Memorandum (*Ability to Pay Court Rule Amendments*), August 16, 2016,[23] for more information on determining a defendant's ability to pay court-ordered financial obligations.

J. *Refund of Payment of Court-Ordered Financial Obligations Upon Invalidation of Conviction*. "When a criminal conviction is invalidated by a reviewing court and no retrial will occur, . . . the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction[;]" the retention of such conviction-related assessments following the reversal of a conviction, where the defendant will not be retried, "offends the Fourteenth Amendment's guarantee of due process." *Nelson v. Colorado*, 581 U.S. ___, ___ (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 due process[]").

3.16 Sentences to Jail.

A. *Representation by Counsel*. District court judges should be sure that defendants who are being sentenced to jail have counsel at sentencing, or knowingly and voluntarily waive their rights to an attorney, even for defendants who have previously waived their rights to an attorney at the arraignment or plea.

B. *Types of Jail Sentences*:

1. Straight Jail. A defendant may be sentenced to a straight jail term without putting him or her on probation. The court would lose jurisdiction once the sentence is imposed. A straight jail term of one year or less has no minimum by law. MCL 769.28.

2. Straight Jail and a Fine. This is permitted even when the penal statute authorizes imprisonment or a fine. *People v. Krum*, 374 Mich. 356 (1956). MCL 769.5 states:

> "(1) If a statute provides that an offense is punishable by imprisonment and a fine, the court may impose imprisonment without the fine or the fine without imprisonment.

[22] Accessible at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/AbilityToPay.pdf .
[23] Accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2016-25.pdf.

(2) If a statute provides that an offense is punishable by fine or imprisonment, the court may impose both the fine and imprisonment in its discretion."

3. Straight Jail and Costs. There is no statute authorizing such a sentence. See *People v. Watts*, 133 Mich. App. 80 (1984), where the Court of Appeals reversed a sentence of eight months and jail plus costs for attorney fees, witness fees and jury fees. NOTE: If the defendant is placed on probation, however, then the conditions may be that the offender pay "fines, costs, damages, or any combination." The second sentence to MCL 769.3 states:

   Except for a person who is convicted of criminal sexual conduct in the first or third degree, the court may also place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination in installments with any time and may, upon default in any of those payments, impose sentence as provided by law.

4. Specific Date of Release from Jail. A judge may not impose a jail term with a specific date of release. This could deny the defendant the opportunity for good time credits under MCL 51.282(2); *People v. Cannon*, 206 Mich. App. 652 (1994).

5. Jail With Additional Instructions. In Wayne County, a district judge can specify that a defendant is to serve a certain number of jail days, such as 90 days, and can indicate on the mittimus that the defendant can be early released only to a substance abuse facility, mental health facility, or a tether. Often this occurs for defendants with untreated substance abuse or mental health problems.

6. Jail-Based Programs. Many county jails, such as the Wayne County Jail, have programs wherein inmates can earn GEDs, attend AA, attend batterers counseling sessions, obtain treatment for mental illnesses, etc. District judges should become familiar with any jail-based programs available to them.

C. *Reductions in Jail Sentences*.

1. Good Time Credits. A county jail inmate may earn good time credits to reduce his or her sentence. The credits amount to one day for every six days served. MCL 51.282(2).

2. Reduction of "Straight" Jail Term. A prisoner may receive, if approved by the court, a reduction of one-fourth of a jail term if the prisoner's conduct, diligence, and general attitude merit such reduction. MCL 801.257. "The statute's application is not limited to prisoners who have already requested and been granted work release pursuant to other sections of the day parole act." *People v. Wilkins*, ___ Mich. ___, ___ (2017). Reductions under MCL 801.257 are not available to a prisoner who willfully refuses to cooperate with the county in its

attempt to enforce the Prisoner Reimbursement to the County Act. See MCL 801.85(2). They are also not available to a prisoner who willfully refuses to cooperate with the county in its attempt to seek reimbursements for medical care given to the prisoner. MCL 801.5a.

3. Reduction Contingent on Payment of Restitution. Decreasing the number of days in jail may not be contingent upon the payment of restitution. If the prisoner is unable to pay the amount owed, he or she would suffer punishment for not making payments. An evidentiary hearing is required to determine a person's ability to pay and a jail sentence may not be increased due to the non-payment of restitution. *People v. Collins*, 239 Mich. App. 125 (1999); MCL 769.1a(12).

D. *Day Parole of Prisoners, a/k/a Work Release.* Under MCL 801.251(1), the sentencing judge may order that the prisoner be granted the privilege of leaving jail during necessary and reasonable hours for any of the following purposes:

1. Seeking employment
2. Working at employment
3. Conducting his or her self-employed business or occupation, including housekeeping and caring for needs of family
4. Attendance at an educational institution
5. Medical treatment, substance abuse treatment, mental health counseling, or psychological counseling.

Note: Some jails may not have the ability to honor an order for day parole or work release. Check with your jail before ordering day parole/work release.

E. *Concurrent Jail Sentences.* Sentences for separate convictions must always be imposed to run concurrently absent specific statutory authorization to the contrary. *People v. Chambers*, 430 Mich. 217 (1988); *People v. Sawyer*, 410 Mich. 531 (1981). This rule applies even if there is a conviction for a State and Federal offense. *In re Carey*, 372 Mich. 378 (1964); *People v. Gallagher*, 404 Mich. 429 (1979). It also applies when a defendant is convicted in another state as well as Michigan. *People v. Daniels*, 69 Mich. App. 345 (1976).

F. *Consecutive Jail Sentences.*

1. Purpose. The purpose of consecutive sentences is to "enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts." *People v. Smith*, 423 Mich. 427 (1985); *People v. Chambers, supra*.

2. Second-In-Time Judge to Impose Consecutive Sentence. Only the judge sentencing second-in-time has the authority to choose consecutive sentencing. *People v. Chambers, supra*; *People v. Rondon*, 144 Mich. App. 410 (1985); *People v. Kaake*, 118 Mich. App. 71 (1982).

3. Prosecutor Has Duty To Inform Judge. The prosecuting attorney has a statutory duty to inform the court of the applicability of any consecutive sentencing provision. A statement of applicability of any consecutive sentence is required from the prosecutor as part of the presentence report. MCL 771.14(2)(d).

4. Following Probation Revocation. A consecutive sentence may be imposed for a sentencing following a revocation of probation even if a concurrent sentence was originally pronounced. The sentence imposed by the court would occur following a finding of a violation and revocation of probation. The new sentence would be based upon the underlying offense, not the probation violation. *People v. Alvarado*, 192 Mich. App. 718 (1992).

5. Formal Resentencing Hearing to Convert Concurrent to Consecutive. A formal resentencing hearing must be conducted before a court converts a concurrent sentence to a consecutive sentence, even if the original sentence was invalid and the court was acting to correct the mistake. *People v. Roberto Thomas*, 223 Mich. App. 9 (1997); *People v. Mapp*, 224 Mich. App. 431 (1997).

6. When Consecutive Sentences are Mandatory. Consecutive sentences are mandatory when the crime was committed while the defendant was incarcerated, an escapee or on parole. MCL 768.7a(1). However, this statute does not apply to misdemeanors. Also, the consecutive sentencing provisions of the escape from jail statutes do not apply to persons who are in jail for the commission of misdemeanors. MCL 750. 195(1); MCL 750.197(1).

7. Consecutive Sentences Only if Subsequent Offense is a Felony. The statute only authorizes consecutive sentences if the subsequent conviction is a felony. This rule applies even if the original charge is a felony that is subsequently reduced to a misdemeanor. *People v. Nantelle*, 215 Mich. App. 77 (1996); MCL 768.7b(2). Note: Under the holdings in *People v. Smith*, 423 Mich. 427 (1985) and *People v. Ackels*, 190 Mich. App. 30 (1991), consecutive sentencing is permitted when the pending felony results in a misdemeanor conviction. See also *People v. Washington*, ___ Mich. ___, ___ (2018) (holding that the misdemeanor offense of keeping or maintaining a drug house can be considered a predicate felony for purposes of a felony-firearm charge because "[w]hen the government charges a criminal defendant with felony-firearm under the Penal Code, th[e] Court must look to the Penal Code to ascertain the meaning of the word 'felony,' which is defined as an offense punishable by imprisonment in state prison," and "[a]lthough the Legislature intended the offense of keeping or maintaining a drug house to be a misdemeanor for purposes of the Public Health Code, that offense is punishable by imprisonment in state prison, and, therefore, it unquestionably satisfies the definition of 'felony' in the Penal Code"). In reaching its conclusion, the *Washington* Court stated 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." *Id.* at ___. For purposes

of the pending offense, the controlling factor is the nature of the offense that is charged, not the offense for which the defendant is ultimately convicted.

3.17 Alternatives to Jail. Incarceration is an expensive sentencing tool, with a relatively negligible impact on recidivism. District court judges have at their disposal a variety of alternatives to incarceration. Section 3.2 contains a listing of the possible terms of probation, and any of them could be seen as an alternative to jail. The items discussed below are common sentencing conditions that act as alternatives to jail, even if probation is not ordered.

A. *Drug and Alcohol Testing*. Since most misdemeanor crimes have an underlying element of drug or alcohol abuse, a sentence that includes random substance testing can be very effective in preventing recidivism. Without the substance abuse, many defendants can be productive and law-abiding.

1. Random Testing. There are many privately run companies and treatment facilities that provide drug and alcohol testing. Portable breath testing and urine drug screening are often included in the judgment of sentence as an alternative to incarceration. Several companies have developed procedures by which the courts can assign random testing for a defined number of days per week or month, depending on the level of substance use and the needs of the particular defendant. Many courts provide for testing at the courthouse, either for free or for a fee comparable to that charged by the private companies. An ethyl glucuronide test detects a direct metabolite of alcohol up to four days after consumption and is another option for judges sentencing defendants with alcohol abuse problems. TIP: It can be very effective to test the defendant for drugs and alcohol on the day of sentencing.

2. Daily PBTs. Every district court probation officer should have a portable breath testing machine. It can often be quite effective to order a defendant who has an alcohol problem to submit to daily PBTs before 9:00 a.m. See Exhibit 6.13 for a sample PBT grid.

B. *Tether or House Arrest*. Although there is no statutory authority for this alternative to jail, tethers have become common sentencing tools district courts use in lieu of incarceration. The devices include, but are not limited to, a wrist bracelet, ankle bracelet, device similar to a cell phone, and television monitor with or without a preliminary breath tester attached. The devices may be monitored by telephone or radio frequency. The court has the authority to specify the terms, such as hours and location, for each individual case. At about $11 per day, a tether is a relatively inexpensive option compared to incarceration. Different types are described below.

1. House Arrest. House arrest is generally an ankle bracelet the defendant wears continuously that confines him or her to a certain area (i.e., home, court appointed treatment, school, etc.). This kind of tether is usually connected through a land line telephone to a remote monitoring station and sends an alert if the tether is moved outside the reception area.

2. GPS Tether. A global positioning (GPS) tether is commonly used in domestic violence or assault cases. A GPS tether allows a judge to sentence the defendant by proscribing certain geographical "hot zones" frequented by the victim. If the defendant enters one of the off-limit areas, the tether sends an alert.

3. Sobrietor (Alcohol) Tether. The Sobrietor tether has a breath test instrument in the transmission module attached to the defendant's home telephone line and periodically tests the defendant and transmits the test results to a remove data location for processing.

4. SCRAM Tether. A Secure Continuous Remote Alcohol Monitor (SCRAM) tether permits testing for alcohol through the pores in the defendant's skin and permits increased mobility for the defendant.

5. Jail-Initiated Tether Programs. Many jails maintain tether programs, whereby non-violent jail inmates are early released to tether due to jail overcrowding.

6. No Credit for Tether Time. Although tethers are often used an alternative to jail, when sentencing a defendant for a probation violation, the defendant is not entitled to credit for time he or she spent on an electronic tether program. (*People v Smith*, 195 Mich App 147; 489 NW2d 135 (1992)).

C. *Community Service*. Community service work is often used as part of a sentence or probation term for various offenses. Community service work may be performed in lieu of payment of fines and costs or in lieu of jail time. There are two basic types of community service: the type where the defendant chooses where and when to perform the service and provides proof to the court or probation officer, and the type where court personnel oversees the community service. Courts typically charge defendants for court-monitored community service.

1. Authority. Where probation is an authorized sentence, in most but not all felonies and misdemeanors, the court may require the probationer to engage in community service as a condition of probation. (MCL 771.3(2)(e)) As part of the sentence for a violation of operating a vehicle while intoxicated (OWI), operating while visibly impaired (OWVI), operating with presence of drugs (OWPD), minor in possession of alcohol, transporting or possessing open alcohol in a motor vehicle, and minor transporting or possessing alcohol in a motor vehicle, a court may order a person to perform community service as designated by the court without compensation for a specified period (MCL 257.624a(3), MCL 257.624b(1), MCL 257.625, MCL 436.1703(1)): a. up to 360 hours for first offenses of OWPD, OWI, and OWVI. b. between 30 and 90 days for prior convictions of OWPD, OWI, and OWVI. A prior conviction means any conviction pursuant to MCL 257.625(1), (3), (4), (5), (6), (7), (8), and (23), and MCL 257.625m.

2. Liability for Injuries to Defendants. The Attorney General has issued opinions that persons placed in community service programs are not employees of the governmental unit under the Michigan Workers Compensation Disability Act. It appears that participants injured in community service programs would not be entitled to workers compensation benefits. (OAG, 1983-1984, No. 6158, P. 129 (June 24, 1983), OAG, 1971-1976, No. 5061, P. 522 (June 28, 1976)) Another consideration is governmental liability for injuries or damages to persons performing community service, third parties, or property. There may be governmental immunity if the community service program is a governmental function; that is, an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. (MCL 691.1407)

3. Insurance. Since governmental immunity may not provide complete coverage, the possibility of accident and health insurance for the participant and liability insurance for the governmental agency should be explored. Insurance policies can offer coverage for community service programs. Insurance premiums may also be recovered from probationers. A court may impose, as a cost, expenses incurred in providing oversight to the probationer. (MCL 771.3(5)) In OWI, OWPD, and OWVI cases the statute authorizes reimbursement for the cost of supervision for defendants sentenced to community service. Arguably, the cost of providing insurance for community service programs is such an expense. (MCL 257.625(14)) Any community service program should take into consideration the safety of the participants and the public. Courts should consult with their insurance carrier and should include in their community service programs only those activities that are approved by their carrier.

D. *Treatment and Counseling*. Drug and alcohol treatment is a very important sentencing option for district courts. In conjunction with requiring the defendant to remain substance free by implementing a breath and/or urine testing regimen, treatment and/or counseling provide the defendant with techniques to make the long-term choices to maintain a sober lifestyle.

The Salvation Army Adult Rehabilitation Center is a six-month, in-patient program, free for people with substance abuse problems. In Wayne County, there are facilities for men and women. However, the Salvation Army is a church, so some could argue that the Constitutional principle of separation of church and state is violated by mandating the Salvation Army's rehabilitation program. You could instead order the defendant to complete the Salvation Army rehabilitation program *or an equivalent program*.

E. *Out-Patient Mental Health Treatment*. A district judge has no authority to commit a mentally ill defendant to a treatment facility. Only probate judges have that authority. However, district courts can order defendants to voluntarily seek out mental health treatment as a condition of probation. Sometimes the threat of jail works to compel a mentally ill defendant to take needed medication and resume therapy.

3.18 Specialized Sentences:

A. *Drunk Driving*. Drunk driving is a common but serious misdemeanor offense. The consequences to the defendant are huge and include many Secretary of State sanctions. For example, a conviction of Operating While Intoxicated will cost the Defendant $2,000 under Michigan's Driver Responsibility Laws in addition to court fines and costs. It is not uncommon for all the costs of an OWI conviction to run over $10,000.

1. Sentencing Guidelines. District courts are not required to follow sentencing guidelines. However, guidelines can be helpful in developing an appropriate sentence. See Exhibit 6.16 for sentencing guidelines developed by the 3B District Court for drunk driving offenses.

2. Common Sentencing Provisions.

(a) Fines and Costs. These can often run over $2,000. See Section 3.15 B., *supra*.

(b) Credit for Time Served in Jail. It is important to note how many days the defendant spent in jail before the sentencing hearing so he or she can be given credit for time served. Mothers Against Drunk Driving (MADD) collects and publishes this information, so you should ensure that it is accurate.

(c) Jail. See Section 3.16, *supra*.

(d) Probation. Probation is usually ordered for drunk driving, so the court can monitor the defendant to reduce or prevent recidivism or relapse. The term can be as long as two years.

(e) MADD Impact Panel. Victim panels are held nationwide and are sponsored by the Mothers Against Drunk Driving organization. They consist of a panel of victims and survivors of drunk-driving crashes, who speak briefly about their experience, which may include death of a loved one and/or injury to themselves. Drunk driving offenders or other persons convicted of alcohol-related crimes can be required to attend as an element of their sentence. There is no interaction between victims and offenders. Any cost to the defendant for attending the program must be limited to the actual cost and cannot include any contribution used for political activity by the sponsor. A procedure must exist to waive the cost of attendance for any indigent defendant whose attendance is ordered by the court.

(f) Alcoholics Anonymous. This is somewhat controversial, since AA, like the Salvation Army, referenced above, is seen by some as a faith-based program that could be seen to violate the Constitutional principle of separation of church and state. However, AA is free and it does help lots

of people. It can be problem to verify attendance, since AA is, by definition, anonymous. Some courts order the defendant to obtain a sponsor and provide proof to the probation officer.

(g) Community Service. See Section 3.17 C., *supra*.

(h) Abstention from Alcohol and Illegal Drugs. Random testing for alcohol should be mandatory in every drunk driving case. Daily PBTs should be ordered for defendants having a very high BAC at the time of arrest or who are alcoholics. See Exhibit 6.13 for a sample PBT grid.

(i) Alcohol Education or Treatment. Alcohol education, counseling or treatment, depending on the level of the problem.

(j) Drug, Sobriety, Mental Health or Veterans Treatment Court. See Sections 3.9-3.12 *supra*.

(k) Drivers License Sanctions. License sanctions are based on the master driving record maintained by the Department of State and are imposed administratively by the Department of State as indicated by statute. The court does not order licensing sanctions. (MCL 257.319, MCL 257.320a, MCL 257.625b(4)) NOTE: At the time the plea is taken, the court need only advise the defendant that licensing sanctions will be determined based upon the master driving record maintained by the Michigan Department of State. (MCL 257.625b(4))

(l) Vehicle Immobilization. Vehicle immobilization is based upon the master driving record kept by the Secretary of State and is imposed by the court. Immobilization may not begin until after a jail sentence is served. Minimum and maximum days of immobilization are based on the number of prior convictions. (MCL 257.625(11)(e), MCL 257.904d)

3. Second or Third Offenses. Prior statutory offenses are defined in MCL 257.625(11)(c). If the prosecuting attorney intends to seek an enhanced sentence, second- or third-offense status must be charged in the complaint or information. (MCL 257.625(15)) Prior convictions are established at sentencing by one or more of the following: (1) a copy of a judgment of conviction, (2) an abstract of conviction, (3) a transcript of a prior trial or a plea taking or sentencing proceeding, (4) a copy of a court register of actions, (5) a copy of the defendant's driving record, (6) information contained in a presentence report, or (7) an admission by the defendant. (MCL 257.625(17).) See the Criminal Sentencing/Administrative Consequences Chart attached as Exhibit 6.18. A prior conviction means any conviction pursuant to MCL 257.625 and MCL 257.625m.

4. "Super Drunk." MCL 267.625(1)(c) adds the new offense of high BAC driving and makes it a 180-day misdemeanor to operate a motor vehicle with a bodily

alcohol content of .17 or greater. Because the maximum penalty for this new offense is 180 days, charges must be brought on a complaint and warrant rather than written on a citation. If convicted of this new offense, the court must order the defendant to participate in and successfully complete a minimum 1-year alcohol treatment or self-help program at the defendant's expense, devised from an assessment performed by an appropriately licensed alcohol assessor and approved by the court. As a condition of probation, the court must order the defendant to install a Breath Alcohol Ignition Interlock device (BAIID) in any vehicle the defendant drives: if the court does not order it, the Secretary of State must order the installation of a BAIID, even if the defendant was not placed on probation.

5. Attempted Drunk Driving. A person convicted of attempted OWI, OWVI, or OWPD shall be punished as if the offense has been completed. (MCL 257.204b).

6. Case Processing: Timing Considerations. Time Guidelines for Case Processing of Misdemeanors:

(a) Except as otherwise stated in MCL 257.625b, the defendant must be arraigned within 14 days of arrest. (MCL 257.625b(1))

(2) A pretrial must be held within 35 days, or 42 days in multi-county districts where there is only one judge. (MCL 257.625b(2)) Either side may have one 14-day adjournment. The defendant must attend the pretrial.

(3) The case must be disposed of within 77 days of the date the issued or reissued arrest warrant is served, whichever is later. (MCL 257.625b(3)) "Final disposition" refers to a plea or finding of guilt, not sentencing. Statutory exceptions for not meeting the disposition time frame include: (1) the unavailability of the defendant, material evidence, or witnesses; (2) interlocutory appeals; or (3) other exceptional circumstances. Docket congestion cannot be an excuse. The court shall not dismiss a case or impose any other sanction for failing to comply with any of these time limits.

B. *Minor in Possession of Alcohol*. Jail cannot be imposed for a first offense; even upon violation of probation. Some district court judges believe that first-offense MIP probationers can be placed in jail for contempt of court. However, this would violate the principle that a probation violation in and of itself does not amount to a new crime. *People v. Kaczmarek*, 464 Mich. 478, 482-83 (2001). See Judge Mark Goldsmith's Opinion and Order Vacating Stay in *People of the Township of Bloomfield v. John Michael Williams*, Exhibit 6.10, *supra*. See Section 3.6, *supra*, for a discussion of deferred sentencing for first-time MIP offenders.

C. *Domestic Violence*. Notwithstanding the intimate nature of the relationship between the defendant and the victim, domestic violence is a serious crime and should be treated as

such by district court judges. The safety of the victim should be a paramount consideration. See Section 3.3 *supra* for information on delayed sentencing procedures for first-time offenders. Also, MJI's Domestic Violence Benchbook is an excellent, comprehensive resource. Additional considerations are set forth below.

1. Federal Law Prohibition Against Possessing, Transporting, etc., Firearms and Ammunition. Federal law makes it unlawful for any person who has been convicted of domestic violence to own or possess firearms or ammunition. 18 U.S.C.A. § 922(g)(9). However, a conviction does not count if the conviction was expunged or if the defendant's civil rights were restored. In Michigan, misdemeanants cannot vote in jail, thus depriving them of their civil rights. When they are freed from jail, their civil rights are, in effect, restored, even if they never actually served time in jail. This quirk in Michigan law provides a loophole in the federal law prohibiting firearms for persons convicted of domestic violence. See Exhibit 6.11 *infra*. *Suggestion:* write on the Judgment of Sentence the following: "No civil rights are being suspended or restored pursuant to this conviction and the terms of probation. Possession, etc. of firearms is prohibited after probation is concluded pursuant to Federal law."

2. Batterer's Intervention. Many district courts order defendants to complete programs offered by "batterer intervention services" as a condition of probation. To promote victim safety and offender accountability in such cases, SCAO has encouraged Michigan courts to follow guidelines on batterer intervention standards that were promulgated by a statewide task force and endorsed by Governor Engler in 1999, and by the 2001 Governor's Domestic Violence Homicide Prevention Task Force. See SCAO Administrative Policy Memorandum 1999-01 and Report and Recommendations, Domestic Violence Homicide Prevention Task Force, p. 12, 18 (April, 2001).

   The approved programs provide for weekly counseling sessions for a minimum of 26 weeks.

3. Alcohol or Drug Abuse. Many times substance abuse goes hand in hand with domestic violence. Both the substance abuse and the violence should be treated by the sentencing court.

4. Review Hearings. It can be helpful to schedule monthly review hearings where the judge meets with the defendant to ensure compliance with probation conditions requiring batterer's intervention counseling or substance abuse treatment. This is a typical feature of specialized domestic violence courts.

5. Parenting Classes. These should be ordered if the incident involved a child or occurred in the presence of a child.

6. Victim Issues. One of the most frustrating aspects of domestic violence cases is the failure of victims to follow through with prosecution, "no contact" bond

provisions or probation conditions. This does not mean that the domestic violence did not occur. Often, victims are dependent upon the perpetrator financially and otherwise. It is important to remember that the court has no jurisdiction over victims. However, the court is allowed to provide information to victims about local domestic violence organizations.

D. *Drug, Sobriety and Other Problem-Solving Courts*. Problem-solving courts include (1) drug or sobriety courts, (2) domestic violence courts, (3) mental health courts, and (4) veterans courts. Such courts have become extremely popular in recent years because they are effective in changing negative behavior and reducing recidivism. The problem for small courts is resources. These specialized courts require additional probation personnel and full cooperation with funding units and police departments. Although grant money is usually available in the first year, it is not usually available in subsequent years. In a time of shrinking budgets, it can be difficult to start and/or maintain a specialized court. A detailed discussion of problem-solving courts is beyond the scope of these materials. Contact SCAO if you are interested in starting a problem-solving court.

**IV. THE SENTENCING HEARING.** The sentencing hearing is usually brief. See Exhibit 6.5 for a sample "script" of the hearing.

4.1 Scheduling the Sentencing Hearing.

A. *Law*.

(1) MCR 6.425(E)(1) requires the court to sentence the defendant within a reasonably prompt time after the plea or verdict, unless the court delays the sentencing as allowed by law. Although this rule only applies to circuit courts, this is obviously a good practice for district courts.

(2) The court must sentence the defendant within one year of his or her conviction. This may be excused only in limited circumstances. *People v. Richards*, 205 Mich. App. 442 (1994); see also MCL 771.1(2).

(3) 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 U.S. ___, ___ (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." *Betterman*, ___ U.S. at ___.

B. *Victims*. In cases involving victims, it is prudent to allow 10 days from the date of the plea or verdict to sentencing to allow the prosecutor enough time to notify the victim. MCL 780.823(1)

4.2. Review of File. The judge should review the PSIR and any other relevant information in the file before the sentencing hearing.

4.3 Judge's Authority to Pronounce Sentence. The same judge who presided over the trial or took the plea must impose the sentence, if "reasonably available." *People v. Robinson*, 203 Mich. App. 196 (1993). If a visiting judge held the trial or took the plea, that visiting judge must return to impose the sentence, if "reasonably available." *People v. Humble*, 146 Mich. App. 198 (1985). A visiting Circuit Judge who no longer had the authority to act as a Circuit Judge was not "reasonably available" per *People v. VanAuker*, 132 Mich. App. 394 (1984).

4.4 Defendant's Presence. The defendant has an absolute right to be present. *People v. Mallory*, 421 Mich. 229 (1994); MCL 763.8. Also see *People v. Palmerten*, 200 Mich. App. 302 (1993). However, a defendant may be sentenced in absentia, if he or she enters into a "plea by mail" with the consent of the court. MCR 6.610(E)(6).

4.5 Rules of Evidence. The rules of evidence, other than those with respect to privileges, do not apply to sentence hearings. MRE 1101(b)(3).

4.6 MCR 6.610(F) governs sentence hearings in district court. This is a much abbreviated procedure than that required by MCR 6.425 in circuit court. MCR 6.610 is summarized as follows:

A. *Right to Counsel*. Subrule (F)(1)(a) requires "the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence." Also see *People v. Johnson*, 385 Mich. 705 (1971).

B. *Presentence Report*. Subrule (F)(1)(b) provides that at sentencing the court must give the defendant's attorney, or if the defendant is not represented by counsel, the defendant, an opportunity to review the presentence report if one has been prepared.

C. *Right of Allocution*. Subrule (F)(1)(b) provides that at sentencing the court must give the defendant's attorney, or the defendant if he or she is not represented by counsel, an opportunity to "advise the court of circumstances defendant believes should be considered in imposing sentence." The comparable circuit court rule, MCR 6.425(D)(2)(c), requires that allocution be offered to the defendant, the defendant's lawyer, the prosecutor, and the victim. There is no specific prohibition against placing the defendant under oath prior to sentencing. *People v. Jones*, 201 Mich. App. 449 (1993). Even if the defendant's attorney makes a statement, it is important that the judge asks the defendant separately if he or she wishes to address the court. *People v. Berry*, 409 Mich. 774 (1980); *People v. Lugo*, 214 Mich. App. 615 (1995).

D. *Credit for Time Served*. Subrule (F)(1)(c) requires the court to advise the defendant of any credit to be given for time served. Credit against a sentence of incarceration, for time served prior to sentencing, is required by a number of statutes and is sometimes constitutionally required.

E. *Restitution.* Subrule (F)(1)(d) requires the court to order the dollar amount of restitution that the defendant must pay to make full restitution. It also provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." MCR 6.610(F)(1)(d).

F. *Incarceration for Nonpayment; Ability to Pay*. Subrule (F)(2) provides that "[t]he court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3)."[24] (See Section 3.15(I) for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.)

G. *Right to Appeal*. Subrule (F)(4) requires that if the court imposes a sentence of incarceration, even if suspended, the court must advise the defendant that he or she may file an appeal within 21 days after sentencing and will be appointed appellate counsel if indigent and the request for counsel is made within 14 days after sentencing. This advice is meant to insure that the defendant in that case is aware of the federal constitutional right to the assistance of appellate counsel. NOTE: In practice, this means that you must advise every criminal defendant of his or her appeal rights, even if incarceration is not imposed. It's best to do it in writing, on the sentencing form. See Exhibit 6.14, Sample Judgment of Sentence, 29th District Court, at the bottom.

4.7. Victim's Rights. In addition to the right to make a written or oral impact statement for use in the presentence report (see Section 2.2 C(2) above), the victim also has the right to "appear and make an oral impact statement at the sentencing of the defendant." However, the failure of the victim to address the court is not grounds for resentencing. In *People v. Pfeifer*, 207 Mich. App. 151 (1994), the victim was given the wrong date by the prosecutor and missed the actual sentencing date. The Court of Appeals reinstated the original sentence, stating that a trial court could not modify a valid sentence after it was imposed except as provided by law.

4.8 Plea Withdrawal. Generally, there is no absolute right to withdraw a guilty plea once it has been accepted. *People v. Gomer*, 206 Mich. App. 55 (1994); *People v. Harris*, 224 Mich. App. 130 (1997), overruled in part on other grounds by *People v. Comer*, 500 Mich. 278, 297, 298 (2017). MCR 6.310 contains rules regarding withdrawal of guilty pleas for felonies, but these do not apply to district court. Many district courts allow defendants to withdraw their pleas prior to sentencing, if the judge finds it in the interest of justice. See *People v. Spencer*, 192 Mich. App. 146 (1991). Also, see Section 2.3 above regarding allowing a defendant to withdraw a plea that was made pursuant to a sentence bargain that was rejected by the sentencing judge.

4.9 Imposition of Sentence.

A. *Reasons*. The judge must state the specific reasons for the sentence imposed and which criteria were considered. *People v. Coles*, 417 Mich. 523 (1983).

[24] See also MCR 6.001(B), providing that MCR 6.425(E)(3) applies to misdemeanor cases.

B. *Individualized*. The sentence must be individualized to a specific offender. The judge is given wide discretion in source and types of evidence used in determining the kind and extent of punishment. *People v. Adams*, 430 Mich. 679 (1988). Also see Section 3.1 *supra*.

C. *Paperwork.*

1. A mittimus, also known as Commitment to Jail, must be certified and delivered to the sheriff if the person is sentenced to the county jail. MCL 769.16; MCL 769.18.

2. A written judgment of sentence must be dated, signed and filed within 7 days after sentencing. MCR 6.427. However, if this provision is violated, there are no sanctions under current law, and the violation does not divest the court of jurisdiction. *People v. Levandoski*, 237 Mich. App. 612 (1999).

3. See Exhibit 6.14, Sample Judgment of Sentence used by the 29th District Court and Exhibit 6.15, Sample Judgments of Sentence forms used by the 3B District Court.

4.10 Credit for Time Served.

A. *Circumstances Where Credit for Jail or Prison Time Served Must be Granted*:

1. Credit must be given for time spent in jail or prison whenever the defendant is being represented following a new conviction based on facts arising out of an earlier void conviction and sentence. MCL 769.11a.

2. Credit must be given for time spent in a forensic center for a competency evaluation on the pending criminal case or any other case arising out of the same transaction. MCL 330.2042.

3. The judge must give credit for time spent in confinement as a Youth Trainee against a sentence imposed after that status has been revoked. MCL 762.12.

4. Credit against a jail or prison sentence must be given whenever the defendant has been incarcerated due to being denied or being unable to furnish bond for the offense of which the defendant is eventually convicted. MCL 769.11b; *People v. Prieskorn*, 424 Mich. 327 (1985).

5. Credit must be given, even if there is no statutory authority. Credit is sometimes required as a matter of due process of law in order to avoid multiple punishments or consecutive sentences when not authorized by law. *People v. Sturdivant*, 412 Mich. 92 (1981); *People v. Gallagher*, 404 Mich. 429 (1979).

6. Credit must be given for time served in confinement as a condition of probation against a sentence imposed after probation revocation. *People v. Sturdivant, supra*.

7. Credit must be given for time spent in jail awaiting trial even if the defendant was on a parole from another state at the time of the commission of the crime of which he was eventually convicted. This is not limited to a credit against the time on the paroled offense. However, if defendant was on parole for a sentence imposed in Michigan, the credit would properly have been applied to the paroled offense. *People v. Johnson*, 205 Mich. App. 144 (1994).

B. *Circumstances Where Defendant is Not Entitled to Credit*:

1. Generally, the defendant is not entitled to credit when he or she was already obligated to serve the time on a prior sentence. *People v. Patterson*, 392 Mich. 83 (1974).

2. Credit for time served is not to be given if defendant is under the care, custody or supervision of the Department of Corrections while awaiting trial and would qualify for a consecutive sentence. MCL 768.7a. This rule applies to a parolee on "extended furlough." *People v. Lakin*, 118 Mich. App. 471 (1982).

3. Defendant is not entitled to credit for time served while a "hold" has been placed on him or her while serving another sentence. *People v. Adkins*, 192 Mich. App. 679 (1992).

4. A consecutive sentence may be imposed following a probation revocation even if a concurrent sentence was originally pronounced. *People v. Alvardo*, 192 Mich. App. 679 (1992).

5. A tether is not considered "incarceration" for purposes of receiving credit against a jail or prison sentence. *People v. Reynolds*, 195 Mich. App. 182 (1992).

6. Credit for time served is limited to time served before sentencing for the offense for which the defendant is convicted. Where a defendant starts serving a sentence for a conviction while awaiting sentence for another conviction, no credit toward the second sentence is due for the period between the first and second sentence. MCL 769.11b; *People v. Givans*, 227 Mich. App. 113 (1997).

7. A defendant is not entitled to credit for time spent in a substance abuse rehabilitation program where it was a condition of program. A rehabilitation facility is not "jail" for purposes of the sentence credit statute. The purpose of such a program is treatment and rehabilitation, rather than incarceration. However, the court acknowledged that there were some facilities operated by state or local units of government which have as their purpose incarceration as well as

rehabilitation. These would be considered "jails" for purposes of allowing credit. *People v. Whiteside*, 437 Mich. 188 (1991).

8. A deferred sentence to allow the defendant to enter a residential rehabilitation facility does not mandate credit for time spent in the facility; the court may take defendant's behavior into account or may grant credit, but is not obligated to do so. *People v. Scott*, 216 Mich. App. 196 (1996).

9. No credit is required for time spent by a defendant in a special alternative incarceration unit ("boot camp"). A boot camp is not a jail under the sentencing credit statute. Further, the double jeopardy clause of the Constitution does not mandate awards of sentence credit for all probationary confinements. The purpose of the probationary confinement must be incarceration, rather than treatment and rehabilitation. *People v. Wagner*, 193 Mich. App. 679 (1992).

C. *Definition of "Incarceration"*:

1. County Jail. *People v. Lyles*, 76 Mich. App. 688 (1977).

2. Jail in Another State. *Brinson v. Genesee Circuit Judges*, 403 Mich. 676 (1978).

3. State Prison. *People v. Tillard*, 98 Mich. App. 17 (1980).

4. Mental Hospital. *People v. Gravlin*, 52 Mich. App. 467 (1974).

5. Federal Prison. *People v. Gallagher*, 404 Mich. 429 (1979).

6. Juvenile Detention Facility. *People v. Corbin*, 109 Mich. App. 120 (1981).

4.11 Modification of Existing Sentence. MCR 6.429(A) provides that a "court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party." The court cannot modify a valid sentence after it has been imposed except as provided by law, and "[a]ny correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence." *Id.* However, this court rule only applies to felonies. See MCR 6.001(A)-(B).

## V. SOME POST-SENTENCING MATTERS.

5.1 Appeals. MCR 7.101 contains the rules for appeals to circuit courts from district courts. Appeals as of right must be made within 21 days after the entry of the order or judgment appealed from. Many circuit courts will not accept appeals from district courts until after the sentencing occurs in district court. You should always advise defendants at sentencing of their right to appeal described in Section 4.6 E. *supra*. When an appeal of right is not available, the defendant can apply for leave to appeal in accordance with MCR 7.103. Three decisions you must make regarding criminal appeals: (1) whether a bond needs to be filed with the district court, (2) the amount of the bond, and (3) whether the sentence will be stayed while the appeal is pending.

5.2 Probation Violation or Revocation. A detailed discussion of probation violations and/or revocations is beyond the scope of these materials. MCR 6.445 contains the basic rules. Subsections (A) through (G) apply to both circuit court and district court. However, MCR 6.445(H) only applies to circuit court. MCR 6.001(B). Many of the same rules that apply to sentencings also apply to probation violation sanctions. See Exhibit 6.17 for probation violation arraignment and probation violation sentencing hearing scripts.

5.3 Failure to Pay Fines and Costs: Ability to Pay. MCL 769.1k(10) provides that "A defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." See also MCR 6.445(G) (providing that the court "may not sentence [a] probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence information reports)] and [MCR 6.425(E) (governing sentencing procedure)]"); MCR 6.610(F)(2) (providing that "[t]he court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3)[]" ). See Section 3.15(I) for discussion of MCR 6.425(E)(3) and a defendant's ability to pay court-ordered financial obligations.

Many courts first schedule a hearing on a Motion to Show Cause to allow the defendant to come forward and explain why he or she did not pay the fines and costs timely. If the defendant appears and the judge believes that he or she is legitimately unable to pay, the judge has broad discretion to fashion a payment plan, waive part or all of the fines and costs, or allow the defendant to perform community service in lieu of all or part of the amount owing. See MCR 6.425(E)(3)(b). On the other hand, it is common practice to issue a bench warrant if the defendant fails to appear at the show cause hearing; and jail time in lieu of fines and costs is often ordered when the defendant is later arraigned on the bench warrant. (However, the court must comply with MCR 6.425(E)(3) before incarcerating a defendant for failure to pay a court-ordered financial obligation.)

5.4 Expungement. You will probably, at some point, receive an Application to Set Aside a Conviction (Form MC 227) that occurred in your court, and you will be asked to enter an Order on Application to Set Aside Conviction (Form MC 228). Expungements are governed by MCL 780.621 *et seq*. MCL 780.621 was substantially revised by 2014 PA 463, effective January 12, 2015, and 2014 PA 335, effective January 14, 2015.

In general, and subject to several exceptions, "[a] person who is convicted of not more than 1 felony offense and not more than 2 misdemeanor offenses may petition the convicting court to set aside the felony offense[,]" MCL 780.621(1)(a), and "a person who is convicted of not more than 2 misdemeanor offenses and no other felony or misdemeanor offenses may petition the convicting court or the convicting courts to set aside 1 or both of the misdemeanor convictions[,]" MCL 780.621(1)(b). MCL 780.621(3) enumerates offenses that are ineligible for expungement, including traffic offenses. With the exception of certain prostitution offenses

committed by victims of human trafficking violations,[25] a person may have only one conviction set aside under MCL 780.621 *et seq*., MCL 780.624, and five years must have passed after imposition of sentence, completion of probation or term of imprisonment, or discharge from parole, whichever occurs last, MCL 780.621(5). Additionally, special rules apply to convictions of fourth-degree criminal sexual conduct. See MCL 780.621(1)(c); MCL 780.621(3)(c).

The applicant must meet certain conditions before a hearing on the application can be held. These conditions are described in detail on the forms and in MCL 780.621(8)—MCL 780.621(13) and can be summarized as follows. The applicant must serve the application on the Michigan State Police, the Attorney General, and each prosecuting attorney who prosecuted the crime or crimes sought to be set aside, and the applicant must send a fingerprint card and processing fee with the copy served on the Michigan State Police. MCL 780.621(9)—MCL 780.621(11).

The hearing is usually set several months after the application is received, so the Michigan State Police have enough time to prepare a report. The hearing cannot be held until the court receives the Michigan State Police report under MCL 780.621(9). At the hearing, the Attorney General and the prosecuting attorney have the opportunity to contest the application. MCL 780.621(11). If the conviction was for an "assaultive crime" or "serious misdemeanor" as defined in MCL 780.621(16), the prosecuting attorney must give the victim of that offense written notice of the application. MCL 780.621(11). The victim has a right to appear at any proceeding concerning the setting aside of the conviction and to make a written or oral statement. *Id*.

"If the court determines that the circumstances and behavior of an applicant . . . 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).

[25] Beginning January 12, 2015, more than one conviction for certain prostitution offenses committed as a direct result of an applicant being a victim of human trafficking can be expunged, see MCL 780.621(4); MCL 780.621(7), and "[a]n application [to set aside such a conviction] may be filed at any time following the date of the conviction to be set aside[,]" MCL 780.621(7).