Criminal Proceedings Benchbook, Volume 2, Revised Edition

Content formerly part of the original MJI Circuit Court Benchbook and the MJI Criminal Procedure Monograph Series

•Sentencing

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Michigan Supreme Court

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Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. This benchbook was originally created in 2013 by consolidating materials that were initially published in 2009, 2010, 2012, and 2013. The text has been revised, reordered, and updated through February 21, 2024.

Note on Precedential Value

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

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

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

Acknowledgments

The *Criminal Proceedings Benchbook, Volume 2*, is part of a three-volume set. The *Criminal Proceedings Benchbook, Volume 1*, concerns pretrial and trial matters, the *Criminal Proceedings Benchbook, Volume 2*, concerns sentencing, and the *Criminal Proceedings Benchbook, Volume 3*, concerns other posttrial matters.

The revised edition of the *Criminal Proceedings Benchbook, Volume 2*, was authored by MJI Research Attorney Specialist Alessa Boes and was edited by MJI Publications Manager Sarah Roth. The author of this edition was greatly assisted by an editorial advisory committee whose members reviewed draft text and provided valuable feedback. The members of the editorial advisory committee were:

- Stephanie Beyersdorf, Court Services, Circuit Court Analyst
- The Honorable Kimberly L. Booher, 49th Circuit Court
- The Honorable Kathleen M. Brickley, 36th Circuit Court
- The Honorable Anica Letica, Michigan Court of Appeals
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The *Criminal Proceedings Benchbooks, Volumes 1, 2,* and *3*, derive from the former *Circuit Court Benchbook: Criminal Proceedings* and *Criminal Procedure Monograph Series*. The information from those publications has been combined and reorganized to better serve MJI's core audience.

The *Michigan Circuit Court Benchbook* was originally authored by Judge J. Richardson Johnson. In 2009, the *Michigan Circuit Court Benchbook* was revised and broken into three volumes: *Circuit Court Benchbook: Civil Proceedings—Revised Edition*; *Circuit Court Benchbook: Criminal Proceedings—Revised Edition*; and *Evidence Benchbook*. The civil and criminal portions of the benchbook were revised by MJI Research

Attorneys Sarah Roth and Lisa Schmitz, who revised the Civil and Criminal volumes, respectively, of the benchbook. The editorial advisory committee members consisted of The Honorable William J. Caprathe, The Honorable J. Richardson Johnson, The Honorable Richard M. Pajtas, The Honorable James R. Redford, and The Honorable Donald E. Shelton.

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

- Monograph 1: *Issuance of Complaints & Arrest Warrants—Fourth Edition*
- Monograph 2: *Issuance of Search Warrants—Fourth Edition*
- Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition*
- Monograph 4: *Felony Arraignments & Pleas—Third Edition*
- Monograph 5: *Preliminary Examinations—Third Edition*
- Monograph 6: *Pretrial Motions—Third Edition*
- Monograph 7: *Probation Revocation—Fourth Edition*
- Monograph 8: *Felony Sentencing—Revised Edition*
- Monograph 9: *Postconviction Proceedings*

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

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

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

The **Michigan Judicial Institute (MJI)** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for

Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373–7171.**

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1.1 Introduction

The primary objective of this benchbook is to present a comprehensive picture of the dynamic landscape of sentencing in Michigan. This chapter addresses sentencing presumptions in misdemeanor cases, provides a general overview of the legislative sentencing guidelines, and introduces contempt for noncompliance with a sentence. Chapter 2 addresses the scoring of the prior record variables (PRVs) and offense variables (OVs). Chapter 3 addresses sentencing non-habitual offenders, and Chapter 4 addresses sentencing habitual offenders. Chapter 5 discusses factors to consider when imposing a sentence, the imposition of out-of-guidelines sentences, and appellate review of sentences. Chapter 6 addresses the sentencing hearing, including the presentence investigation report, the defendant's right to allocution, crime victim impact statements, and select post-sentencing issues. Chapter 7 addresses special sentencing considerations, including concurrent and consecutive sentences, sentence credit, plea agreements, and lifetime electronic monitoring. Chapter 8 addresses fines, costs, assessments, and restitution. Chapter 9 addresses specific types of sentences, including probation and deferred sentences. Finally, while the bulk of this benchbook is relevant to felony sentencing, district court sentencing issues are discussed where relevant.

The Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1* discusses pretrial and trial issues, and the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3* discusses postjudgment issues.

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

All references in this benchbook to "the guidelines" are to the legislative or statutory sentencing guidelines enacted by 1998 PA 317.

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

Finally, note that the Michigan Judicial Institute has several quick reference materials relevant to sentencing. These materials will be linked throughout this benchbook, and can all be accessed here.

1.2 Misdemeanor Sentencing

Presumption against jail time. "There is a rebuttable presumption that the court shall sentence an individual convicted of a misdemeanor, other than a serious misdemeanor, with a fine, community service, or other nonjail or nonprobation sentence." MCL 769.5(3).

"The court may depart from the presumption under [MCL 769.5(3)] if the court finds reasonable grounds for the departure and states on the record the grounds for the departure." MCL 769.5(4).

Court's discretion. "Subject to MCL 769.5(3), 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." MCL 769.5(1). "Subject to MCL 769.5(3), 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." MCL 769.5(2).

Commitment to county jail. "Notwithstanding any provision of law to the contrary, if a person convicted of a crime or contempt of court is committed or sentenced to imprisonment for a maximum of 1 year or less, the commitment or sentence shall be to the county jail of the county in which the person was convicted and not to a state penal institution." MCL 769.28.[1] See also *People v Weatherford*, 193 Mich App 115, 117 (1992) (stating "Michigan courts consistently have interpreted [MCL 769.28] to require that crimes for which the punishment is one year or less be punished by imprisonment in the county jail and not in the state prison system," and citing several cases). However, "prisoners who commit crimes while incarcerated as defined in the consecutive sentencing statute must serve any resulting consecutive sentence in the custody of the Department of Corrections, not the county jail, notwithstanding the provisions of MCL 769.28." *Weatherford*, 193 Mich App at 119.

1.3 Applicability of the Statutory Sentencing Guidelines

The statutory sentencing guidelines apply to felony offenses listed in MCL 777.11 to MCL 777.19 that were committed on or after January 1, 1999.[2] MCL 769.34(2). The brief descriptions accompanying the statutory sections listing the felony offenses in MCL 777.11 to MCL 777.19 "are for

[1]Note that MCL 769.28 "does not apply to a juvenile placed on probation and committed to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to [MCL] 803.309, under section 1(3) or (4) of this chapter." MCL 769.28.

[2]However, while MCL 777.16q lists MCL 750.335a(2)(c) (aggravated indecent exposure by a sexually delinquent person), the Michigan Supreme Court held that the guidelines do not apply to that offense; instead, the court must impose the statutory sentence of 1 day to life required by MCL 750.335a(2)(c). *People v Arnold*, 508 Mich 1, 26 (2021) (*Arnold II*).

assistance only." MCL 777.6. The language contained in the statute defining the felony offense itself governs application of the sentencing guidelines. *Id*. The statutory sentencing guidelines are *not* applicable to offenses for which the applicable statute establishes a mandatory determinate penalty or a mandatory penalty of life imprisonment for conviction of the offense. MCL 769.34(5).

In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 365, 399 (2015), aff'g in part and rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[3] The *Lockridge* decision is discussed in detail in Section 1.4.

Application of the statutory sentencing guidelines is determined by "the date the crime was committed," MCL 769.34(2); application of the guidelines is not affected by the date of conviction or the date of sentencing.

1.4 Sentencing Before and After *Lockridge*

In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 365 (2015). The following discussion aims to provide a historical backdrop for this conclusion and a detailed discussion of how courts are required to use the sentencing guidelines in imposing sentences post-*Lockridge*. See also the Michigan Judicial Institute's *Lockridge* flowchart.

A. How Michigan's Sentencing Scheme Was Justified Under *Apprendi* and *Alleyne* Before the *Lockridge* Decision

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

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

(2004). In *Alleyne v United States*, 570 US 99, 112 (2013), the United States Supreme Court extended the *Apprendi/Blakely* rule to "mandatory minimum" sentences, overruling *Harris v United States*, 536 US 545 (2002), and holding that "a fact increasing either end of [a sentencing] range produces a new penalty and constitutes an ingredient of the offense." Additionally, in *United States v Booker*, 543 US 220, 226, 245, 259 (2005), the United States Supreme Court held that the mandatory federal sentencing guidelines violated the Sixth Amendment under *Apprendi* and *Blakely*; as a remedy, two provisions of the federal guidelines were invalidated,[4] and the guidelines were rendered *advisory* rather than mandatory.

In caselaw that preceded *Alleyne*, 570 US 99, the Michigan Supreme Court concluded that the *Apprendi/Blakely* rule was inapplicable to Michigan's "indeterminate" sentencing scheme. See *People v Drohan*, 475 Mich 140, 163-164 (2006) (defining *indeterminate* as a sentence of unspecified duration), abrogated in part as recognized by *People v Lockridge*, 498 Mich 358, 378-379 (2015). Noting that "*Blakely*[, 542 US 296,] applies only to bar the use of judicially ascertained facts to impose a sentence beyond that permitted by the jury's verdict" and that "a Michigan trial court may not impose a sentence greater than the statutory maximum," the *Drohan* Court concluded that "the trial court's power to impose a sentence is always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict"; accordingly, "[a]s long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Drohan*, 475 Mich at 160-161, 164 (citations omitted).

In *People v Herron*, 303 Mich App 392, 403-404 (2013), rev'd in part 498 Mich 901 (2015) and overruled by *Lockridge*, 498 Mich at 399,[5] the Court of Appeals rejected the defendant's challenge to the scoring of the sentencing guidelines on the basis of *Alleyne*, 570 US at 99. The *Herron* Court concluded that "[w]hile judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sentence, the maximum of which is set by law, *Drohan*, 475 Mich at 164, it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-

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

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

finding does not violate due process or the Sixth Amendment's right to a jury trial." *Herron*, 303 Mich App at 403-404, citing *Alleyne*, 570 US at 116, 116 n 6. The Court explained:

> "[J]udicial fact-finding to score Michigan's sentencing guidelines falls within the '"wide discretion"' accorded a sentencing court '"in the sources and types of evidence used to assist [the court] in determining the kind and extent of punishment to be imposed within limits fixed by law[.]"' Michigan's sentencing guidelines are within the 'broad sentencing discretion, informed by judicial factfinding, [that] does not violate the Sixth Amendment.'" *Herron*, 303 Mich App at 405, quoting *Alleyne*, 570 US at 116, 128 (alterations in original; internal citation omitted).

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

In *People v Lockridge*, 304 Mich App 278, 284 (2014), rev'd in part 498 Mich 358 (2015),[6] the Court of Appeals applied *People v Herron*, 303 Mich App 392 (2013), and rejected the defendant's *Alleyne*[7] challenge to the scoring of the guidelines. However, two judges on the *Lockridge* panel filed concurring opinions indicating that they disagreed with the analysis in *Herron*, 303 Mich App 392. Judge Beckering opined that *Alleyne*, 570 US 99, "renders Michigan's indeterminate sentencing scheme unconstitutional," and that the appropriate remedy "would [be to] make the sentencing guidelines in Michigan advisory as the United States Supreme Court did with the federal sentencing guidelines in [*United States v Booker*, 543 US 220 (2005)]." *Lockridge*, 304 Mich App at 285-286 (BECKERING, P.J., concurring). Judge Shapiro agreed with Judge Beckering that *Herron*, 303 Mich App 392, "[did] not comport with the constitutional mandate of *Alleyne*[, 570 US 99,]" but only to the extent "that fact-finding is used to set a sentencing 'floor,' i.e., a mandatory minimum"; therefore, Judge Shapiro would have made "only the lower end of a range . . . advisory only." *Lockridge*, 304 Mich App at 311, 315-316 (SHAPIRO, J., concurring).

The Michigan Supreme Court reversed, in part, the judgment of the Court of Appeals, 304 Mich App 278, and overruled *Herron*, 303 Mich App 392, holding that "[b]ecause Michigan's sentencing guidelines scheme allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives, it violates the Sixth

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

[7]*Alleyne v United States*, 570 US 99 (2013).

Amendment to the United States Constitution under *Alleyne*." *Lockridge*, 498 Mich at 383, 399 (additionally noting that "[b]ecause Michigan's sentencing scheme is not 'indeterminate' as that term has been used by the United States Supreme Court, [it] cannot be exempt from the *Apprendi*[8] and *Alleyne* rule on that basis").[9]

"To remedy the constitutional flaw in the guidelines," the *Lockridge* Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *Lockridge*, 498 Mich at 391, 399. Subsequently, MCL 769.34 was amended to omit the substantial and compelling language and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021. The Court further held, in accordance with *Booker*, 543 US at 233, 264, that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," the guidelines "are advisory only." *Lockridge*, 498 Mich at 365, 399.

The *Lockridge* Court also stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Lockridge*, 498 Mich at 365 n 1.

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

"[S]entencing courts [are no longer] *bound* by the applicable sentencing guidelines range[.]" *People v Lockridge*, 498 Mich 358, 392 (2015). "Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Id*., citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[10] The *Lockridge* Court specifically noted that its

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[8] *Apprendi v New Jersey*, 530 US 466 (2000).

[9] Although, "[i]n [*People v Drohan*, 475 Mich 140, 153 n 10 (2006), where the Michigan Supreme Court] cited the definition of 'indeterminate sentence' from *Black's Law Dictionary* (8th ed): a sentence 'of an unspecified duration, such as one for a term of 10 to 20 years,'" and correctly concluded "that Michigan has an indeterminate sentencing scheme under that definition of the term," *Lockridge*, 498 Mich at 380 n 18, the *Lockridge* Court further explained that "Michigan's sentencing scheme is *not* 'indeterminate' as the United States Supreme Court has ever applied that term," *id*. at 380 (citations omitted; emphasis added). Rather, "the relevant distinction between constitutionally permissible 'indeterminate' sentencing schemes and impermissible 'determinate' sentencing schemes, as the United States Supreme Court has used those terms, . . . turns on whether judge-found facts are used to curtail judicial sentencing discretion by *compelling* an increase in the defendant's punishment[; i]f so, the system violates the Sixth Amendment[, and] Michigan's sentencing guidelines do just that." *Id*. at 383.

holding "[did] nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not." *Lockridge*, 498 Mich at 392 n 28, citing MCL 777.21(1)(a); MCL 777.31(1); MCL 777.32(1).

Under *Lockridge*, 498 Mich 358, "the Legislative sentencing guidelines are advisory in every case, regardless of whether the case involves judicial fact-finding"; the *Lockridge* Court "drew no distinction between cases that applied judge-found facts and cases that did not." *People v Rice*, 318 Mich App 688, 690, 692 (2017) (holding that where the guidelines were scored without judicial factfinding and the trial court departed downward, the trial court properly treated the guidelines as advisory and properly rejected the prosecution's argument "that the trial court was mandated to apply the sentencing guidelines . . . because [the] case did not involve constitutionally impermissible judicial fact-finding"). See also *People v Steanhouse (Steanhouse II)*, 500 Mich 453, 466 (2017) ("reaffirm[ing] *Lockridge*'s remedial holding rendering the guidelines advisory in all applications").

"When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant[11] or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so."[12] *Lockridge*, 498 Mich at 391-392. However, the trial court must score the now-advisory guidelines before imposing a departure sentence.[13] *People v Geddert*, 500 Mich 859, 859 (2016). See also *Steanhouse II*, 500 Mich at 474-475 ("repeat[ing the] directive from *Lockridge*[, 498 Mich at 391,] that the guidelines remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts must consult and take . . . into account when sentencing") (quotation marks and citations omitted).

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

[11] For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *Lockridge*, 498 Mich at 399, the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea, in testimony, by stipulation, or by some similar or analogous means." *People v Garnes*, 316 Mich App 339, 344 (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id.* (citing *Apprendi*, 530 US at 469-471, and remanding "for possible resentencing in accordance with *United States v Crosby*, 397 F3d 103 (CA 2, 2005)," because "[the d]efendant did not make any . . . formal admission" with respect to several contested offense variable scores).

[12] See also MCR 6.425(D)(1)(e), which provides that "if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the reasons justifying that specific departure[.]"

[13] See Section 1.5 for more information on calculating a minimum sentence range under the guidelines.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable." *Lockridge*, 498 Mich at 392, citing *Booker*, 543 US at 261. See also MCL 769.34(3) (court may depart from guidelines range "if the departure is reasonable and the court states on the record the reasons for departure"). "[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, [435 Mich 630, 636 (1990)], [and reaffirmed in *People v Babcock*, 469 Mich 247 (2003), and *People v Smith*, 482 Mich 292, 304-305 (2008),] 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *Steanhouse II*, 500 Mich at 459-460, 473, aff'g in part and rev'g in part 313 Mich App 1 (2015). Further, the reasonableness of a trial court's sentence is reviewed for an abuse of discretion. *Steanhouse II*, 500 Mich at 459-460.

See Chapter 5 for a discussion of appellate review of sentence departures and a discussion of appellate review of sentences in cases that have been held in abeyance for *Lockridge*, 498 Mich 358.

1.5 Calculating a Minimum Sentence Range Under the Guidelines[14]

Fashioning an appropriate sentence under the statutory guidelines requires the court's attention to the offender's prior record variable (PRV) and offense variable (OV) scores and the specific cell in which those scores place the offender in the appropriate sentencing grid. Every PRV is scored for all felony offenses. MCL 777.21(1)(b). However, every OV is not scored for every offense; the offense category of each particular felony determines which OVs are scored. MCL 777.22.

"A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111 (2008). "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error[.]" *People v Hardy*, 494 Mich 430, 438 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.[15] See

[14]The minimum sentence range calculated under the sentencing guidelines is advisory only; however, sentencing courts "must determine the applicable guidelines range and take it into account when imposing a sentence." *People v Lockridge*, 498 Mich 358, 365 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). See Section 1.4 for discussion of *Lockridge* and the procedure for imposing a sentence post-*Lockridge*.

Section 5.9 for a detailed discussion of appellate review of felony sentencing.

"Proposed scoring of the [sentencing] guidelines shall accompany the presentence report." MCR 6.425(C). See also MCL 771.14(2)(e). When a defendant is convicted of multiple offenses, the guidelines might not have to be scored for all of the convictions depending on whether sentencing is consecutive or concurrent and what crime classes are involved. See MCL 777.21(2); MCL 771.14(2)(e). For a detailed discussion on when to score the guidelines when multiple offenses are involved, see Section 7.2(B).

Offense categories and crime classes are discussed in detail in Section Section 1.6, and sentencing grids are discussed in Section 1.7. See Chapter 2 for detailed discussion about scoring PRVs and OVs. For additional information about scoring the sentencing guidelines, see the *Sentencing Guidelines Manual*.

1.6 Offense Categories and Crime Classes

A. Offense Category (Crime Group)

All felony offenses to which the sentencing guidelines apply fall into one of six offense categories. The offense category, or "crime group," to which an offense belongs determines which offense variables must be scored. See MCL 777.22. The six offense categories are defined in MCL 777.5(a)-(f) as:

- crimes against a person,
- crimes against property,
- crimes involving a controlled substance,
- crimes against public order,
- crimes against public trust, and
- crimes against public safety.

For further discussion of crime groups, see Section 2.12.

[15]"[G]iven the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*." *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 38 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453, 459-461 (2017), citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438; *People v Gullett*, 277 Mich App 214, 217 (2007). For more information on the precedential value of an opinion with negative subsequent history, see our note.

B. Crime Class

Within each "crime group," all offenses to which the guidelines apply are further categorized by the seriousness of the offense.[16] This gradation of offense seriousness is indicated by the offense's "crime class."[17] An offense's crime class determines which sentencing grid applies to the sentencing offense. MCL 777.21(1)(c).[18] An offense's crime class is designated by the letters A through H and M2 (second-degree murder). M2 and A represent the most serious felony offenses, while the letters B through H represent the remaining felony offenses in decreasing order of their seriousness.

An offense's crime class roughly corresponds to the maximum term of imprisonment for offenses in the same class:[19]

- Class A — life
- Class B — 20 years of imprisonment
- Class C — 15 years of imprisonment
- Class D — 10 years of imprisonment
- Class E — 5 years of imprisonment
- Class F — 4 years of imprisonment
- Class G — 2 years of imprisonment
- Class H — Jail or other intermediate sanction

Although the actual statutory maximum term of imprisonment for a specific offense is generally consistent with the sentences specified in the bulleted list, there are some offenses that stray from this standard. For example, MCL 409.122(3) and MCL 750.145c(3)(a) are both "crimes against a person," and both are designated as class D felonies. MCL 777.14b; MCL 777.16g. According to language found in legislative documents discussing the statutory guidelines,[20] class D felonies are crimes for which a maximum sentence of 10 years of

[16] See Part 6 of Chapter XVII of the Code of Criminal Procedure (providing sentencing grids with sentence ranges based on the applicable offense class).

[17] See Part 2 of Chapter XVII of the Code of Criminal Procedure (setting out the offenses to which the sentencing guidelines apply and assigning each a crime class).

[18] Sentencing grids are available by clicking here.

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

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

imprisonment may be appropriate. However, the maximum term of imprisonment authorized by MCL 750.145c(3)(a) is only seven years, while the maximum term authorized by MCL 409.122(3) is 20 years. While the crime class designation in most cases will correspond to the maximum sentences listed in the bulleted list above, the two offenses discussed here exemplify the directive of MCL 777.6: the express language of the statute defining the offense itself governs application of the sentencing guidelines.

There is no legislative authority for the division of felonies into crime classes; therefore, there is no prohibition against assigning a felony to a crime class that is inconsistent with the statutory maximum for that felony offense. Rather, the statutory maximum, as it is stated in the actual language of the statute, governs the upper limit of punishment possible for conviction of a particular offense. See MCL 777.6.

C. Attempts

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

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

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

MCL 777.19 is a relevant consideration when the sentencing offense is an attempt. *People v Jackson*, 504 Mich 929, 930 (2019). "MCL 777.19 is also relevant to identify the offense classification of a prior attempt conviction for purposes of scoring [PRV 1 and PRV 2.]" *Jackson*, 504 Mich at 930.[21] "MCL 777.19 does not 'expressly designate[]' the defendant's attempt convictions to be felonies." *Jackson*, 504 Mich at 930, quoting MCL 761.1(f) (defining *felony*) (alteration in original).[22]

[21]PRV 1 is discussed in Section 2.5, and PRV 2 is discussed in Section 2.6.

[22]*Jackson* was decided in the context of a challenge to the scoring of OV 13. For further discussion see Section 2.26.

1.7 Sentencing Grids

Sentencing grids for all felony offenses to which the guidelines apply are located in MCL 777.61 to MCL 777.69. There are nine different grids, one each for each of the crime classes.[23] Each sentencing grid is divided into cells corresponding to the number of offense variable (OV) and prior record variable (PRV) levels applicable to the crime class represented by the grid. A defendant's recommended minimum sentence range is indicated by a numerical range in the cell located at the intersection of the defendant's OV level (vertical axis) and PRV level (horizontal axis) on the sentencing grid appropriate to the offense of which the defendant was convicted. MCL 777.21(1)(c). The recommended minimum sentence in each cell is expressed by a range of numbers (in months) or life imprisonment. *Id*.

The nine grids in MCL 777.61 to MCL 777.69 contain only the sentence ranges for offenders *not* being sentenced as habitual offenders; no separate grids for habitual offenders are provided. However, the recommended minimum sentence range for habitual offenders is determined by reference to the ranges reflected in the nine basic grids. MCL 777.21(3)(a)–MCL 777.21(3)(c). The sentencing grids printed in the *Michigan Sentencing Guidelines Manual*, and as shown in the examples provided in this chapter, are comprehensive sentencing grids that combine the minimum sentences recommended under the guidelines for all offenders—both first-time and habitual.

Specific cells in some sentencing grids are differentiated from other cells by their classification as *prison cells*, *straddle cells*, and *intermediate sanction cells*.[24] The following is an example of a sentencing grid:

Sentencing Grid for Class F Offenses—MCL 777.67 Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c))							
OV Level	PRV Level						Offender Status
	A 0 Points	B 1-9 Points	C 10-24 Points	D 25-49 Points	E 50-74 Points	F 75+ Points	

[23] Crime classes are discussed in Section 1.6(B).

I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4
II 10-34 Points	0	6*	0	9*	0	17*	5	23	10	23	12	24	
		7*		11*		21		28		28		30	HO2
		9*		13*		25		34		34		36	HO3
		12*		18*		34		46		46		48	HO4
III 35-74 Points	0	9*	0	17*	2	17*	10	23	12	24	14	29	
		11*		21		21		28		30		36	HO2
		13*		25		25		34		36		43	HO3
		18*		34		34		46		48		58	HO4
IV 75+ Points	0	17*	2	17*	5	23	12	24	14	29	17	30	
		21		21		28		30		36		37	HO2
		25		25		34		36		43		45	HO3
		34		34		46		48		58		60	HO4
Intermediate sanction cells are marked with asterisks, straddle cells are shaded, and prison cells are unmarked.													

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

A. Prison Cells

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

B. Straddle Cells

Straddle cells[25] are those cells in which the lower limit of the recommended range is one year or less and the upper limit of the recommended range is more than 18 months. MCL 769.34(4)(c); *People v Stauffer*, 465 Mich 633, 636 n 8 (2002). *Straddle cells* appear shaded in the sentencing grids published in the State of Michigan *Sentencing Guidelines Manual* and in the grids used in this chapter, as shown in the example at the beginning of this section.

C. Intermediate Sanction Cells

Intermediate sanction cells[26] are those cells in which the upper limit recommended by the guidelines is 18 months or less. MCL 769.34(4)(a). These cells are marked with an asterisk in the State of Michigan *Sentencing Guidelines Manual* and in the examples in this chapter.

D. Habitual Offenders

The upper limit of the recommended minimum sentence range (also referred to as the "maximum-minimum" sentence) under the statutory sentencing guidelines may be incrementally increased based on the defendant's number of previous felony convictions, as depicted by the rows for HO2, HO3, and HO4 in the examples in this chapter and in the State of Michigan *Sentencing Guidelines Manual*. MCL 777.21.

Chapter 3 discusses the standard method of determining the recommended minimum sentence ranges using the statutory sentencing guidelines and grids for offenders *not* being sentenced as habitual offenders; Chapter 4 discusses the guidelines and grids as they apply to habitual offenders.

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[25] See Section 1.8(E) for a comprehensive discussion of straddle cells.

[26] See Section 1.8 for a comprehensive discussion of intermediate sanctions.

1.8 Intermediate Sanctions

A. Statutory Authority and Impact of *Lockridge*

Two types of differentiated sentencing grid cells, *intermediate sanction cells* (governed by MCL 769.34(4)(a)-(b)) and *straddle cells* (governed by MCL 769.34(4)(c)),[27] generally provide for the imposition of intermediate sanctions.

MCL 769.34(4) provides:

> "Intermediate sanctions must be imposed under this chapter as follows:
>
> > (a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines . . . is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record reasonable grounds to sentence the individual to incarceration in a county jail for not more than 12 months or to the jurisdiction of the department of corrections for any sentence over 12 months.
> >
> > (b) If an attempt to commit a felony designated in offense class H . . . is punishable by imprisonment for more than 1 year, the court shall impose an intermediate sanction upon conviction of that offense absent a departure.
> >
> > (c) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
> >
> > > (*i*) To imprisonment with a minimum term within that range.
> > >
> > > (*ii*) To an intermediate sanction with or without a term of jail incarceration of not more than 12 months."

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

MCL 769.34(4) reads as mandatory; however, after *Lockridge*,[28] trial courts are not *required* to impose an intermediate sanction under MCL 769.34(4). See *People v Lockridge*, 498 Mich 358, 365 n 1 (2015); *People v Schrauben*, 314 Mich App 181, 194 (2016), overruled in part on other grounds by *People v Posey*, 512 Mich 317, 326 (2023).[29] *Schrauben* specifically applied the reasoning of *Lockridge* to MCL 769.34(4)(a), explaining "[i]n accordance with the broad language of *Lockridge*, [498 Mich at 365 n 1, 391,] under [MCL 769.34(4)(a)], a trial court *may*, but is no longer *required to*, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *Schrauben*, 314 Mich App at 194-195 (holding, "[c]onsistently with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word 'may'"). Moreover, "because, under *Lockridge*, an intermediate sanction is no longer mandated," a trial court does not violate *Alleyne v United States*, 570 US 99 (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, 314 Mich App at 195. See Section 1.4 for discussion of *Lockridge* and *Alleyne*.

B. Examples of Intermediate Sanctions

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

- inpatient or outpatient drug treatment or participation in a drug treatment court (MCL 600.1060 *et seq*.);
- probation with conditions required or authorized by law;
- residential probation;
- probation with special alternative incarceration (SAI);
- mental health treatment;
- mental health or substance abuse counseling;
- participation in a community corrections program;
- community service;
- payment of a fine;

[28]The *Lockridge* Court did not specifically address intermediate sanctions. However, MCL 769.34(4), governing intermediate sanctions, refers to *departures*, and the *Lockridge* Court stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or *refers to departures from the guidelines*, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1 (emphasis added).

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

- house arrest; and
- electronic monitoring. MCL 769.31(b)(*i*)-(*xi*).

C. Intermediate Sanction Cells

Intermediate sanction cells are those cells in which the upper limit of the guidelines-recommended minimum range is 18 months or less. MCL 769.34(4)(a). Intermediate sanction cells are marked with an asterisk in the sentencing grids published in this chapter and in the State of Michigan *Sentencing Guidelines Manual*. An intermediate sanction is any sanction other than imprisonment in a county jail, state prison, or state reformatory that may be lawfully imposed on an offender. See MCL 769.31(b).

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

If the offender's PRV and OV scores place him or her in an intermediate sanction cell, the trial court may impose an intermediate sanction. *People v Schrauben*, 314 Mich App 181, 194-195 (2016), overruled in part on other grounds by *People v Posey*, 512 Mich 317, 326 (2023).[30] If the trial court declines to impose an intermediate sanction under MCL 769.34(4)(a) and instead imposes a prison sentence that is within the recommended minimum sentencing range, the prison sentence "is within the range authorized by law." *Schrauben*, 314 Mich App at 195-196.

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

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

Under MCL 769.34(4)(b), when an offender is convicted of attempting to commit a class H felony for which a term of more than one year of imprisonment is authorized, the trial court may impose an intermediate sanction.[31]

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

E. Straddle Cells

Generally, *straddle cells* are those cells that "straddle" the division between prison and jail. *Straddle cells* are those cells in which the lower limit of the recommended range is one year or less and the upper limit of the recommended range is more than 18 months. MCL 769.34(4)(c); *People v Stauffer*, 465 Mich 633, 636 n 8 (2002). *Straddle cells* appear shaded in the sentencing grids published in the State of Michigan *Sentencing Guidelines Manual* and in the grids used in this chapter, as shown in the example in Section 1.7.

When an offender's prior record variable (PRV) and offense variable (OV) levels result in his or her placement in a *straddle cell*, the sentencing court may sentence the offender in one of two ways described in MCL 769.34(4)(c)[32]:

- The court must impose a sentence in which the minimum term of imprisonment is within the range indicated in the *straddle cell*; that is, if the court sentences the offender to

[31]The language used in MCL 769.34(4)(b) makes an intermediate sanction mandatory absent a departure; however, in *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1, 391 (emphasis added). For a detailed discussion of the *Lockridge* decision's affect on MCL 769.34, see Section 1.8(A).

[32]The language used in MCL 769.34(4)(c) makes the described sentences mandatory absent a departure; however, in *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1, 391 (emphasis added). For a detailed discussion of the *Lockridge* decision's affect on MCL 769.34, see Section 1.8(A).

prison rather than jail, the minimum term must be within the range of months recommended in that cell, MCL 769.34(4)(c)(*i*); or

- The court must sentence the offender to an intermediate sanction, with or without a term of jail incarceration up to 12 months, MCL 769.34(4)(c)(*ii*).

People v Martin, 257 Mich App 457 (2003), provides an example of a case involving a straddle cell. MCL 769.34(4)(c). According to the guidelines, the defendant's recommended minimum sentence was 5 to 28 months in prison for the offense of larceny from a person, MCL 750.357. *Martin*, 257 Mich App at 459-460. Pursuant to a *Cobbs*[33] agreement, the defendant pleaded guilty based on the trial court's preliminary sentence evaluation that the court would sentence him to a term in county jail rather than a term of imprisonment in state prison. *Martin*, 257 Mich App at 458. The defendant was sentenced as a second-offense habitual offender, MCL 769.10, to ten months in the county jail, and the prosecution appealed on the grounds that the trial court erred as a matter of law by imposing a determinate sentence. *Martin*, 257 Mich App at 458.

Although MCL 769.8 prohibits determinate sentencing[34] where the penalty for a felony offense may be imprisonment in a state prison, the Michigan Court of Appeals concluded that the Legislature intended an exception to MCL 769.8 with the creation of "intermediate sanctions" for offenses "with a relative lack of severity." *Martin*, 257 Mich App at 461.[35] Specifically, the Court explained that sentencing the defendant—whose guidelines range fell within a straddle cell—to a determinate sentence of ten months in county jail "did not negate any statutory language, but merely recognized that our Legislature created an exception in less serious cases," and "gave proper effect to MCL 769.34(4)(c)." *Martin*, 257 Mich App at 462.[36]

[33] *People v Cobbs*, 443 Mich 276 (1993); see Section 7.11 for more information.

[34] A *determinate sentence* is a sentence "of a specified duration." *Black's Law Dictionary* (5th pocket ed). For example, MCL 750.227b(1) (felony-firearm) provides for a determinate sentence of 2 years for a first conviction, stating that violation is a felony that "shall be punished by imprisonment for 2 years." Indeterminate sentencing is generally discussed in Section 5.4.

[35] At the time *Martin* was decided, imprisonment in a county jail was considered an intermediate sanction; however, effective March 24, 2021, 2020 PA 395 redefined *intermediate sanction* to specifically exclude imprisonment in a county jail.

[36] Note that *Martin* was decided when the sentencing guidelines were mandatory.

1.9 Contempt for Noncompliance with Sentence

"If the court finds that the sentenced person has not complied with his or her sentence, including a nonjail or nonprobation sentence, the court may issue an order for the person to show cause why he or she should not be held in contempt of court for not complying with the sentence. If the court finds the person in contempt, it may impose an additional sentence, including jail or probation if appropriate." MCL 769.5(5).

"If the finding of contempt of court under [MCL 769.5(5)] is for nonpayment of fines, costs, or other legal financial obligations, the court must find on the record that the person is able to comply with the payments without manifest hardship, and that the person has not made a good-faith effort to do so, before imposing an additional sentence." MCL 769.5(6).

For a detailed discussion of contempt proceedings, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

1.10 Prison Mailbox Rule

Filings by incarcerated individuals are addressed by MCR 1.112, which provides:

> "If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." MCR 1.112.

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2.1 Introduction

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

In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 365, 399 (2015), aff'g in part and rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles,* 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[1] The *Lockridge* decision is discussed in detail in Section 1.4. See also the Michigan Judicial Institute's *Lockridge* flowchart.

2.2 Evidentiary Standard for Scoring the Guidelines

"A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111 (2008). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438 (2013).[2] See Section 5.9 for a detailed discussion of appellate review of felony sentencing.

Part A: Scoring an Offender's Prior Record Variables (PRVs)

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

[2]"[G]iven the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*." *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 38 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453, 459-461 (2017), citing *Lockridge*, 498 Mich 358, 392 n 28 (2015); *Hardy*, 494 Mich at 438; *People v Gullett*, 277 Mich App 214, 217 (2007). For more information on the precedential value of an opinion with negative subsequent history, see our note.

2.3 Overview of PRVs[3]

All of the PRVs are scored for every felony offense to which the guidelines apply, including offenses listed in MCL 777.18 (guidelines offenses based on the commission of an underlying offense). MCL 777.21(1)(b); *People v Peltola*, 489 Mich 174, 187-189, 190-191 (2011) (holding that all PRVs should be scored for violations listed in MCL 777.18 despite the absence of any reference to PRVs in MCL 777.21(4)). The total number of points assessed for the PRVs constitutes the offender's "PRV level," which is represented by the horizontal axis on each sentencing grid.[4]

Each PRV statute contains several statements to which a specific number of points is assigned. See MCL 777.50 to MCL 777.57. The statements appearing in each of the PRV statutes quantify the specific sentencing characteristic addressed by each individual PRV; generally, the PRVs consider the offender's prior convictions and juvenile adjudications. See *id.* See also *People v Smith*, 437 Mich 293, 302-303 (1991) (noting that the purpose of automatic expungement was not to protect the adult offender from any criminal consequences of his or her juvenile record, but to eliminate the social or civil stigma of delinquency and the economic disabilities that could accompany a record of juvenile delinquency). For example, PRV 1 targets an offender's previous high severity felony convictions and assigns a point value to these prior convictions. MCL 777.51. The point value increases according to the number of previous qualifying convictions. *Id.*

Conviction is defined by MCL 777.50(4)(a)[5] for purposes of Part 5 (Prior Record Variables) of Chapter XVII of the Code of Criminal Procedure to include assignment to youthful trainee status under MCL 762.11 to MCL 762.15 and a conviction set aside under MCL 780.621 to MCL 780.624. The Court has specifically applied the definition in MCL 777.50(4)(a) to analysis of whether a defendant had a qualifying prior conviction under PRV 1, and extrapolating from that case, it appears this definition would similarly apply to the term "conviction" as it is used in other PRVs. See *People v Williams*, 298 Mich App 121, 125-127 (2012).

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[3] The rule of *Apprendi v New Jersey*, 530 US 466, 490 (2000), ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"), does not apply to prior convictions and therefore presumably does not implicate the scoring of prior record variables under Michigan's sentencing guidelines. See *Alleyne v United States*, 570 US 99, 111 n 1 (2013) (noting that "[i]n *Almendarez–Torres v United States*, [523 US 224 (1998)], [the United States Supreme Court] recognized a narrow exception to [the] general rule [of *Apprendi*] for the fact of a prior conviction"; the *Alleyne* Court declined to revisit *Almendarez-Torres* "[b]ecause the parties [did] not contest that decision's vitality"); see also, generally, *People v Lockridge*, 498 Mich 358, 370 n 12 (2015).

[4] Sentencing grids are found in MCL 777.61 to MCL 777.69. Each grid is also available in the *Sentencing Guidelines Manual*. See Section 1.7 for discussion of sentencing grids.

[5] MCL 777.50 sets forth the ten-year gap rule, discussed in Section 2.4.

Note that a conviction obtained in violation of a defendant's right to counsel cannot be used to enhance punishment for another offense. *People v Moore*, 391 Mich 426, 437-438 (1974). For a discussion on challenging the constitutional validity of a prior conviction, see Section 6.14.

2.4 Ten-Year Gap Requirement for Prior Convictions and Adjudications

MCL 777.50 proscribes using a conviction or a juvenile adjudication when scoring PRVs 1 through 5 if discharge from the conviction or adjudication occurred more than 10 years before commission of the sentencing offense. Specifically, MCL 777.50(1) states:

> "In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication."

A. Application

To apply MCL 777.50(1), determine the length of time between the discharge date of the conviction or juvenile adjudication immediately preceding the *commission date* of the sentencing offense. If the time span is 10 years or more, that conviction or juvenile adjudication—and any convictions or adjudications that occurred earlier—must not be counted when scoring the offender's PRVs. MCL 777.50(2). If the time span between the commission date of the offender's sentencing offense and the discharge date of the offender's most recent conviction or juvenile adjudication is less than 10 years, that prior conviction or adjudication must be counted in scoring the offender's PRVs. *Id.* Continue the process of determining the length of time between the discharge date of each conviction or juvenile adjudication and the commission date of the next conviction or adjudication "until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain." *Id*.

B. Unavailable Discharge Date

"If a discharge date is not available, add either the time defendant was sentenced to probation or the length of the minimum incarceration term to the date of the conviction and use that date as the discharge date." MCL 777.50(3). Note that the date the

defendant was *convicted* controls; not the date the defendant was *sentenced*. See *id.*

C. Any Prior Conviction Counts Under the 10-Year-Gap Rule

"[A] prior conviction that is not otherwise scorable under the prior record variables (PRVs) of the sentencing guidelines may, nevertheless, be considered in applying the so-called '10-year gap' rule of MCL 777.50." *People v Butler*, 315 Mich App 546, 547-548, 550 (2016) (rejecting the defendant's argument that "only offenses scorable under MCL 777.55 [(PRV 5)] may be considered in applying the 10-year-gap rule under MCL 777.50 in determining which offenses may be scored under PRV 5"). While MCL 777.50 and MCL 777.55 "serve a common purpose by limiting what prior convictions may be considered, the limitations are different, and the underlying purpose of each respective limitation is obviously different as well." *Butler*, 315 Mich App at 551. "[T]he provisions of MCL 777.55, along with MCL 777.51 through MCL 777.54, consider the nature of the defendant's prior crimes, whether they are worthy of being scored under the sentencing guidelines, and points are to be assessed based on the number and severity of those offenses," while "MCL 777.50, on the other hand, addresses the question whether a defendant's prior criminal history should be considered *at all* because of a period of time spent as a law-abiding citizen." *Butler*, 315 Mich App at 552. "In making this judgment, the Legislature, not unreasonably, insisted that the 10-year conviction-free period be . . . free of *any* convictions, even ones that would not themselves be scorable under the PRVs." *Id.*

2.5 PRV 1—Prior High Severity Felony Convictions

Points	Scoring Provisions for PRV 1
75	The offender has 3 or more prior high severity convictions. MCL 777.51(1)(a).
50	The offender has 2 prior high severity convictions. MCL 777.51(1)(b).
25	The offender has 1 prior high severity conviction. MCL 777.51(1)(c).
0	The offender has no prior high severity convictions. MCL 777.51(1)(d).

A. Scoring

Step 1: Determine if the defendant has any previous convictions entered before the sentencing offense was committed that qualify as prior high severity felony convictions.[6] MCL 777.51(1). If the

defendant has previous convictions that qualify under PRV 1, go to Step 2.

Step 2: Determine which one or more of the statements addressed by the variable apply to the offender's previous high severity felony convictions and assign the point value indicated by the applicable statement with the highest number of points. MCL 777.51(1).

B. Issues

1. Corresponding Federal and Out-of-State Convictions

"[B]y distinguishing high- and low-severity felony convictions [in MCL 777.51(2) (PRV 1) and MCL 777.52(2) (PRV 2)] the Legislature intended to provide sentencing courts with a mechanism for matching criminal conduct prohibited by other states with similar conduct prohibited by Michigan statutes, with the focus on the type of conduct and harm that each respective statute seeks to prevent and punish." *People v Crews*, 299 Mich App 381, 389-390 (2013).

MCL 777.51(2)(b), defining *prior high severity felony conviction*, requires that an out-of-state conviction "correspond to a specific Michigan crime in the appropriate class." *Crews*, 299 Mich App at 392 (noting that PRV 1 cannot be scored simply because an out-of-state statute seeks to protect against the same type of harm as a Michigan statute).[7] However, MCL 777.51(2)(b) requires only that the out-of-state felony "correspond" to a crime in a listed offense class, and "[t]he plain meaning of 'correspond' does not require statues to mirror each other under all circumstances; rather, it requires only that statutes be analogous or similar, meaning that they have 'qualities in common.'" *Crews*, 299 Mich App at 396, quoting *Random House Webster's College Dictionary* (1997) (holding that PRV 1 was properly scored where the defendant's two prior convictions of second-degree burglary under an Ohio statute corresponded to second-degree home invasion under MCL 750.110a(3), notwithstanding that "one element of [the Ohio statute] . . . [did] not exactly match MCL 750.110a(3)").

[6]Prior convictions must also satisfy the 10-year-gap rule discussed in Section 2.4.

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

2. Meaning of *Another State*

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

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

3. Meaning of *Conviction*

Caselaw has specified that the following constitute a conviction for purposes of scoring PRV 1:

- **Assignment of youthful trainee status under the Holmes Youthful Trainee Act, MCL 762.11 *et seq*.** *People v Williams*, 298 Mich App 121, 125, 127 (2012).

- **A prior conviction entered against an individual who was tried as an adult in a designated proceeding under MCL 712A.2d.**[8] *People v Armstrong*, 305 Mich App 230, 243 (2014). It does not matter whether the individual was sentenced as an adult or received a juvenile disposition in the designated proceeding. *Id*. at 243-244.

See also MCL 777.50(4)(a) (defining conviction).

4. Attempt Convictions

"MCL 777.19 provides that, in addition to the enumerated felonies in [MCL 777.11 to MCL 777.19], attempts to commit certain enumerated felonies are to be sentenced under the guidelines if the attempt constitutes a felony." *People v Jackson*, 504 Mich 929, 929 (2019). "MCL 777.19 is . . . relevant to identify the offense classification of a prior attempt conviction

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

for purposes of scoring Prior Record Variable (PRV) 1, MCL 777.51, and PRV 2, MCL 777.52, which expressly incorporate the sentencing guidelines' offense classifications." *Jackson*, 504 Mich at 930, citing *People v Wright*, 483 Mich 1130 (2009).[9] In *Wright*, the Court held that under MCL 777.19(3)(a), attempted assault with intent to do great bodily harm is a class E offense for purposes of scoring PRV 2 (prior low-severity felony convictions):

> "Prior Record Variable 1 (PRV 1) was misscored. According to the presentence investigation report, the defendant was scored 25 points for this variable because of a 2005 conviction for attempted assault with intent to do great bodily harm. Because assault with intent to do great bodily harm is a class D offense, and an attempt to commit a class A, B, C, or D offense is a class E offense, the defendant's prior conviction for attempted assault with intent to do great bodily harm was a class E offense. MCL 777.19(3)(a). The defendant's prior class E offense should have been treated as a 'prior low severity felony conviction,' scorable under PRV 2. MCL 777.52. Therefore, resentencing is required." *Wright*, 483 Mich at 1130.

[9]Similarly, PRV 3 and PRV 4 also expressly incorporate the sentencing guidelines' offense classifications. See MCL 777.53; MCL 777.54 (both expressly defining terms with reference to crimes listed in specific offense classes). See also *Jackson*, 504 Mich at 930 (acknowledging that "other sentencing guidelines variables" also "expressly incorporate the sentencing guidelines' offense classifications").

2.6 PRV 2—Prior Low Severity Felony Convictions

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

A. Scoring

Step 1: Determine whether the offender has any convictions that qualify as prior low severity felony convictions.[10] MCL 777.52(1). If the defendant has previous convictions to which PRV 2 applies, go to Step 2.

Step 2: Determine which of the statements listed in the variable apply to those prior low severity felony convictions and assign the point value corresponding to the applicable statement having the highest number of points. MCL 777.52(1).

B. Issues

1. Meaning of *Another State* Does Not Include Foreign State

For purposes of scoring an offender's PRVs, "another state," as contemplated by MCL 777.51(2), does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 2 is the same as the language used in PRV 1. MCL 777.52(2). See Section 2.4(B)(2) for a detailed discussion of *Price*.

2. Example of Prior Conviction Under the Law of Another State

An Indiana felony conviction arising from the defendant's purchase of a stolen firearm constituted a prior low severity felony conviction under the law of another state for purposes

[10]Prior convictions must also satisfy the 10-year-gap rule discussed in Section 2.4.

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

3. Attempt Convictions

"MCL 777.19 provides that, in addition to the enumerated felonies in [MCL 777.11 to MCL 777.19], attempts to commit certain enumerated felonies are to be sentenced under the guidelines if the attempt constitutes a felony." *People v Jackson*, 504 Mich 929, 929 (2019). "MCL 777.19 is . . . relevant to identify the offense classification of a prior attempt conviction for purposes of scoring Prior Record Variable (PRV) 1, MCL 777.51, and PRV 2, MCL 777.52, which expressly incorporate the sentencing guidelines' offense classifications." *Jackson*, 504 Mich at 930, citing *People v Wright*, 483 Mich 1130 (2009).[11] In *Wright*, the Court held that under MCL 777.19(3)(a), attempted assault with intent to do great bodily harm is a class E offense for purposes of scoring PRV 2 (prior low-severity felony convictions):

> "Prior Record Variable 1 (PRV 1) was misscored. According to the presentence investigation report, the defendant was scored 25 points for this variable because of a 2005 conviction for attempted assault with intent to do great bodily harm. Because assault with intent to do great bodily harm is a class D offense, and an attempt to commit a class A, B, C, or D offense is a class E offense, the defendant's prior conviction for attempted assault with intent to do great bodily

[11]Similarly, PRV 3 and PRV 4 also expressly incorporate the sentencing guidelines' offense classifications. See MCL 777.53; MCL 777.54 (both expressly defining terms with reference to crimes listed in specific offense classes). See also *Jackson*, 504 Mich at 930 (acknowledging that "other sentencing guidelines variables" also "expressly incorporate the sentencing guidelines' offense classifications").

harm was a class E offense. MCL 777.19(3)(a). The defendant's prior class E offense should have been treated as a 'prior low severity felony conviction,' scorable under PRV 2. MCL 777.52. Therefore, resentencing is required." *Wright*, 483 Mich at 1130.

2.7 PRV 3—Prior High Severity Juvenile Adjudications

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

A. Scoring

Step 1: Determine whether the offender has any adjudications that qualify as prior high severity juvenile adjudications.[12] MCL 777.53(1). If the offender has previous adjudications to which PRV 3 applies, go to Step 2.

Step 2: Determine which one or more of the statements addressed by PRV 3 apply to the offender and assign the point value indicated for the applicable statement with the highest number of points. MCL 777.53(1).

B. Issues

1. Meaning of *Another State* Does Not Include Foreign State

For purposes of scoring an offender's prior record variables, "another state," as contemplated by MCL 777.51(2), does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 3 is the same as the language used in PRV 1. MCL 777.53(2). See Section 2.4(B)(2) for a detailed discussion of *Price*.

[12]Prior adjudications must also satisfy the 10-year-gap rule discussed in Section 2.4.

2. Meaning of *Conviction*

A prior conviction entered against an individual who was tried as an adult in a designated proceeding under MCL 712A.2d[13] was properly counted under PRV 1 rather than under PRV 3 because the defendant "was tried as an adult and thus had a conviction." *People v Armstrong*, 305 Mich App 230, 243 (2014). It does not matter whether the individual was sentenced as an adult or received a juvenile disposition in the designated proceeding. *Id.* at 243-244.

3. Attempt Convictions

"MCL 777.19 provides that, in addition to the enumerated felonies in [MCL 777.11 to MCL 777.19], attempts to commit certain enumerated felonies are to be sentenced under the guidelines if the attempt constitutes a felony." *People v Jackson*, 504 Mich 929, 929 (2019). "MCL 777.19 is . . . relevant to identify the offense classification of a prior attempt conviction for purposes of scoring Prior Record Variable (PRV) 1, MCL 777.51, and PRV 2, MCL 777.52, which expressly incorporate the sentencing guidelines' offense classifications." *Jackson*, 504 Mich at 930, citing *People v Wright*, 483 Mich 1130 (2009). PRV 3 similarly expressly incorporates the sentencing guidelines' offense classifications. See MCL 777.53(2) (defining prior high severity juvenile adjudication by referencing crimes listed in specific offense classes). See also *Jackson*, 504 Mich at 930 (acknowledging that "other sentencing guidelines variables" also "expressly incorporate the sentencing guidelines' offense classifications"). See Section 2.4(B)(4) for a detailed discussion of *Jackson* and *Wright*.

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

2.8 PRV 4—Prior Low Severity Juvenile Adjudications

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

A. Scoring

Step 1: Determine whether the offender has any adjudications that qualify as prior low severity juvenile adjudications.[14] MCL 777.54(1). If the offender has previous adjudications to which PRV 4 applies, go to Step 2.

Step 2: Determine which one or more of the statements addressed by PRV 4 apply to the offender and assign the point value indicated for the applicable statement with the highest number of points. MCL 777.54(1).

B. Issues

1. Meaning of *Another State* Does Not Include Foreign State

For purposes of scoring an offender's prior record variables, "another state," as contemplated by MCL 777.51(2), does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 4 is the same as the language used in PRV 1. MCL 777.54(2). See Section 2.4(B)(2) for a detailed discussion of *Price*.

[14]Prior adjudications must also satisfy the 10-year-gap rule discussed in Section 2.4.

2. Attempt Convictions

"MCL 777.19 provides that, in addition to the enumerated felonies in [MCL 777.11 to MCL 777.19], attempts to commit certain enumerated felonies are to be sentenced under the guidelines if the attempt constitutes a felony." *People v Jackson*, 504 Mich 929, 929 (2019). "MCL 777.19 is . . . relevant to identify the offense classification of a prior attempt conviction for purposes of scoring Prior Record Variable (PRV) 1, MCL 777.51, and PRV 2, MCL 777.52, which expressly incorporate the sentencing guidelines' offense classifications." *Jackson*, 504 Mich at 930, citing *People v Wright*, 483 Mich 1130 (2009). PRV 3 similarly expressly incorporates the sentencing guidelines' offense classifications. See MCL 777.54(2) (defining prior low severity juvenile adjudication by referencing crimes listed in specific offense classes). See also *Jackson*, 504 Mich at 929 (acknowledging that "other sentencing guidelines variables" also "expressly incorporate the sentencing guidelines' offense classifications"). See Section 2.4(B)(4) for a detailed discussion of *Jackson* and *Wright*.

2.9 PRV 5—Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications

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

A. Scoring

Step 1: Determine whether the offender has any prior misdemeanor convictions or prior misdemeanor juvenile adjudications.[15] MCL 777.55(1). If so, go to step 2.

Step 2: Determine which one or more of the statements addressed by the variable apply to the offender and assign the point value indicated for the applicable statement with the highest number of points. MCL 777.55(1).

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

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

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

[15] Prior convictions and adjudications must also satisfy the 10-year-gap rule discussed in Section 2.4.

- prior misdemeanor convictions or prior misdemeanor juvenile adjudications that are offenses against a person or property, weapons offenses, or controlled substances offenses,[16] and

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

B. Issues

1. Meaning of *Another State* Does Not Include Foreign State

For purposes of scoring an offender's prior record variables, "another state," as contemplated by MCL 777.51(2), does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 5 is the same as the language used in PRV 1. MCL 777.55(3). See Section 2.4(B)(2) for a detailed discussion of *Price*.

2. Meaning of *Prior Conviction/Adjudication*

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

[16]The term *controlled substance offense* is not defined by MCL 777.55; however, "the phrase relates to Article 7 of the Public Health Code," which defines *controlled substance* and "penalizes offenses involving controlled substances." *People v Stevens*, 306 Mich App 620, 626 (2014). MCL 333.7104 - part of Article 7 of the Public Health Code - defines *controlled substance* to mean "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 [of the Public Health Code]." MCL 333.7104(2).

3. Examples of Prior Convictions/Adjudications That Must be Scored

Minor's violation of zero-tolerance provision. A defendant's conviction for being a minor operating a vehicle with any bodily alcohol content—the "zero-tolerance provision," MCL 257.625(6)—constitutes a misdemeanor for operating a vehicle while under the influence of alcohol or impaired by alcohol for purposes of scoring PRV 5. *People v Bulger*, 291 Mich App 1, 5-7 (2010). Although the "prior conviction under the zero-tolerance provision did not require proof that [the defendant] was actually under the influence of alcohol or was impaired by alcohol," MCL 777.55 should be read "broadly to refer to the drunk-driving statute as a whole, rather than to the specific crimes that require proof of operating a vehicle 'under the influence of or impaired by' alcohol." *Bulger*, 291 Mich App at 6-7.

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

Misdemeanor malicious use of telecommunications device. Because the statute governing the misdemeanor offense of malicious use of a telecommunications device, MCL 750.540e(1), "specifically addresses communications directed at 'another person,'" it "is an offense against a person" as required by MCL 777.55(2)(a), and the trial court properly counted it under PRV 5. *People v Maben*, 313 Mich App 545, 550 (2015).

4. Examples of Prior Convictions/Adjudications That Cannot be Scored

Other alcohol-related offenses. Previous alcohol-related convictions unrelated to operating while under the influence or impaired are not convictions involving a controlled substance for purposes of scoring PRV 5. *People v Endres*, 269 Mich App 414, 416-417 (2006).[17] Specifically, prior alcohol-related offenses that do not involve operating while under the influence or impaired cannot be counted under PRV 5 because the definition of *controlled substance* in the Public Health Code[18] does not include alcohol, and the language of MCL 777.55(2)(b) "clearly indicates that 'alcohol' and 'a controlled substance' are

not to be considered one and the same"; rather, "[e]ach is a distinct category of substances that can be ingested separately or in combination[.]" *Endres*, 269 Mich App at 419-420. See also *People v Stevens*, 306 Mich App 620, 626 (2014) (citing *Endres* and noting that the Court of Appeals "reasoned that the defendant's alcohol-related misdemeanor convictions could not be counted under PRV 5 as controlled substance offenses").

Discharge under MCL 333.7411. A discharge and dismissal following a defendant's successful completion of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring PRV 5. *People v James*, 267 Mich App 675, 679 (2005). "MCL 333.7411(1) specifically states that the discharge and dismissal procedure that it authorizes is 'without adjudication of guilt' and 'is not a conviction for purposes of . . . disabilities imposed by law upon conviction of a crime[.]'" *James,* 267 Mich App at 679-680 (holding that the "defendant's misdemeanor guilty plea cannot be used to enhance his sentence," because "[t]o do so would be to impose a 'disability' against him upon his conviction") (alterations omitted).

5. Out-of-State Convictions for Attempted Crimes

An out-of-state conviction for an attempted crime may qualify for scoring under PRV 5 if the attempted offense is tied to the crime attempted, the attempted offense is a misdemeanor, and the crime attempted "'is an offense against a person or property, a controlled substance offense, or a weapon offense.'" *People v Crews*, 299 Mich App 381, 397-399 (2013), quoting MCL 777.55(2)(a). In *Crews*, the defendant's prior Ohio attempt conviction stemming from a charge of possession or use of drugs was properly considered in assessing 10 points under PRV 5 because "Ohio's attempt statute specifically tie[d] an attempt conviction to the crime attempted," and it was clear from the defendant's PSIR that the attempt plea was based on a controlled substance offense. *Crews*, 299 Mich App at 397-399.

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[17]Note that in *People v Hardy*, 494 Mich 430, 438 n 18 (2013), the Court acknowledged that "[s]everal recent Court of Appeals decisions," including *Endres*, 269 Mich App 414, "have stated that '[s]coring decisions for which there is any evidence in support will be upheld,'" and explicitly noted that "[t]his statement is incorrect." *Hardy* explained that "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for purposes of assessing points under the sentencing guidelines." *Hardy*, 494 Mich at 438 n 18.

[18]It is appropriate to use the definition of *controlled substance* in Article 7 of the Public Health Code (PHC) for purposes of scoring PRV 5. *People v Stevens*, 306 Mich App 620, 626 (2014) (citing *Endres* and adopting its approach to using the definition of *controlled substance* found in Article 7 of the PHC for purposes of PRV 5 since the Code of Criminal Procedure and the statutory provisions relating to PRV 5 do not include a definition of *controlled substance*).

2.10 PRV 6—Relationship to the Criminal Justice System

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

A. Scoring

PRV 6 assesses points based on an offender's relationship to the criminal justice system. MCL 777.56. PRV 6 should be assessed against an offender who is involved with the criminal justice system of Michigan, another state, or the federal criminal justice system. MCL 777.56(1)-(2).

Step 1: Determine which of the statements addressed by the variable apply to the offender. MCL 777.56(1).

Step 2: Assign the point value indicated by the applicable statement with the highest number of points. MCL 777.56(1).

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

- MCL 333.7411 (deferral for certain controlled substance offenses),
- MCL 600.1076(4) (deferral involving drug treatment courts),
- MCL 750.350a (deferral under limited circumstances for parental kidnapping),
- MCL 750.430 (deferral for impaired healthcare professionals),
- MCL 762.11 to MCL 762.15 (assignment to youthful trainee status), and

- MCL 769.4a (deferral under limited circumstances for domestic assault). MCL 777.56(3)(a).[19]

B. Issues

1. PRV 6 Counts Only Conduct Occurring Before Commission of the Sentencing Offense

Because PRV 6 accounts for an offender's conduct before commission of the sentencing offense, an offender's PRV 6 score may not be adjusted to account for an offender's subsequent conduct related to a probation violation. *People v Hendrick*, 261 Mich App 673, 682 (2004), aff'd in part and rev'd in part on other grounds 472 Mich 555 (2005).[20] PRV 6 does not apply to conduct arising after the commission of the sentencing offenses. *Hendrick*, 261 Mich App at 682.

2. Disposition of a Previous Crime Pending at the Time Sentencing Offense is Committed

A defendant has a prior "relationship with the criminal justice system" for purposes of scoring PRV 6 when disposition of a misdemeanor crime committed by the defendant is pending at the time the defendant committed the sentencing offense. *People v Endres*, 269 Mich App 414, 422-423 (2006).[21]

3. Defendant not Technically on Bond

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

> "Admittedly, when an offender commits an offense after his or her bond has been forfeited or revoked,

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[19] Specific statutes under which an offender's sentence may be delayed are discussed in detail in Section 9.8.

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

[21] Note that in *People v Hardy*, 494 Mich 430, 438 n 18 (2013), the Court acknowledged that "[s]everal recent Court of Appeals decisions," including *Endres*, 269 Mich App 414, "have stated that '[s]coring decisions for which there is any evidence in support will be upheld,'" and explicitly noted that "[t]his statement is incorrect." *Hardy* explained that "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for purposes of assessing points under the sentencing guidelines." *Hardy*, 494 Mich at 438 n 18.

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

Thus, a five-point score for PRV 6 was proper where the defendant committed a misdemeanor for which bond was granted and subsequently revoked because "the ramifications of the charge remained." *Johnson*, 293 Mich App at 89-90. Because the defendant's misdemeanor charge was still pending, the Court could not "classify [him] as having had 'no relationship' with the criminal justice system." *Id.* at 90.

Where the defendant entered a plea on a juvenile offense and was "awaiting adjudication or sentencing at the time he committed the sentencing offense," five points were properly assessed under PRV 6, "even if [the defendant] was not on bond at the time he committed the sentencing offense." *People v Gibbs*, 299 Mich App 473, 486-487 (2013).

4. Defendant on Probation for a Juvenile Offense

Ten points were properly scored for PRV 6 where the defendant committed the sentencing offense while on probation for a juvenile offense. *People v Anderson*, 298 Mich App 178, 180-183 (2012) ("[j]uveniles on probation are involved with the corrections aspect of the criminal justice system"; therefore, the "defendant's prior juvenile adjudications supported the trial court's scoring of [PRV 6]").

5. Incorrect Date Listed on PSIR

The trial court did not err when it assessed five points under PRV 6 despite the fact that the PSIR listed two different dates as the date on which the sentencing offenses occurred and one of those listed dates was after the defendant's probation ended where the defendant was on probation until October 2011 and "there was evidence at trial that defendant started misappropriating [the victim's] wealth in March 2011." *People v*

Haynes, 338 Mich App 392, 439 (2021) (holding "there was evidence in the record to support the trial court's implied finding that defendant committed the sentencing offense while he was still on probation").

2.11 PRV 7—Subsequent or Concurrent Felony Convictions

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

A. Scoring

PRV 7 assesses points against an offender who is convicted of multiple felonies or is convicted of a felony offense after his or her commission of the sentencing offense. MCL 777.57.

Step 1: Determine which of the statements apply to the offender. MCL 777.57(1).

Step 2: Assign the point value corresponding to the applicable statement with the highest number of points. MCL 777.57(1).

"Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed." MCL 777.57(2)(a).

Certain felony convictions cannot be scored under PRV 7:

- A conviction for felony-firearm may not be counted under PRV 7. MCL 777.57(2)(b).
- A concurrent felony conviction that will result in a mandatory consecutive sentence may not be counted under PRV 7. MCL 777.57(2)(c).
- A concurrent felony conviction that will result in a consecutive sentence under MCL 333.7401(3) may not be counted under PRV 7.[22] MCL 777.57(2)(c).

B. Issues

Exception to general rule. PRV 7 is an exception to the general rule that PRVs account only for an offender's prior conduct because PRV 7 assigns a point value for felony convictions that occur concurrent to the sentencing offense and felony convictions that occur after the sentencing offense. MCL 777.57; *People v Peltola*, 489 Mich 174, 187 n 29 (2011).

Part B: Scoring an Offender's Offense Variables (OVs)

2.12 Overview of Offense Variables

MCL 777.21 details the method by which an offender's recommended minimum sentence range is determined using the offender's prior record variable (PRV) and OV scores. There are 20 offense variables, some of which have been amended since the guidelines first went into effect. See MCL 777.31 to MCL 777.49a. Each OV consists of several statements to which a specific number of points is assigned; these statements quantify the specific offense characteristics addressed by each individual OV. *Id.*

Every OV is not scored for every offense. The offense category or "crime group" to which the sentencing offense belongs is "used to determine which of the OVs to score for each crime *and* how those OVs should be scored." *People v Bonilla-Machado*, 489 Mich 412, 422 (2011) (citations omitted); see also MCL 777.21(1)(a); MCL 777.22. The total number of points assessed for all OVs scored for an offense constitutes the offender's "OV level," which is represented by the vertical axis on each sentencing grid.[23] MCL 777.21(1)(a). The offense category for every felony to which the sentencing guidelines apply is set out in MCL 777.11 through MCL 777.19.

The Legislature classified each offense to which the sentencing guidelines apply into one of six particular offense categories; therefore, an offense that is statutorily designated as a "crime against public safety" may not also be considered a "crime against a person" for purposes of scoring an OV. *Bonilla-Machado*, 489 Mich at 415-416, 425 (the Court of Appeals wrongly decided that assault of a prison guard, a crime against public safety according to its statutory designation in MCL 777.16j, "is *also* a

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

[23] Sentencing grids are found in MCL 777.61 to MCL 777.69. Each grid is also available by clicking here. See Section 1.7 for a discussion of sentencing grids.

crime against a person because, obviously, a prison guard is a person"). The Court further noted that "MCL 777.21(1)(a) explicitly instructs a court to first '[f]ind the *offense category* for the offense from' MCL 777.11 through [MCL] 777.19 and then 'determine the offense variables to be scored for that *offense category*[.]'" *Bonilla-Machado*, 489 Mich at 426. "The use of the named offense categories throughout the sentencing guidelines chapter indicates legislative intent to have the offense categories applied in a uniform manner, including when they are applied in the offense variable statutes." *Id.* Accordingly, "a felony statutorily designated as a 'crime against public safety' may not be used to establish a pattern of felonious criminal activity involving three or more crimes against a person for purposes of scoring OV 13." *Id.* at 430-431. See also *People v Pearson*, 490 Mich 984, 984-985 (2012) (because "conspiracy is classified as a 'crime against public safety'" under MCL 777.18, conspiracy to commit armed robbery may not be considered when scoring OV 13, even though armed robbery is classified under MCL 777.16y as a crime against a person; MCL 777.21(4) "does not allow the offense category underlying the conspiracy to dictate the offense category of the conspiracy itself for purposes of scoring OV 13"); *People v Reynolds*, 495 Mich 921, 921 (2014) (holding that because "[a] conspiracy conviction cannot be scored as a crime against a person," the trial court erred in "consider[ing] the defendant's conspiracy conviction to be a crime against a person" for purposes of scoring OV 12 and OV 13), citing *Pearson*, 490 Mich 984, and *Bonilla-Machado*, 489 Mich 412.

Offense Category/Crime Group	OVs to be Scored
Crimes Against a Person (Designated as *person* in the statutory list of felonies) See MCL 777.5(a).	• 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, 20; • 5 and 6 if the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder; • 16 if the sentencing offense is a violation or attempted violation of MCL 750.110a (home invasion); and • 17 and 18 if the offense or attempted offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. See MCL 777.22(1).
Crimes Against Property (Designated as *property* in the statutory list of felonies) See MCL 777.5(b).	• 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20. See MCL 777.22(2).
Crimes Involving a Controlled Substance (Designated as *CS* in the statutory list of felonies.) See MCL 777.5(c).	• 1, 2, 3, 12, 13, 14, 15, 19, and 20. See MCL 777.22(3).

Offense Category/Crime Group	OVs to be Scored
Crimes Against Public Order (Designated as *pub ord* in the statutory list of felonies.) See MCL 777.5(d).	• 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20. See MCL 777.22(4).
Crimes Against Public Trust (Designated as *pub trst* in the statutory list of felonies.) See MCL 777.5(e).	• 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20. See MCL 777.22(4).
Crimes Against Public Safety (Designated as *pub saf* in the statutory list of felonies.) See MCL 777.5(f).	• 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, 20; • 18 if the offense or attempted offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. See MCL 777.22(5).

2.13 Issues Regarding OV Scoring In General

A. OVs Are Generally Offense-Specific

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).[24]

When scoring offense-specific variables, "a trial court may properly consider all of 'defendant's conduct during' that offense." *People v Chelmicki*, 305 Mich App 58, 72 (2014), quoting *McGraw*, 484 Mich at 134.[25]

McGraw requires sentencing courts "to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was charged and later dismissed or dropped, regardless of the sequence in which the conduct transpired." *People v Gray*, 297 Mich App 22, 28, 31, 33-34 (2012).

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

[25] However, note that a trial court may not consider "acquitted conduct." See *People v Beck*, 504 Mich 605, 629, 630 (2019). See Section 2.13(E).

B. Conduct Inherent in a Crime

"[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables." *People v Hardy*, 494 Mich 430, 441-442 (2013) (holding that "[t]he Court of Appeals . . . erred in [*People v Glenn*, 295 Mich App 529, 535 (2012),] to the extent it concluded that 'circumstances inherently present in the crime must be discounted for purposes of scoring an OV'"). "The sentencing guidelines explicitly direct courts to disregard certain conduct inherent in a crime when scoring OVs 1, 3, 8, 11, and 13";[26] however, "[i]n all other cases, the Sentencing Guidelines allow a factor that is an element of the crime charged to also be considered when computing an offense variable score." *Hardy*, 494 Mich at 442 (quotation marks and citation omitted).

C. Co-Offenders' Conduct[27]

"[T]he court may not assess [a] defendant points solely on the basis of his or her co-offender's conduct unless the OV at issue explicitly directs the court to do so." *People v Gloster*, 499 Mich 199, 201, 209-210 (2016) (holding that "a sentencing court may not assess a defendant 15 points for predatory conduct under OV 10 solely on the basis of the predatory conduct of the defendant's co-offenders" because "MCL 777.40 contains no language directing a court to assess a defendant the same number of points as his co-offenders in multiple-offender situations"). "[T]he Legislature has explicitly provided that all offenders in a multiple-offender situation should receive the same score for OVs 1, 2, and 3, but excluded that language from other OVs[.]" *Gloster*, 499 Mich at 206.

In a multiple-offender situation, the trial court must "increase a defendant's sentence on the basis of a codefendant's conduct where the defendant would have been assessed the same number of points had the defendant been convicted of a charged offense . . . so long as the calculation is solely based on a codefendant's conduct and not charges for which a defendant was acquitted." *People v Ventour*, ___ Mich App ___, ___ (2023) (holding that scoring OVs 1 and 2 in this manner was not contrary to the rule from *People v Beck*, 504 Mich 605 (2019)).

OV 14 also "addresses the role of offenders who act in concert with others and requires the court to score the variable when the offender

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

[27] Detailed discussion of scoring multiple offenders under OVs 1, 2, 3, and 14 is included in each respective OV's section.

acted as a leader." *People v Dupree*, 511 Mich 1, 10 (2023), citing MCL 777.44. In contrast to the multiple offender provisions in OVs 1, 2, and 3, offenders receive *different* scores under OV 14 depending on the role the offender played in the offense. *Dupree*, 511 Mich at 9-10.

D. Judicial Fact-Finding

Despite the fact that the sentencing guidelines are now advisory only, see *People v Lockridge*, 498 Mich 358 (2015), the *Lockridge* Court specifically noted that its holding "[did] nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not." *Id*. at 392 n 28, citing MCL 777.21(1)(a); MCL 777.31(1); MCL 777.32(1). "The fact that a trial court engaged in judicial fact-finding is not relevant to the inquiry into an evidentiary challenge" to the scoring of the OVs. *People v Biddles*, 316 Mich App 148, 158, 161 (2016) (disagreeing "with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant's OV scores under the guidelines," which "is in direct contradiction of the *Lockridge* Court's rejection of the defendant's argument that juries should be required to find the facts used to score the OVs"), citing *Lockridge*, 498 Mich at 389. Under *Lockridge*, 498 Mich at 392 n 28, "judicial fact-finding is proper, as long as the guidelines are advisory only." *Biddles*, 316 Mich App at 159, 159-160 n 5 (additionally disagreeing with the suggestion in *People v Blevins*, 314 Mich App 339, 362 n 8 (2016), that "judicial fact-finding 'constitutes a departure'"). See Section 1.4 for discussion of *Lockridge*.

E. Acquitted Conduct

"[D]ue process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." *People v Beck*, 504 Mich 605, 629 (2019). "When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." *Id.* at 626.[28] However, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent," and "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due

[28]The Court noted that any findings must not "mandate an increase in the mandatory minimum or statutory maximum sentence." *Beck*, 504 Mich at 626 n 22.

process." *Id.* at 626, 627. Acquitted conduct can be identified by examining "what the parties actually disputed at trial." *People v Brown*, 339 Mich App 411, 423 (2021). "This approach moves away from prohibiting any and all facts and circumstances related to any element of the crime and instead focuses on the key facts and circumstances that the parties argued about during the trial." *Id.* at 423. "This approach is similar to the 'rational jury' standard used in the double-jeopardy context, which requires examining the record to determine the ground or grounds upon which a rational jury could have acquitted the defendant." *Id.* at 423. "[U]nder the rational-jury approach, the sentencing court could consider facts and circumstances that were not, in a practical sense, put in dispute at trial, as long as those facts and circumstances were otherwise consistent with the jury's acquittal on a particular charge." *Id.* at 425. "Moreover, if a specific fact or circumstance was relevant to both the acquitted charge and the convicted charge—i.e., if there was an overlap of relevant conduct—then the trial court could consider that fact or circumstance when sentencing on the convicted charge." *Id.* at 425 (concluding that the "rational-jury approach" of identifying the facts and circumstances that are prohibited at sentencing is "consistent with *Beck*").

1. Examples of Application

Where "the factual issue facing the jury in determining the defendant's guilt or innocence of [an] assault with intent to murder charge was whether he passed a gun to another individual, who it is undisputed then fired the gun into a crowd on a city street," and the jury acquitted the defendant of the AWIM charge, the trial court improperly sentenced the defendant based on acquitted conduct by assigning 25 points to OV 9 for endangering the crowd and departing upwards from the recommended guidelines range "in order to deter gun violence on the city's streets[.]" *People v Roberts*, 506 Mich 938 (2020).

Where the defendant was convicted of being a felon in possession, but acquitted of second-degree murder and voluntary manslaughter based on a self-defense theory, with a jury finding specifically "that defendant was not criminally responsible for [the victim's] death, . . . the trial court could not consider the actual shooting and death when sentencing on the felon-in-possession conviction." *People v Brown*, 339 Mich App 411, 427 (2021). "All of the relevant facts and circumstances leading up to th[e] point [where the victim brandished his weapon] can be considered by the trial court when sentencing defendant on the felon-in-possession conviction," but "[d]efendant's conduct after that point and [the victim's]

resulting death fall under [the] concept of 'acquitted conduct' and are off-limits for purposes of sentencing." *Id.* at 427.

In a multiple offender case, the trial court did not err by scoring OV 1 and OV 2 on the basis of the defendant's codefendants' possession of a firearm where the defendant was convicted of second-degree murder under an aiding and abetting theory but acquitted of felony-firearm. *People v Ventour*, ___ Mich App ___, ___ (2023). "Defendant's acquittal for felony-firearm has no bearing on the trial court's finding that another offender possessed a firearm during the commission of the offense." *Id.* at ___. Thus, "*Beck* does not prohibit the trial court from adhering to the clear statutory instructions for assessing points under OVs 1 and 2" in multiple offender cases. *Ventour*, ___ Mich App at ___ (explaining that "defendant's acquittal of felony-firearm prohibited the trial court from enhancing defendant's sentence for second-degree murder on the basis of a finding that defendant personally possessed a firearm, or aided or abetted a co-offender's possession of a firearm," and concluding that "the trial court did not score OV 1 and OV 2 on the basis of any such finding," instead it scored points "because defendant was a codefendant in a multiple-offender case in which the other offenders possessed and used a lethal weapon and were assessed points for the presence and use of such a weapon").

2. Resentencing Not Required

Where the defendant failed to establish that the trial court's erroneous reference to acquitted conduct was "part of its sentencing rationale," resentencing was not required. *People v Beesley*, 337 Mich App 50, 65 (2021) (trial court stated that a gun was used by the defendant, which was contrary to the jury's verdict acquitting him of all charged firearm offenses). Specifically, "[u]nlike in *Beck*, the trial court sentenced defendant within the sentencing guidelines range," "none of the OVs scored by the trial court involved the use of a gun," and the trial court did not find by a preponderance of the evidence that the defendant committed one of the acquitted charges, but rather referenced "defendant's use of a gun only in response to defense counsel's argument that defendant had not committed a violent offense." *Beesley*, 337 Mich App at 64-65.[29] Accordingly, "the trial judge's statement that a gun was used in this case, without more, [did] not amount to a *Beck* violation requiring resentencing" where defendant failed to preserve the sentencing issue and could not establish prejudice under the plain error standard. *Beesley*, 337 Mich App at 65-66.

3. Content in PSIR

"[A] sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant." *People v Stokes*, 333 Mich App 304, 311 (2020). The inclusion of information about acquitted conduct in a PSIR does not create a presumption that the sentencing court relied on acquitted conduct; rather, "[t]here must be some evidence in the record that the sentencing court relied on such information to warrant finding a *Beck* violation." *Id.* at 311-312 (noting that the acquitted conduct referenced in the PSIR was about a different and separate case and "the trial court did not refer to any acquitted conduct" nor did it "intimate that such conduct influenced its sentencing decisions").[30]

F. Preponderance of the Evidence Required

Facts used to score the offense variables must be in the record and supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111 (2008). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Allen*, 331 Mich App 587, 594 (2020) (quotation marks and citation omitted), vacated in part on other grounds 507 Mich 856 (2021).[31] Assertions made by the parties are not evidence and cannot support an offense variable score. *People v Swift*, 505 Mich 980 (2020) (vacating defendant's sentence where OV 4 was scored solely on the basis of the prosecutor's assertion and correction of the scoring error resulted in a lower sentencing range).

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[29]The Court noted that "there was ample support for the trial court's conclusion that defendant was being sentenced for a violent offense even without a finding that defendant used a gun." *Beesley, 337* Mich App at 66 n 6 (the defendant was convicted of first-degree criminal sexual conduct, unlawful imprisonment, and domestic violence, and the victim testified that defendant strangled her and she feared for her life during the entire incident).

[30]The Supreme Court denied leave in *Stokes*. *People v Stokes*, 507 Mich 939 (2021). Chief Justice McCormack concurred in the denial of leave, noting that it was not clear that *Beck* applied to the case; however, she also expressed doubt about the *Stokes* panel's statements "that sentencing courts do not violate *Beck* by 'considering the entire *res gestae* of an acquitted offense,'" and that "'a sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant,'" indicating that she is "not confident that either statement is correct or consistent with our caselaw." *Stokes*, 507 Mich at 939 (McCormack, C.J., concurring; Welch, J., joined the statement) (citations omitted).

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

2.14 OV 1—Aggravated Use of a Weapon

Points	General Scoring Provisions for OV 1
25	A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon. MCL 777.31(1)(a).
20	The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.31(1)(b). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER APRIL 22, 2002. SEE 2002 PA 137.
15	A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon. MCL 777.31(1)(c).
10	The victim was touched by any other type of weapon. MCL 777.31(1)(d).
5	A weapon was displayed or implied. MCL 777.31(1)(e). **Score 5 points if** the offender used an object to suggest that he or she had a weapon. MCL 777.31(2)(c). **Score 5 points if** the offender used a chemical irritant, chemical irritant device, smoke device, or imitation harmful substance or device. MCL 777.31(2)(d).
0	No aggravated use of a weapon occurred. MCL 777.31(1)(f).
Instructions	**Special Scoring Provisions for OV 1**
Assign same number of points	Multiple offenders and one offender is assigned points for the use or the presence of a weapon. MCL 777.31(2)(b).
Do NOT score 5 points	The sentencing offense is a conviction of MCL 750.82 (felonious assault) or MCL 750.529 (armed robbery). MCL 777.31(2)(e).

A. Scoring

OV 1 is scored for all offenses to which the sentencing guidelines apply, i.e., for offenses in every crime group designation. MCL 777.22.

Step 1: Determine which statements addressed by OV 1 apply to the offense. MCL 777.31(1).

Step 2: Review special scoring provisions in MCL 777.31(2) then assign the point value indicated by the applicable statement having the highest number of points. MCL 777.31(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

"OV 1 is an 'offense-specific' variable; therefore, in scoring OV 1, the trial court [is] limited to 'considering the sentencing offense alone.'" *People v Chelmicki*, 305 Mich App 58, 72 (2014), quoting *McGraw*, 484 Mich at 127. "However, in doing so, a trial court may properly consider all of 'defendant's conduct during' that offense." *Chelmicki*, 305 Mich App at 72, quoting *McGraw*, 484 Mich at 134. The Court rejected the defendant's contention that because "the [sentencing] offense of unlawful imprisonment was 'complete' the moment he [asported the victim], . . . evidence of his putting [a] BB gun to the victim's head occurred after that crime and, therefore, [could not] be used in scoring OV 1." *Chelmicki*, 305 Mich App at 71. Rather, the Court held that 10 points were properly scored for OV 1 because the "defendant's act of holding a BB gun to the victim's head was conduct that occurred 'during' the ongoing offense of unlawful imprisonment." *Id.* at 72. See also *People v Biddles*, 316 Mich App 148, 166 (2016) (holding that the trial court clearly erred by assessing 25 points for OV 1 where "there was no evidence that defendant's possession of [a] gun, which was used to support [his] felon-in-possession conviction, entailed defendant's discharge of the weapon, let alone discharging it at or toward a human being").

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Multiple Offender Provision

The instructions for scoring OV 1 include specific directions in cases involving multiple offenders.[32] For OV 1, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same number of points. MCL 777.31(2)(b).

[32] OVs 2 and 3 have similar multiple offender provisions.

Two conditions must be satisfied before the multiple offender provision is triggered: (1) the case must be a multiple offender case, and (2) one offender must be assessed points for possessing a weapon. *People v Dupree*, 511 Mich 1, 7 (2023). Accordingly, even where there is no dispute that multiple offenders were involved in a crime and a weapon was possessed and/or used, if the defendant being sentenced did not possess and/or use a weapon during the offense, and "no other offender was assessed points" under OV 1, then OV 1 must be "scored at zero points." *Id.* at 4. In *Dupree*, three men robbed a store, only one man was armed during the robbery, and only defendant was arrested, charged, and convicted of the robbery. *Id.* at 4-5. "There is no evidence that defendant was the offender who wielded the gun in this robbery." *Id.* at 6. Under these facts, "the second condition, requiring another offender to have been assessed points for possessing a weapon, was not satisfied." *Id.* at 7. "Since defendant was the only person arrested, convicted, and assessed points under OVs 1 and 2, points could only be assessed under OVs 1 and 2 if he had possessed and/or used the weapon *himself*." *Id*.

Further, the multiple offender provision applies only when the offenders are being scored for the same offense. *People v Johnston*, 478 Mich 903, 904 (2007).[33] The multiple offender provision does not require that an offender be assessed the same number of points as other offenders involved in the same criminal episode if the offender was the only person convicted of the specific crime being scored. *Id.* at 904. In other words, when more than one offender is involved in the same criminal conduct, but only one offender is convicted of a specific crime arising from the conduct, that particular crime does not involve multiple offenders for purposes of scoring OV 1. *Id.*

"[I]n the absence of any clear argument that the scores assessed [against the first offender] were incorrect," the multiple offender provision in OV 1 and OV 3 requires that other offenders convicted of the same offense be assessed the same number of points. *People v Morson*, 471 Mich 248, 261-262 (2004) (the defendant and the codefendant robbed a woman at

[33] However, see *People v Jackson*, 320 Mich App 514, 523-527 (2017), rev'd in part on other grounds 504 Mich 929 (2019), which applied the multiple-offender provisions of OV 1 and OV 2 to the defendant—who was convicted of *unarmed* robbery—based on the scores for those variables previously assessed against his codefendant, who was convicted of *armed* robbery. The *Jackson* Court did not, however, specifically address the fact that the defendant and codefendant were not convicted of the same offense. For more information on the precedential value of an opinion with negative subsequent history, see our note. Further, note that in *People v Beck*, 504 Mich 605, 629 (2019), the Court specifically held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." See Section 2.13(E).

gunpoint and a third party was injured when the codefendant shot him). At issue in *Morson* was the fact that the defendant, who was sentenced after the codefendant was sentenced, received higher scores for OV 1 and OV 3 than did the codefendant. *Id*. at 258-259. The prosecution argued that the statute clearly required the court to assess the highest number of points for each variable, but it did not dispute the codefendant's scores at her sentencing or on appeal. *Id*. at 259. Under these circumstances, the *Morson* Court explained:

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

The multiple-offender provisions in OV 1 and OV 3 were "not implicated" where the defendant was acquitted of the crimes to which his codefendant pleaded guilty and the defendant's felon-in-possession conviction was based on evidence unrelated to the shooting that formed the basis of his codefendant's convictions. *People v Biddles*, 316 Mich App 148, 164, 166 (2016) (concluding that, because the defendant and his codefendant were not convicted of the same specific offense, the case "was not a multiple-offender case"), citing *Johnston*, 478 Mich at 904, and *Morson*, 471 Mich at 260 n 13.

The multiple-offender provisions of OV 1 and OV 2 required the court to assess the defendant the same number of points for those variables as were previously assessed to his accomplice in a robbery, even though the defendant was acquitted of felony-firearm. *People v Jackson*, 320 Mich App 514, 525-526 (2017), rev'd in part on other grounds 504 Mich 929 (2019).[34] "[T]rial courts have no scoring discretion in multiple offender cases" under MCL 777.31(2)(b) (OV 1) and MCL 777.32(2) (OV 2). *Jackson*, 320 Mich App at 525.[35] Therefore, where the defendant was being sentenced for unarmed robbery, and "the trial court had information that another offender involved in the commission of the robbery had been assessed points for OV 1 for the aggravated use of a firearm and points for OV 2 for possession or use of a firearm" when he was sentenced for

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

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

armed robbery, the trial court was required under *Morson*, 471 Mich at 260, to assess the defendant the same number of points for OV 1 and OV 2 as had been assessed to his codefendant, "regardless of defendant's acquittal of . . . felony-firearm charges." *Jackson*, 320 Mich App at 525-526.

In a multiple offender case, the trial court did not err by scoring OV 1 and OV 2 on the basis of the defendant's codefendants' possession of a firearm where the defendant was convicted of second-degree murder under an aiding and abetting theory but acquitted of felony-firearm. *People v Ventour*, ___ Mich App ___, ___ (2023). "Defendant's acquittal for felony-firearm has no bearing on the trial court's finding that another offender possessed a firearm during the commission of the offense." *Id.* at ___. Thus, "*Beck*[36] does not prohibit the trial court from adhering to the clear statutory instructions for assessing points under OVs 1 and 2" in multiple offender cases. *Ventour*, ___ Mich App at ___. The plain language of OV 1 and OV 2 makes clear that "if one offender is assessed points, all of the offenders shall be assessed the same number of points." *Id.* at ___. The statutory mandate applies "regardless of whether the offender or a co-offender discharged or possessed the firearm," and there is no requirement "that the defendant actually possess a firearm or be convicted of possessing a firearm." *Id.* at ___ (explaining that "defendant's acquittal of felony-firearm prohibited the trial court from enhancing defendant's sentence for second-degree murder on the basis of a finding that defendant personally possessed a firearm, or aided or abetted a co-offender's possession of a firearm," and concluding that "the trial court did not score OV 1 and OV 2 on the basis of any such finding," instead it scored points "because defendant was a codefendant in a multiple-offender case in which the other offenders possessed and used a lethal weapon and were assessed points for the presence and use of such a weapon").

The multiple offender provision in MCL 777.31(2)(b) does not require a sentencing court "to assess the same erroneous score" for a defendant where it is undisputed that the co-offender's guidelines were improperly scored. *People v Libbett*, 251 Mich App 353, 367 (2002).

[36]In *People v Beck*, 504 Mich 605, 629 (2019), the Court held "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." For a detailed discussion of the *Beck* case, see Section 2.13(E).

3. Inoperable Weapons

The definition of *firearm* in MCL 750.222(e) "does not prescribe a requirement that the weapon be 'operable' or 'reasonably or readily repairable.'" *People v Peals*, 476 Mich 636, 638 (2006). "[T]he design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a 'firearm.'" *Id.* (construing the definition of *firearm* to determine whether the defendant was guilty of being a felon in possession of firearm and of possession of a firearm during the commission of a felony). See also *People v Humphrey*, 312 Mich App 309, 318 (2015) (holding that "the operability of a firearm is not relevant to firearms offenses under Chapter XXXVII of the Michigan Penal Code, and the inoperability of a pistol is [not] a valid affirmative defense to a [carrying a concealed weapon (CCW)] charge").

4. Threatening Victim Versus Merely Displaying or Implying a Weapon

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

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

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

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

In *Brooks*, 304 Mich App at 319, 322-323, although the factual record was unclear regarding "whether defendant ever . . . removed [a] knife from his sock, let alone actually pointed it at or gestured with it toward anyone," the Court of Appeals rejected the defendant's contention that he "merely displayed or implied the knife," and that five points, rather than 15, should have been scored under OV 1 for his conviction of unarmed robbery. The Court explained that the actions of the defendant "were sufficient to constitute a threat under MCL 777.31(1)(c)":

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

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

5. Harmful Substances

a. Harmful Biological Substance

For purposes of scoring OV 1, harmful biological substance includes HIV-infected blood because blood containing HIV meets the statutory definition: "it is a substance produced by a human organism that contains a virus that can spread or cause disease in humans." *People v Odom*, 276 Mich App 407, 413 (2007) (holding that

twenty points were properly scored for OV 1 where the defendant, who was HIV positive and whose mouth was bleeding, spit on a corrections officer).

b. Harmful Chemical Substance

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

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

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

'explosive device' [under MCL 777.31(1)(b),] as demonstrated by the fact that [the] lab exploded, causing . . . serious injury," the evidence did not support a finding that the batteries, fuel, and methamphetamine lab were used as weapons).

"A chemical substance can be . . . both an irritant and a harmful substance," and pepper spray is both a chemical irritant and a harmful chemical substance. *People v Savage*, 327 Mich App 604, 624 (2019). Pepper spray satisfies the definition of harmful chemical substance because it causes an injury; specifically, pepper spray is designed to "incapacitate a person with intense pain and involuntary physiological reactions." *Id.* Further, "there is nothing in the plain language of OV 1 to suggest that the Legislature intended that only a permanent injury qualify for [the assessment of 20 points]." *Id.* Accordingly, although "pepper spray is designed to inflict temporary injury," this "does [not] mean that the Legislature intended to exclude the spray from the category of harmful chemical substances," because "a temporary injury is still an injury[.]" *Id.* at 624, 633-634.

6. Unconventional Weapons

For purposes of scoring OV 1, a brass statue and a shotgun are not "other cutting or stabbing weapon[s]," even if the items were used in a way that resulted in the victim's bleeding. *People v Wilson*, 252 Mich App 390, 394-395 (2002), quoting MCL 777.31(1).[37] "To the extent that either object was used in a manner to cause the primary victim to bleed, it was not because she was cut or stabbed, but because she was hit with a relatively heavy object." *Wilson*, 252 Mich App at 395.

For purposes of scoring OV 1, a glass mug may be a "weapon." *People v Lange*, 251 Mich App 247, 252-255 (2002). Ten points were properly scored against the defendant who caused his wife's injuries and eventual death by striking her with a glass mug. *Id.* at 258. The Court reasoned that the Legislature's use of the word "weapon" was not predicated on an object's ability to reflect an offender's "plan" or "preparation." *Id.* at 255. The fact that the defendant did not plan to use the mug as a weapon did not preclude the mug's characterization as a

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

weapon. *Id*. at 254. In defining what the Legislature intended by the word "weapon" in OV 1, the Court referred to a previous Michigan Supreme Court decision that defined the term "dangerous weapon":

> "'Some weapons carry their dangerous character because so designed and are, when employed, *per se*, deadly, while other instrumentalities are not dangerous weapons unless turned to such purpose. *The test as to the latter is whether the instrumentality was used as a weapon and, when so employed in an assault, dangerous*. The character of a dangerous weapon attaches by adoption when the instrumentality is applied to use against another in furtherance of an assault. *When the purpose is evidenced by act, and the instrumentality is adapted to accomplishment of the assault and capable of inflicting serious injury, then it is, when so employed, a dangerous weapon*.'" *Lange*, 251 Mich App at 256, quoting *People v Vaines*, 310 Mich 500, 505-506 (1945).

See also *People v Bosca*, 310 Mich App 1, 50 (2015) (holding that, under MCL 777.31(c), based on the manner of use of a "circular saw to instill fear, coupled with the 'cutting' nature of the saw," the trial court did not err in assessing 15 points for OV 1), rev'd in part on other grounds 509 Mich 851 (2022).[38]

7. Use of Bare Hands as a Weapon

"[A]n offender's bare hands cannot be treated as weapons under OV 1 because, unlike a gun or a knife, hands are not an article distinct from the particular offender." *People v Hutcheson*, 308 Mich App 10, 14-16 (2014) (holding that points may not be assessed under OV 1 or OV 2 where "defendant used only his bare hands, and no distinct weapon, to assault the victim").

8. Sufficient Evidence to Support OV 1 Score

Fifteen points were appropriately scored under OV 1 where, even though the defendant was acquitted of armed robbery, trial testimony and the defendant's PSIR indicated that the defendant brandished a gun during the robbery and pointed it at a victim's face. *People v Harverson*, 291 Mich App 171, 182-183

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

(2010). But see *People v Beck*, 504 Mich 605, 629 (2019) (holding "that due process bars sentencing courts from finding by a preponderance of the evidence that defendant engaged in conduct of which he was acquitted"). See Section 2.13(E).

2.15 OV 2—Lethal Potential of the Weapon Possessed or Used

Points	General Scoring Provisions for OV 2
15	The offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device. MCL 777.32(1)(a). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER OCTOBER 23, 2001. SEE 2001 PA 136.
15	The offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon. MCL 777.32(1)(b).
10	The offender possessed or used a short-barreled rifle or a short-barreled shotgun. MCL 777.32(1)(c).
5	The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon. MCL 777.32(1)(d).
1	The offender possessed or used any other potentially lethal weapon. MCL 777.32(1)(e).
0	The offender possessed or used no weapon. MCL 777.32(1)(f).
Instructions	**Special Scoring Provisions for OV 2**
Assign same number of points	Multiple offenders and one offender is assigned points for the use or the presence of a weapon. MCL 777.32(2).

A. Scoring

OV 2 is scored for crimes against a person, crimes against property, and crimes involving a controlled substance. MCL 777.22.

Step 1: Determine which statements apply to the circumstances of the offense. MCL 777.32(1).

Step 2: Review special scoring provision in MCL 777.32(2) then assign the point value indicated by the applicable statement having the highest number of points. MCL 777.32(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.32 does not specifically authorize the court to consider facts outside the sentencing offense

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Multiple Offender Provision

The instructions for scoring OV 2 include specific directions in cases involving multiple offenders.[39] For OV 2, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same number of points. MCL 777.32(2).

Two conditions must be satisfied before the multiple offender provision is triggered: (1) the case must be a multiple offender case, and (2) one offender must be assessed points for possessing a weapon. *People v Dupree*, 511 Mich 1, 7 (2023). Accordingly, even where there is no dispute that multiple offenders were involved in a crime and a weapon was possessed and/or used, if the defendant being sentenced did not possess and/or use a weapon during the offense, and "no other offender was assessed points" under OV 1, then OV 1 must be "scored at zero points." *Id.* at 4. In *Dupree*, three men robbed a store, only one man was armed during the robbery, and only defendant was arrested, charged, and convicted of the robbery. *Id.* at 4-5. "There is no evidence that defendant was the offender who wielded the gun in this robbery." *Id.* at 6. Under these facts, "the second condition, requiring another offender to have been assessed points for possessing a weapon, was not satisfied." *Id.* at 7. "Since defendant was the only person arrested, convicted, and assessed points under OVs 1 and 2, points could only be assessed under OVs 1 and 2 if he had possessed and/or used the weapon *himself*." *Id*.

Further, the multiple offender provision applies only when the offenders are being scored for the same offense. *People v Johnston*, 478 Mich 903, 904 (2007).[40] The multiple offender provision does not require that the court assess an offender the same number of points as other offenders involved in the same

[39] OVs 1 and 3 have similar multiple offender provisions.

criminal episode if the offender was the only person convicted of the specific crime being scored. *Id.* at 904. In other words, when criminal conduct involves more than one offender but only one offender is convicted of a specific crime arising from the conduct, that particular crime does not involve multiple offenders for purposes of scoring OV 2.

For a discussion of cases applying the multiple offender provisions, see Section 2.13(B)(2).

3. Inoperable Weapons

The definition of *firearm* in MCL 750.222(e) "does not prescribe a requirement that the weapon be 'operable' or 'reasonably or readily repairable.'" *People v Peals*, 476 Mich 636, 638 (2006). "[T]he design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a 'firearm.'" *Id.* (construing the definition of *firearm* to determine whether the defendant was guilty of being a felon in possession of firearm and of possession of a firearm during the commission of a felony). See also *People v Humphrey*, 312 Mich App 309, 318 (2015) (holding that "the operability of a firearm is not relevant to firearms offenses under Chapter XXXVII of the Michigan Penal Code, and the inoperability of a pistol is [not] a valid affirmative defense to a [carrying a concealed weapon (CCW)] charge").

4. Harmful Substances

For purposes of scoring OV 2, harmful chemical substance does *not* include heated cooking oil because, under MCL 750.200h(i), cooking oil is not a substance that "possess[es] an inherent or intrinsic ability or capacity to cause death, illness, injury, or disease" as required by the term *harmful*. *People v Blunt*, 282 Mich App 81, 86, 89 (2009) (holding that the court improperly scored points for OV 1 where the defendant threw hot oil at the victim's face). Any substance that is innocuous in its unaltered state is not a harmful substance under MCL 777.31(1)(b). *Blunt*, 282 Mich App at 88.

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[40] However, see *People v Jackson*, 320 Mich App 514, 523-527 (2017), rev'd in part on other grounds 504 Mich 929 (2019), which applied the multiple-offender provisions of OV 1 and OV 2 to the defendant—who was convicted of *unarmed* robbery—based on the scores for those variables previously assessed against his codefendant, who was convicted of *armed* robbery. The *Jackson* Court did not, however, specifically address the fact that the defendant and codefendant were not convicted of the same offense. For more information on the precedential value of an opinion with negative subsequent history, see our note. Further, note that in *People v Beck*, 504 Mich 605, 629 (2019), the Court specifically held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." See Section 2.13(E).

Pepper spray satisfies the definition of "harmful chemical substance" for purposes of scoring OV 2 because it causes an injury; specifically, pepper spray is designed to "incapacitate a person with intense pain and involuntary physiological reactions." *People v Savage*, 327 Mich App 604, 624 (2019). Further, although "pepper spray is designed to inflict temporary injury," this "does [not] mean that the Legislature intended to exclude the spray from the category of harmful chemical substances," because "a temporary injury is still an injury[.]" *Id.* at 624, 627, 634 (noting that OV 1 and OV 2 both refer to a "harmful chemical substance" and use the same definition for the term).

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

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

5. Use of Bare Hands as a Weapon

"[A]n offender's bare hands cannot be treated as weapons under OV 1 because, unlike a gun or a knife, hands are not an article distinct from the particular offender." *People v Hutcheson*, 308 Mich App 10, 14-16 (2014) (holding that points may not be assessed under OV 1 or OV 2 where "defendant used only his bare hands, and no distinct weapon, to assault the victim").

6. Unconventional Weapons

One point was properly assessed under OV 2 where the evidence supported the conclusion that the defendant "possessed and used a tire iron during the robbery" because "a tire iron is a potentially dangerous weapon." *People v Rodriguez*, 327 Mich App 573, 577 (2019) (quotation marks and citation omitted).

7. Sufficient Evidence to Score OV 2

Five points were appropriately scored under OV 2 where, even though the defendant was acquitted of armed robbery, trial testimony and the defendant's PSIR indicated that the defendant brandished a gun during the robbery and pointed it at a victim's face. *People v Harverson*, 291 Mich App 171, 182-183 (2010). But see *People v Beck*, 504 Mich 605, 629 (2019) (holding "that due process bars sentencing courts from finding by a preponderance of the evidence that defendant engaged in conduct of which he was acquitted"). See Section 2.13(E).

The trial court did not err by assessing five points under OV 2 where a preponderance of the evidence showed that the defendant possessed a box cutter during the commission of the sentencing offenses—prisoner taking a hostage and kidnapping. *People v Montague*, 338 Mich App 29, 52, 53 (2021) (the evidence included the victim's testimony that defendant grabbed a box cutter and continually gestured at her while holding the box cutter, a physical box cutter that was found on the ground near a vehicle defendant entered, and testing that showed the defendant's DNA matched DNA found on the box cutter). The fact that the jury acquitted defendant of armed robbery and felonious assault precluded the scoring of OV 1 (aggravated use of a weapon); however, those acquittals did not preclude the finding that "defendant possessed the box cutter when he committed prisoner taking a hostage and kidnapping." *Id.* at 54.

2.16 OV 3—Physical Injury to a Victim

Points	General Scoring Provisions for OV 3
100	A victim was killed. MCL 777.33(1)(a). **Score 100 points if** death results from the commission of the offense *and* homicide is not the sentencing offense. MCL 777.33(2)(b).

50	A victim was killed. MCL 777.33(1)(b).
	(35 points for offenses committed before September 30, 2003. 2003 PA 134.)
	
	Score 50 points if:
	• Death results from an offense or attempted offense that involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and any of the following apply:
	  • the offender was under the influence of or visibly impaired by the use of alcohol, a controlled substance, or a combination of alcohol and a controlled substance, MCL 777.33(2)(c)(*i*);
	  • the offender had an alcohol content of 0.08 grams[1] or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, MCL 777.33(2)(c)(*ii*); OR
	  • The offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212 or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(*iv*), MCL 777.33(2)(c)(*iii*).

25	Life threatening or permanent incapacitating injury occurred to a victim. MCL 777.33(1)(c).
10	Bodily injury requiring medical treatment occurred to a victim. MCL 777.33(1)(d).
5	Bodily injury not requiring medical treatment occurred to a victim. MCL 777.33(1)(e).
0	No physical injury occurred to a victim. MCL 777.33(1)(f).
Instructions	**Special Scoring Provisions for OV 3**
Assign same number of points	Multiple offenders and one offender is assigned points for death or physical injury. MCL 777.33(2)(a).
Do NOT score 5 points	Bodily injury is an element of the sentencing offense. MCL 777.33(2)(d).

1. Beginning 5 years after the state treasurer publishes a certification under MCL 257.625(28) stating that the state no longer receives annual federal highway construction funding conditioned on compliance with a national blood alcohol limit, the alcohol content level increases to 0.10 grams or more.

A. Scoring

OV 3 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22.

Step 1: Determine which statements addressed by the variable apply to the offense. MCL 777.33(1).

Step 2: Assign the point value indicated by the applicable statement with the highest number of points. MCL 777.33(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

OV 3 is offense-specific; accordingly, only the sentencing offense may be considered when scoring OV 3. See *People v Mushatt*, 486 Mich 934, 934 (2010), citing *McGraw*, 484 Mich at 133. In *Mushatt*, 486 Mich at 934, the Court vacated the sentence because the prosecutor conceded that OV 3 was improperly scored at 5 points where although an individual was bruised after being hit by the defendant's car, the defendant was acquitted of the related felonious assault charge, and the individual's injury did not arise from the criminal actions that were the subject of the defendant's convictions (fleeing and eluding and larceny). See *People v Mushatt*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2009 (Docket No. 283954) (providing the factual basis of the case).

Where the "defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim], and . . . [his] codefendant . . . was convicted by plea of the crimes for which defendant was acquitted," the trial court erred in assessing 100 points for OV 3; "looking solely at defendant's conduct," it could not be concluded that the victim's death "resulted from or was factually caused by defendant's commission of the offense of felon-in-possession[.]" *People v Biddles*, 316 Mich App 148, 164-165 (2016).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Evidence Required to Score OV 3

If "a preponderance of the evidence supports the trial court's . . . score," the trial court is not required to independently verify disputed information contained in the presentence investigation report (PSIR) or conduct an evidentiary hearing. *People v Maben*, 313 Mich App 545, 550-552 (2015) (where the defendant disputed that the victim "actually

went to the hospital," contrary to the victim's impact statement in the PSIR, "the trial court [did not err] by scoring 10 points for OV 3 without independently verifying the report"; the defendant's "description of the manner in which he strangled [the victim]," together with additional "undisputed information" about the victim's injuries and his statement to officers "that he intended to seek treatment, provided independent support for the trial court's finding").

Points are appropriately scored for OV 3 only where there is record evidence of a victim's injury; a prosecutor's file notes do not constitute record evidence. *People v Endres*, 269 Mich App 414, 417-418 (2006).[41]

Where the jury convicted the defendant of first-degree child abuse and second-degree murder for the death of her newborn infant, 25 points should have been scored for OV 3, irrespective of the existence of "conflicting evidence surrounding the baby's manner of death[.]" *People v Portellos*, 298 Mich App 431, 434, 446-448 (2012), overruled in part on other grounds by *People v Calloway*, 500 Mich 180 (2017).[42] "[N]othing in the language of OV 3 addresses how the injury that killed the victim occurred," and the court must assess 25 points "if a life-threatening or permanent incapacitating injury occurred to a victim." *Portellos*, 298 Mich App at 447-448 (holding that, in determining the number of points to assess under OV 3 when the sentencing offense is a homicide, a court must consider "whether, but for the defendant's conduct, the victim's death would have occurred").

Where the defendant was convicted of first-degree child abuse for causing a brain injury, retinal hemorrhage, and tibia fracture, the trial court clearly erred by finding the defendant's actions caused permanent incapacitating injury to the victim because there was no expert testimony about the long-term effects of the brain injury and the expert testified that even if the victim had neurological problems it would be difficult to determine whether they were caused by the brain injury inflicted by the defendant or an unrelated prenatal stroke, and the expert further opined that there would be no long-term

[41]Note that in *People v Hardy*, 494 Mich 430, 438 n 18 (2013), the Court acknowledged that "[s]everal recent Court of Appeals decisions," including *Endres*, 269 Mich App 414, "have stated that '[s]coring decisions for which there is any evidence in support will be upheld,'" and explicitly noted that "[t]his statement is incorrect." *Hardy* explained that "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for purposes of assessing points under the sentencing guidelines." *Hardy*, 494 Mich at 438 n 18.

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

effects from the fracture or retinal hemorrhage. *People v McFarlane*, 325 Mich App 507, 532-533 (2018) (holding that despite the clear error regarding permanent incapacitating injury, there was sufficient evidence that the injuries were life-threatening).

"[T]he evidence did not support a 25-point assessment for a life-threatening injury," and "OV 3 should have been scored at 10 points for bodily injury requiring medical treatment" where "[t]he medical records [did] not indicate that [the victim's] injuries were potentially fatal," the doctor did not testify that the injuries were potentially fatal, and while the victim was hospitalized for more than a month, "no heroic measures were needed, and there [was] no suggestion in the records that [the victim's] life was ever in danger." *People v Chaney*, 327 Mich App 586, 589-590 (2019). In order to assess 25 points for OV 3, there must be "some evidence indicating that the injuries were, in normal course, potentially fatal," and "[i]n the absence of evidence suggesting that [the victim's] life was placed at risk or more general evidence establishing that the injury suffered is by nature a life-threatening injury," the 25 point assessment was clearly erroneous. *Id.* at 591.

3. Meaning of *Victim*

For purposes of scoring OV 3, "the term 'victim' includes any person harmed by the criminal actions of the charged party." *People v Albers*, 258 Mich App 578, 593 (2003). In *Albers*, the defendant was convicted of involuntary manslaughter for the death of a child killed in an apartment complex fire caused by the defendant's son. *Id.* at 580. The defendant argued that OV 3 was improperly scored for injury to an individual other than the child who died as a result of the fire and for whose death the defendant was convicted. *Id*. at 591. The Court rejected the defendant's argument that MCL 777.33's use of the singular *victim* indicated a legislative "intent that OV 3 apply only to the victim of the charged offense"; the rules of statutory construction clearly provide that every reference to the singular may include reference to the plural. *Albers*, 258 Mich App at 592-593, citing MCL 8.3b.

"[A] coperpetrator is properly considered a 'victim' for purposes of OV 3 when he or she is harmed by the criminal actions of the charged party"; accordingly, where the defendant's coperpetrator was fatally shot by the homeowner during the home invasion for which the defendant was convicted, "[t]he trial court properly assessed 100 points for OV 3 because the coperpetrator was harmed by the criminal

actions of defendant." *People v Laidler*, 491 Mich 339, 341-342 (2012). Noting that "[b]ecause OV 3 is defined as 'physical injury to a victim,' it is manifest that a 'victim' is required in all cases in which OV 3 is scored"; but because "MCL 777.33 does not define 'victim,'" the *Laidler* Court concluded that, for purposes of OV 3, "a 'victim' is any person who is harmed by the defendant's criminal actions," including a coperpetrator whose injury is factually caused by the defendant's criminal actions. *Laidler,* 491 Mich at 343, 345-349. "But for defendant's commission of the [home invasion], [his coperpetrator] would not have been killed"; "[b]ecause [the coperpetrator] was killed as a result of the home invasion perpetrated jointly with defendant, he was clearly 'harmed by the criminal actions' of defendant . . . [and, t]herefore, he was a 'victim' for purposes of OV 3." *Id*. at 350.

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

4. Multiple Offender Provision

The instructions for scoring OV 3 include specific directions in cases involving multiple offenders.[43] MCL 777.33(2)(a). For OV 3, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same number of points. MCL 777.33(2)(a). However, the multiple offender provision applies only when the offenders are being scored for the same offense. *People v Johnston*, 478 Mich 903, 904 (2007).[44] The multiple offender provision does not require that the court assess an offender the same number of points as other offenders involved in the same criminal episode if the offender was the only person convicted of the specific crime being scored. *Id*. In other words, when more than one offender is involved in the same criminal

[43] OVs 1 and 2 have similar multiple offender provisions.

[44] However, see *People v Jackson*, 320 Mich App 514, 523-527 (2017), rev'd in part on other grounds 504 Mich 929 (2019), which applied the multiple-offender provisions of OV 1 and OV 2 to the defendant—who was convicted of *unarmed* robbery—based on the scores for those variables previously assessed against his codefendant, who was convicted of *armed* robbery. The *Jackson* Court did not, however, specifically address the fact that the defendant and codefendant were not convicted of the same offense. For more information on the precedential value of an opinion with negative subsequent history, see our note. Further, note that in *People v Beck*, 504 Mich, 629 (2019), the Court specifically held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." See Section 2.13(E).

conduct but only one offender is convicted of a specific crime arising from the conduct, that particular crime does not involve multiple offenders for purposes of scoring OV 3. See *id.*

For a discussion of cases applying the multiple offender provisions, see Section 2.13(B)(2).

5. Life Threatening or Permanent Incapacitating Injury Examples

"In scoring OV 3, the focus is not on the defendant's actions; rather, OV 3 assesses whether a *victim's injuries* were life-threatening." *People v Chaney*, 327 Mich App 586, 588 (2019) (quotation marks and citation omitted). Further, the fact that an injury requires "significant and ongoing medical treatment" does not "by itself establish[] a life-threatening injury," rather, "some evidence indicating that the [injury was], in normal course, potentially fatal" is required to support a 25-point assessment for life-threatening injury. *Id.* at 589-591 (holding "the evidence did not support a 25-point assessment for a life-threatening injury and that OV 3 should have been scored at 10 points for bodily injury requiring medical treatment" where "[t]he medical records [did] not indicate that [the victim's] injuries were potentially fatal," the doctor did not testify that the injuries were potentially fatal, and while the victim was hospitalized for more than a month, "no heroic measures were needed, and there [was] no suggestion in the records that [the victim's] life was ever in danger").

The fact that an assault with intent to commit murder "*could* have ended in [the victim's] death had defendant been able to complete [the] intended murderous assault" does not automatically warrant a score of 25 points for OV 3. *People v Rosa*, 322 Mich App 726, 746 (2018) (emphasis added). "OV 3 does not assess whether a *defendant's actions* were life-threatening; rather, OV 3 assesses whether a *victim's injuries* were life-threatening." *Id*. Therefore, where a defendant is convicted of assault with intent to commit murder, the court should score 25 points for OV 3 only if "the victim suffered a life-threatening injury" from the defendant's actions; "[c]onversely, if . . . the victim received only a minor wound that did not place his or her life in danger or permanently incapacitate him or her, OV 3 should not be scored at 25 points." *Id*.

In *Rosa*, 322 Mich App at 731, the defendant was convicted of assault with intent to commit murder and other offenses arising out of an incident in which he strangled the victim with

a belt. After the incident, "[t]here was physical evidence of the strangling, including bruising on [the victim's] neck and broken blood vessels around her eyes. *Id*. The Court of Appeals held that the court properly scored 25 points for OV 3, noting that "the act of strangulation [may not] always [be] enough to score OV 3," but "when the evidence shows that the strangulation was severe enough and continued long enough such that the victim lost consciousness or control over bodily functions—albeit temporarily—it demonstrates that the anoxic injury was severe enough to be life-threatening." *Id*. at 746-747.

The trial court properly scored 25 points under OV 3 for a life-threatening injury where the record showed that the victim "had significant subdural bleeding, repeated seizures, and retinal hemorrhages, and that these injuries were severe enough that the treating physicians at the hospital where she first reported had her airlifted to a larger hospital." *People v McFarlane*, 325 Mich App 507, 533 (2018).

The trial court properly scored 25 points under OV 3 for permanently incapacitating injury where the evidence showed "that two victims of defendant's offense had been severely injured in ways that continued to significantly incapacitate them in their daily lives, and that it was very possible they would never fully recover"; specifically, "one victim will be left with metal plates and pins in her leg, with the attendant risk of future surgeries, while the other will continue to suffer long-term changes to her cognition and memory." *People v Teike*, ___ Mich App ___, ___ (2023) (rejecting the defendant's argument that the trial court erred by assessing 25 points for OV 3 because "the victims *might* make a full recovery").

6. Bodily Injury Examples

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

OV 3 because there [was] no evidence that medical treatment was necessary for her injury") (citations omitted).

The evidence supported a 10-point score where the defendant "acknowledged that he placed his hands around [the victim's] neck and throat and applied pressure such that [the victim] suffered injury," and the victim "defecated during the assault," "reported soreness to his neck and throat," and indicated he "intended to seek treatment[.]" *People v Maben*, 313 Mich App 545, 551-552 (2015).

"In the context of sexual assaults, sexually transmitted infections (STIs) and pregnancy are bodily injuries for the purpose of assessing [OV 3]." *People v Barnes*, 332 Mich App 494, 499 (2020). Further, "the administration of prophylactic medication to prevent pregnancy or disease following a sexual assault is sufficient by itself to require assessment of 10 points for OV 3." *People v Johnson*, 342 Mich App 90, 97-98 (2022).

7. Scoring OV 3 in Homicide Cases

Even where the sentencing offense is homicide, a trial court properly scores 25 points for OV 3 when a defendant causes a physical injury to a victim in the process of killing the victim. *People v Houston*, 473 Mich 399, 402 (2005). Because the guidelines instruct the sentencing court to score the highest number of points applicable, and because 100 points is not an option when the sentencing offense is homicide, the number of points attributable to the next applicable variable statement should be scored. *Id.* at 405-407. The defendant's argument that the court should score zero points wrongly assumed "that only the 'ultimate result' of a defendant's criminal act—here, the death rather than the injury that preceded the death—may be considered in scoring OV 3." *Id*. at 405. The Court explained that while the defendant's gunshot to the victim's head ultimately killed the victim, the defendant's conduct also caused the victim to first suffer a "'[l]ife threatening or permanent incapacitating injury'" for which 25 points were appropriately scored. *Id*. at 402, quoting MCL 777.33(1)(c).

"[T]he defendant's conduct need not be the *sole* cause of the victim's death" for a score under OV 3; rather, in determining the number of points to assess when the sentencing offense is a homicide, a court must consider "whether, but for the defendant's conduct, the victim's death would have occurred." *People v Portellos*, 298 Mich App 431, 448 (2012).[45] Therefore, where the jury convicted the defendant of first-degree child abuse and second-degree murder for the death of her newborn

infant, the court should have scored 25 points for OV 3, irrespective of the existence of "conflicting evidence surrounding the baby's manner of death[.]" *Id.* at 434, 447-448.

8. Determining Whether Death is an Element of the Sentencing Offense

Additional statutory requirements—such as that the driver caused the accident and that another person died as a result of the accident under MCL 257.617(3)—"are elements of the offense because they increase the prescribed range of penalties to which a criminal defendant is exposed," and they "must be presented to and found by the jury." *People v Dumback*, 330 Mich App 631, 642 (2019) (applying the reasoning of *People v McBurrows*, 504 Mich 308, 318-320 (2019) to the subsections in MCL 257.617, which establish different crimes regarding leaving the scene of an accident) (cleaned up). In rejecting the reasoning of previous unpublished decisions that treated "the 'results in the death of another individual' piece of failure to stop at the scene of an accident when at fault and resulting in death offense as a penalty provision rather than an element," the Court also relied on the fact that previous decisions have "determined that similar vehicular crimes involving death are homicides for purposes of OV 3, precluding a score of 100 points,"[46] and a previous Michigan Supreme Court opinion holding that "'the plain language of MCL 257.617(3) contains an element of causation.'" *Dumback*, 330 Mich App at 643, 646-647 (reasoning that if causation is an element, death must also be an element), quoting *People v Feezel*, 486 Mich 184, 193 (2010). Accordingly, "a violation of MCL 257.617(3) is a 'homicide' for purposes of scoring OV 3 under MCL 777.33," and "[t]herefore, a 100-point score for OV 3 is not permitted." *Dumback*, 330 Mich App at 633.

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[45]*Calloway* overruled *People v Portellos*, 298 Mich App 431 (2012), "to the extent it stated or implied" that OV 5 is "limited to situations in which a victim's family member has already sought or received treatment, or expressed an intention to do so[.]" *Calloway*, 500 Mich at 188. Accordingly, this did not affect the Court's analysis of OV 3.

[46]The Court cited *People v Brown*, 265 Mich App 60, 61-62 (2005), rev'd on other grounds 474 Mich 876 (2005). The issue in *Brown* was whether 25 points could be assessed under OV 3 where the sentencing offense was driving with a suspended license causing death in violation of MCL 257.904(4), and the "Court stated without analysis that driving with a suspended license causing death was a 'homicide' offense and therefore 100 points was not permissible." *Dumback*, 330 Mich App at 643. The *Dumback* Court also cited and discussed two unpublished opinions. For more information on the precedential value of an opinion with negative subsequent history, see our note.

9. Scoring OV 3 in Sexual Assault Cases

"In the context of sexual assaults, sexually transmitted infections (STIs) and pregnancy are bodily injuries for the purpose of assessing [OV 3]." *People v Barnes*, 332 Mich App 494, 499 (2020),[47] citing *People v McDonald*, 293 Mich App 292, 298 (2011) (holding the trial court properly assessed 10 points under OV 3 where a rape victim "suffered an infection as a consequence of the rape" because the infection "is sufficient to constitute 'bodily injury requiring medical treatment' within the meaning of OV 3") and *People v Cathey*, 261 Mich App 506, 514-515 (2004) (holding that pregnancy resulting from sexual assault is bodily injury).

The *McDonald* Court defined "bodily injury" in the context of OV 3 as "encompass[ing] anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *McDonald*, 293 Mich App at 298. See also *People v Lampe*, 327 Mich App 104, 113 (2019) (ten points properly assessed for OV 3 where the evidence supported the trial court's factual findings that the victim was hospitalized for injuries to his ears and anus caused by defendant and received medical treatments to prevent him from contracting sexually transmitted diseases).

Further, "the administration of prophylactic medication to prevent pregnancy or disease following a sexual assault is sufficient by itself to require assessment of 10 points for OV 3." *People v Johnson*, 342 Mich App 90, 97-98 (2022) (rejecting the defendant's argument that evidence of physical trauma or injury was required in order to satisfy the bodily injury element of OV 3).

"[T]he trial court properly assessed 10 points for OV 3" where "the victim required medical treatment to prevent pregnancy and disease because of an illegal, unprotected sexual penetration to prevent pregnancy and disease." *Johnson*, 342 Mich App at 98. The fact that "the victim was treated for an unprotected sex act with someone other than defendant" was "immaterial" where the "[d]efendant raped the victim close enough in time to the sex act involving [the other person] that defendant's DNA was still present and found on the forensic specimen," and it was "beyond any conceivable doubt that the victim would have minimally received the exact same

[47]The victim in *Barnes* was transported to the hospital by ambulance, underwent a forensic medical examination, had two injuries (points of tenderness) to her genital area, was prescribed emergency contraception to prevent pregnancy, prophylactic medication to prevent sexually transmitted infections, and instructed to follow up with her doctor for HIV testing. *Barnes*, 332 Mich App at 500.

treatment had defendant's act of raping her been discovered contemporaneously" to the other sex act. *Id.* at 98. "It is only relevant that [the victim] *required* treatment after defendant raped her, not whether she immediately received treatment or was taken for the treatment involuntarily for another effectively contemporaneous sexual encounter." *Id.* at 98.

10. Out-of-Guidelines Sentence[48]

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

11. Claim of *Lockridge* Error

The trial court's assessment of 50 points for OV 3 and 100 points for OV 9 did not violate the defendant's Sixth Amendment right to a jury trial where the "jury . . . found defendant guilty of OUIL causing death, which required the jury to find that defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof," and "two counts each of second-degree murder, . . . reflect[ing] that the jury found beyond a reasonable doubt that multiple deaths occurred"; under these circumstances, "each of the facts necessary to support [the OV scores] was necessarily found by the jury beyond a reasonable doubt." *People v Bergman*, 312 Mich App 471, 498-499 (2015) (noting that where "facts found by the jury [are] sufficient to assess the minimum number of OV points necessary for defendant's placement in the . . . cell of the sentencing grid under which she [is] sentenced, there [is] no plain error and defendant is not entitled to resentencing or other relief [on an unpreserved claim] under [*People v Lockridge*, 498 Mich 358 (2015)]"). See also Section 2.12(B)(4) for a discussion of judicial fact-finding after *Lockridge*.

[48] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." Note that subsequently, MCL 769.34 was amended to omit the substantial and compelling language and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021. Discussion of pre-*Lockridge* caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 1.4 for additional discussion of *Lockridge*.

2.17 OV 4—Psychological Injury to a Victim

Points	General Scoring Provisions for OV 4
10	Serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a). **Score 10 points if** the victim's serious psychological injury *may* require professional treatment. MCL 777.34(2). Whether the victim has sought treatment for the injury is not conclusive. *Id*.
5	For a conviction under MCL 750.50b (killing or torturing animals), serious psychological injury requiring professional treatment occurred to the owner of a companion animal.[1] MCL 777.34(1)(b).
0	No serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(b).

1. This statement was added to MCL 777.34(1) by 2018 PA 652, effective March 28, 2019.

A. Scoring

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

Step 1: Determine which statement applies to the offense. MCL 777.34(1).

Step 2: Review special scoring provision in MCL 777.34(2) then assign the point value indicated by the applicable statement. MCL 777.34(1).

B. Issues

In addition to the following discussion of issues, see the Michigan Judicial Institute's table summarizing OV 4 scoring circumstances caselaw.

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.34 does not specifically authorize the court to consider facts outside the sentencing offense.

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Professional Treatment and Serious Psychological Injury

OV 4 does not require proof that a victim has already sought or received, or intends to seek or receive, professional treatment; rather, the court may score 10 points when the evidence demonstrates that a victim is experiencing "serious psychological issues . . . that could require future professional treatment." *People v Wellman*, 320 Mich App 603, 611 (2017) (extending to OV 4 the reasoning of *People v Calloway*, 500 Mich 180, 186 (2017), which held that OV 5 did not require that a family member "be, at present, seeking or receiving professional treatment or intending to do so"[49]). Accordingly, the trial court did not abuse its discretion in assessing 10 points for OV 4 where the victim "explained that the assault was traumatic for her and that one of the lasting effects on her was how her 'everyday life was harder now'"; was fidgety and nervous while testifying; testified about her memory loss; and digestive issues, which she experienced again the day of her testimony on the way to the courthouse. *Wellman*, 520 Mich App at 611-612 (concluding that, "[g]iven the similarity between the language of MCL 777.34 and MCL 777.35, . . . [t]here [was] no reason to assume that OV 4 and OV 5 should be interpreted differently").

As noted, the reasoning of *Calloway* was extended to OV 4; in *Calloway*, the Court held that the court properly assessed 15 points "even absent proof that a victim's family member has sought or received, or intends to seek or receive, professional treatment." *Calloway*, 500 Mich at 182.[50] Specifically, "OV 5 may also be scored when a victim's family member has suffered a serious psychological injury that may require professional treatment in the future, regardless of whether the victim's family member presently intends to seek treatment." *Id.* Similarly, "the fact that treatment *has* been sought or received will not always be dispositive—for example, when the treatment sought or received is not indicated by the injury." *Id.* at 186-187 n 18.

The *Calloway* Court acknowledged that "this threshold may seem low," but emphasized that the court must find "*serious*

[49]The *Calloway* Court noted that its interpretation of the language in OV 5 was "consistent with published Court of Appeals cases construing OV 4, which contains identical statutory language in pertinent part." *People v Calloway*, 500 Mich 180, 188 n 22 (2017).

[50]*Calloway* overruled *People v Portellos*, 298 Mich App 431 (2012), "to the extent it stated or implied" that OV 5 is "limited to situations in which a victim's family member has already sought or received treatment, or expressed an intention to do so[.]" *Calloway*, 500 Mich at 188.

psychological injury" in order to assess points under OV 5. *Calloway*, 500 Mich at 186 (quotation marks omitted). In the context of MCL 777.35, *serious* "is defined as having important or dangerous possible consequences." *Calloway*, 500 Mich at 186 (quotation marks and citation omitted). "Thus, in scoring OV 5, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received." *Id.* "[E]ven when professional treatment has not yet been sought or received, points are properly assessed for OV 5 when a victim's family member has suffered a serious psychological injury that may require professional treatment in the future." *Id.*

3. Examples of Insufficient Evidence to Score OV 4

"[P]oints for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a 'serious psychological injury' would normally occur as a result of the crime perpetrated against the victim[.]" *People v White*, 501 Mich 160, 162-163 (2017) (holding that the trial court improperly "assessed 10 points on the sole basis of its conclusion that people would *typically* suffer a psychological injury when confronted with [an armed robbery]"). "The trial court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury '*occurred* to a victim.'" *People v Lockett*, 295 Mich App 165, 183 (2012) (because "[t]here was no testimony indicating that [the victim] suffered a psychological injury, the presentence report contain[ed] no information that would indicate any victims suffered psychological harm, and the record [did] not include a victim-impact statement," the trial court erred in assessing 10 points for OV 4 on the ground that the defendant's conduct "'would cause any normal person of [the victim's] age serious psychological injury'").

Further, "evidence of fear while a crime is being committed, *by itself*, is insufficient to assess points for OV 4." *White*, 501 Mich at 162, 164, overruling *People v Apgar*, 264 Mich App 321, 329 (2004), "to the extent it held that a victim's fear during a crime, *by itself and without any other showing of psychological harm*, is sufficient to assess 10 points for OV 4."[51] Although "a victim's fear while a crime is being committed may be highly relevant to determining whether he or she suffered a 'serious psychological injury [that] may require professional treatment' and thus may be considered together with other facts in determining how to score OV 4, . . . *absent other evidence of*

psychological harm, fear felt during the crime is insufficient to assess points for this variable." *White*, 501 Mich at 165 n 3 (first alteration in original).

Accordingly, in *White*, "the trial court erred by assessing 10 points for OV 4" where "the only evidence to support this scoring was the victim's fear while the crime was being committed." *White*, 501 Mich at 162-163 (holding that the defendant's admission during his plea that the victim was afraid that he was going to shoot her was insufficient to sustain the trial court's scoring where "[t]here was no victim impact statement, preliminary examination, or victim statement in evidence at sentencing"). "While crime victims are often obviously, and understandably, frightened when a crime is being perpetrated, this fear does not necessarily result in a 'serious psychological injury,' and . . . a court cannot merely assume that a victim has suffered a 'serious psychological injury' solely because of the characteristics of the crime." *Id*. at 164-165. See also *People v McChester*, 310 Mich App 354, 359 (2015) (holding that the trial court erred by assessing 10 points for OV 4 where "the only information or evidence in the record regarding the victim's psychological state was the [presentence investigation report's] reference to her being 'visibly shaken,'" and there was no "indication from the victim herself regarding her psychological state").

"Because OV 4 does not specifically provide otherwise," the sentencing court is "limited to solely considering the sentencing offense" when scoring OV 4. *People v Biddles*, 316 Mich App 148, 167 (2016), citing *People v McGraw*, 484 Mich 120, 129 (2009). Accordingly, where the "defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim]," the trial court erred by assessing 10 points for OV 4; "[t]he record contain[ed] no evidence that serious psychological injury occurred to a victim as a result of defendant's status as a felon and his being seen carrying a gun after the shooting[.]" *Biddles*, 316 Mich App at 164, 167.[52]

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[51] The Court also cited (without explicitly overruling) other cases that have cited *Apgar*, 264 Mich App 321, "for the proposition that a victim's 'expression of fearfulness' during a crime is sufficient to assess 10 points for OV 4." *White*, 501 Mich at 164, 164 n 2, citing *People v Williams*, 298 Mich App 121, 124 (2012); *People v Earl*, 297 Mich App 104, 109 (2012); *People v Davenport (After Remand)*, 286 Mich App 191, 200 (2009).

[52] See Section 2.12(B)(1) for a general discussion of offense-specific scoring.

4. Examples of Sufficient Evidence to Score OV 4

The trial court properly assessed 10 points for OV 4 where the victim-impact statement showed that the victim "suffered serious psychological injury that has made it much harder for her to live her normal life," and while "there is no evidence that she has sought treatment for the injuries, the trial court could reasonably infer that her psychological injury was serious enough that it requires treatment." *People v Haynes*, 338 Mich App 392, 436-437 (2021) (noting the victim-impact statement indicated "that she had lost confidence in her ability to make her own decisions and lost her trust in others," "she now wakes at night when she hears things and worries that defendant will send someone to hurt her," "she now felt trapped in her home," "has nightmares about her day in court," "suffered from a lot of stress, ate less, and was more nervous and jumpy," and sometimes "would welcome death to ease the suffering that defendant has created in her life") (cleaned up).

The trial court properly assessed 10 points for OV 4 where "the evidence showed that [the victim] experienced a terrifying ordeal, and actually sought professional counseling after" her ex-husband strangled her with a belt in the presence of her child. *People v Rosa*, 322 Mich App 726, 731, 745 (2018) (noting that the victim "testified in detail about the terror she experienced during the lengthy assault and her fear for the fate of her children, which defendant exploited to increase her suffering"; that "[a] social worker and police officer both testified that [the victim] appeared too frightened to speak to them when they had visited the family home"; that the victim stated at sentencing "that she was in counseling and was working through the situation together with her children"; and that the PSIR "stated that [the victim] reported that she and her children were in counseling").

The trial court properly assessed 10 points for OV 4 where the victim's impact statement indicated that her "life has been terrible since the incidents," specifically, "she has a lot of nightmares, problems in her marriage, problems at work, and in just about every other facet of her life," and she intends to seek treatment in the future. *People v Drohan*, 264 Mich App 77, 90 (2004) (quotation marks omitted).[53]

[53]The Michigan Supreme Court's decision in *People v Drohan*, 475 Mich 140 (2006), was abrogated in part on other grounds as recognized by *People v Lockridge*, 498 Mich 358, 378-379 (2015). See Section 1.4 for discussion of *Lockridge*, which held that Michigan's mandatory sentencing guidelines violated the Sixth Amendment and cured the constitutional violation by making the guidelines advisory only.

The trial court properly assessed 10 points for OV 4 where videotaped evidence showed the victims behaving in a manner that indicated both victims had suffered serious psychological injury as a result of the defendant's conduct. *People v Wilkens*, 267 Mich App 728, 740-741 (2005). The *Wilkens* Court stated:

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

The trial court properly assessed 10 points for OV 4 where one victim of an armed robbery "testified that the experience was traumatic and he had bad dreams about it," another victim's statement at sentencing included mention of "what [the defendant] took from us psychologically,'" and a third victim "indicated [in his impact statement] that he did not feel safe in his store." *People v Gibbs*, 299 Mich App 473, 493 (2013).

A "trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247-248 (2014)

(holding that even though the victim "testified that she did not want counseling because she did not want to continue to talk about her experience," points were properly assessed under OV 4 because the victim's "statements about the way the sexual assault affected her life showed that she suffered a psychological injury[that] . . . may require treatment in the future").

The trial court properly assessed 10 points for OV 4 where one victim was in counseling for posttraumatic stress disorder and testified that "he was experiencing problems with increased anger and memory," and another victim testified that "he had also consulted a therapist." *People v Bosca*, 310 Mich App 1, 51 (2015), rev'd in part on other grounds 509 Mich 851 (2022).[54]

The trial court properly assessed 10 points for OV 4 for the defendant's uttering and publishing convictions where the victim "indicated in a letter discussed in the trial court that the past three years [had] been a struggle for him psychologically," and "[t]he trial court had the opportunity to observe [the victim's] demeanor during trial, and it noted how . . . when defendant committed the crimes, everything changed for [the victim]." *People v Schrauben*, 314 Mich App 181, 196-198 (2016), overruled in part on other grounds by *People v Posey*, 512 Mich 317, 326 (2023)[55] (quotation marks omitted).

The trial court properly assessed 10 points for OV 4 where the victim feared she would die while she was confined and assaulted by her boyfriend, testimony at trial indicated that "she wanted to look at pictures of her children as she died," the trial court's observation of the victim during trial, the victim impact statement which "indicated that [the victim] had been seeing a therapist through a domestic violence shelter because she was feeling unlovable and disgusting because of the abuse she had endured," and the victim's indication that she experienced "nightmares and flashbacks to the day 'he decided to take [her] life,' and a daily struggle with emotional stability as a result of the trauma." *People v Urban*, 321 Mich App 198, 215-216 (2017), aff'd in part, vacated in part on other grounds 504 Mich 950 (2019).[56]

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

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The trial court properly assessed 10 points for OV 4 where the victim and the victim's father provided victim impact statements that "reported a change in [the victim's] personality; he became angry, afraid, distrustful, defensive, and hypervigilant"; further, the victim "was so fearful as a result of the attack that he slept with a knife under his bed for a period," and "suffered flashbacks and panic attacks when reminded of the assault by sights, sounds, or even smells." *People v Lampe*, 327 Mich App 104, 114-115 (2019). Additionally, the victim "was in counseling for 1 1/2 years, attending therapy as often as twice a week," and "at the time of resentencing, more than three years after the assault, [he] still suffered the psychological effects of defendant's conduct." *Id.* at 114.

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

Points	General Scoring Provisions for OV 5
15	Serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(a). **Score 15 points if** the victim's family member's serious psychological injury *may* require professional treatment. MCL 777.35(2). Whether the victim has sought treatment for the injury is not conclusive. *Id*.
0	No serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(b).

A. Scoring

OV 5 is scored only under very specific circumstances involving a crime against a person. See MCL 777.22.

Step 1: Determine whether the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22.

Step 2: Review the special scoring provision in MCL 777.35(2) and assign the point value indicated by the statement that applies to the sentencing offense. MCL 777.35(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.35 does not specifically authorize the court to consider facts outside the sentencing offense.

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Professional Treatment and *Serious* Psychological Injury

"[Fifteen] points may be assessed for OV 5 even absent proof that a victim's family member has sought or received, or intends to seek or receive, professional treatment." *People v Calloway*, 500 Mich 180, 182 (2017).[57] Specifically, "OV 5 may also be scored when a victim's family member has suffered a serious psychological injury that may require professional treatment in the future, regardless of whether the victim's family member presently intends to seek treatment." *Id.* See also *People v Baskerville*, 333 Mich App 276, 293 (2020) (rejecting defendant's argument that points should not be assessed because there was no evidence that treatment was sought or intended to be sought, holding that "[t]he nature and descriptions of the psychological effects of [the victim's] death on his family members were sufficient to establish that even if professional treatment had not yet been sought, it may be necessary in the future"). Similarly, "the fact that treatment *has* been sought or received will not always be dispositive—for example, when the treatment sought or received is not indicated by the injury." *Calloway*, 500 Mich at 186-187 n 18.[58]

The *Calloway* Court acknowledged that "this threshold may seem low," but emphasized that the court must find "*serious* psychological injury" in order to assess points under OV 5. *Calloway*, 500 Mich at 186 (quotation marks omitted). In the context of MCL 777.35, *serious* "is defined as having important

[57] *Calloway* overruled *People v Portellos*, 298 Mich App 431 (2012), "to the extent it stated or implied" that OV 5 is "limited to situations in which a victim's family member has already sought or received treatment, or expressed an intention to do so[.]" *Calloway*, 500 Mich at 188.

[58] The *Calloway* Court noted that its interpretation of the language in OV 5 was "consistent with published Court of Appeals cases construing OV 4, which contains identical statutory language in pertinent part." *Calloway*, 500 Mich at 188 n 22. See also *People v Wellman*, 320 Mich App 603, 609 (2017) (extending to OV 4 the reasoning of *Calloway*, 500 Mich 180). See Section 2.16(B)(2) for discussion of OV 4 and *Wellman*, 320 Mich App 603.

or dangerous possible consequences." *Calloway*, 500 Mich at 186 (quotation marks and citation omitted). "Thus, in scoring OV 5, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received." *Id.* "[E]ven when professional treatment has not yet been sought or received, points are properly assessed for OV 5 when a victim's family member has suffered a serious psychological injury that may require professional treatment in the future." *Id.*

The evidence was not sufficient to assess 15 points under OV 5 where the victim's wife's statements expressed grief, but "there was no evidence presented to show that she experienced the type of serious psychological trauma contemplated in MCL 777.35." *People v Bailey*, 330 Mich App 41, 62 (2019) (the victim impact statements indicated the victim forgave defendant, believed he should receive a life sentence, detailed the length of her and the victim's relationship, and discussed the victim's significance as a husband, son, brother, grandfather, and great grandfather).

3. Meaning of *Family*

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

4. Examples of Sufficient Evidence to Score OV 5

There was a rational basis to assess 15 points under OV 5 where the murder victim's sister's impact statement expressed "her anger, grief, and despair," that her life was now "unfamiliar," that she takes medication to sleep, has nightmares, is less sociable and lively, has lost productivity at work, is frequently depressed and sad, wakes in the night, begins each day with "pain," has a physical response when near the location of the murder, that her family is suffering,

and one child is now "withdrawn and sad." *People v Baskerville*, 333 Mich App 276, 292-294 (2020).

The trial court properly scored OV 5 where the murder victim's stepfather stated in the presentence investigation report and at sentencing that he was experiencing pain and had thought about the murder every day; that "the victim's mother '[was] having a very hard time dealing with this situation'"; that the murder "'had a tremendous, traumatic effect' on him and his family'" and would "'change them for the rest of their lives'"; and that the 24-year-old victim had a baby who would never see her father. *People v Calloway*, 500 Mich 180, 188-189 (2017). The Michigan Supreme Court held that, based on the stepfather's statements, "the trial court correctly concluded that two members of the victim's family suffered serious psychological injuries that may require professional treatment in the future," and that "[t]here was ample evidence of the seriousness of the injuries and their long-lasting effects to support the trial court's decision to assess 15 points for OV 5." *Id*. at 189.

"[T]he trial court properly assessed 15 points for OV 5" where testimony established that the victim's parents "were present in their home when the crime occurred, and that they found their son with his throat slashed by someone whom they believed to be their son's close friend[.]" *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 39 (2015) (additionally noting that "[t]he trial court's opportunity to observe the demeanor of [the victim's] parents during their testimony also supported the trial court's finding that [they] sustained psychological injury," and the victim "testified at the sentencing hearing that his parents were 'deeply affected' by the incident and [were] in the process of seeking psychological help"), aff'd in part and rev'd in part on other grounds 500 Mich 453, 459-461 (2017).[59]

5. Examples of Insufficient Evidence to Score OV 5

"[T]he phrase "serious psychological injury" in MCL 777.34 and MCL 777.35 should be given the same meaning." *People v Jaber*, ___ Mich ___, ___ n 1 (2023). Accordingly, the analysis of OV 4 in *People v White*, 501 Mich 160, 162-163 (2017) extends to OV 5. *Jaber*, ___ Mich at ___ n 1. In *White*, the Court held that "points for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a 'serious psychological injury' would normally occur as a result of the crime perpetrated

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

against the victim[.]" *People v White*, 501 Mich 160, 162-163 (2017) (holding that the trial court improperly "assessed 10 points on the sole basis of its conclusion that people would *typically* suffer a psychological injury when confronted with [an armed robbery]").

"The evidence presented was insufficient to support the trial court's decision to score OV 5 at 15 points" where the trial court's primary justification for scoring OV 5 was its conclusion that the experience had to be psychologically damaging for the family, and its inference that the victim's mother did not speak at the sentencing hearing because she was in "pain." *Jaber*, ___ Mich at ___, ___ n 2 (holding OV 5 may not be scored solely based on the conclusion that serious psychology injury would normally occur and "psychological injury cannot be inferred from the fact that the victim's mother did not speak at sentencing, as the record is silent as to why she did not speak").

2.19 OV 6—Intent to Kill or Injure Another Individual

Points	General Scoring Provisions for OV 6
50	The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, first-degree criminal sexual conduct third-degree criminal sexual conduct, first-degree child abuse, a major controlled substance offense, robbery, breaking and entering of a dwelling, first-degree home invasion, second-degree home invasion, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer. MCL 777.36(1)(a).
25	The offender had unpremeditated intent to kill, had the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result. MCL 777.36(1)(b).
10	The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life. MCL 777.36(1)(c). **Score 10 points if** the killing is intentional within the definition of second-degree murder or voluntary manslaughter, but the death took place in a combative situation or in response to the decedent's victimization of the offender. MCL 777.36(2)(b).
0	The offender had no intent to kill or injure. MCL 777.36(1)(d).

Instructions	Special Scoring Provisions
Score must be consistent with jury's verdict	UNLESS the sentencing court has information that was not presented to the jury. MCL 777.36(2)(a). See Section 2.18(B)(3) for caselaw discussing this requirement.

A. Scoring

OV 6 is scored only under very specific circumstances involving a crime against a person. See MCL 777.22.

Step 1: Determine whether the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22.

Step 2: Determine which statements apply to the sentencing offense. MCL 777.36(1).

Step 3: Review the special scoring provisions in MCL 777.36(2) then assign the point value indicated by the applicable statement having the highest number of points. MCL 777.36(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.36 does not specifically authorize the court to consider facts outside the sentencing offense.

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Premeditation

In *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 39-41 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453, 459-461 (2017),[60] the Court of Appeals rejected the defendant's contention that there was insufficient evidence of premeditation to support a 50-point score for OV 6. The Court explained:

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

> "Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. . . . [P]remeditation and deliberation characterize a thought process undisturbed by hot blood. Nonexclusive factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. Additionally, [p]remeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation." *Steanhouse I*, 313 Mich App at 40-41 (alterations in original, quotation marks and citations omitted).

There was support for the trial court's conclusion that the defendant had a premeditated intent to kill where the victim testified that he went upstairs and "when he returned to the basement, he was struck in the head, apparently without warning, and his throat was slit," and that when he woke up and realized he had been injured "he saw defendant staring at him, '[j]ust wait[ing] for [him] to die,'" and making "no effort to assist [him]." *Steanhouse I*, 313 Mich App at 41 (first three alterations in original). Further, "[t]here was no evidence of an altercation or argument between defendant and [the victim] immediately before the assault to indicate that the attack was provoked or instigated by hot blood." *Id.* Accordingly, the circumstances permitted a reasonable inference "that defendant planned the attack before it occurred and was lying in wait to attack [the victim] when he returned to the basement, which justifies an assessment of 50 points under OV 6[.]" *Id.* (citation omitted).

For a detailed discussion of the evidence required to establish premeditation and deliberation, see *People v Oros*, 502 Mich 229, 240-244 (2018) (discussing sufficiency of the evidence in the context of first-degree murder).

3. Killing Committed in the Course of Enumerated Offense or Murder of Officer

The trial court properly scored 50 points under OV 6 when "a killing was committed in the course of an enumerated felony," or "when 'the killing was the murder of a peace officer,'" irrespective of whether the offender had the premeditated intent to kill. *People v Bowling*, 299 Mich App 552, 561-562 (2013) (the plain language of MCL 777.36(1)(a) provides that "the scoring of 50 points is appropriate when the offender has the premeditated intent to kill *or* the killing was committed in the course of the commission of one of the enumerated offenses," and the murder of a peace officer is an enumerated offense; accordingly, because the record supported the conclusion that a police officer was killed during a home invasion in which the defendant participated, 50 points were appropriately scored). But see *People v Beck*, 504 Mich 605, 629 (2019) (holding "that due process bars sentencing courts from finding by a preponderance of the evidence that defendant engaged in conduct of which he was acquitted"). See Section 2.13(E).

4. Directive to Score Consistent With Jury Verdict

OV 6 must be scored "consistent with a jury verdict unless the judge has information that was not presented to the jury," MCL 777.36(2)(a); accordingly, "a sentencing court may be constrained under the guidelines from scoring OV 6 as high as it otherwise would have." *People v Dixon-Bey*, 321 Mich App 490, 527 (2017). In *Dixon-Bey*, the trial court sentenced the defendant—who was charged with first-degree murder but convicted of second-degree murder—to a minimum of 35 years in prison, an upward departure from the advisory guidelines range. *Id.* at 522, 528. The trial court based its departure, in part, on its conclusion that the defendant "brutally murdered [the victim] in cold blood." *Id.* at 522-523. The Court held "that the trial court's sentence was not reasonably proportionate to the crime and the offender" because the trial court failed to adequately explain why the imposed sentence was more proportionate than a different sentence within the guidelines range and the offense factors discussed by the trial court in support of its sentence "were contemplated by at least one offense variable[.]" *Id.* at 520, 525-526. Regarding OV 6, the Court explained that a trial court may not "sentence a defendant convicted of second-degree murder as though the murder were premeditated." *Id*. at 528 (noting that "[t]here [was] no indication on the record that the trial court had any information that was not presented to the jury,

yet it nonetheless concluded that defendant acted with premeditation"). Furthermore, because assessing 50 points for OV 6 to reflect premeditated intent would have resulted in an unchanged minimum sentence range, it "would not have supported a conclusion that a departure sentence was more proportionate." *Id*. at 528-529.

"The plain language of MCL 777.36(2)(a) permits the sentencing court to consider information that was not presented to the jury, but nothing in the statutory language suggests that the court should take into account information that is not relevant to the variable in question." *People v Anderson*, 322 Mich App 622, 635-636 (2018). In *Anderson*, the defendant was convicted of assault with intent to murder for firing his gun at two men who were attempting to execute a vehicle-repossession order. *Id.* at 625-627. The Court rejected the defendant's argument that although "the trial court's assessment of 25 points was consistent with the jury's verdict," OV 6 should have been scored on the basis of information that was known to the judge but not presented to the jury—i.e., that the defendant was 70 years old, had no prior record, and was living a productive and law-abiding life, and that the offense was completely out of character. *Id*. at 635. The information the defendant cited was "irrelevant to the scoring of OV 6, because [his] age, health, family status, and lack of a criminal record [had] no bearing whatsoever on [his] intent at the time he decided to open fire on [the victims]." *Id*. at 636.

5. Death Resulting From Delivery of Controlled Substance

"OV 6 should be assigned 25 points only where there is a very high risk of death, meaning more than the risk attendant to other deliveries, or that the defendant had particularized knowledge that this delivery was more probably than not going to lead to great bodily harm or death." *People v Berridge*, 507 Mich 890, 890 (2021).

2.20 OV 7—Aggravated Physical Abuse[61]

Points	General Scoring Provisions for OV 7
50	A victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(a).
0	No victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(b).

A. Scoring

OV 7 is scored for crimes against a person only. MCL 777.22.

Step 1: Determine which statement applies to the offense. MCL 777.37(1).

Step 2: "Count each person who was placed in danger of injury or loss of life as a victim," MCL 777.37(2), then assign the number of points indicated by the applicable statement. MCL 777.37(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

Because OV 7 "does not specifically provide that a sentencing court may look outside the sentencing offense to past criminal conduct in scoring OV 7," the sentencing court is permitted to consider only "conduct that occurred during the [sentencing] offense . . . for purposes of scoring OV 7." *People v Thompson*, 314 Mich App 703, 711 (2016). Accordingly, the trial court improperly assessed 50 points for OV 7 "in light of conduct engaged in by defendant throughout the two-year course of the sexual abuse[against the victim], instead of confining its examination to conduct occurring during the sexual assault [forming the basis of the defendant's no-contest plea], which

[61] Effective April 22, 2002, 2002 PA 137 deleted "terrorism" from OV 7's list of behaviors meriting points. Although terrorism was eliminated from consideration under OV 7, the conduct previously defined as terrorism remains in OV 7's statutory language as "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "Terrorism" is now addressed by OV 20, MCL 777.49a. See Section 2.33.

was the only criminal offense" of which the defendant was convicted under his plea bargain. *Id*. at 711-712.

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. 2016 Amendment

The former version of MCL 777.37(1)(a), which was in effect from April 2002[62] until January 2016, required a 50-point score if "[a] victim was treated with sadism, torture, *or* excessive brutality *or c*onduct designed to substantially increase the fear and anxiety a victim suffered during the offense." (Emphasis added.) Effective January 5, 2016, 2015 PA 137 amended MCL 777.37(1)(a) to require a 50-point score if "[a] victim was treated with sadism, torture, excessive brutality, or *similarly egregious* conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." (Emphasis added.)

The 2016 amendment was prompted by *People v Hardy*, 494 Mich 430, 439-443 (2013),[63] in which the Michigan Supreme Court construed the former version of MCL 777.37(1)(a) as establishing four separate categories of scorable conduct—"sadism, torture, or excessive brutality, . . . [or] 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense'"—and further concluded that conduct under the "fourth category" did "not have to be 'similarly egregious' to 'sadism, torture, or excessive brutality[.]'" Justice Cavanagh dissented on this point and would have held that "the amendatory history of OV 7 evidence[d] a legislative intent that the 'conduct designed' category include only conduct that is of the same class as the other three categories of conduct listed in OV 7." *Hardy*, 494 Mich at 458 (CAVANAGH, J., concurring in part and dissenting in part). Justice McCormack concurred in the majority opinion, but "[wrote] separately to encourage the Legislature to amend [OV 7] to define, or more clearly articulate its intent in including, the language 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.'" *Id*. at 448 (MCCORMACK, J., concurring), quoting former MCL 777.37(1).

The legislative analysis attached to 2015 PA 137 explains that the amendment clarifies the Legislature's intent that the "conduct designed" category must be similarly egregious to

[62] See 2002 PA 137, effective April 22, 2002.

[63] See the House Legislative Analysis, HB 4463 (April 30, 2015).

sadism, torture, or excessive brutality. House Legislative Analysis, HB 4463 (April 30, 2015), p 2. Accordingly, 2015 PA 137 effectively superseded the majority's construction of OV 7 in *Hardy*, 494 Mich 430.[64]

3. Four Discrete Alternatives Support an OV 7 Score

"[T]he 'similarly egregious conduct' clause is a discrete alternative to conduct that does constitute sadism, torture, or excessive brutality." *People v Walker*, 330 Mich App 378, 389 (2019). Stated differently, OV 7 must be scored "[i]f the case involves conduct consisting of one or more of the categories of sadism, torture, or excessive brutality," and "[i]f the case does not involve one or more of the categories of sadism, torture, or excessive brutality, then the sentencing court must determine whether the case involves 'similarly egregious conduct' to at least one of those categories [(the fourth category of conduct)]." *People v Lydic*, 335 Mich App 486, 496-497 (2021). If the court determines similarly egregious conduct was present, it "also must determine whether the [similarly egregious] conduct significantly increased a victim's fear and anxiety." *Id.* at 497. The fourth category of conduct under OV 7 requires both a finding of similarly egregious conduct *and* a finding that the similarly egregious conduct was intended to increase the victim's fear. *Id.* at 496-497. The requirement that conduct be intended to significantly increase the victim's level of fear is only applicable to the fourth category of similarly egregious conduct; conduct that constitutes sadism, torture, or excessive brutality alone requires assessment of points under OV 7 regardless of whether it significantly increases the victim's fear. *Id.* at 496. See also *Walker*, 330 Mich App at 389 (explaining that "if a defendant treated a victim with excessive brutality, 50 points should be scored under OV 7 even if the defendant did not intend to substantially increase the victim's fear and anxiety").

4. Scoring Limited to Actual Participants

"For OV 7, only the defendant's actual participation should be scored." *People v Hunt*, 290 Mich App 317, 326 (2010). In *Hunt*, the trial court erred in assessing 50 points for OV 7 where, although the "defendant was present and armed during the commission of the crimes . . . he did not himself commit, take

[64]In *People v Rodriguez*, 327 Mich App 573, 579 n 3 (2019), the Court stated that the "amendment essentially put into place the [*People v Glenn*, 295 Mich App 529 (2012)] Court's interpretation of OV 7."

part in, or encourage others to commit acts constituting 'sadism, torture, or excessive brutality[.]'" *Id*. at 325-326.

5. Actual Physical Abuse Not Necessary

Actual physical abuse is not necessary to score a defendant's conduct under OV 7. *People v Mattoon*, 271 Mich App 275, 276, 278 (2006). In *Mattoon*, the defendant was convicted of various crimes related to an episode in which he held his girlfriend at gunpoint for nine hours. *Id.* at 276. No actual physical abuse was involved in the incident. *Id.* Because the trial court concluded that actual physical abuse was required to score a defendant's conduct under OV 7, the court scored the offense variable at zero points. *Id*.

The *Mattoon* Court examined the plain language of MCL 777.37 and concluded that the Legislature did not intend that actual physical abuse be required to support an OV 7 score. *Mattoon*, 271 Mich App at 277-279. According to the Court:

> "While the label of OV 7 is 'aggravated physical abuse,' when the section is read as a whole, it is clear that the Legislature does not require actual physical abuse in order for points to be assessed under this variable. Specifically, subsection 3 defines 'sadism' to mean 'conduct' that, among other things, subjects the victim to extreme or prolonged humiliation. While humiliation may have a physical component, there does not have to be physical abuse in order to produce humiliation. Emotional or psychological abuse can certainly have that effect as well. If the Legislature intended to limit the applicability of OV 7 to cases where there is physical abuse, then instead of defining 'sadism' to be 'conduct' that produces pain or humiliation, it would have said 'physical abuse' that subjects the victim to pain or humiliation." *Mattoon*, 271 Mich App at 277-278.

6. Consciousness of Victim Not Required

The assessment of points under OV 7 does not depend on whether the victim is alive or conscious of the treatment scored by this variable. *People v Kegler*, 268 Mich App 187, 191-192 (2005). "The focus of OV 7 is defendant's conduct and purpose with respect to aggravated physical abuse." *Id.* at 191 (noting that the statute does not require that the victim *experience* the torture, excessive brutality, or conduct designed to increase

fear and anxiety). Although OV 7 also allows for the assessment of points for sadism, the definition of which suggests "the victim's experience as well as the defendant's conduct must be considered," OV 7 is not limited to those criminal episodes where a victim's consciousness is implicitly required. *Id.* at 191 n 14.

7. Sadism

The trial court properly assessed 50 points under OV 7 where the defendant pleaded to assault with intent to do great bodily harm less than murder; the defendant heated cooking oil, knocked on the victim's door, and threw hot cooking oil at the victim's face when he opened the door causing "severe burns of his face, neck, chest, and esophagus that necessitated extensive skin grafting." *People v Blunt*, 282 Mich App 81, 82-83, 89 (2009). Specifically, the Court concluded that the "[d]efendant's conduct subjected the victim to extreme pain and extensive and series injuries," and "[t]he nature and circumstances of the offense support a reasonable inference that defendant attacked the victim for the purpose of producing suffering." *Id.* at 89.

The trial court properly assessed 50 points under OV 7 where the defendant was convicted of unlawful imprisonment, assault with a dangerous weapon, and domestic violence; the record contained "substantial evidence supporting the conclusion that defendant's prolonged behavior was egregious and sadistic," and "appeared to be designed to keep [the victim] captive emotionally as well as physically and went beyond the elements of his crimes." *People v Urban*, 321 Mich App 198, 217 (2017), aff'd in part, vacated in part on other grounds 504 Mich 950 (2019).[65] The defendant "confined [the victim] for 3½ to 4 hours"; "threatened her with guns"; "assaulted her with his hands and feet, a liquor bottle, and a handgun"; choked and kicked her"; "told her she could not leave and that he was going to drink liquor and smoke cigarettes before he killed them both"; "threatened to rape her"; "told her that she should have believed the stories he had told her of bad things he had done to other women"; "struck her while she was in the fetal position and not responsive to him"; "would not allow [her] to stand, pointed the gun at her head when she resisted"; "made her repeatedly load the gun, telling her that he wanted the bullet that killed him to have her fingerprints"; and "forced [her] to put the handgun in her

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

mouth." *Id.* at 217-218. "While [the victim] initially may not have believed defendant's threats, the record [was] clear that by the time she made her escape she was convinced that defendant was serious and that her life was at risk." *Id.* at 217 (noting that "OV 7 is scored on the basis of [a] defendant's conduct and his intent, not whether the victim felt sufficiently threatened").

The trial court properly assessed 50 points under OV 7 where the defendant was convicted of third-degree criminal sexual conduct and went beyond the minimum requirements necessary to sustain that conviction "by verbally abusing [the victim] and subjecting her to extreme and humiliating conduct to make her suffer for his own gratification." *People v Lowrey*, 342 Mich App 99, 121 (2022). Specifically, defendant "forced himself upon her while she was on her menstrual period," and simultaneously engaged in anal and vaginal sex with the victim by "insert[ing] [a] dildo into the victim's anus and his penis into her vagina." *Id.* at 104, 121. Further, "[t]he victim testified that she was scared for her life and believed defendant was going to kill her." *Id.* at 121-122 (holding the trial court did not clearly err by determining defendant's actions constituted sadism).

8. Excessive Brutality

Because brutality must be *excessive*, a trial court may only score 50 points if it finds that the brutality exceeds any brutality that normally encompasses commission of the crime. *People v McFarlane*, 325 Mich App 507, 533 (2018).

The evidence supported the trial court's finding that the victim was subjected to excessive brutality in the commission of first-degree child abuse where it showed that the defendant "had to have violently shaken or thrown [the victim] to cause the subdural hematomas and other injuries." *McFarlane*, 325 Mich App at 534. The Court explained that while first-degree child abuse requires "serious physical harm," and "serious physical harm necessarily includes subdural hemorrhages, a person can commit first-degree child abuse without causing such an injury." *Id.* Accordingly, "[t]he severity of the injuries supported a finding that [the victim] was treated with brutality in excess of that which necessarily accompanies the commission of first-degree child abuse." *Id.*

The trial court properly scored 50 points for OV 7 on the basis of excessive brutality for the defendant's conviction of assault with intent to commit murder where the defendant "attempted

to strangle or suffocate [the victim] three times over the course of the assault"; the defendant told the victim's young child, who was present during the assault, "to say goodbye to [the victim] and that her grandmother would take good care of her"; and "it appear[ed] that defendant intended to rape [the victim] while he was strangling her." *People v Rosa*, 322 Mich App 726, 744 (2018). "Based on this evidence, the trial court properly found, by a preponderance of the evidence, that defendant's conduct was excessively brutal, that it went beyond what was required to complete an assault with the intent to kill [the victim], and that it was designed to substantially increase [the victim's] fear and anxiety." *Id*.[66]

The trial court properly scored 50 points for OV 7 on the basis of excessive brutality exhibited by the defendant during the assault of his wife. *People v Wilson*, 265 Mich App 386, 398 (2005). "The victim's testimony detailed a brutal attack, which took place over several hours, involving being attacked by weapons and being kicked, punched, slapped, and choked numerous times, ending in injuries requiring treatment in a hospital." *Id.*

The trial court properly scored 50 points for OV 7 on the basis of excessive brutality for the defendant's conviction of second-degree murder where "the victim was frail and weak," had "at least eight areas of blunt-force trauma to the head that were caused by multiple blows," the victim's nose was struck and "flattened against his face," the medical examiner's testimony indicated "the victim's injuries were consistent with someone either having smashed the victim's head against the floor or having struck the back of the victim's head as he lay face down on the floor," the victim had "bleeding underneath his scalp and on the surface of his brain," the defendant admitted "he repeatedly struck the victim as he lay face down on the floor either stunned or unconscious," and the defendant's own injuries indicated he "did not simply strike the victim with his fists." *People v Walker*, 330 Mich App 378, 391 (2019).

The trial court properly scored 50 points for OV 7 on the basis of excessive brutality for the defendant's conviction of assault by strangulation where defendant threw the victim to the ground, dragged her a few feet, choked her with a belt, and threatened to kill her because this conduct went beyond the

[66] Although MCL 777.37 was amended by 2015 PA 137, effective January 5, 2016, before the crime was committed, the *Rosa* Court applied the pre-amended version of MCL 777.37 and the caselaw construing that former version of the statute; however, the *Rosa* Court focused on "excessive brutality," which is not the part of MCL 777.37 that was amended by 2015 PA 137. See *People v Rosa*, 322 Mich App 726, 743-744 (2018). See Section 2.10(B)(1) for discussion of 2015 PA 137.

minimum required to commit the sentencing offense, which does not require the use of a weapon or death threats to satisfy its elements. *People v Lydic*, 335 Mich App 486, 498-499 (2021). Accordingly, defendant's "use of the belt . . . satisfie[d] the requirement of excessive brutality[.]" *Id.* at 499.

9. Similarly Egregious Conduct Designed to Increase Victim's Fear and Anxiety

The former version of MCL 777.37(1)(a), which was in effect from April 2002[67] until January 2016, required a 50-point score if "[a] victim was treated with sadism, torture, *or* excessive brutality *or c*onduct designed to substantially increase the fear and anxiety a victim suffered during the offense" (emphasis added). Effective January 5, 2016, 2015 PA 137 amended MCL 777.37(1)(a) to require a 50-point score if "[a] victim was treated with sadism, torture, excessive brutality, or *similarly egregious* conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." (Emphasis added.) The 2016 amendment is discussed in detail in Section 2.10(B)(1).

Prior to the 2016 amendment, the *Hardy* Court, in construing the scorable conduct under former MCL 777.37(1)(a), held that "it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." *People v Hardy*, 494 Mich 430, 440-441 (2013). "[T]he focus is on the intended effect of the conduct,[68] not its actual effect on the victim." *Id*. at 441 n 29. "The relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 443-444.

Post-amendment, in determining whether the defendant treated the victim "with conduct 'similarly egregious' to sadism, torture, or excessive brutality that was 'designed to substantially increase the fear and anxiety a victim suffered during the offense'" the Court still considers "'whether the defendant engaged in conduct beyond the minimum required to commit the offense,' and, if so, 'whether the conduct was

[67] See 2002 PA 137, effective April 22, 2002.

[68] "[A] defendant does not have to verbalize his intentions for a judge to find that the defendant's conduct was designed to elevate a victim's fear or anxiety[; r]ather, a court can infer intent indirectly by examining the circumstantial evidence in the record that was proven by a preponderance of the evidence." *Hardy*, 494 Mich at 440 n 26.

intended to make a victim's fear or anxiety greater by a considerable amount.'" *People v Rodriguez*, 327 Mich App 573, 578-579 (2019), quoting MCL 777.37(1)(a) and *Hardy*, 494 Mich at 443-444.

"Since the 'conduct designed' category only applies when a defendant's conduct was designed to substantially *increase* fear, to assess points for OV 7 under this category, a court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue." *Hardy*, 494 Mich at 442-443 (citation omitted). The *Hardy* Court explained:

> "To make this determination, a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied. Then the court should determine, to the extent practicable, the fear or anxiety associated with the minimum conduct necessary to commit the offense. Finally, the court should closely examine the pertinent record evidence, including how the crime was actually committed by the defendant. . . . [E]vidence which satisfies an element of an offense need not be disregarded solely for that reason. Instead, all relevant evidence should be closely examined to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount." *Hardy*, 494 Mich at 443.

Where the defendant "took the extra step of racking [a] shotgun," which "went beyond the minimum conduct necessary to commit a carjacking," and because a preponderance of the evidence showed that "he did so to make his victim fear that a violent death was imminent, not just possible, the circuit court properly assessed 50 points for OV 7." *Hardy*, 494 Mich at 444-445, 447 (concluding that the defendant Hardy's[69] "conduct of racking a shotgun while pointing it at the victim constituted 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense'") (citation omitted).

[69] In *Hardy*, the Court decided two consolidated cases. *Hardy*, 494 Mich at 434.

Similarly, the trial court properly scored 50 points under former OV 7 where "a preponderance of the evidence established that [defendant] Glenn struck two victims [of an armed robbery] with the butt of what appeared to be a sawed-off shotgun, knocked one victim to the ground, and forced both victims behind a store counter to make them fear imminent, serious injury or death[.]" *Hardy*, 494 Mich at 446-448 (reversing *People v Glenn*, 295 Mich App 529 (2012), and concluding that "[defendant] Glenn's conduct went beyond that necessary to effectuate an armed robbery" and that "he intended for his conduct to increase the fear of his victims by a considerable amount").[70]

The trial court properly scored 50 points under former OV 7 where the evidence established that, in robbing a drugstore, he "did more than simply produce a weapon and demand money." *People v Hornsby*, 251 Mich App 462, 469 (2002).[71] In *Hornsby*, 251 Mich App at 468, the shift supervisor testified that the defendant held her at gunpoint behind the closed door of the manager's office as she transferred money from the store's safe to an envelope. Further testimony established that the defendant threatened to kill her and everybody else in the store, and that at one point, the shift supervisor heard the defendant's gun click as if it was being cocked when someone began turning the doorknob to the room she and the defendant occupied. *Id*. at 468-469. The defendant's repeated threats against the shift supervisor and store customers and his actions in cocking the gun provided sufficient support[72] for the trial court's conclusion that "[the defendant] deliberately engaged in 'conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.'" *Id*. at 469; MCL 777.37(1)(a).

Under the current version of the statute, the Court distinguished *Hornsby* and concluded that the trial court should not have assessed 50 points for OV 7 despite similar factual circumstances because of the statutory amendment. *People v Rodriguez*, 327 Mich App 573, 580-581 (2019). In *Rodriguez*, the defendant unquestionably "engaged in conduct

[70] It is unclear whether, and to what extent, this portion of the analysis of former MCL 777.37(1)(a) in *Hardy*, 494 Mich at 441-448, remains good law following the amendments to OV 7 under 2015 PA 137, effective January 5, 2016. See Section 2.10(B)(1) for additional discussion of 2015 PA 137. In *People v Lydic*, 335 Mich App 486, 496-497 (2021), the Court explained that in order to score points under the fourth category of the current version of OV 7, a Court must find that conduct similarly egregious to sadism, torture, or excessive brutality was present *and* that the similarly egregious conduct significantly increased the victim's fear. The analysis under the former version of the statute only considered whether the conduct was intended to significantly increase the victim's fear and did not analyze whether the conduct was similarly egregious to sadism, torture, or excessive brutality.

that went beyond the minimum required to commit [unarmed robbery[73]] by using a tire iron during the course of the robbery[.]" *Id.* at 579. The Court acknowledged that in *Hornsby*, the assessment of 50 points was upheld; however, in light of the current statutory requirement that conduct be "'similarly egregious' to conduct that falls within sadism, torture, or excessive brutality," the Court held that *Hornsby* could not "control the outcome" of the case. *Rodriguez*, 327 Mich App at 580-581 (holding the statutory amendment made a "significant difference"). "[A]lthough defendant threatened [the victim] when demanding the money and other belongings, he did no more," and the use of a tire iron to smash the windows of a truck that the victim was occupying, "without more, did not rise to a level that would require an assessment of 50 points for OV 7." *Id.* at 581.

Under the current version of OV 7, points were properly scored on the basis of conduct similarly egregious to sadism where the sentencing offense was assault by strangulation and in committing the offense the defendant choked the victim with a belt and told her "that when her young son returned home he would find [her] dead."[74] *People v Lydic*, 335 Mich App 486, 497-498 (2021). The Court found that the threats made by defendant during the assault of the victim that she was "about to die," and "that her body would be found by [her] minor son . . . were severe enough to be treated as 'similarly egregious' to sadism, based on their infliction of humiliation and other emotional suffering[.]" *Id.* at 499. Further, the requirement that the conduct significantly increase the victim's fear was satisfied because death threats are not "encompassed by the offense of assault by strangulation," and the death threats not only increased the victim's fear for her own life—"as would always be the case during a violent

[71] *Hornsby*, 251 Mich App 462, was decided before OV 7 was amended under both 2015 PA 137, effective January 5, 2016, and 2002 PA 137, effective April 22, 2002; accordingly, it is unclear whether, and to what extent, *Hornsby* remains good law. In *People v Lydic*, 335 Mich App 486, 496-497, the Court explained that in order to score points under the fourth category of the current version of OV 7, a Court must find that conduct similarly egregious to sadism, torture, or excessive brutality was present *and* that the similarly egregious conduct significantly increased the victim's fear. The analysis under the former version of the statute only considered whether the conduct was intended to significantly increase the victim's fear and did not analyze whether the conduct was similarly egregious to sadism, torture, or excessive brutality.

Additionally, *Hornsby* was decided before OV 20 was enacted, under 2002 PA 137, effective April 22, 2002, to address *terrorism* (a violent act that is dangerous to human life and is intended to intimidate or influence a civilian population or government operation). See Section 2.33. Before the enactment of OV 20, the language in OV 7 included *terrorism* in its list of behaviors meriting points under that variable. Notwithstanding the elimination of the term *terrorism* from the language of OV 7, the variable accounts for the conduct to which the term *terrorism* then referred—"*conduct designed to substantially increase the fear and anxiety a victim suffered during the offense*." MCL 777.37(1)(a) (emphasis added).

See Section 2.10(B)(1) for additional discussion of the former versions of MCL 777.37(1)(a).

assault"—but also increased the victim's fear for "the well-being of her young child[.]" *Id*.

Under former MCL 777.37(1)(a), the trial court properly scored OV 7 at 50 points where the defendant "ordered the [rape] victim to keep her eyes closed, . . . indicated that he and what he implied were accomplices knew who she was and had been watching her, . . . [and] made threats that clearly indicated that he could find her again in the future, thereby suggesting not only that she was suffering a horrific assault but that there might never be any escape, either." *People v McDonald*, 293 Mich App 292, 298-299 (2011).[75] "[E]ven though the victim eventually concluded that defendant really did not know her identity there was ample evidence that defendant engaged in 'conduct designed to substantially increase [her] fear and anxiety[.]'" *Id.* at 299. See also *People v Bosca*, 310 Mich App 1, 51-52 (2015) (upholding the scoring of OV 7 under the former version of the statute), rev'd in part on other grounds 509 Mich 851 (2022).[76]

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[72] The *Hornsby* Court stated that "'[s]coring decisions for which there is any evidence in support will be upheld.'" *Hornsby*, 251 Mich App at 468, quoting *People v Elliott*, 215 Mich App 259, 260 (1996). However, in *Hardy*, 494 Mich at 437-438, 438 n 18, the Michigan Supreme Court clarified that, contrary to several Court of Appeals decisions, "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines[;]" rather, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence" (citations omitted). "[T]he standards of review traditionally applied to the trial court's scoring of the variables remain viable after [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 38 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453, 459-461 (2017), citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438 (additional citation omitted). For more information on the precedential value of an opinion with negative subsequent history, see our note.

[73]The elements of unarmed robbery are "(1) a felonious taking of property from another (2) by force or violence or assault or putting in fear (3) while unarmed." *Rodriguez*, 327 Mich App at 579.

[74]The Court noted that it need not decide whether a death threat qualifies as sadism under OV 7 standing alone, and noted that "at a minimum" the threats at issue in *Lydic* were "akin to sadism," and satisfied the fourth category under OV 7. *People v Lydic*, 335 Mich App 486, 499 (2021).

2.21 OV 8—Victim Asportation or Captivity

Points	General Scoring Provisions for OV 8
15	A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a).
0	No victim was asported or held captive. MCL 777.38(1)(b). **Score 0 points if** the sentencing offense is kidnapping. MCL 777.38(2)(b). Note that unlawful imprisonment is a "distinct crime," and can be scored where the facts support it. *People v Kosik*, 303 Mich App 146, 159 (2013).[1]

1. "[T]he plain language of MCL 777.38 directs the assessment of zero points for OV 8 only when the sentencing offense is 'kidnapping.'" *People v Kosik*, 303 Mich App 146, 158-159 (2013) (noting that although "the Legislature amended MCL 750.349 [in 2006] and added MCL 750.349b, differentiating unlawful imprisonment from kidnapping," it "fail[ed] to include unlawful imprisonment in MCL 777.38(2)(b)").

A. Scoring

OV 8 is scored for crimes against a person only. MCL 777.22.

Step 1: Determine which statement applies to the sentencing offense. MCL 777.38(1).

Step 2: "Count each person who was placed in danger of injury or loss of life as a victim," MCL 777.38(2)(a), then assign the point value indicated by the applicable statement. MCL 777.38(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

[75] *McDonald*, 293 Mich App 292, was decided before OV 7 was amended under 2015 PA 137, effective January 5, 2016; accordingly, it is unclear whether, and to what extent, *McDonald* remains good law. In *People v Lydic*, 335 Mich App 486, 496-497 (2021), the Court explained that in order to score points under the fourth category of the current version of OV 7, a Court must find that conduct similarly egregious to sadism, torture, or excessive brutality was present *and* that the similarly egregious conduct significantly increased the victim's fear. The analysis under the former version of the statute only considered whether the conduct was intended to significantly increase the victim's fear and did not analyze whether the conduct was similarly egregious to sadism, torture, or excessive brutality.

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

Under the *McGraw* rule, post-offense conduct cannot be considered when determining whether the defendant asported the victim to a place or situation of greater danger. *People v Allen*, 331 Mich App 587, 596 (2020), vacated in part on other grounds 507 Mich 856 (2021).[77] Specifically, the statutory language of OV 8 regarding asportation "does not provide for consideration of conduct after the completion of the sentencing offense," and accordingly, "it must be scored solely on the basis of [the defendant's] conduct before or during the sentencing offense." *Id.* at 596.

Regarding conduct occurring before the sentencing offense, in *People v Barrera*, 500 Mich 14, 16-17 (2017), the Court clarified that the term "asported" as used in OV 8 includes movement that is merely incidental to the commission of a crime. Specifically, the Court upheld the assessment of points under OV 8 on the basis of asportation where the evidence indicated that the "defendant took the victim from the living room into his bedroom in order to sexually assault her" because "the sexual assault was less likely to be discovered [in the defendant's bedroom], which rendered the location a 'place of greater danger' or 'a situation of greater danger'" within the meaning of MCL 777.38(1)(a). *Barrera*, 500 Mich at 21-22.

However, the statutory language of OV 8 regarding a victim being "held captive beyond the time necessary to commit the offense" specifically "allows a trial court to consider a defendant's conduct 'beyond the time necessary to commit the offense.'" *Allen*, 331 Mich App at 598. Accordingly, "OV 8 requires the trial court to assess points for a defendant's postoffense conduct of holding a victim captive even after the completion of the sentencing offense." *Id.* at 598-599.

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Asportation Does Not Require Forcible Movement

"Asportation" need not be forcible to merit a score under OV 8. *People v Spanke*, 254 Mich App 642, 647 (2003), overruled in part on other grounds by *People v Barrera*, 500 Mich 14, 17 (2017).[78] The trial court did not abuse its discretion by assessing 15 points for OV 8 where the victims voluntarily accompanied the defendant to the place where the criminal acts occurred

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

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

(defendant's home). *Spanke*, 254 Mich App at 647-648. "The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others." *Id*. at 648.

The trial court appropriately scored OV 8 where, although the victim had been to the defendant's house on other occasions, the defendant transported the victim to the defendant's house at the time the sentencing offenses occurred. *People v Cox*, 268 Mich App 440, 454-455 (2005).

3. Asportation May Include Movement Incidental to the Sentencing Offense

"[M]ovement of a victim that is incidental to the commission of a crime nonetheless qualifies as asportation under OV 8." *People v Barrera*, 500 Mich 14, 17, 22 (2017) (holding that "'asported' as used in OV 8 should be defined according to its plain meaning, rather than by reference to [the Michigan Supreme Court's] kidnapping jurisprudence," and overruling *People v Thompson*, 488 Mich 888 (2010), and *People v Spanke*, 254 Mich App 642, 647 (2003), to the extent that they "have been interpreted to have created an incidental-movement exception to OV 8"). Accordingly, where the "defendant took the victim from the living room into his bedroom in order to sexually assault her, . . . the trial court could reasonably determine by a preponderance of the evidence that the victim was 'removed' to a location where the sexual assault was less likely to be discovered, which rendered the location a 'place of greater danger' or 'a situation of greater danger'" within the meaning of MCL 777.38(1)(a). *Barrera*, 500 Mich at 21-22. "[S]uch movement, whether incidental to the offense or meaningfully deliberate, may suffice to assess points for OV 8[.]" *Id*. at 22.

4. Asportation to Places or Situations of Greater Danger

"When evaluating the phrase 'to a place of greater danger or to a situation of greater danger,' trial courts must consider whether the risk of danger to the victim is increased by the defendant's movement of the victim." *People v Allen*, 331 Mich App 587, 598 (2020), vacated in part on other grounds 507 Mich 856 (2021).[79]

"[P]laces where others [are] less likely to see [a] defendant committing crimes," e.g., a trailer on the defendant's property,

a tree stand on the defendant's property, and a dirt bike ridden "far away from the house," constitute places or situations of greater danger under MCL 777.38(1)(a) for which OV 8 is properly scored. *People v Steele*, 283 Mich App 472, 490-491 (2009). See also *People v Chelmicki*, 305 Mich App 58, 70-71 (2014) (holding that "OV 8 could have properly been scored . . . on the basis of 'asportation'" where the victim was dragged by the defendant away from the balcony of their apartment, "where she was in the presence or observation of others, to the interior of the apartment, where others were less likely to see defendant committing a crime"); *People v Phillips*, 251 Mich App 100, 108 (2002) (the defendant drove the victim to "an isolated area near a river" and parked the car so it faced away from the road).

The transportation of an injured assault victim from her home to a hospital in another county was not asportation to a place or situation of greater danger despite the fact that the defendant "chose [the] particular hospital to conceal [the victim's] injuries from the victim's family" because "[t]he trial court did not make any findings about how taking the victim from her home to a public hospital in another county put her at a greater risk of danger than remaining untreated and injured in her home." *Allen*, 331 Mich App at 598 n 9.[80]

5. Victim Held Captive Beyond the Time Necessary to Commit the Offense

Points can be assessed under OV 8 where "the defendant held the victim 'captive beyond the time necessary to commit the offense.'" *People v Chelmicki*, 305 Mich App 58, 70 (2014), quoting MCL 777.38(1)(a).

"[A] victim is held captive under OV 8 when the defendant exerts either physical restraint or psychological influence over the victim." *People v Allen*, 331 Mich App 587, 599 (2020) (noting that "captive" is not defined by the statute and citing dictionary definitions of the term), vacated in part on other grounds 507 Mich 856 (2021).[81]

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

[80]The *Allen* Court also held that under *McGraw*, consideration of post-offense conduct is not permissible when scoring OV 8 on the basis of asportation. *Allen*, 331 Mich App at 596. See Section 2.20(B)(1).

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

There was "record evidence to support that the victim was held psychologically captive" where the defendant assaulted her at home, transported her to a hospital of his choosing without input from her, never left her alone while at the hospital, "took her directly from the hospital to [a] hotel room" for two days, and "denied [the victim] possession of her cell phone." *Allen*, 331 Mich App at 600 (noting that the victim was only able to escape defendant's control several days after the assault when he briefly left her alone and she was able to retrieve her cell phone and call for help).[82]

When the "defendant continued to hold the victim against her will after dragging her [from the balcony of their apartment] into the apartment, he effectively held her longer than the time necessary to commit the [sentencing] offense of unlawful imprisonment." *Chelmicki*, 305 Mich App at 70 (noting that because there is no specific length of time a victim must be restrained in order to constitute unlawful-imprisonment, "the crime can occur when the victim is held for even a moment," and holding that 15 points were therefore properly scored for OV 8 notwithstanding that "all of defendant's conduct during the time he restrained the victim was conduct that occurred 'during' the offense").

2.22 OV 9—Number of Victims

Points	General Scoring Provisions for OV 9
100	Multiple deaths occurred. MCL 777.39(1)(a). Score 100 points only in homicide cases. MCL 777.39(2)(b).
25	10 or more victims were placed in danger of physical injury or death. 20 or more victims were placed in danger of property loss. MCL 777.39(1)(b). POINTS FOR VICTIMS PLACED IN DANGER OF PROPERTY LOSS WERE ADDED BY 2006 PA 548, EFFECTIVE MARCH 30, 2007.

[82]However, the Court of Appeals remanded the case without determining whether points were properly assessed under OV 8 on the basis of captivity "because the trial court failed to make any factual findings" on the issue. *Allen*, 331 Mich App at 600.

10	2 to 9 victims were placed in danger of physical injury or death. 4 to 19 victims were placed in danger of property loss. MCL 777.39(1)(c). POINTS FOR VICTIMS PLACED IN DANGER OF PROPERTY LOSS WERE ADDED BY 2006 PA 548, EFFECTIVE MARCH 30, 2007.
0	Fewer than 2 victims were placed in danger of physical injury or death. Fewer than 4 victims were placed in danger of property loss. MCL 777.39(1)(d). POINTS FOR VICTIMS PLACED IN DANGER OF PROPERTY LOSS WERE ADDED BY 2006 PA 548, EFFECTIVE MARCH 30, 2007.

A. Scoring

OV 9 is scored for all felony offenses except crimes involving a controlled substance. MCL 777.22.

Step 1: Determine which statements in OV 9 apply to the offense. MCL 777.39(1).

Step 2: "Count each person who was placed in danger of physical injury or loss of life or property as a victim," MCL 777.39(2)(a), then assign the point value indicated by the applicable statement having the highest number of points. MCL 777.39(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

OV 9 is offense-specific; accordingly, only conduct related to the sentencing offense may be considered. See, e.g., *People v Sargent*, 481 Mich 346, 347-348, 350-351 (2008) (noting that when scoring OV 9, only people placed in danger of injury or loss of life or property *during* conduct "relating to the [sentencing] offense" should be considered).

The trial court properly considered only conduct that occurred during the commission of the sentencing offense (reckless driving causing serious impairment of a body function) where it concluded "that ten or more persons were placed in danger, including the drivers of both other vehicles involved in the accident, the minor passenger of one of the drivers, and the driver and 16 minor passengers of a school bus that defendant nearly struck when he crossed the centerline of the road immediately before the collision." *People v Teike*, ___ Mich App ___, ___ (2023). The court rejected the defendant's argument

"that the trial court impermissibly considered conduct outside the sentencing offense" when it counted the occupants of the school bus because "[w]hen defendant crossed the centerline and nearly struck the school bus, he was already engaged in the act of reckless driving," and "[t]hat conduct was not completed until the collision [with a different vehicle] that brought defendant's vehicle to a stop and caused a serious impairment of body function." *Id*. at ___. "At that point the occupants of the school bus had already been placed in close proximity to a physically threatening situation"; "[t]herefore, the trial court properly considered the occupants of the school bus when scoring this variable." *Id*. at ___ (quotation marks and citation omitted).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Meaning of *Victim*

The term victim as used in MCL 777.39 is not limited to *persons* who suffered danger of physical injury or loss of life or property; rather, "MCL 777.39 allows a trial court when scoring OV 9 to count as a victim 'one that is acted on' by the defendant's criminal conduct and placed in danger of loss of life, bodily injury, or loss of property." *People v Ambrose*, 317 Mich App 556, 563 (2016), quoting *Merriam-Webster's Collegiate Dictionary* (11th ed).[83] The *Ambrose* Court explained:

> "MCL 777.39(1)(c) does not define the term 'victim' as a dictionary would—by setting forth the meaning of the term. However, MCL 777.39(2)(a) does instruct courts to '[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim.' Notably, MCL 777.39(2)(a) contains no words limiting the definition of 'victim' to *persons* who were placed in danger of physical injury or loss of life or property. Rather, it simply states that those persons *must* be counted as victims. Therefore, . . . there is no basis on which to conclude that the word 'victim' as used in MCL 777.39 must be defined only to include persons who suffered danger of physical injury or loss of life.

[83] The *Ambrose* Court further noted that "'[p]erson' as it is defined under the Penal Code 'include[s], unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations.'" *People v Ambrose*, 317 Mich App 556, 562 n 4 (2016), quoting MCL 750.10 (second alteration in original). "A similar definition, including 'an individual' in its definition of 'person,' appears in the Code of Criminal Procedure," under MCL 761.1(p). *Ambrose*, 317 Mich App at 562 n 4. Note that at the time *Ambrose* was decided, MCL 761.1(p) was lettered MCL 761.1(a).

* * *

> Further, because we read MCL 777.39(2)(a) as only providing guidance to the trial court about who *must* be counted as a victim, and not as providing a complete and limiting definition of the term 'victim,' we may consult a dictionary for guidance. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines 'victim' as 'one that is acted on and usu[ally] adversely affected by a force or agent[.]'" *Ambrose*, 317 Mich App at 562-563 (alterations in original; citation omitted).

Fetus as victim. Applying this definition of *victim*, the *Ambrose* Court—"without declaring [a] fetus . . . to be a person under the law"—held that a fetus was properly counted as a victim under OV 9 where the defendant was convicted of feloniously assaulting his pregnant girlfriend. *Ambrose*, 317 Mich App at 564 (noting that the defendant's conduct "placed the fetus at risk of bodily injury or loss of life, not only as an indirect result of the risk of death or harm to the victim-mother but also as a direct result of blows to the victim-mother's abdominal area").

Actual harm not required. "A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim." *People v Gratsch*, 299 Mich App 604, 623-624 (2013) (evidence that the defendant told a fellow jail inmate that the defendant "'should stab . . . [a corrections officer] in the neck'" with a needle he had constructed, and that he threatened to hurt the inmate if the inmate told anyone about the needle, supported the trial court's score of ten points for OV 9; "at least two victims were placed in danger of physical injury because of defendant's possession of the needle, . . . [and it was] irrelevant that neither the inmate nor the correction[s] officer was actually harmed"), vacated in part on other grounds 495 Mich 876 (2013);[84] see also *People v Teike*, ___ Mich App ___, ___ (2023) (trial court properly counted occupants of a school bus as victims because while they were not actually harmed they were "placed in close proximity to a physically threatening situation" where "defendant crossed the centerline and nearly struck the school bus" right before he struck another vehicle, causing injuries that ultimately resulted in a reckless driving causing serious impairment conviction); *People v Rodriguez*, 327 Mich App 573, 582 (2019) (where

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

defendant used a tire iron to smash the windows of a truck before robbing the victim hiding inside and a second person watched from "outside his apartment, in close proximity to the robbery, the trial court properly counted [the second person who was watching] as a victim"); *People v Walden*, 319 Mich App 344, 349-350 (2017) (holding that "defendant was properly assessed 10 points for OV 9" where "at least three people were near defendant when he drew a knife and began swinging it," and "although [the victim] was the only person stabbed, at least two other people were placed in immediate danger of physical injury or loss of life and [were] thus victims for the purpose of scoring OV 9").

First responders. First responders may constitute "victims" under OV 9 if they were "'placed in danger of physical injury or loss of life[.]'" *People v Fawaz*, 299 Mich App 55, 62-63 (2012) (quoting MCL 777.39(2)(a) and holding that two firefighters who "suffered injuries requiring medical attention while combating [a fire] set by defendant" qualified as "'victims' under the unambiguous language of OV 9").

3. Examples of Sufficient Evidence to Score OV 9

The trial court properly scored OV 9 at 10 points where the defendant was charged with several sex-related crimes against three separate victims on three separate occasions because more than one potential victim was in the room sleeping while the defendant assaulted another victim. *People v Waclawski*, 286 Mich App 634, 684 (2009). Although the charges against the defendant stemmed from behavior that occurred on three different dates and only one victim was harmed on each of those dates, the evidence presented "support[ed] the conclusion that defendant would choose a victim while the other boys were present." *Id.* at 684. Thus, a score of 10 points was proper "because the record support[ed] the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed." *Id.* Similarly, relying on the holding in *Waclawski*, the Court upheld the assessment of 10 points under OV 9 where the defendant was present in a bathroom while an intoxicated woman was vomiting on the same night he sexually assaulted a different intoxicated female victim; while no one was present in the room when the sexual assault that was the sentencing offense occurred, the vomiting woman was staying in the same condominium unit. *People v Carlson*, 332 Mich App 663, 671-673 (2020). The Court accepted the trial court's reasoning that "given defendant's predatory predilection, his mere presence

placed [the vomiting woman] in danger give that she was highly intoxicated." *Id.* at 672.

The trial court properly scored OV 9 at 10 points where the defendant committed an armed robbery in a store, then stopped a woman driving a car and forced her to drive him to another location. *People v Mann*, 287 Mich App 283, 284-285, 288 (2010). The defendant argued that OV 9 should be scored at zero points, because "his armed robbery was completed with there being only one victim . . . before he began the separate crime stemming from his commandeering a car and driver for his getaway." *Id.* at 286. However, the Court found that the applicable statutes provide that "the course of an armed robbery includes the robber's conduct in fleeing the scene of the crime."[85] *Id*. at 287. In this case, the "defendant's commandeering of a car immediately after taking money from the first victim and forcing the driver of the car to drive him to another community, created a second victim of the armed robbery. In other words, the carjacking incident constituted not only the commission of separate offenses, but was also a continuation of the armed robbery." *Id*.

The trial court properly scored OV 9 at 10 points for four victims where the defendant caused a fatal car collision that "endangered not only the person who died, but also both occupants the car that struck that person," and a passenger who was traveling with the decedent who, while not ultimately injured, was also placed in danger by defendant's actions. *People v Lechleitner*, 291 Mich App 56, 63 (2010) ("the trial court correctly identified a total of four victims, resulting in a score of 10 points under OV 9, because, in addition to the decedent, defendant created a risk of physical injury to the decedent's passenger, the driver of the car that struck the decedent, and the passenger in that car, all in the course of the sentencing offense").

The trial court properly scored OV 9 at 10 points for two victims where the defendant shot a bystander who attempted to aid the armed robbery victim because the bystander was also placed in danger of injury or loss of life as a victim. *People v Morson*, 471 Mich 248, 251, 261-262 (2004). See also *People v Fawaz*, 299 Mich App 55, 58, 63-64 (2012) (two firefighters who "suffered physical injuries requiring medical attention" as a

[85] The defendant in *Mann*, 287 Mich App 283, was convicted of armed robbery under MCL 750.529, which incorporates MCL 750.530 by reference. MCL 750.530 expressly defines "in the course of committing a larceny" as including "acts that occur in an attempt to commit the larceny, or during commission of the larceny, *or in flight or attempted flight after the commission of the larceny*, or in an attempt to retain possession of the property." MCL 750.530(2) (emphasis added).

result of combating the fire the defendant started and the defendant's elderly neighbor who "had to be escorted from her home by a police officer for her personal safety" when her home filled with smoke due to the defendant's arson of his nearby home qualified as victims under OV 9); *People v Kimble*, 252 Mich App 269, 274 (2002) (decedent, her fiancé, and her child were with her in the car and were all "in danger of injury or loss of life" when the defendant fatally shot the decedent through the car's windshield).

Two victims were placed in danger of injury or loss of life where a videotape created by the defendant showed the male victim threatening the female victim with physical harm, the male victim applying lotion that "burned" to the female victim after at the defendant's suggestion, and both minor victims were in danger after drinking "a large quantity of alcohol provided by defendant." *People v Wilkens*, 267 Mich App 728, 741-742 (2005).

Where "at least one [neighborhood] resident [was] present in the area" when the defendant's accomplice fired multiple gunshots and killed a police officer during a home invasion, the trial court properly scored 10 points under OV 9. *People v Bowling*, 299 Mich App 552, 562-563 (2013).

4. Examples of Insufficient Evidence to Score OV 9

OV 9 is offense-specific, and many cases have found scoring errors where the sentencing court relied on conduct unrelated to the scoring offense.[86] For example, the sentencing court erred by assessing 10 points for OV 9 on the basis that there were two victims where the defendant was convicted of sexually abusing a single victim even though evidence that the defendant also sexually abused the victim's sister on a separate occasion was introduced at trial. *People v Sargent*, 481 Mich 346, 347-348, 351 (2008). The Court noted that when scoring OV 9, only people placed in danger of injury or loss of life or property *during* conduct "relating to the [sentencing] offense" should be considered. *Id.* at 350-351 (holding zero points should have been assessed where the defendant was not convicted of sexually abusing the victim's sister, and the defendant's sexual abuse of the sister did not arise out of the same transaction as the abuse of the victim). See also *People v Nawwas*, 499 Mich 874, 874 (2016) (holding that where the defendant was convicted of discharge of a firearm in an occupied facility, MCL 750.234b(2), possession of a firearm

[86]See Section 2.12(B)(1) for a general discussion of offense-specific scoring.

during the commission of a felony, MCL 750.227b, and carrying a pistol in a motor vehicle, MCL 750.227,[87] but "the trial court only scored the sentencing guidelines for the defendant's violation of MCL 750.227, . . . [t]he trial court erred in scoring [OV 9] based on a finding that two to nine victims were placed in danger of physical injury or death in relation to the defendant's violation of MCL 750.227"); *People v Biddles*, 316 Mich App 148, 164, 167 (2016) (holding that where the "defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm," and was convicted only of felon-in-possession "based on evidence apart from the shooting[of the victim], and . . . [his codefendant] was convicted by plea of the crimes for which defendant was acquitted," the trial court erred by assessing 10 points for OV 9; the "defendant's commission of the offense of felon-in-possession, in and of itself, simply did not place anyone in danger of physical injury or death"); *People v Gullett*, 277 Mich App 214, 217-218 (2007) (holding the sentencing court erred by assessing points for OV 9 based on the number of victims involved in a separate incident where the record revealed that the defendant was convicted and sentenced on only one charge of CSC-I involving a single victim).

The trial court erred by assessing 25 points for OV 9 on the ground that the defendant's vandalism of two schools "'was a crime against a community'" because "[t]here [was] no evidence on the record to establish that 20 or more persons were affected by defendant's vandalism, either directly or indirectly, . . . OV 9 should have been scored at zero points." *People v Carrigan*, 297 Mich App 513, 515-516 (2012) (noting that "nearly every criminal offense could result in a score of 25 points for OV 9 because the community as a whole always indirectly suffers when a crime is committed" if indirect victims, such as "the community" could be counted under OV 9).[88]

The trial court erred by assessing 10 points for OV 9 "based on the danger posed to [the human trafficking victim's] one-year-old child by defendant's shooting of [the murder victim] and by the child being left alone while defendant and [the child's

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

[88] Note that in *People v Hardy*, 494 Mich 430, 438 n 18 (2013), the Court acknowledged that "[s]everal recent Court of Appeals decisions," including *Carrigan*, 297 Mich App 513, "have stated that '[s]coring decisions for which there is any evidence in support will be upheld,'" and explicitly noted that "[t]his statement is incorrect." *Hardy* explained that "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for purposes of assessing points under the sentencing guidelines." *Hardy*, 494 Mich at 438 n 18.

mother] moved [the murder victim's] body and vehicle." *People v Baskerville*, 333 Mich App 276, 294 (2020). The evidence did not support a finding that the child was in close proximity to a physically threatening situation where the shooting occurred in the front of the house while the child was in a bedroom in the back of the house and the evidence showed that the "defendant emerged from the back of the house, so the child would have been behind defendant and thus not in any potential line of fire[.]" *Id.* at 294-295 (acknowledging that "bullets can travel a very long distance," and accordingly, "'close proximity' to a physically threatening situation with a gun may be much more extensive than 'close proximity' to, say, a physically threatening situation with a knife"). Further, while the evidence demonstrated that the child was left alone after the homicide occurred, the evidence did "not clearly indicate the length of time the child was left alone, or whether the child was really endangered as a consequence." *Id.* at 295 (noting that while "[t]he child was in an obviously unhealthy environment," there was no evidence that the defendant's criminal activity "posed any specific danger of *physical* harm to the child").

5. Claim of *Lockridge* Error

Assessing 50 points for OV 3 and 100 points for OV 9 did not violate the defendant's Sixth Amendment right to a jury trial where the "jury . . . found defendant guilty of OUIL causing death, which required the jury to find that defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof," and "two counts each of second-degree murder, . . . reflect[ing] that the jury found beyond a reasonable doubt that multiple deaths occurred"; under these circumstances, "each of the facts necessary to support [the OV scores] was necessarily found by the jury beyond a reasonable doubt." *People v Bergman*, 312 Mich App 471, 498-499 (2015) (noting that where "facts found by the jury [are] sufficient to assess the minimum number of OV points necessary for defendant's placement in the . . . cell of the sentencing grid under which she [is] sentenced, there [is] no plain error and defendant is not entitled to resentencing or other relief [on an unpreserved claim] under [*People v Lockridge*, 498 Mich 358 (2015)]"). See also Section 2.12(B)(4) for a discussion of judicial fact-finding after *Lockridge*.

2.23 OV 10—Exploitation of a Vulnerable Victim

Points	General Scoring Provisions for OV 10
15	Predatory conduct was involved. MCL 777.40(1)(a).
10	The offender exploited a victim's physical disability, mental disability, or youth or agedness, or a domestic relationship, or the offender abused his or her authority status. MCL 777.40(1)(b).
5	The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. MCL 777.40(1)(c).
0	The offender did not exploit a victim's vulnerability. MCL 777.40(1)(d).

A. Scoring

OV 10 is scored for all felony offenses except crimes involving a controlled substance. MCL 777.22.

Step 1: Determine which statements apply to the circumstances of the sentencing offense. MCL 777.40(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.40(1).

MCL 777.40(2) expressly states that "[t]he mere existence of 1 or more factors described in [MCL 777.40](1) does not automatically equate with victim vulnerability."

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.40 specifically authorizes the consideration of facts outside the sentencing offense; accordingly, the *McGraw* rule does not apply to OV 10. See, e.g., MCL 777.40(3)(a) (defining predatory conduct to include certain *preoffense* conduct).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Overview of OV 10's Purpose

OV 10 is intended to cover a broad range of an offender's conduct and to differentiate between the potential dangers arising from that conduct when an offender directs his or her conduct at a victim under circumstances external to a victim, or when an offender directs his or her conduct at a victim because of the victim's inherent condition or circumstances. See *People v Huston*, 489 Mich 451, 460-461 (2011). The Court summarized the intended application of OV 10's graduated scoring in light of an offender's conduct as it is directed toward a victim with or without inherent vulnerability:

> "The hierarchical range of points that may be assessed under OV 10 extends from zero to 15 points. Zero points are to be assessed when '[t]he offender did not exploit a victim's vulnerability.' MCL 777.40(1)(d). Five points are to be assessed when '[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious'—things that are largely within the victim's own control. MCL 777.40(1)(c). Ten points are to be assessed when '[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status'—things that are largely outside of the victim's control. MCL 777.40(1)(b). Finally, 15 points are to be assessed when '[p]redatory conduct was involved'—something that is *always* outside of the victim's control and something that may impact the community as a whole and not only persons with already-existing vulnerabilities. . . . [W]e can only interpret the Legislature's hierarchical approach in OV 10 as indicating its own view that 'predatory conduct' deserves to be treated as the *most serious* of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were *already* vulnerable for one reason or another. By its essential nature, predatory conduct may render *all* persons uniquely susceptible to criminal exploitation and transform all persons into potentially 'vulnerable' victims. Only in this way can MCL 777.40(1)(a) be

understood as connected with MCL 777.40(1)(b) through [MCL 777.40(1)](d)." *Huston*, 489 Mich at 460-461 (alterations in original).

3. Victim Vulnerability in General

"[P]oints should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 158 (2008), overruled in part on other grounds in *People v Huston*, 489 Mich 451, 458 n 4 (2011).[89] Factors that evidence a victim's vulnerability include:

- physical disability,
- mental disability,
- youth or agedness,
- existence of a domestic relationship between the victim and the offender,
- the offender's abuse of authority status,
- difference in the victim's and the offender's size, strength, or both,
- victim's intoxication or drug use,
- whether the victim is asleep; and
- victim's level of consciousness. *Cannon*, 481 Mich at 158-159. See also *People v Barnes*, 332 Mich App 494, 502 (2020) (quoting and analyzing the factors from *Cannon*).

"The mere existence of one of these factors does not automatically render [a] victim vulnerable," and "[t]he absence of one of these factors does not preclude a finding of victim vulnerability[.]" *Cannon*, 481 Mich at 158-159, n 11.

4. Exploitation Requirement

Exploitation of a vulnerable victim is a prerequisite to assessing points under OV 10. *People v Cannon*, 481 Mich 152, 162 (2008), overruled in part on other grounds in *People v*

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

Huston, 489 Mich 451, 458 n 4 (2011).[90] However, "nothing in *Cannon* requires the offender to have first-hand contact to exploit a victim. Rather, *Cannon* provides that every subdivision of MCL 777.40(1) requires that the offender have somehow exploited a vulnerable victim[.]" *People v Needham*, 299 Mich App 251, 258 (2013).

Within the meaning of OV 10, "exploitation requires manipulation of the victim 'for selfish or unethical purposes.'" *People v Ziegler*, 343 Mich App 406, 412 (2022), quoting MCL 777.40(3)(b). "[T]he definition of 'exploitation' intrinsically establishes an element of intent: any manipulation must have been done with a *goal* of accomplishing something selfish or unethical." *Ziegler*, 343 Mich App at 413. Stated differently, "for purposes of OV 10, 'exploitation' means the defendant intended to gain something from the manipulation of the victim at some kind of cost to the victim." *Id*.

The Court provided the following examples of exploitation:

- Where "the defendant beat her 12-year-old son to death," the defendant's conduct "satisfied the definition of being 'for selfish or unethical purposes' because 'it is readily inferable from the evidence that defendant acted at least partly out of selfish motivation, e.g., to preserve her authority status in the face of a rebellious son, to vent frustration at his continued disobedience or to insure her place in heaven by chastising her son in accordance with the dictates of her religion.'" *Ziegler*, 343 Mich App at 413, quoting *People v Yarbough*, 148 Mich App 139, 141-142 (1986).

- Exploitation is present where the defendant engages in "'grooming' conduct or other 'quid pro quo' conduct in pursuit of sexually assaulting victims." *Ziegler*, 343 Mich App at 413.

The Court contrasted exploitive conduct with conduct where the defendant is grossly irresponsible, concluding that the Legislature did not intend to extend OV 10 "to mere irresponsibility, no matter how egregious and no matter how vulnerable the victim." *Ziegler*, 343 Mich App at 414. In *Ziegler*, OV 10 was erroneously scored where the defendant was operating while intoxicated with her six-year-old daughter in the vehicle because while the defendant's "conduct was grossly irresponsible," there was no evidence "that defendant

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

placed her daughter in the truck and drove drunk for the purpose of gaining something from her daughter at a cost to her daughter." *Id*.

5. Vulnerability—Age of the Victim

In the context of the defendant's claim of ineffective assistance of counsel, the Court of Appeals refused to adopt the defendant's argument that the trial court improperly scored OV 10 because "despite the girls' young ages in this case, there was no evidence that they were vulnerable or that he exploited them." *People v Harmon*, 248 Mich App 522, 531 (2001). The defendant relied on the statutory language of OV 10, which states that "'[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.'" *Id*. at 531, quoting MCL 777.40(2). Contrary to the defendant's argument that the young girls participated in his photography sessions without coercive or exploitive conduct on his part, the evidence established that the defendant manipulated the victims based on their age, their financial need, and their aspiration to become models. *Harmon*, 248 Mich App at 531-532. "By using these two incentives, fame and fortune, defendant manipulated the minors into posing for lewd and lascivious photographs." *Id*. at 532. See also *People v Wilkens*, 267 Mich App 728, 742 (2005) ("defendant 'exploited' the victim's youth by manipulating her with clothes and alcohol in exchange for [her participation in] making [a] sexually abusive videotape").

A five-year age difference between a defendant and a complainant may justify a score of 10 points for OV 10. *People v Johnson*, 474 Mich 96, 103 (2006) (holding that "[w]here complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim's youth in committing the sexual assault") (quotation marks and citation omitted).

The trial court properly scored 10 points for OV 10 where the evidence showed that the 24-year-old defendant exploited the 16-year-old victim's youth and vulnerability within the meaning of MCL 777.40. *People v Phelps*, 288 Mich App 123, 136 (2010).[91] Although the victim's age alone did not support

[91]Note that in *People v Hardy*, 494 Mich 430, 438 n 18 (2013), the Court acknowledged that "[s]everal recent Court of Appeals decisions," including *Phelps*, 288 Mich App 123, "have stated that '[s]coring decisions for which there is any evidence in support will be upheld,'" and explicitly noted that "[t]his statement is incorrect." *Hardy* explained that "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for purposes of assessing points under the sentencing guidelines." *Hardy*, 494 Mich at 438 n 18.

assessing points for OV 10, "the record supported that [the victim's] age and immaturity made her a vulnerable victim." *Phelps*, 288 Mich App at 136. The Court of Appeals noted that "evidence on the record supported that [the defendant] exploited the [victim] for selfish purposes by manipulating her into engaging in sexual acts with him and allowing him to be in a position in which he could engage in nonconsensual sexual intercourse." *Id*. at 136-137. Further, "the evidence showed that the [victim] was vulnerable because it was readily apparent that she was susceptible to physical restraint, persuasion, or temptation." *Id*. at 137.

The trial court properly scored 15 points for OV 10 where the defendant "picked up [the 12-year-old victim of dissemination of sexually explicit matter to a minor] in the middle of the night in his van," and "drove to a liquor store to purchase alcohol" before he parked his van at a city park; "[b]ecause of [the victim's] young age, she was susceptible to injury, physical restraint, or temptation," and "it [was] a reasonable inference that victimization was [the defendant's] primary purpose for engaging in the preoffense conduct." *People v Lockett*, 295 Mich App 165, 171, 184 (2012).

The trial court properly scored 10 points under OV 10 based on the defendant's possession of child sexually abusive material. *People v Needham*, 299 Mich App 251, 252, 260 (2013) ("evidence of possession [of child sexually abusive material] . . . can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim's vulnerability due to the victim's youth").

"The fact that the offense of first-degree child abuse applies to children, see MCL 750.136b(1)(a), does not mean that the trial court may not consider the victim's youth for purposes of scoring OV 10[.]" *People v McFarlane*, 325 Mich App 507, 536 (2018) (holding that consideration of youth is proper "unless the Legislature provided otherwise," and noting that "[t]he Legislature did not provide that MCL 777.40(1)(b) does not apply to crimes against children"). The evidence supported the trial court's assessment of 10 points under OV 10 where the record permitted "an inference that defendant violently shook or threw [the victim] when she was just nine weeks of age." *McFarlane*, 325 Mich App at 536.

6. Vulnerability Arising Out of a Victim's Relationships or Circumstances

A score of 15 points under OV 10 does not require that a victim be "inherently vulnerable." *People v Huston*, 489 Mich 451, 454 (2011). MCL 777.40(3)(c) "contemplat[es] vulnerabilities that may arise not only out of a victim's characteristics, but also out of a victim's relationships or circumstances." *Huston*, 489 Mich at 464. Furthermore, "[MCL 777.40(3)(c)] does not mandate that [the victim's] 'susceptibility' be *inherent* in the victim. Rather, the statutory language allows for susceptibility arising from external circumstances as well." *Huston*, 489 Mich at 466. Where defendant and his cohort "were lying in wait, armed with two BB guns and a knife, and hidden from the victim, who was by herself at night in an otherwise empty parking lot," the victim was properly considered "vulnerable" under MCL 777.40(3)(c) because the victim "would have a 'readily apparent susceptibility . . . to injury [or] physical restraint . . . ." *Huston*, 489 Mich at 454-455, 467 (alterations in original). See also *People v Kosik*, 303 Mich App 146, 160-161 (2013) (the trial court's conclusion "that the circumstances of the offense rendered the victim vulnerable . . . [was] sufficient; the trial court did not need to find that the victim possessed some inherent vulnerability").

The trial court properly scored 10 points for OV 10 where "[t]he victim was clearly vulnerable in light of defendant's greater strength, [the victim's] intoxication, and the domestic relationship between the two, including the fact that [the victim] and defendant had a child together." *People v Dillard*, 303 Mich App 372, 380-381 (2013) (holding that "defendant unambiguously exploited his greater strength and his relationship with the victim; both facts ensured that [the victim] had no meaningful way to escape from him until outside intervention by the police occurred"), overruled in part on other grounds by *People v Barrera*, 500 Mich 14, 16 (2017).[92]

The trial court properly concluded that the victim was vulnerable where there was a difference in size and strength between the defendant and the victim, and the victim was new to the area, met defendant on a chatline and agreed to meet him after he indicated he was looking for friendship and offered to take her sightseeing, but instead the defendant exploited the victim's unfamiliarity with the city and drove to

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

isolated and secluded areas to sexually assault her. *People v Barnes*, 332 Mich App 494, 502-503 (2020).

The trial court reasonably inferred "that defendant took advantage of his difference in size and strength" to exploit a vulnerable victim despite the fact that the victim was "taller than an average lady" where defendant kicked through a locked door, pushed or threw the victim to the floor at least twice, "was muscular and more physically imposing than [the victim]," and the victim stated she thought defendant was going to kill her, that "[h]e had complete control of the situation and overpowered [her]," and she "was completely helpless and at his mercy." *People v Montague*, 338 Mich App 29, 54, 55 (2021) (quotation marks omitted).

7. Vulnerability Based on Finding that Victim is a *Vulnerable Adult*

The evidence showing that the victim was a *vulnerable adult* under MCL 750.145m(u)(*i*) was "sufficient to support a finding that [the victim] was also vulnerable for purposes of assessing [OV 10]." *People v Haynes*, 338 Mich App 392, 438 (2021). MCL 750.145m(u)(*i*) defines *vulnerable adult* in relevant part to be "an 'individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.'" *Haynes*, 338 Mich App at 417. The Court concluded that despite "testimony that [the victim] was mentally and physically able to care for herself, there was also strong evidence from which a jury could have found that [the victim] was a vulnerable adult within the meaning of MCL 750.145m(u)(*i*)." *Haynes*, 338 Mich App at 418. Specifically, the evidence showed that the victim "needed significant assistance in order to lead her life" where "her mobility issues made her reliant on others to shop, get to doctor's appointments, and obtain her mail," she was at risk of falling and sustaining serious injury, she "was not computer literate and could not handle her financial needs to the extent that she had to rely on a computer to do so," and she was "vulnerable to anyone that she entrusted with her account information." *Id.* at 419-420.

8. Defendant's Conduct Need Not Be Directed at a Specific Victim

A court may assess 15 points against a defendant for predatory conduct without regard to whether the defendant directed his or her preoffense conduct at a specific victim—all that is

required under OV 10 is that the defendant's preoffense conduct was "directed at 'a victim.'" *People v Huston*, 489 Mich 451, 454 (2011). Furthermore, "the victim does not have to be inherently vulnerable. Instead, a defendant's 'predatory conduct,' by that conduct alone (*eo ipso*), can create or enhance a victim's 'vulnerability.'" *Id*. at 454-455 (holding the defendant engaged in predatory conduct to exploit a vulnerable victim where he was lying in wait, armed with weapons, and hidden from view and the victim was alone at night in an empty parking lot).

9. Abuse of Authority Status

The Court rejected the defendant's argument that OV 10 was improperly scored because no evidence was presented "to indicate any manipulation by defendant or any exploitation of his status" where the defendant, who was 67 years old, sexually assaulted a 14-year-old who lived at the defendant's home and who the defendant was in the process of adopting. *People v Phillips,* 251 Mich App 100, 109 (2002) (quotation marks omitted).

10. Determination of Who is the Victim

"A 'victim' is 'a person harmed by a crime, tort, or other wrong" . . . or . . . a person who "is acted on and usually adversely affected by a force or agent[.]'" *People v Needham*, 299 Mich App 251, 255 (2013) (holding that "[t]he victim of crimes involving child sexually abusive activity, including the possession of child sexually abusive material is the child victim portrayed in the material"), quoting *People v Althoff*, 280 Mich App 524, 536-537 (2008) (additional quotation marks and citations omitted).

The trial court erred in assessing points under OV 10, "not on the basis of having exploited the second-degree murder victim, but on the basis of having exploited her own children who were merely passengers in her car and not the victims of the criminal offense being scored." *People v Hindman*, 472 Mich 875, 876 (2005).

11. Direct or Physical Contact Not Required

The trial court properly scored 10 points under OV 10 based on the defendant's possession of child sexually abusive material because "[n]othing in the plain language of MCL 777.40 [(OV 10)] suggests that an offender must have direct or physical contact with the victim to exploit or manipulate him or her."

People v Needham, 299 Mich App 251, 255-256, 260 (2013) (holding that "[b]y possessing sexually abusive images of children, defendant made those children the victims of his sexual offense and exploited them for his sexual gratification").

12. Domestic Relationship

"[T]o qualify as a 'domestic relationship' [for purposes of scoring OV 10, MCL 777.40], there must be a familial or cohabitating relationship." *People v Jamison*, 292 Mich App 440, 447 (2011). The trial court erred in assessing 10 points for OV 10 where the defendant and the victim dated in the past, but did not share a domicile and were not related. *Id*. at 448. Specifically, the Court of Appeals stated that "[it did] not believe that simply *any* type of dating relationship, past or present, meets the requirements of OV 10," and held that the "relationship [in *Jamison*] did not display the characteristics needed to elevate [the] ordinary relationship [between the victim and the defendant] to 'domestic relationship' status." *Id.* at 447-448.

"[T]he trial court erroneously assessed 10 points for OV 10" where, although the defendant and the victim "remained friends," they "had stopped dating at least two months prior to the assault[,] . . . were dating other people, . . . did not continue to have sex, and . . . did not live together." *People v Brantley*, 296 Mich App 546, 555 (2012), overruled in part on other grounds by *People v Comer*, 500 Mich 278 (2017).[93]

13. Predatory Conduct

"MCL 777.40(3)(a) does not define 'predatory conduct' to mean preoffense conduct directed at *the* victim; instead, MCL 777.40(3)(a) defines 'predatory conduct' to mean 'preoffense conduct directed at *a* victim[.]'" *People v Huston*, 489 Mich 451, 458 (2011).[94] Thus, MCL 777.40(3)(a) must not be construed "as requiring that the defendant's preoffense predatory conduct have been directed at one particular or specific victim, but instead as requiring only that the defendant's preoffense predatory conduct have been directed at *a* victim." *Huston*, 489 Mich at 459. OV 10 instructs trial courts to score the highest number of points for predatory conduct "because that conduct

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

[94] After *Huston* was decided, 2014 PA 350, effective October 17, 2014, amended MCL 777.40(3)(a) to include, in the definition of *predatory conduct* preoffense conduct that is directed at "a law enforcement officer posing as a potential victim[.]"

itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were *already* vulnerable for one reason or another. By its essential nature, predatory conduct may render *all* persons uniquely susceptible to criminal exploitation and transform all persons into potentially 'vulnerable' victims." *Id.* at 461.

Further, predatory conduct "does not encompass *any* 'preoffense conduct,' but rather only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *Huston*, 489 Mich at 462 (quotation marks and citation omitted). Predatory conduct "is behavior that is predatory in nature, precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action[.]" *Id.* at 463 (first alteration in original; quotation marks and citation omitted). Accordingly, the defendant's preoffense conduct of "[lying] in wait while armed and hidden from view for the primary purpose of eventually causing a person to suffer from an injurious action, i.e., an armed robbery . . . constituted 'predatory conduct' both under the statutory definition of this phrase and according to common understanding under which lying in wait constitutes quintessential 'predatory conduct.'" *Huston*, 489 Mich at 463-464. The trial court properly scored 15 points under OV 10 for "[a] defendant who directed his preoffense conduct at the community at large by lying in wait, armed, in a parking lot at night, waiting for the first random person to come along so that he or she could be criminally victimized." *Id*. at 459-460. See also *People v Savage*, 327 Mich App 604, 630 (2019) ("The evidence that defendant robbed the hotel early in the morning and approached the hotel clerk at a time when she was working alone is akin to lying in wait, supporting a conclusion that defendant engaged in predatory conduct.").

The trial court properly assessed 15 points against the defendant for predatory conduct under OV 10 where the evidence established that the defendant and his accomplices drove around looking for a car from which they could steal a set of expensive wheel rims, spotted the victim's car and its valuable wheel rims, followed the victim's car to the victim's home, watched the victim pull her car into the driveway, shot the victim, and stole her car. *People v Kimble*, 252 Mich App 269, 274-275 (2002) (noting the defendant's "preoffense behavior in

seeking out a victim and following this victim home for the specific purpose of committing a crime against her was clearly predatory with the meaning of [OV 10]").

The trial court properly scored 15 points for OV 10 where the victim's demeanor on the stand evidenced her vulnerability, the evidence showed that the victim confided in the defendant about her personal problems, the defendant took advantage of her vulnerability by approaching her on numerous occasions, and ultimately waiting for her in a parking structure before sexually assaulting her. *People v Drohan*, 264 Mich App 77, 90-91 (2004).[95]

The trial court properly scored 15 points for OV 10 because the timing and location of an offense is evidence that the defendant watched and waited for an opportunity to commit the criminal act, and watching and waiting for an opportunity to commit a crime is "predatory conduct." *People v Witherspoon*, 257 Mich App 329, 336 (2003) (defendant sexually assaulted his girlfriend's nine-year-old daughter when she was alone doing chores in the basement). See also *People v Ackah-Essien*, 311 Mich App 13, 37-38 (2015) (holding that 15 points were properly scored for OV 10 where defendant and his accomplices engaged in "pre-offense conduct designed to lure the victim[, a pizza deliveryman,] to . . . [an] abandoned home where they then, on the pretext of paying him, lured him in to a dark and abandoned home where he was jumped and robbed") (quotation marks omitted); *People v Kosik*, 303 Mich App 146, 160 (2013) (holding that 15 points were properly scored for OV 10 where "defendant engaged in predatory conduct by investigating the store [in which the victim worked] and waiting until the victim was alone to strike").

The trial court properly scored 15 points under OV 10 where the defendant engaged in sexual conduct with "a seventeen-year-old, mentally incapable victim," and the evidence established that, before the charged sexual conduct, the defendant visited the victim at his foster home, the victim had been to the defendant's home on several occasions and had viewed pornographic material there, and the "defendant admitted to harboring the victim as a runaway from a foster home." *People v Cox*, 268 Mich App 440, 442, 446-447, 455 (2005).

[95] The Michigan Supreme Court's decision in *People v Drohan*, 475 Mich 140 (2006), was abrogated in part on other grounds as recognized by *People v Lockridge*, 498 Mich 358, 378-379 (2015). See Section 1.4 for discussion of *Lockridge*, which held that Michigan's mandatory sentencing guidelines violated the Sixth Amendment and cured the constitutional violation by making the guidelines advisory only.

The trial court properly scored 15 points under OV 10 based on evidence that, prior to engaging in intercourse with the child victim, the defendant gave her gifts, including a cell phone so that she could communicate with him, and picked her up in his vehicle and took her to his home. *People v Johnson*, 298 Mich App 128, 133-134 (2012) ("defendant's gifts to [the victim] and picking [her] up in his vehicle were predatory conduct used to exploit . . . a vulnerable victim"). Similarly, the defendant engaged in predatory conduct for the purpose of victimization justifying the assessment of 15 points where his "preoffense conduct, including Facebook exchanges and other contacts with [the victim], visiting [the victim's] home, spending leisure time with [the victim], and discussing personal topics . . . led [the victim] to trust defendant and feel comfortable alone with him, thereby making it easier for defendant to carry out his sexual assault." *People v Lampe*, 327 Mich App 104, 116 (2019). Further, the defendant engaged in preoffense "grooming" behavior— massages and putting his arm around the victim — and assaulted the victim when he was asleep and they were alone together. *Id.* at 116-117 (concluding the victim was vulnerable "because of his youth and naiveté").[96]

The trial court properly concluded that the defendant engaged in predatory conduct where he "represented to [the victim] that he was not looking for sex and that she did not need to be afraid of him" in order to "assuage [the victim's] apprehensions about meeting defendant in person, and to coax [the victim] into trusting him," and then used that trust to convince the victim to drive alone with him to "locations of his choosing"; accordingly, "defendant's preoffense conduct went beyond 'run-of-the-mill planning'" because he "built a rapport with [the victim] to gain her trust, then abused that trust to create a situation in which he could use his superior size and strength to sexually assault her." *People v Barnes*, 503 Mich App 494, 503-504 (2020).

The trial court properly assessed 15 points under OV 10 where the evidence showed that the victim was "extremely intoxicated," and the defendant's conduct of lingering around the condominium units where the victim was staying "late into the night" constituted preoffense conduct. *People v Carlson*, 332 Mich App 663, 668-669 (2020). There was evidence "that defendant was looking at [the victim] in the shower, naked, before the assault," and "[t]his 'naked gazing' was further

[96]"'Grooming' refers to 'less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact.'" *Lampe*, 327 Mich App at 116, quoting *People v Steele*, 283 Mich App 472, 491-492 (2009).

preoffense conduct." *Id.* (additionally concluding that the evidence supported the inference "that victimization was defendant's primary purpose for engaging in the preoffense conduct"). Finally, the Court determined that the predatory conduct created or enhanced the victim's vulnerability and was more than run-of-the-mill planning because the evidence "indicated that defendant was, in practical effect, 'lying in wait' to target a drunken woman—either [the victim or her friend] who was staying upstairs from [the victim and her companion] and [the victim's friend] explained that defendant engaged in an inappropriate encounter with her while she was intoxicated and barely dressed." *Id.* at 669.

The evidence did not support the trial court's finding that the defendant engaged in predatory conduct where the defendant "placed advertisements to induce potential customers to pay to engage in sexual encounters with [a human trafficking victim]," but there was "no evidence that defendant's conduct was intended to lure [the homicide victim], or any one else, to the [house where the sexual encounters occurred] for the purpose of killing him." *People v Baskerville*, 333 Mich App 276, 296-297 (2020) (finding that the record did not support the trial court's conclusion that the advertisements were made and directed at the victim in order to lure him for the homicide or to a place of danger, and holding "no points should have been assigned to OV 10 for the offense of second-degree murder").

Evidence that the "defendant befriended [the victim] and performed gratuitous services that were not the kinds of things that one's investment advisor would normally do," and also involved the victim in his family's life, "permitted an inference that defendant" took specific actions "in order to gain [the victim's] trust and then take advantage of the relationship." *People v Haynes*, 338 Mich App 392, 438 (2021). Accordingly, the evidence supported the conclusion that the "defendant engaged in preoffense conduct that he directed at [the victim] for the purpose of making her a victim." *Id*.

14. Co-offenders' Conduct

"[A] sentencing court may not assess a defendant 15 points for predatory conduct under OV 10 solely on the basis of the predatory conduct of the defendant's co-offenders." *People v Gloster*, 499 Mich 199, 210 (2016). "In direct contrast to other OVs, MCL 777.40 contains no language directing a court to assess a defendant the same number of points as his co-offenders in multiple-offender situations." *Gloster*, 499 Mich at 201. Accordingly, "the trial court erred by assessing defendant

15 points for OV 10 because the record indicate[d] that the court based its assessment of points entirely on the conduct of defendant's co-offenders." *Id*. at 209 (additionally holding that the Court of Appeals "erred by concluding that the trial court's scoring of OV 10 was supported by defendant's own conduct[; b]ecause the trial court did not itself find that defendant's own conduct was predatory in nature").

2.24 OV 11—Criminal Sexual Penetration

Points	General Scoring Provisions for OV 11
50	Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a).
25	One criminal sexual penetration occurred. MCL 777.41(1)(b).
0	No criminal sexual penetration occurred. MCL 777.41(1)(c).
Instructions	**Special Scoring Provisions for OV 11**
Score all sexual penetrations of victim by offender	All sexual penetrations arising out of the sentencing offense. MCL 777.41(2)(a).
May score multiple sexual penetrations of victim by offender in OV 12 or 13[1]	Conduct scored under OV 11 must not be scored under OV 12. MCL 777.42(2)(c). Conduct scored under OV 11 may be scored under OV 13 only if the conduct is gang-related or related to the offender's membership in an organized criminal group. MCL 777.43(2)(c).
Do not score initial penetration for certain offenses	Do not count the one penetration that forms basis for a CSC-I or CSC-III offense. MCL 777.41(2)(c).

1. OV 12 addresses criminal acts that occur within 24 hours of the sentencing offense and will not result in a separate conviction. See Section 2.25. OV 13 accounts for an offender's pattern of criminal conduct over a period of five years regardless of outcome. See Section 2.26.

A. Scoring

OV 11 is scored only for crimes against a person. MCL 777.22.

Step 1: Determine which statements addressed by OV 11 apply to the offense. MCL 777.41(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.41(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

In order to score points under OV 11, there must be sufficient "record evidence to support a finding that any charged or uncharged criminal sexual penetration arose out of the sentencing offense." *People v Goodman*, 480 Mich 1052 (2008); *People v Thompson*, 474 Mich 861 (2005) ("The record does not establish when the noncharged sexual penetrations occurred, and therefore there is no evidence in this case to support a finding that the additional sexual penetrations arose out of the sentencing offense.").

The *Goodman* Court vacated the defendant's sentence and remanded for resentencing because "[t]he defendant should have been scored zero points for OV 11 where there was no record evidence to support a finding that any charged or uncharged criminal sexual penetration arose out of a sentencing offense." *Goodman*, 480 Mich 1052. Specifically, the Supreme Court disagreed with the Court of Appeals' conclusion that there was "support for the proposition that the subsequent penetrations 'arose out of' the first," where the "sexual penetrations of the victim could be considered part of a pattern of defendant's abuse of his close relationship with the victim's mother," and "the subsequent penetrations occurred because defendant influenced the victim to not tell his mother by convincing him that she would not believe his allegations." *Id.*; *People v Goodman*, unpublished per curiam opinion of the Court of Appeals, issued August 28, 2007 (Docket No. 269620), p 5.

The trial court erred by assessing 25 points for OV 11 where "the two penetrations that formed the bases of the two sentencing offenses in this case occurred on different dates and there [was] no evidence that they arose out of each other[.]" *People v Johnson*, 474 Mich 96, 97-98 (2006). The Court examined the meaning of *arising out of the sentencing offense* in MCL 777.41(2)(a), and held that the "most reasonable definition" of *arising out of* "suggest[s] a causal connection between two events of a sort that is more than incidental. *Johnson*, 474 Mich

at 100-101. The Court elaborated: "Something that 'aris[es] out of,' or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *Id.* at 101 (alteration in original).

In order to satisfy the "arising out of" requirement in MCL 777.41, there must be "more than the mere fact that the penetrations involved the same defendant and victim." *People v Johnson*, 298 Mich App 128, 132 (2012). OV 11 was properly scored at 50 points where the defendant was convicted of 3 counts of CSC–I for vaginal penetration, fellatio, and cunnilingus and the victim testified that she and defendant engaged in sexual activity involving penetrations on several occasions over a three-year period beginning when she was 13 years old; although "[the victim] did not recall how many times she had sex with defendant," her testimony that they engaged in intercourse, fellatio, and cunnilingus "almost every time they were together" constituted "record evidence establish[ing] that two sexual penetrations arose out of the penetrations forming the basis of the sentencing offenses." *Id.*

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Meaning of *Sexual Penetration*

Neither MCL 777.41 (OV 11) nor the statutory sentencing guidelines define *sexual penetration*; however, for purposes of interpreting MCL 777.41, the Court of Appeals adopted the Michigan Penal Code (MPC) definition of *sexual penetration* found in MCL 750.520a. See *People v McLaughlin*, 258 Mich App 635, 673 n 15 (2003).[97] MCL 750.520a(r) defines the term as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." The criminal sexual conduct offenses are codified in the MPC. See MCL 750.520b–MCL 750.520e.

"Vaginal penetration, fellatio, and cunnilingus are considered separate sexual penetrations when scoring OV 11 under MCL 777.41." *People v Johnson*, 298 Mich App 128, 132 (2012).

[97] *McLaughlin* cites MCL 750.520a(o); however, MCL 750.520a has been relettered and the definition of *sexual penetration* is now codified at MCL 750.520a(r).

3. Scoring OV 11 Where Defendant is Convicted of Multiple Counts of CSC

The sexual penetration that is the basis of the sentencing offense may not be scored under OV 11, but a sexual penetration arising from the sentencing offense and on which a conviction separate from the sentencing offense is based should be scored. *People v McLaughlin*, 258 Mich App 635, 676 (2003).

In *McLaughlin*, the defendant argued he was improperly scored 50 points for two penetrations when those penetrations resulted in separate CSC-I convictions on the basis of MCL 777.41(2)(c), which prohibits assessing points "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." *McLaughlin*, 258 Mich App at 671-672. Because the defendant was convicted of three counts of CSC-I, the defendant argued that each penetration was the basis of its own conviction and could not be used in scoring the other convictions. *Id*. The Court rejected the defendant's argument, and notwithstanding the ambiguity of the language used in MCL 777.41(2)(c), the Court concluded:

> "[T]he proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is first-degree or third-degree CSC. Under this interpretation, trial courts may assign points under [MCL 777.]41(2)(a) for 'all sexual penetrations of the victim by the offender arising out of the sentencing offense,' while complying with the mandate of [MCL 777.]41(2)(c), by not scoring points for *the one penetration* that forms the basis of a first- or third-degree CSC offense. Accordingly, trial courts are prohibited from assigning points for the one penetration that forms the basis of a first- or third-degree CSC offense that constitutes the sentencing offense, but are directed to score points for penetrations that did not form the basis of the sentencing offense." *McLaughlin*, 258 Mich App at 676.

See also *People v Lampe*, 327 Mich App 104, 117-118 (2019) (trial court properly assessed 50 points where defendant was convicted of two counts of CSC-III and evidence supported that there were "three distinct acts of sexual penetration—which all occurred on the same day, at the same place, during the same course of conduct—[that] arose out of the sentencing offense"); *People v Johnson*, 474 Mich 96, 102 n 2 (2006) (noting

"it is clear that each criminal sexual penetration that forms the basis of its own sentencing offense cannot be scored for purposes of that particular sentencing offense"); *People v Wilkens*, 267 Mich App 728, 742-743 (2005) (OV 11 was properly scored at 25 points for each of defendant's two CSC–I convictions where the evidence established that regarding count 1 (penetration during the commission of a felony), the defendant penetrated the female victim more than once in making the videotape, and regarding count 2 (aiding and abetting in the production of child sexually abusive material), the evidence established that the defendant aided and abetted the male victim's penetration of the female victim and that the defendant also penetrated the female victim at least one other time); *People v Cox*, 268 Mich App 440, 455-456 (2005) (OV 11 was properly scored at 25 points where the defendant was convicted of two counts of CSC-III for penetrations arising from the same incident—the trial court properly scored the one penetration that did not form the basis of the sentencing offense, even though the defendant was separately convicted for both penetrations); *People v Matuszak*, 263 Mich App 42, 61 (2004) (fifty points were appropriate under OV 11 where there was evidence of five penetrations occurring during the assault underlying the sentencing offense).

4. Scoring OV 11 Where Defendant is Convicted of Human Trafficking

"[T]here was a more than sufficient causal connection between defendant's crime of human trafficking and his sexual penetrations of the victim" where "defendant did not personally engage in sexual relations with the victim . . . for money as part of the commercial enterprise," but "he did engage in sexual relations with [her] as a result of her being forced into the criminal enterprise." *People v Baskerville*, 333 Mich App 276, 298-300 (2020).

2.25 OV 12—Contemporaneous Felonious Criminal Acts

Points	General Scoring Provisions for OV 12
25	Three or more contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(a).
10	Two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b).

10	Three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(c).
5	One contemporaneous felonious criminal act involving a crime against a person was committed. MCL 777.42(1)(d).
5	Two contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(e).
1	One contemporaneous felonious criminal act involving any other crime was committed. MCL 777.42(1)(f).
0	No contemporaneous felonious criminal acts were committed. MCL 777.42(1)(g).
Instructions	**Special Scoring Provisions for OV 12**
Do not count certain firearm/gun violations	Violations of MCL 750.227b (felony-firearm or possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony) should not be counted when scoring this variable. MCL 777.42(2)(b).
Do not score OV 11 conduct	Conduct scored in OV 11 must not be scored under this variable. MCL 777.42(2)(c). See Section 2.24 for discussion of OV 11.

A. Scoring

OV 12 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22.

Step 1: Determine which statements apply to the circumstances of the sentencing offense. MCL 777.42(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.42(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). OV 12 is an example of a variable that provides otherwise; specifically, when scoring OV 12 courts must only consider conduct that did *not* establish the sentencing offense. *People v Light*, 290 Mich App 717, 723 (2010).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Application of *Light* Rule

"[W]hen scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Light*, 290 Mich App 717, 723 (2010). "What matters, [for purposes of scoring OV 12], is whether the 'sentencing offense' can be separated from other distinct 'acts.'" *People v Carter*, 503 Mich 221, 227 (2019) (for purposes of the OVs, the term "sentencing offense" means "the crime of which the defendant has been convicted and for which he or she is being sentenced") (quotation marks and citation omitted). See also *People v Stoner*, 339 Mich App 429, 436 (2021) ("What *Carter* and *Light* make clear is that under MCL 777.42 only the number of underlying criminal *acts* is to be considered when scoring OV 12, not the number of *crimes* that may be charged from those acts.").

In *Light*, 290 Mich App at 720, the defendant pleaded guilty to unarmed robbery, and the trial court assessed five points for OV 12 (two or more contemporaneous felonious criminal acts): (1) carrying a concealed weapon (which was not in dispute), and (2) either larceny from a person or larceny in a building (the lower court record was unclear as to which form of larceny its ultimate scoring decision was based). The Court of Appeals determined that "for OV 12 scoring purposes, [the defendant's] physical act of wrongfully taking [the victim's] money while inside a grocery store is the same single act for all forms of larceny—robbery, larceny from a person, and larceny in a building." *Id.* at 725. "Therefore, even though the trial court sentenced [the defendant] for unarmed robbery, [the defendant's] sentencing offense included all acts 'occur[ring] in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.'" *Id*., quoting MCL 750.530(2) (third alteration in original). The Court held that "[b]ecause [the defendant's] sentencing offense was unarmed robbery, neither form of larceny could be used as the contemporaneous felonious act needed to increase [the defendant's] OV 12 score." *Light*, 290 Mich App at 726. Stated another way, "the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense." *Id*. "Because both forms of larceny served as the basis of [the defendant's] sentencing offense, the trial court should not have scored 5 points for [the defendant's] unarmed-robbery conviction under OV 12." *Id*.

See also *Carter*, 503 Mich at 227 ("a determination of whether an offender has engaged in multiple 'acts' for purposes of OV 12 does not depend on whether he or she could have been charged with other offenses for the same conduct").

Where the sentencing offense was assault with intent to commit great bodily harm, and "the prosecution relied on all three gunshots as evidence of defendant's intent to commit murder or inflict great bodily harm, a finding that two of the gunshots were not part of the sentencing offense cannot be supported by the evidence," and accordingly, 10 points cannot be assessed for OV 12 because the "same three gunshots cannot . . . be used to establish separate 'acts' that occurred within 24 hours of the 'sentencing offense' under MCL 777.42(2)(a)(*i*)." *Carter*, 503 Mich at 229-230 (noting it is possible that there could be "circumstances under which multiple gunshots may constitute separate 'acts' that are distinguishable from the 'sentencing offense'").

Five points were properly assessed for OV 12 where defendant was convicted of armed robbery and carjacking, and "sprayed the victim in the face with pepper spray after he used [a] pneumatic gun to place her in fear and after she gave him her car keys." *People v Savage*, 327 Mich App 604, 632 (2019) (distinguishing the facts in *Light*, 290 Mich App at 717, where the defendant "committed one act that comprised both the robbery of the victim and the underlying larceny"). Specifically, "[t]he trial court did not clearly err in finding that the force or threat of force used to commit both the armed robbery and the carjacking was defendant's use of the pneumatic gun," and noting that in light of defendant's felony-firearm convictions, the jury presumably "found that defendant used the pneumatic gun to commit" the sentencing offenses. *Savage*, 327 Mich App at 632.

There was "insufficient evidence that defendant committed three or more contemporaneous acts within 24 hours to justify the 10-point assessment of OV 12" where "the prosecution listed all 21 dates [on which the defendant allegedly committed felonious criminal acts, including five specific incidents for which the defendant was separately charged and convicted,] under Count I of the charging document as predicate offenses constituting the sentencing offense of conducting a criminal enterprise." *People v Abbott (On Remand)*, 330 Mich App 648, 657-658 (2019) (noting that while "[c]onducting a criminal enterprise may be punished separately from and cumulatively with the underlying predicate offenses," it was not clear which predicate acts the jury relied on to convict the defendant of conducting a criminal

enterprise). Accordingly, under *Carter*, 503 Mich at 229, there was no evidence of "contemporaneous felonious criminal acts for the purpose of scoring OV 12" because "the predicate offenses for the defendant's conviction of conducting a criminal enterprise constitute the sentencing offense," and the prosecution included all of the defendant's conduct in the predicate offenses it charged. *Abbott (On Remand)*, 330 Mich App at 651 (quotation marks and citation omitted).

The trial court erred by concluding that there were three separate acts under OV 12 based on the presence of three people where the defendant first pointed a gun at the group as a whole and later approached the group "while holding the gun in the air above his head, as opposed to pointing the gun towards the group or any of its individual members." *Stoner*, 339 Mich App at 438 (quotation marks omitted). Because the record did not support the conclusion that the defendant "specifically targeted any of the three individuals in the group," it supported finding only "one additional 'act' based on [the defendant's] second armed approach of the group." *Id.* at 437-438 (noting that "there may be circumstances in which pointing a gun at a group of people may constitute separate acts . . . for example, if the defendant specifically pointed the gun at each individual in the group").

The trial court erred by counting two dismissed charges as contemporaneous felonious acts in a case where the sentencing offense was reckless driving causing serious impairment and the dismissed charges counted under OV 12 were operating a vehicle while intoxicated causing serious impairment and operating a vehicle with a suspended license causing serious impairment. *People v Teike*, ___ Mich App ___, ___ (2023). "[T]he acts underlying the uncharged offenses were not separate from the acts underlying the sentencing offense" because "[w]hat matters under OV 12 is whether the acts alleged to be contemporaneous felonious acts can be separated from the sentencing offense—in other words, whether they were used to establish elements of the sentencing offense." *Id.* at ___. In this case, the record shows that "defendant's conduct in operating his vehicle while intoxicated was used to establish an element of the sentencing offense, and therefore cannot be used to establish separate felonious acts for the purposes of scoring OV 12," and "both the sentencing offense and the dismissed charges were based on defendant's single act of operating a motor vehicle." *Id.* at ___, ___ n 2 (noting it is possible that "under a different set of circumstances, a defendant's conduct during a single period of driving may give

rise to acts that are separate from those underlying the sentencing offense").

3. Scoring Both OV 12 and OV 13

"[A]ll conduct that can be scored under OV 12 must be scored under that OV before proceeding to score OV 13." *People v Bemer*, 286 Mich App 26, 28 (2009). Conduct that is properly scored under OV 12 may not be omitted from OV 12 simply because scoring the conduct under OV 13 would yield a higher OV total. *Id.* at 28. OV 13 is discussed in Section 2.26.

4. Offense Category Designations

"The plain language of MCL 777.42 indicates the Legislature's express intent to allow sentencing courts to consider crimes within *all* the offense categories when scoring OV 12." *People v Bonilla-Machado*, 489 Mich 412, 428-429 (2011) (noting that MCL 777.42 permits 25 points for "'[t]hree or more contemporaneous felonious criminal acts involving *crimes against a person*,'" but 10 points for "'[t]hree or more contemporaneous felonious criminal acts involving *other crimes*'" making it clear that all crimes can be considered under OV 12) (alterations in original).

However, in scoring OV 12, a trial court "[is not] free to look at the substance of the crime rather than the offense category designations under the guidelines themselves[.]" *People v Wiggins*, 289 Mich App 126, 130 (2010). In *Wiggins*, the defendant was charged with two counts of attempting to arrange for child sexually abusive activity, MCL 750.145c(2) (designated as crimes against a person under MCL 777.16g), and two counts of disseminating sexually explicit matter to a minor, MCL 722.675 (designated as crimes against public order under MCL 777.15g). *Wiggins*, 289 Mich App at 127. After the defendant pleaded no contest to one count of attempting to arrange for child sexually abusive activity, the trial court assessed 25 points for OV 12 (three or more contemporaneous felonious criminal acts involving crimes against a person were committed). *Id*. at 127-128; MCL 777.42(1)(a). The Court of Appeals held that OV 12 should have been scored at 10 points (three or more contemporaneous felonious criminal acts involving other crimes were committed), because only one of the other three charges was designated as a crime against a person, and the other charges were designated as crimes against public order. *Wiggins,* 289 Mich App at 130-131; MCL 777.42(1)(c). The trial court erred by assessing 25 points for OV 12 based on its conclusion that "all three of the additional

charges were crimes involving other persons, namely the minor children involved." *Wiggins*, 289 Mich App at 127-128, 131. The Court of Appeals clarified that "only crimes with the offense category designated as 'person' under MCL 777.11 to MCL 777.18 can be considered 'crimes against a person' for purposes of scoring OV 12[.]" *Wiggins*, 289 Mich App at 131, 131 n 3 (noting that the same reasoning applies to OV 13). See also *Bonilla-Machado*, 489 Mich at 425-426 (in the context of OV 13, rejecting the Court of Appeals' reasoning that an assault of a prison guard could be considered a crime against a person despite the fact that it is statutorily designated as a crime against public safety because prison guards are people).

5. Examples of Sufficient Evidence to Score OV 12

The trial court properly scored 25 points for OV 12 where the defendant was in possession of "numerous sexually explicit pictures" of the three child victims "at the time and place where he committed CSC-I against [one of the victims]," and where "he was never charged as a result of the possession." *People v Waclawski*, 286 Mich App 634, 687 (2009).

The trial court properly scored 25 points for OV 12 where the defendant possessed "at least 100 distinct images of child pornography contained in . . . four [computer] disks" but was bound over on only one count of possession of child sexually abusive material and one count of using a computer to commit a crime; either "the number of images (over 100) or the number of disks (four) were sufficient to find that defendant possessed three or more different child sexually abusive materials, which in turn is enough to satisfy the numerical threshold for [either] OV 12 [or] OV 13." *People v Loper*, 299 Mich App 451, 454-455, 460-461 (2013) (rejecting the defendant's argument that MCL 750.145c(4), governing the felony offense of possession of child sexually abusive material, "[was] unconstitutionally vague because both a single image . . . and a collection of images . . . are prohibited, resulting in a variance in the number of criminal charges that could be brought by prosecutors in cases in which there is a collection of separate images of child sexually abusive material[and] . . . that because of this ambiguity, the trial court improperly assessed 25 points for OV 12 (and would have improperly scored OV 13 had points been assigned), despite the fact that he was bound over on only one count").

Further, the trial court properly scored 25 points for OV 12 even though "the majority of the child sexually abusive material was downloaded onto the four disks . . . over a year

before the date of the offense[.]" *Loper*, 299 Mich App at 454, 462-463 (because "the facts presented to the trial court form[ed] the basis of a reasonable inference that defendant possessed the disks . . . beginning in 2007 or before, and that he possessed all four disks . . . on October 23, 2008[(which the trial court listed as the offense date),] . . . [i]t was reasonable for the trial court to infer that defendant possessed the images within 24 hours of the offense date[;] . . . [t]hus, there was evidence supporting the trial court's finding that there were three or more contemporaneous acts of possession of child sexually abusive material under MCL 777.42(2)(a)").

The trial court properly considered breaking and entering with intent under MCL 750.111 as a contemporaneous felonious act despite the fact that the act occurred in a motel open to the public because defendant entered areas of the motel open only to employees—behind the front desk and, after kicking down the door, into a locked office. *People v Montague*, 338 Mich App 29, 55-58 (2021) (additionally rejecting defendant's argument that there was no evidence to find the third contemporaneous felonious criminal act where MCL 750.111 "clearly applies when a defendant enters certain buildings 'without breaking,'" and "even if a 'breaking' was required, the evidence established that one occurred").

6. *Lockridge* Error

Because OV 12 "specifically states that it cannot be scored for criminal acts for which there was a conviction, . . . any criminal act scored under OV 12 would not be a criminal act found by the jury." *People v Norfleet*, 317 Mich App 649, 667-668 (2016). Accordingly, where there was no indication in the record that the defendant admitted committing the contemporaneous felonious criminal acts supporting the score of 10 points for OV 12, and where removing the 10 points resulted in a change in the applicable guidelines range, he was entitled to a remand for possible resentencing under *People v Lockridge*, 498 Mich 358, 395, 397 (2015), and *United States v Crosby*, 397 F3d 103 (CA 2, 2005), even though the "evidence was [otherwise] sufficient to support" the score. *Norfleet*, 317 Mich App at 667-668. See also Section 2.12(B)(4) for a discussion of judicial fact-finding after *Lockridge*.

2.26 OV 13—Continuing Pattern of Criminal Behavior

Points	General Scoring Provisions for OV 13[1]
50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a). **Score 50 points *only* if** the sentencing offense is first-degree criminal sexual conduct. MCL 777.43(2)(d).
25	The offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang. MCL 777.43(1)(b). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER APRIL 1, 2009. SEE 2008 PA 562.
25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c).
10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property <u>or a violation of MCL 333.7401(2)(a)(*i*)-(*iii*) or MCL 333.7403(2)(a)(*i*)-(*iii*)</u>. MCL 777.43(1)(d). THE UNDERLINED PORTION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER MARCH 1, 2003. SEE 2002 PA 666.
10	The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. Formerly MCL 777.43(1)(d); deleted by 2008 PA 562, effective April 1, 2009. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE APRIL 1, 2009. SEE 2008 PA 562.
10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of MCL 333.7401(2)(a)(*i*)-(*iii*) or MCL 333.7403(2)(a)(*i*)-(*iii*). MCL 777.43(1)(e). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER MARCH 1, 2003. SEE 2002 PA 666.
5	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. MCL 777.43(1)(f).
0	No pattern of felonious criminal activity existed. MCL 777.43(1)(g).
Instructions	**Special Scoring Provisions for OV 13**
Count all crimes w/in five year period	Count all crimes within a period of five years, *including the sentencing offense*, without regard to whether the offense resulted in a conviction. MCL 777.43(2)(a).

Determining existence of organized criminal group	The existence of an organized criminal group may be reasonably inferred from the facts surrounding the sentencing offense, and the group's existence is more important than the presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication demonstrated by the criminal group. MCL 777.43(2)(b).
Do not consider OV 11 or 12 conduct except in certain circumstances	Do not consider conduct scored in OVs 11 or 12 unless the offense was related to membership in an organized criminal group, or unless the offense was gang-related. MCL 777.43(2)(c).[2]
Scoring controlled substance offenses	Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring this variable.[3] MCL 777.43(2)(e). Only one crime involving the same controlled substance may be counted under this variable.[4] For example, conspiracy and a substantive offense involving the same amount of controlled substances cannot both be counted under OV 13. Similarly, possession and delivery of the same amount of controlled substances may not be counted as two crimes under OV 13. MCL 777.43(2)(f).

1.Effective March 1, 2003, 2002 PA 666 amended the instructions for OV 13 to include references to specific controlled substance offenses. Additionally, effective April 1, 2009, 2008 PA 562 amended the instructions for OV 13 to replace the provision allocating 10 points for a pattern of activity related to "membership in an organized criminal group" with a provision allocating 25 points for a pattern of activity related to gang membership. Unshaded areas in the OV 13 chart contain the instructions for scoring OV 13 for all offenses and also contain specific instructions regarding certain scores that apply only to offenses occurring on or after March 1, 2003 or April 1, 2009, as indicated by the chart. Language appearing in the shaded area of the chart represents a former version of the variable that applies only to offenses that occurred before April 1, 2009.

2. "Gang-related" conduct was added by 2008 PA 562, effective April 1, 2009. OV 11 is discussed in Section 2.24, and OV 12 is discussed in Section 2.25.

3. This provision only applies to offenses committed on or after March 1, 2003. See 2002 PA 666.

4. This provision only applies to offenses committed on or after March 1, 2003. See 2002 PA 666.

A. Scoring

OV 13 is scored for all felony offenses subject to the statutory sentencing guidelines. MCL 777.22.

Step 1: Determine which statements addressed by OV 13 apply to the circumstances of the offense. MCL 777.43(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.43(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.43 specifically authorizes the consideration of facts outside the sentencing offense; accordingly, the *McGraw* rule does not apply to OV 13. See, e.g., MCL 777.43(2)(a) (including all crimes within a 5-year period).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Scoring Both OV 12 and OV 13

"[A]ll conduct that can be scored under OV 12 must be scored under that OV before proceeding to score OV 13." *People v Bemer*, 286 Mich App 26, 28 (2009). Conduct that is properly scored under OV 12 may not be omitted from OV 12 simply because scoring the conduct under OV 13 would yield a higher OV total. *Id.* at 28. OV 12 is discussed in Section 2.25.

3. Required Proofs for Scoring OV 13

"Before any alleged crimes may be used to score OV 13, the prosecution must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they are properly classified as felony 'crimes against a person,' MCL 777.43(1)(c), and that they occurred 'within a 5-year period' of the sentencing offense, MCL 777.43(2)(a)." *People v Nelson*, 502 Mich 934, 935 (2018) (remanding for resentencing where "[t]he court assigned 25 points to [OV 13], MCL 777.43, based upon charges that were dismissed in accordance with the plea agreement, but the record provide[d] no evidence to support the conclusion that the defendant committed a third crime against a person"). See also *People v McFarlane*, 325 Mich App 507, 537-538 (2018) (remanding for "resentencing with zero points assessed under OV 13" where the defendant's presentence investigation report noted only one prior felony offense in addition to the present felony offense within the five-year period and "[t]he trial court did not make any specific findings with regard to a third felony offense, so it [was] unclear how it arrived at the score of 25 points for this OV," and holding that "[o]n this record, the trial court clearly erred to the extent that it found that defendant had committed three felony offenses against a person within the past five years").

Ten points were properly assessed under OV 13 where the PSIR indicated that "defendant committed the sentencing offense in December 2016, had been convicted of felony breaking and entering twice in December 2014, and convicted of the felony of attempted unlawful driving away of an automobile in June 2014." *People v Muniz*, 343 Mich App 437, 453-454 (2022) (holding "the prerequisite three prior felony convictions, including the sentencing offense, within five years of the sentencing offense, are matters of record requiring assessment of 10 points for OV 13"). The Court rejected the defendant's argument that his prior felony convictions "established no 'pattern of felonious activity' because the earlier convictions were for crimes against property, as opposed to the instant crime against a person" since "[t]he plain language of MCL 777.43(1)(d) . . . specifies assessment of points for 'felonious criminal activity' consisting of 'crimes against a person or property[.]'" *Muniz*, 343 Mich App at 454.

4. Five-Year Period

The five-year period to which OV 13 refers must encompass the sentencing offense. *People v Francisco*, 474 Mich 82, 86-87 (2006). In *Francisco*, the trial court scored OV 13 at 25 points for the defendant's three previous felonies that occurred in 1986, even though the offense for which the defendant was being sentenced occurred in 2003. *Id*. at 88. Based on the plain language of MCL 777.43, the *Francisco* Court explained:

> "[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.
>
> * * *
>
> "Because MCL 777.43(2)(a) states that the sentencing offense 'shall' be included in the five-year period, the sentencing offense *must* be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense." *Francisco*, 474 Mich at 87.

Similarly, in *People v Nelson*, 491 Mich 869, 870 (2012), the Court reversed the judgment of the Court of Appeals with respect to the scoring of OV 13 "for the reasons stated in the Court of Appeals dissenting opinion[.]" The dissenting Court of Appeals opinion cited *Francisco*, 474 Mich at 86-87, and concluded that in order to score 25 points under OV 13, the

sentencing offense must also be a crime against a person; accordingly, where the defendant was convicted of a crime involving a controlled substance, 25 points could not be assessed under OV 13 because "the crime for which he was convicted could not have been part of a *pattern* of crimes against persons." *People v Nelson*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2011 (Docket No. 296932) (SHAPIRO, J., concurring in part and dissenting in part), p 1-2.

In *People v Furlong*, 509 Mich 1030 (2022), the Court held that "based on the reasoning of [*People v Nelson*, 491 Mich 869 (2012)], 50 points may only be assigned to OV 13 if the sentencing offense is first-degree criminal sexual conduct involving the penetration of a victim under the age of 13 and is part of a pattern of other sexual penetrations of a victim under the age of 13." Accordingly, "50 points should not have been assigned to OV 13" where the sentencing offense was violation of MCL 750.520b(1)(b) (victim at least 13 but less than 16 and defendant member of the same household) because the offense "did not involve sexual penetration of a person less than 13 years of age[.]" *Furlong*, 509 Mich at 1030.

5. Pending or Dismissed Charges and Acquittals

"[D]ue process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." *People v Beck*, 504 Mich 605, 629 (2019). See Section 2.13(E).

In finding a pattern of felonious criminal activity, the trial court properly relied on a witness's "testimony [that] was adequate to show, at least by a preponderance of the evidence, that defendant committed fourth-degree criminal sexual conduct (CSC-IV) against her[.]" *People v Carlson*, 332 Mich App 663, 670 (2020) (the testimony was admitted as other-acts evidence and defendant was never charged in connection to the conduct). Although CSC-IV is classified as a two-year misdemeanor in the Michigan Penal Code, it was properly considered felonious criminal activity for purposes of scoring OV 13 because "the sentencing guidelines are part of the Code of Criminal Procedure," which "defines 'felony' for purposes of that act as 'a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.'" *Id.* at 670-671, quoting MCL 761.1(f).

"[A] court may consider [a] charge[] against a defendant [that was] dismissed as a result of a plea agreement in scoring OV 13." *People v Nix*, 301 Mich App 195, 205 (2013). Moreover, a charge dismissed as a result of a plea agreement may be considered in assessing 25 points under MCL 777.43(1)(c), even if the plea agreement resulted in an "ultimate conviction . . . for a crime that is not a crime against a person." *Nix*, 301 Mich App at 203-206 (where the evidence supported the trial court's "determin[ation] that defendant had committed an act of felonious assault [(a crime against a person)] three days before the sentencing offenses," the charged felonious assault was properly considered in assessing 25 points for OV 13, even though the defendant ultimately pleaded guilty of a different offense (a crime against public safety) in connection with the incident).[98]

"[T]he trial court [properly] considered a 2008 charge of bank robbery, which was dismissed, as the third offense to support [a] 10-point score for OV 13" in sentencing the defendant for a 2010 robbery at the same bank. *People v Earl*, 297 Mich App 104, 106, 110-111 (2012) ("[a]lthough the 2008 case was dismissed in the district court, there was no indication at sentencing that the 2008 allegation was dismissed for want of probable cause," and "[i]n light of the unchallenged evidence presented at sentencing regarding the 2008 bank robbery offense, there was enough evidence for the trial court to score 10 points for OV 13").

The trial court properly scored 25 points for OV 13 where the defendant was convicted of two felony offenses against a person and had two CSC-I charges pending at the time he was sentenced. *People v Wilkens*, 267 Mich App 728, 743-744 (2005).

6. Applicable Crime Categories

"[T]he six named offense category designations used in MCL 777.5 and [MCL] 777.11 through [MCL] 777.19 apply to the

[98] The *Nix* Court stated that a score under the sentencing guidelines must be upheld "if there is any supporting evidence." *Nix*, 301 Mich App at 204, citing *People v Hornsby*, 251 Mich App 462, 468 (2002). However, in *People v Hardy*, 494 Mich 430, 437-438, 438 n 18 (2013), the Michigan Supreme Court clarified that, contrary to several Court of Appeals decisions, "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines[;]" rather, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence" (citations omitted). "[T]he standards of review traditionally applied to the trial court's scoring of the variables remain viable after [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 38 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453, 459-461 (2017), citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438 (additional citation omitted). For more information on the precedential value of an opinion with negative subsequent history, see our note.

scoring of offense variables and, therefore, a felony designated as a 'crime against public safety' may not be used to establish a 'pattern of felonious criminal activity involving 3 or more crimes against a person,' MCL 777.43(1)(c), for purposes of scoring OV 13." *People v Bonilla-Machado*, 489 Mich 412, 416 (2011). In *Bonilla-Machado*, the defendant was convicted of two counts of assaulting a prison employee, an offense that is designated under MCL 777.16j as a crime against public safety. *Bonilla-Machado*, 489 Mich at 417, 424-425. The defendant had two prior convictions for offenses designated as crimes against a person and one prior conviction for an offense designated as a crime against public safety. *Id.* at 425 n 20. The trial court assessed 10 points for OV 13 under MCL 777.43(1)(d) ("[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property"). *Bonilla-Machado*, 489 Mich at 425. The Court of Appeals increased the defendant's OV 13 score to 25 points under MCL 777.43(1)(c) ("[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person"), explaining that "[a]lthough MCL 777.16j indicates that assault of a prison guard is a crime against public safety, this offense is *also* a crime against a person because, obviously, a prison guard is a person." *Bonilla-Machado*, 489 Mich at 425 (quotation marks and citation omitted).

The Michigan Supreme Court, noting that "MCL 777.21(1)(a) explicitly instructs a court to first '[f]ind the *offense category* for the offense from' MCL 777.11 through [MCL] 777.19 and then 'determine the offense variables to be scored for that *offense category*,'" concluded that "[t]he use of the named offense categories throughout the sentencing guidelines chapter indicates legislative intent to have the offense categories applied in a uniform manner, including when they are applied in the offense variable statutes." *Bonilla-Machado*, 489 Mich at 426-427, 429 (holding the trial court and Court of Appeals erred in scoring OV 13 because "the combination of designated crimes needed to assess 5 to 50 points for OV 13 [was] not present, . . . the only allowable score under the categories designated in the statute [was] zero points"). See also *People v Pearson*, 490 Mich 984, 984-985 (2012) (because "conspiracy is classified as a 'crime against public safety'" under MCL 777.18, conspiracy to commit armed robbery may not be considered when scoring OV 13, even though armed robbery is classified under MCL 777.16y as a "crime against a person"; MCL 777.21(4) "does not allow the offense category underlying the conspiracy to dictate the offense category of the conspiracy itself for purposes of scoring OV 13").

7. Attempt Convictions

"MCL 777.19 does not expressly designate the defendant's attempt convictions to be felonies." *People v Jackson*, 504 Mich 929, 930 (2019) (cleaned up).[99] Further, OV 13 "does not expressly incorporate the sentencing guidelines' offense classifications" listed in MCL 777.11 through MCL 777.19; instead, "OV 13 is scored for 'felonious criminal activity'—that is, prior conduct that meets the definition of a felony, 'regardless of whether the offense resulted in a conviction.'" *Jackson*, 504 Mich at 930, quoting MCL 777.43(2)(a). Accordingly, the Court of Appeals erred when it held that "MCL 777.19(2) specifically defines what constitutes felonious activity involving attempted offenses for purposes of sentencing." *People v Jackson*, 320 Mich App 514, 522 n 2 (2017), rev'd in part 504 Mich 929 (2019).[100] The Supreme Court clarified that because attempted resisting and obstructing is "not punishable with imprisonment for more than one year," "[a] prior conviction for attempted resisting and obstructing does not, on its face, establish felonious criminal activity" for purposes of OV 13. *Jackson*, 504 Mich at 930 (remanding for the sentencing court to "determine in the first instance whether the defendant's conduct in attempting to violate MCL 750.81d or MCL 750.479, when combined with the sentencing offense, establishes 'a pattern of felonious criminal activity involving 3 or more crimes against a person for purposes of scoring OV 13'") (citations omitted).

8. Juvenile Adjudications

The court may include juvenile adjudications when scoring OV 13. *People v Harverson*, 291 Mich App 171, 180 (2010). "[T]he plain language of the statute does not require a criminal conviction to score 10 points, but only requires 'criminal activity.' A juvenile adjudication clearly constitutes criminal activity because 'it amounts to a violation of a criminal statute, even though that violation is not resolved in a "criminal

[99] MCL 777.19 provides that the sentencing guidelines apply "to an attempt to commit an offense enumerated in [MCL 777.11–MCL 777.19] if the attempted violation is a felony" and sets forth how to determine the attempted offense's offense category.

[100] The Supreme Court noted that MCL 777.19, which "provides that, in addition to the enumerated felonies in part II, attempts to commit certain enumerated felonies are to be sentenced under the guidelines if the attempt constitutes a felony," is "a relevant consideration when the sentencing offense . . . is an attempt," and that "MCL 777.19 is also relevant to identify the offense classification of a prior attempt conviction for purposes of scoring" PRV 1 and PRV 2 because those PRVs "expressly incorporate the sentencing guidelines' offense classifications." *People v Jackson*, 504 Mich 929, 930 (2019). PRV 1 is discussed in Section 2.5 and PRV 2 is discussed in Section 2.6.

proceeding."'" *Id.* at 180, quoting *People v Luckett*, 485 Mich 1076, 1076-1077 (2010) (YOUNG, J., concurring).

9. Multiple Offenses Arising From a Single Criminal Incident

"[M]ultiple concurrent offenses arising from the same incident are properly used in scoring OV 13[.]" *People v Gibbs*, 299 Mich App 473, 487-488 (2013) ("while [the defendant's convictions of two counts of armed robbery and one count of unarmed robbery] arose out of a single criminal episode, [the defendant] committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity" for which 25 points were properly scored).

However, "a single felonious act cannot constitute a [continuing] pattern [of criminal behavior]" for purposes of OV 13; "[MCL 777.43] contemplates that there must be more than one felonious event." *People v Carll*, 322 Mich App 690, 704-705 (2018) (noting that the defendant in *Gibbs*, 299 Mich App at 488, "committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity") (quotation marks omitted). Accordingly, the court should have scored OV 13 at zero where the defendant "had no prior record and all four convictions [(one count of reckless driving causing death and three counts of reckless driving causing serious impairment of a bodily function)] arose from a single act" of reckless driving. *Carll*, 322 Mich App at 693, 704-706 (remanding for resentencing because "although there were multiple victims, nothing was presented to show that he committed separate acts against each individual victim in the course of the reckless driving").

10. Claim of *Lockridge* Error

Where the "defendant had pleaded guilty . . . to two charges of home invasion related to offenses committed [before the sentencing offense] . . . [and d]efense counsel stipulated the existence of these convictions at sentencing, . . . the facts underlying the scoring of OV 13 [based on these offenses as part of a pattern of felonious activity] were admitted by defendant, and the points scored for OV 13 [did not need to] be subtracted in considering defendant's total OV score under [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 436 (2015). See also Section 2.12(B)(4) for a discussion of judicial fact-finding after *Lockridge*.

2.27 OV 14—Offender's Role

Points	General Scoring Provisions for OV 14
10	The offender was a leader in a multiple offender situation. MCL 777.44(1)(a).
0	The offender was not a leader in a multiple offender situation. MCL 777.44(1)(b).
Instructions	**Special Scoring Provisions for OV 14**
Consider entire criminal transaction	Consider the entire criminal transaction in which the sentencing offense occurred when determining the offender's role. MCL 777.44(2)(a).
May have multiple "leaders" in certain circumstances	In cases involving three or more offenders, more than one offender may be considered a leader. MCL 777.44(2)(b).

A. Scoring

OV 14 is scored for all felony offenses to which the guidelines apply. MCL 777.22.

Step 1: Determine which statement applies to the sentencing offense. MCL 777.44(1).

Step 2: Assign the point value indicated by the applicable statement. MCL 777.44(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.44 specifically authorizes the court to consider facts outside the sentencing offense. See MCL 777.44(2)(a) ("The entire criminal transaction should be considered when scoring this variable.").

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Meaning of *Multiple Offender Situation*

"[T]he plain meaning of 'multiple offender situation' as used in OV 14 is a situation consisting of more than one person violating the law while part of a group." *People v Dickinson*, 321 Mich App 1, 22 (2017) (quotation marks and citation omitted). A defendant can be involved in a multiple offender situation even if the defendant is "accompanied by only one other person and even though the other person was not charged in connection with the crime for which the defendant was convicted." *Id.* at 22-23 (holding that the trial court correctly determined that the defendant was involved in a multiple offender situation where the defendant procured heroin, possessed it, transported it to a prison, and delivered it to a prisoner).

3. Meaning of *Leader*

For purposes of scoring OV 14, "a 'leader' is defined in relevant part as 'a person or thing that leads' or 'a guiding or directing head, as of an army or political group,'" and "[t]o 'lead' is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting." *People v Rhodes (On Remand)*, 305 Mich App 85, 90 (2014), citing *Random House Webster's College Dictionary* (2001).

Based on these definitions, the Court concluded that "merely posing a greater threat to a joint victim is [not] sufficient to establish an individual as a leader within the meaning of OV 14, at least in the absence of any evidence showing that the individual played some role in guiding or initiating the [criminal] transaction itself." *Rhodes (On Remand)*, 305 Mich App at 90 (although the "defendant's exclusive possession of a gun during the criminal transaction [was] *some* evidence of leadership, . . . it [did] not meet the [applicable] preponderance of the evidence standard" where "the evidence [did] not show that defendant acted first, gave any directions or orders to [his accomplice], displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in [the accomplice's] participation in the criminal transaction, or was otherwise a primary causal or coordinating agent").

"The implication of MCL 777.44(2)(b)"—stating that "[i]f 3 or more offenders were involved, more than 1 offender may be determined to have been a leader"—"is that when there are exactly two offenders, only one may be assessed 10 points for OV 14." *People v Dupree*, 511 Mich 1, 10 n 2 (2023). "Generally,

OV 14 is clearly meant to ascribe greater culpability to some offenders than to others in multiple-offender situations." *Id.* at 10 n 2.

4. Sufficient Evidence to Support OV 14 Score

Although "there [were] facts that may indicate that [an 18-year-old codefendant] was a leader" in disseminating sexually explicit matter to a minor, the trial court did not clearly err in assessing 10 points against the 35-year-old defendant under OV 14; the defendant was "significantly older than [the codefendant]; [the defendant] owned and drove the van in which he picked the girls up and in which the sexual acts occurred; and it [was] reasonable to assume that [the defendant] purchased the alcohol" that was procured during the criminal episode. *People v Lockett*, 295 Mich App 165, 184-185 (2012).

Although two of the three victims of an armed robbery did not "believe[] that either [the defendant or his accomplice] was 'the leader,' . . . the trial court did not err by assessing 10 points for OV 14" where "[t]here was evidence that [the defendant] was the only perpetrator with a gun, did most of the talking, gave orders to [the accomplice], and checked to make sure [the accomplice] took everything of value," and where the testimony of the accomplice and the third victim supported the finding that the defendant was the leader. *People v Gibbs*, 299 Mich App 473, 494 (2013).

The trial court properly scored 10 points for OV 14 where there was evidence "that it was defendant who first expressed the idea of committing an armed robbery"; "who selected [a pizza restaurant] and directed a female friend to place [a] false order for him, giving her the address to the abandoned house where the crime was to take place"; who "initiated the robbery"; and "who held [a] BB gun to the victim's face during the robbery." *People v Ackah-Essien*, 311 Mich App 13, 39 (2015).

"[T]he trial court considered the 'entire criminal transaction' as required under MCL 777.44(2)(a)" and "correctly scored OV 14 at 10 points for defendant's [leadership] role in the criminal transaction" where "defendant procured . . . heroin, possessed it for a period of time, transported it to [a] prison, and delivered it to [a prisoner.]" *People v Dickinson*, 321 Mich App 1, 23 (2017). The trial court properly determined "that defendant acted as a leader" because the prisoner "obviously could not leave the prison to procure the heroin himself," and it was "reasonable to infer . . . that defendant exercised independent

leadership to procure the heroin from someone else outside the prison, transported it independently to the prison, and smuggled it inside before transferring it to [the prisoner]." *Id*.

Points were properly assessed under OV 14 even though the only two people involved in the murder were defendant and a human trafficking victim whom he "was clearly in total control over[.]" *People v Baskerville*, 333 Mich App 276, 300-301 (2020). The evidence showed that defendant shot the murder victim in the presence of the human trafficking victim during an argument between the two victims, the human trafficking victim helped defendant move the murder victim's body and vehicle, defendant instructed the human trafficking victim not to tell the police anything, and an autopsy showed that the murder victim was shot by two guns; accordingly, "the trial court had a reasonable basis for suspecting that [the human trafficking victim] may have had more involvement in the shooting than reflected in her testimony." *Id*. at 301.

2.28 OV 15—Aggravated Controlled Substance Offenses[101]

Points	General Scoring Provisions for OV 15[1]
100	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(a).
75	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 grams or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(b).
50	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(c).
50	The offense involved traveling from another state or country to this state while in possession of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7212 or MCL 333.7214 with the intent to deliver that mixture in this state. MCL 777.45(1)(d). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING ON OR AFTER MARCH 19, 2014. 2013 PA 203.

25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender. MCL 777.45(1)(e).
20	The offense involved the sale, delivery, or possession with intent to sell or deliver 225 grams or more of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE MARCH 1, 2003. 2002 PA 666.
15	The offense involved the sale, delivery, or possession with intent to sell or deliver 50 or more grams but less than 225 grams of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE MARCH 1, 2003. 2002 PA 666.
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants. MCL 777.45(1)(f).
10	The offense is a violation of MCL 333.7401(2)(a)(*i*)-(*iii*) pertaining to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) and was committed in a minor's abode, settled home, or domicile, regardless of whether the minor was present. MCL 777.45(1)(g).
5	The offense involved the delivery or possession with the intent to deliver marijuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking. MCL 777.45(1)(h).
0	The offense was not an offense described in the categories above. MCL 777.45(1)(i).

1. The statute governing point allocations for OV 15, MCL 777.45, was amended by 2002 PA 666, effective March 1, 2003, and by 2013 PA 203, effective March 19, 2014. Unshaded areas in the OV 15 chart contain the instructions for scoring OV 15 for offenses occurring on or after March 1, 2003, except as otherwise indicated with respect to the 50-point score under MCL 777.45(1)(d), which applies only to offenses occurring on or after March 19, 2014. Language appearing in the shaded areas of the chart represents the variable as it applies to offenses that occurred before March 1, 2003.

A. Scoring

OV 15 is only scored for felony offenses involving a controlled substance. MCL 777.22.

Step 1: Determine which statements apply to the sentencing offense. MCL 777.45(1).

[101] See the Michigan Judicial Institute's *Controlled Substances Benchbook* for detailed information about controlled substance offenses.

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.45(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

OV 15 can only be scored on the basis of the amount of the controlled substance applicable to the sentencing offense; OV 15 "cannot be scored on the basis of other drug offenses committed during a similar period but dismissed as part of [a] plea agreement." *People v Gray*, 297 Mich App 22, 28 (2012). Accordingly, 50 points were improperly scored under OV 15 based on "amounts of cocaine related to dismissed counts but wholly unrelated to the cocaine possession 'sentencing offense' to which defendant pleaded guilty." *Id*. at 24, 28. In *Gray*, the defendant pleaded guilty to certain charges, including a charge of possession with intent to deliver less than 50 grams of cocaine that was based on a small amount of cocaine found in his car, in exchange for dismissal of other charges, including two major controlled substance charges that were based on a large amount of cocaine that was discovered in a motel room. *Id.* at 23-25. The trial court, noting that the defendant possessed both the smaller and larger amounts of cocaine at the same time, assessed 50 points under OV 15, distinguishing *People v McGraw*, 484 Mich 120 (2009), "on the basis that *McGraw* rejected for scoring consideration events that transpired *after* the sentencing offense was completed[.]" *Gray*, 297 Mich App at 27-28 (emphasis supplied). The Court of Appeals reversed, holding that because OV 15 does not specifically provide otherwise, it must be scored based solely on the sentencing offense. *Id*. at 28, 33-34. Noting that "[*McGraw*, 484 Mich at 122, 130-134,] . . . requires a court to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was charged and later dismissed or dropped, regardless of the sequence in which the conduct transpired," the *Gray* Court concluded that although the greater amount of cocaine could be considered as the basis for a departure from the sentencing guidelines, it could not be considered in scoring OV 15. *Gray*, 297 Mich App at 32-34.

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Delivery by Injection

Dicta appearing in a case remanded for articulation of a substantial and compelling reason for departure under the previously-mandatory guidelines indicates that, for purposes of scoring the guidelines, a person may "deliver" a controlled substance by injecting the substance into another person. *People v Havens*, 268 Mich App 15, 18 (2005). The Court stated: "We assume that if injection constitutes delivery for purposes of conviction,[102] the same act constitutes delivery for purposes of scoring offense variable 15 (aggravated controlled substance offenses), MCL 777.45, at 25 points for delivery of a controlled substance other than marijuana to a minor." *Havens*, 268 Mich App at 18.

3. Bases for Scoring Five Points

"A proper reading of MCL 777.45(1)(h) reveals two alternative bases for scoring [OV 15] at five points: (1) when the offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or counterfeit controlled substance; and (2) when the offense involved possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking." *People v Jackson*, 497 Mich 857, 858 (2014) (holding that five points were properly scored for OV 15 "on the ground that there was evidence of delivery of . . . drugs").

4. Improper Assessment

The trial court improperly assessed 50 points for OV 15 on the basis of intent to deliver where the evidence showed that there was one pill crushed into fragments and found in the defendant's pocket, the defendant had a history of substance abuse, was not charged with delivery of a controlled substance, and there was an "absence of other indicia of possession with the intent to deliver[.]" *People v Davis*, 503 Mich 918, 918 (2018) (holding that "the record evidence preponderate[d] in favor of the conclusion that the defendant possessed the controlled substance at issue for personal use").

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[102] The *Havens* Court cited *People v Schultz*, 246 Mich App 695, 701-709 (2001), as support for the conclusion that "delivery of a controlled substance may be accomplished by injecting it into another person." *Schultz* affirmed the trial court's denial of the defendant's motion for a directed verdict regarding the charge of delivery of heroin where evidence established that the defendant and the decedent jointly purchased and shared heroin. *Id.* at 701-702, 709.

2.29 OV 16—Property Obtained, Damaged, Lost, or Destroyed

Points	General Scoring Provisions for OV 16
25	For a conviction under MCL 750.50, the property was 25 or more animals.[1] MCL 777.46(1)(a).
10	For a conviction under MCL 750.50, the property was 10 or more animals but fewer than 25 animals.[2] MCL 777.46(1)(b).
10	Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged. MCL 777.46(1)(c).
10	The property had a value of more than $20,000 or had significant historical, social, or sentimental value. MCL 777.46(1)(d).
5	The property had a value of $1,000 or more but not more than $20,000. MCL 777.46(1)(e).
1	The property had a value of $200 or more but not more than $1,000. MCL 777.46(1)(f).
0	No property was obtained, damaged, lost, or destroyed, or the property had a value of less than $200. MCL 777.46(1)(g).
Instructions	**Special Scoring Provisions for OV 16**
May aggregate value of property involved in certain circumstances	In cases involving multiple offenders or multiple victims, the appropriate point total may be determined by aggregating the value of property involved in the offense, including property involved in uncharged offenses or property involved in charges dismissed under a plea agreement. MCL 777.46(2)(a).
How to score OV 16 when property was unlawfully obtained, lost to lawful owner, or destroyed	Use the value of the property to score this variable. MCL 777.46(2)(b).
How to score OV 16 when property was damaged	Use the amount of money necessary to restore the property to its pre-offense condition to score this variable. MCL 777.46(2)(b).
Scoring OV 16 when uncharged or dismissed charges exist	Money or property involved in admitted but uncharged offenses or in charges dismissed under a plea agreement may be considered in scoring this variable. MCL 777.46(2)(c).

1. This statement was added to MCL 777.46(1) by 2018 PA 652, effective March 28, 2019.

2. This statement was added to MCL 777.46(1) by 2018 PA 652, effective March 28, 2019.

A. Scoring

OV 16 is scored for all felony offenses under the sentencing guidelines except those involving a controlled substance. MCL 777.22. When the offense is a crime against a person, OV 16 is scored only for a violation or attempted violation of MCL 750.110a (home invasion). MCL 777.22(1).

Step 1: Determine which statements addressed by the variable apply to the sentencing offense. MCL 777.46(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.46(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.46 specifically authorizes the consideration of facts outside the sentencing offense; accordingly, the *McGraw* rule does not apply to OV 16. See, e.g., MCL 777.46(2)(c) (including the amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Meaning of *Lost* Property

"OV 16 [is] to be scored when tangible property that was already possessed by a particular owner was unlawfully obtained, damaged, lost or destroyed"; "[t]herefore, . . . the definition of the term 'loss' or 'lost' [as used in MCL 777.46] does not encompass a person's loss of a right or expectation." *People v Hershey*, 303 Mich App 330, 340-341 (2013) (holding that the defendant's failure "to fulfill [his children's] legal expectation of receiving child support because he was unable to make the [court-ordered] payments" did not support a score of five points for OV 16).

3. Meaning of *Obtained* Property

Where "[t]he record [was] void of any evidence . . . to refute that defendant was unemployed and unable to pay," his failure to make court-ordered child support payments did not support a score of five points for OV 16 on the basis that property was "obtained unlawfully" within the meaning of MCL 777.46(2)(b). *People v Hershey*, 303 Mich App 330, 338 (2013) (noting that "[i]f defendant did not have money, he [could not] be said to have retained or obtained money; a legal obligation to pay money [did] not translate to possession of the money owed").[103]

A defendant obtains property under OV 16 so long as the defendant unlawfully obtains the property "from someone or some entity." *People v Horton*, ___ Mich App ___, ___ (2023) (rejecting the defendant's argument that OV 16 should not have been scored despite the fact that he forged a check and deposited it because the funds were never actually transferred from the victim's checking account). In *Horton*, the Court held that 5 points were properly assessed where the defendant wrote himself a $2,000 check, forged the victim's signature, endorsed the check and deposited it by mobile device into his bank account. *Id.* at ___. The bank extended the defendant a provisional credit of $2,000 which was reflected in his bank statement. *Id.* at ___. The fact that the defendant never withdrew any of the money and that payment on the instrument was ultimately declined does not preclude scoring OV 16 because "when the $2,000 check was deposited and defendant obtained $2,000 in provisional credit, he effectively 'obtained' property with 'a value of $1,000.00 or more but not more than $20,000.00,' MCL 777.46(1)(e), even though it was fleeting and temporary." *Horton*, ___ Mich App at ___ (cleaned up).

4. Claim of *Lockridge* Error

The trial court committed a *Lockridge*[104] error in assessing five points for OV 16 over the defendant's objection "because the jury was only required to find that defendant intended or did commit a larceny, not a larceny of a specific value, . . . [and the facts] were not admitted by defendant"; however, because "[r]educing defendant's OV score by 5 points . . . would not

[103] The *Hershey* Court "save[d] for another day[] the issue of whether a defendant who actually possesses the money or means needed to pay child support and who simply elects not to do so can be considered to have 'unlawfully obtained' property under MCL 777.46." *Hershey*, 303 Mich App at 338 n 9.

[104] *People v Lockridge*, 498 Mich 358 (2015).

alter [his] guidelines minimum sentence range, . . . remand [was] not required under *Lockridge*." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 435-436 (2015). See also Section 2.12(B)(4) for a discussion of judicial fact-finding after *Lockridge*.

2.30 OV 17—Degree of Negligence Exhibited

Points	General Scoring Provisions for OV 17
10	The offender showed a wanton or reckless disregard for the life or property of another person. MCL 777.47(1)(a). Do not score 10 points under OV 17 if points are given under OV 6 (intent to kill or injure another individual). MCL 777.47(2).
5	The offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown. MCL 777.47(1)(b).
0	The offender was not negligent. MCL 777.47(1)(c).

A. Scoring

OV 17 is scored only under very specific circumstances: when the offense is a crime against a person *and* the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22.

Step 1: Determine which statements apply to the offense. MCL 777.47(1).

Step 2: Assign the point value indicated by the statement having the highest number of points. MCL 777.47(1).

B. Issues

Application of *McGraw* rule. "Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

The trial court erred in assessing five points for OV 17 where "the defendant's operation of a vehicle occurred after he completed the crime of larceny from a person" because under MCL 777.22(1), OV 17 "can only be scored for larceny from a person, MCL 750.357, if the crime involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive." *People v Siders*, 497 Mich 985,

986 (2015). In support of its order, *Siders* cited "*People v Smith-Anthony*, 494 Mich 669, 689 n 61 (2013) ('In a larceny case, the crime is completed when the taking occurs.'); [and] *McGraw*, 484 Mich at 122 ('[A] defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise.')." *Siders*, 497 Mich at 986 (second alteration in original).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2.31 OV 18—Operator Ability Affected by Alcohol or Drugs

Points	General Scoring Provisions for OV 18[1]
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(a).
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(b).
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender was under the influence of alcoholic or intoxicating liquor, a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance; or while the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(*iv*); or while the offender had an alcohol content of 0.08 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning 5 years after the state treasurer publishes a certification under MCL 257.625(28), the offender had an alcohol content of 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(c).
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE SEPTEMBER 30, 2003. 2003 PA 134.
5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while he or she was visibly impaired by the use of alcoholic or intoxicating liquor or a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content. MCL 777.48(1)(d).

5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.07 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was visibly impaired by the use of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content. THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE SEPTEMBER 30, 2003. 2003 PA 134.
0	The offender's ability to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive was not affected by an alcoholic or intoxicating liquor or a controlled substance or a combination of alcoholic or intoxicating liquor and a controlled substance. MCL 777.48(1)(e).

1. Effective September 30, 2003, 2003 PA 134 amended the statute governing point allocations for OV 18. Language appearing in the shaded areas of the chart represents the variable as it applies to offenses that occurred before September 30, 2003. Unshaded areas contain the instructions for scoring OV 18 for offenses occurring on or after September 30, 2003.

OV 18 is only scored under very specific circumstances: when the offense is a crime against a person or a crime against public safety *and* the crime involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22.

Step 1: Determine which of the statements addressed by this variable apply to the offense. MCL 777.48(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.48(1).

Application of the *McGraw* rule. "Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.48 does not specifically authorize the court to consider facts outside the sentencing offense. See Section 2.13(A) for a general discussion of the *McGraw* rule.

2.32 OV 19—Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice or the Rendering of Emergency Services

Points	General Scoring Provisions for OV 19
25	The offender by his or her conduct threatened the security of a penal institution or court. MCL 777.49(a).
15	The offender used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with the administration of justice. MCL 777.49(b). THIS PROVISION APPLIES ONLY TO OFFENSES OCCURRING BEFORE OCTOBER 23, 2001. 2001 PA 136.
15	The offender used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with, or that results in the interference with, the administration of justice or the rendering of emergency services. MCL 777.49(b).
10	The offender otherwise interfered with or attempted to interfere with the administration of justice, or directly or indirectly violated a personal protection order.[1] MCL 777.49(c).
0	The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or the threat of force. MCL 777.49(d).[2]

1. The phrase "or directly or indirectly violated a personal protection order" was added to MCL 777.49(1) by 2018 PA 652, effective March 28, 2019.
2. Effective April 22, 2002, 2002 PA 137 added "or the rendering of emergency services by force or threat of force" to MCL 777.49(d).

A. Scoring

OV 19 is scored for all felony offenses to which the statutory sentencing guidelines apply. MCL 777.22.

Step 1: Determine which statements addressed by OV 19 apply to the sentencing offense. MCL 777.49(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.49(1).

B. Issues

In addition to the following discussion of issues, see the Michigan Judicial Institute's table summarizing OV 19 scoring circumstances caselaw.

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009).

"OV 19 may be scored for conduct that occurred after the sentencing offense was completed." *People v Smith*, 488 Mich 193, 202 (2010). "Because the circumstances described in OV 19 expressly include events occurring after a felony has been completed, the offense variable provides for the 'consideration of conduct after completion of the sentencing offense.'" *Id.*, quoting *People v McGraw*, 484 Mich 120, 133-134 (2009).

In *Smith*, the defendant was convicted of manslaughter, reckless driving, and witness intimidation. *Smith*, 488 Mich at 197. A few days after the car accident in which the victim was killed, the defendant contacted one of the passengers in the defendant's vehicle at the time of the accident and told her not to talk to anyone about what happened and made additional threatening statements. *Id.* at 196. At sentencing, defense counsel argued that the "defendant's witness intimidation conviction precluded the scoring of OV 19 for the manslaughter conviction." *Id*. at 197. The Court of Appeals agreed and held that the defendant should have been scored zero points for OV 19, based on the rule set out in *McGraw*, 484 Mich 120, that "offense variables may not be scored for conduct that occurred after the completion of the sentencing offense unless provided for in the particular variable[.]" *Smith*, 488 Mich at 197-198.

The Supreme Court reversed, noting that "[t]he aggravating factors considered in OV 19 contemplate events that almost always occur *after* the charged offense has been completed," and that "[t]he express consideration of these events explicitly indicates that postoffense conduct may be considered when scoring OV 19." *Smith*, 488 Mich at 200. Accordingly, "OV 19 may be scored for conduct that occurred after the sentencing offense was completed." *Id*. at 195, 202 (noting that *McGraw* provided an exception to the general rule, holding that only the sentencing offense may be considered when scoring the OVs, "unless otherwise provided in the particular variable.") (quotation marks and citation omitted).

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Meaning of *Interfere With the Administration of Justice*

"[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343 (2013). "It 'encompasses more than just the actual judicial process' and can include '[c]onduct that occurs before criminal charges are filed,' acts that constitute obstruction of justice, and acts that do not 'necessarily rise to the level of a chargeable offense[.]'" *Id*., quoting *People v Barbee*, 470 Mich 283, 286-288 (2004) (first alteration in original).

Interference with the administration of justice is "something more than a suspect's denial of culpability." *People v Deweerd*, 511 Mich 979, 980 (2023). Specifically, the Court in *Deweerd* gave the following examples from caselaw of actions that rose to the level of interference with the administration of justice:

- "actions that actively redirect the investigation";
- "that attempt to or successfully conceal evidence from law enforcement";
- "that attempt to or successfully prevent witnesses from testifying or providing evidence"; and
- "that attempt to or successfully prevent law enforcement from being able to arrest the defendant[.]" *Id* (citations omitted).

See also *People v Muniz*, 343 Mich App 437, 455-456 (2022) (holding that while defendants "have an absolute right to maintain their innocence, and a trial court may not base any part of a defendant's sentence on a refusal to admit guilt," when statements go "beyond denying the allegations by misleading the police," and are made with the intent to "deceive law enforcement during the investigation" it is permissible to assess points under OV 19).

"OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *People v Baskerville*, 333 Mich App 276, 301-302 (2020) (holding the facts provided a reasonable basis to conclude that the defendant interfered in the administration of justice when he attempted to conceal or dispose of the victim's body by moving it, moved the victim's vehicle, got rid of a gun used in the murder, and encouraged the other person involved

to tell the police she did not know anything about the incident) (quotation marks and citation omitted).

In contrast, "a defendant's denial of culpability—without more—does not slow or prevent a criminal investigation or constitute an effort to do so." *Deweerd*, 511 Mich at 980. Further, "while an admission of guilt may expedite a criminal investigation, OV 19 does not contemplate the failure to facilitate a criminal investigation, only the interference or attempted interference with one." *Id*. at 980-981 (further noting that any "increased punishment imposed because of [a] defendant's denial of culpability also raises constitutional concerns regarding the defendant's right to maintain his innocence, for which the defendant cannot be penalized"). See also *People v Teike*, ___ Mich App ___, ___ (2023) (defendant's refusal of a chemical test was expressly permitted by MCL 257.625a and MCL 257.625c, and thus, consistent with the administration of justice under the statutes; "[t]o hold otherwise would implicate constitutional concerns regarding warrantless searches, and would engraft an additional consequence onto MCL 257.625a that the Legislature did not see fit to provide").[105]

3. Conduct Before Criminal Charges

A defendant's conduct before criminal charges are filed against him or her may form the basis of interfering or attempting to interfere with the administration of justice as contemplated by OV 19; the conduct constituting interference with the administration of justice under OV 19 includes giving a police officer a false name when asked for identification. *People v Barbee*, 470 Mich 283, 284-285, 288 (2004) (the defendant gave a false name to a police officer who had pulled over the defendant's car for crossing the fog line).[106]

The Court held that "the phrase 'interfered with or attempted to interfere with the administration of justice' encompasses more than just the actual judicial process." *Barbee*, 470 Mich at 287-288. The Court explained:

> "While 'interfered with or attempted to interfere with the administration of justice' is a broad

[105] MCL 257.625a and MCL 257.625c address chemical tests. For a detailed discussion of chemical tests and driving while intoxicated see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

[106] The *Barbee* decision vacated the Court of Appeals decision in *People v Deline*, 254 Mich App 595, 597 (2002), to the extent that the *Deline* Court equated the conduct required to merit scoring under OV 19 with conduct that constituted the "obstruction of justice." *Barbee*, 470 Mich at 287.

> phrase that *can* include acts that constitute 'obstruction of justice,' it is not limited to *only* those acts that constitute 'obstruction of justice.'
>
> * * *
>
> "The investigation of crime is critical to the administration of justice. Providing a false name to the police constitutes interference with the administration of justice, and OV 19 may be scored, when applicable, for this conduct." *Barbee*, 470 Mich at 286, 288.

However, a court may not score 10 points under OV 19 based solely on the fact that a defendant lied to medical services personnel. *People v Portellos*, 298 Mich App 431, 449-452 (2012) (holding that "[t]he trial court correctly determined that it should not assign 10 points for OV 19 for lying to medical services personnel" about the circumstances surrounding the birth and death of her infant, because "MCL 777.49(c) does not contain any reference to otherwise interfering with emergency services"), overruled in part on other grounds by *People v Calloway*, 500 Mich 180, 188 (2017).[107]

"Fleeing from the police can easily become 'interference with the administration of justice' particularly where . . . there was an effective command for the vehicle to stop, in the form of the police activating their lights and sirens." *People v Ratcliff*, 299 Mich App 625, 632-633 (2013) (holding court properly scored 10 points for OV 19 where police officers approached the stolen vehicle in which the defendant was a passenger and ordered the occupants to "'[f]reeze,'" but the defendant, after a vehicle chase, "instead fled on foot after the vehicle came to a stop"), vacated in part on other grounds 495 Mich 876 (2013).[108] See also *People v Hershey*, 303 Mich App 330, 344 (2013) (citing *Ratcliff*, noting it was vacated in part on other grounds, and noting that "fleeing from police contrary to an order to freeze" has been held "to constitute an interference or attempted interference with the administration of justice"); *People v Smith*, 318 Mich App 281, 286 (2016) ("Hiding from the police constituted an interference with the administration of justice because it was done for the purpose of hindering or hampering the police investigation.").

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

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

A defendant's refusal to submit to a blood draw upon police request does not constitute interference or attempted interference with the administration of justice. *People v Teike*, ___ Mich App ___, ___ (2023). In this case, the defendant was arrested for operating while intoxicated—he refused to submit to a blood draw and the police obtained a warrant for the test which ultimately revealed numerous controlled substances in his bloodstream. *Id.* at ___. "MCL 257.625a[109] contemplates that an arrestee may refuse to submit to a chemical test, and in that event it provides both for alternative means for a police officer to secure the test (a court order) and consequences for the arrestee (suspension of license and driving privileges and the addition of driver record points)." *Teike*, ___ Mich App at ___. "[B]ecause MCL 257.625a permits an arrestee to make a choice and requires that he be informed of his right to make it, his exercise of that right cannot be found to have hampered, hindered, or obstructed the act or process of administering judgment for purposes of assessing points for OV 19." *Teike*, ___ Mich App at ___. "The record does not show that defendant hampered, or attempted to hamper, police officers in obtaining a court order to draw and test his blood; he simply refused to consent to such a test, as was his right under the law (with attendant consequences)." *Id*. at ___ (holding zero points should be assessed under OV 19).

4. Conduct That Threatened the Security of a Penal Institution or Court

"A 25-point score under OV 19 requires the trial court to find by a preponderance of the evidence that the defendant 'by his or her conduct threatened the security of a penal institution or court.'" *People v Dixon*, 509 Mich 170, 177 (2022), quoting MCL 777.49. "To satisfy this standard, a court must find (1) that the defendant engaged in some conduct and (2) that conduct threatened the security of the prison." *Id.* at 177. For example, "possession alone, even constructive possession, could be 'conduct' for purposes of scoring OV 19," and "possession might be 'conduct that threatens the security of a penal institution' depending on the item possessed." *Id.* at 179 (cleaned up). However, "mere possession of any object that hypothetically could pose a threat with some creativity" does not satisfy OV 19's requirement that the conduct threaten the security of the prison; there must be facts to establish that the

[109] MCL 257.625a addresses preliminary chemical breath analysis. For a detailed discussion of chemical tests see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

possession actually threatened the security of the institution. *Id.* at 181.

The trial court properly scored 25 points for OV 19 where the defendant smuggled heroin into a prison and delivered it to a prisoner. *People v Dickinson*, 321 Mich App 1, 24 (2017). The "delivery of an unquestionably dangerous drug like heroin into the confines of the prison threatened the safety and security of both the guards and the prisoners and, therefore, threatened the security of a penal institution." *Id*. at 23-24 (noting that "MCL 777.49 by its language does not limit the scoring of 25 points for OV 19 only to offenders who smuggled weapons or other mechanical destructive devices into a prison").

The trial court properly scored 25 points for OV 19 where the defendant, while in jail awaiting sentencing, attempted to smuggle drugs into the jail and assaulted another inmate who had informed the authorities of his conduct. *People v Carpenter*, 322 Mich App 523, 530-531 (2018) (noting that "OV 19 explicitly contemplates postoffense conduct" and rejecting "defendant's argument that his smuggling of controlled substances and assault of an inmate [did] not sufficiently relate to the underlying sentencing offense of armed robbery to justify the trial court's reference to those events when calculating defendant's OV 19 score"). "The smuggling of controlled substances into a jail is certainly a threat to the security of a penal institution because of the dangers of controlled substances to the users and those around them"; furthermore, "even if a fight between inmates might be found insufficiently related to the security of the penal institution at large, defendant's *retaliatory* attack on an inmate who he believed had informed on him definitely threatened the security of the jail by causing disruption within the jail and by potentially discouraging other inmates from coming forward about security breaches they might witness." *Id*. at 531.

The trial court erred by scoring 25 points for OV 19 where the defendant constructively possessed a cell phone and a charger in a prison, but there was no evidence that the defendant "used the phone or that it was operational." *Dixon*, 509 Mich at 181. The Court held that the fact that "cell phones can be used in threatening ways, particularly in prisons," does not satisfy the threat requirement in OV 19; "unlike possession of a weapon, the nature of the cell phone possession is important to determining whether it 'threatened the security of a penal institution' because cell phones have many nonthreatening uses." *Id.* at 180, 181, 182 (noting that in some cases "prisoner cell phone possession surely meets [the standard in OV 19],"

but there must be "facts establish[ing] that the defendant's conduct, in fact, threatened the security of the institution").

The *Dixon* Court observed that the decisions in *Dickinson* and *Carpenter* "focused on the defendants' conduct beyond the drug possession—drug smuggling and assault—to justify a 25-point score." Accordingly, the *Dixon* Court concluded that the decisions in *Dickinson* and *Carpenter* were not relevant to analyzing the defendant's conduct under OV 19 "where the only evidence was that [he] was near a cell phone[.]" *Dixon*, 509 Mich at 180.

5. Threatening Conduct/Words

The trial court properly scored 10 points or OV 19 where the defendant told the rape victim, during the kidnapping, that he knew who she was and that "his 'boys' had been watching her," and "required the victim to promise not to contact the police *as a condition of releasing her*." *People v McDonald*, 293 Mich App 292, 299-300 (2011) (further noting that "the trial court properly considered testimony from the preliminary examination at sentencing").

A defendant's conduct is properly scored under OV 19 where the defendant threatens to kill a victim of the crime committed. *People v Endres*, 269 Mich App 414, 420-421 (2006).[110] Without regard to a defendant's intention when the threat was issued, fifteen points are appropriate because the "threats resulted in the interference with the administration of justice, either by preventing the victim from coming forward sooner or affecting his testimony against defendant." *Id*. at 422.

The trial court properly scored OV 19 at 10 points where the defendant "told his victims not to disclose his acts or he would go to jail." *People v Steele*, 283 Mich App 472, 492 (2009). The defendant argued his statement was "an obvious fact," and therefore not a threat interfering with the administration of justice; the Court disagreed, holding that the "[d]efendant's admonitions to his victims [that he would go to jail if they disclosed his acts of sexual assault] were a clear and obvious attempt by him to diminish his victims' willingness and ability to obtain justice." *Id.* at 492-493.

[110]Note that in *People v Hardy*, 494 Mich 430, 438 n 18 (2013), the Court acknowledged that "[s]everal recent Court of Appeals decisions," including *Endres*, 269 Mich App 414, "have stated that '[s]coring decisions for which there is any evidence in support will be upheld,'" and explicitly noted that "[t]his statement is incorrect." *Hardy* explained that "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for purposes of assessing points under the sentencing guidelines." *Hardy*, 494 Mich at 438 n 18.

6. Resisting Apprehension

The trial court properly scored OV 19 at 15 points where the defendant, in the course of robbing a retail store, "vigorously resisted and threatened" the store's loss prevention officer and other store employees. *People v Passage*, 277 Mich App 175, 181 (2007) (noting defendant's threat to the officer that he better not see the officer outside of the store was an implicit threat to use physical force and "could have dissuaded the officer from testifying against defendant"). According to the Court, interference with store employees in their efforts to prevent the defendant from leaving the premises with unpaid merchandise constituted "interference with the administration of justice" because MCL 764.16(d) authorizes a private citizen to make an arrest if the citizen is an employee of a merchant and has reasonable cause to believe that the person arrested committed a larceny in that store. *Passage*, 277 Mich App at 180-181. Additionally, the language in MCL 777.49(b) refers only to using force or threatening force against another "person"; the statute does not require that the use or threat of force be directed against police officers. *Passage*, 277 Mich App at 181.

The trial court properly scored OV 19 at 10 points on the basis of "defendant's attempt to avoid getting caught" where after completion of the sentencing offenses, defendant ran to a vehicle, looked at the police while outside the vehicle, got inside the vehicle, and when "[t]he police gave defendant loud verbal commands to freeze," the defendant "was still fumbling inside the vehicle as if trying to get it to start as the police surrounded him." *People v Montague*, 338 Mich App 29, 59 (2021).

7. Perjury

Absent any statutory language indicating otherwise, OV 19 applies to convictions, such as perjury, that necessarily involve interference with the administration of justice. *People v Underwood*, 278 Mich App 334, 339-340 (2008) (the sentencing offense was perjury committed in a court proceeding). The Legislature did not expressly prohibit scoring OV 19 for the crime of perjury, and because perjury is a public trust offense for which OV 19 must be scored, the trial court erred in refusing to do so. *Id.* at 338-339.

8. Concealing or Destroying a Weapon

Evidence of the defendant's "attempt to hide or dispose of the weapon [that he used to stab the victim] in conjunction with

his encouragement of others to lie about where he was at the time of the stabbing was a multifaceted attempt to create a false alibi and mislead the police," and this conduct supported the trial court's assessment of 10 points for OV 19. *People v Ericksen*, 288 Mich App 192, 204 (2010). See also *People v McKewen*, 326 Mich App 342, 358 (2018) (holding "the trial court did not err when it assessed 10 points for OV 19" where there was evidence that the defendant disposed of the weapon he used to stab the victim as well as "the clothing he was observed wearing during the attack"[111]).

9. Failure to Pay Court-Ordered Child Support

The "defendant's failure to comply with [his] court-ordered [child support] obligation" did not "constitute interference with the administration of justice under OV 19." *People v Hershey*, 303 Mich App 330, 342, 345 (2013) (holding that because "defendant's failure to pay child support occurred after the circuit court ordered [him] responsible for child support," the defendant "did not hamper, hinder, or obstruct the act or process of the circuit court's administering judgment" in the divorce and child-support case).

10. Parole/Probation Violations

The "defendant did not interfere with the administration of justice by violating the terms of his probation." *People v Hershey*, 303 Mich App 330, 345 (2013). "When defendant violated the terms of his probation, the trial court had already entered the . . . judgment of sentence, and the court's probation order was already effective." *Id.* "Thus, although defendant violated the trial court's probation order, he did not hinder the process or act of the trial court administering judgment in [that case]." *Id.* at 345-346 (noting "there is no caselaw indicating that an offender's probation violation itself (as compared to the underlying conduct) constitutes interference with the administration of justice under OV 19").

The mere fact that a defendant "was contemporaneously in violation of his parole" at the time of the commission of the sentencing offense does not justify a score of 10 points for OV 19. *People v Sours*, 315 Mich App 346, 348, 350 (2016). "The fact that [the defendant] was also violating his parole had no effect on the process of investigating, trying, and convicting him for the methamphetamine offense; therefore, OV 19 should have

[111]Note that the opinion states only that the defendant's clothing supported the score in this case; it does not describe the defendant's clothing or discuss the significance of it.

been scored at zero points." *Id*. at 350 (noting that "defendant was arrested immediately after being discovered with methamphetamine," and his "failure to report to his parole agent before committing a new felony . . . did not hinder the process of administering judgment for the sentencing offense").

11. Force or Threat of Force Against Property

"[T]he trial court did not err in assessing 15 points for OV 19" where the defendant fled from police on foot after committing retail fraud and broke into a camper parked in a nearby yard for the purpose of hiding from the police. *People v Smith*, 318 Mich App 281, 288 (2016). "Although [the defendant] did not threaten a victim's property or physically destroy the camper in which he hid, he committed the crime of breaking and entering a structure with the intent to commit a felony [(resisting or obstructing a police officer)] when he entered the camper," and when he "broke into the camper, he exerted force against the property of another by opening the door." *Id*. at 288, 288 n 2.

12. Claim of *Lockridge* Error

Where the defendant, "while pleading guilty, . . . admitted that he ran from the police after stealing property . . . and that he broke into [a] camper in order to hide from the police[,] . . . the facts necessary to support a score of 15 points [for OV 19] were admitted by [the defendant], and his sentence was not constrained by improper judicial fact-finding in violation of the Sixth Amendment" under *People v Lockridge*, 498 Mich 358, 373 (2015). *People v Smith*, 318 Mich App 281, 289 (2016), citing *People v Garnes*, 316 Mich App 339, 344 (2016).[112] See also Section 2.12(B)(4) for a discussion of judicial fact-finding after *Lockridge*.

[112]"As used in *Lockridge*, the phrase 'admitted by the defendant' means '*formally* admitted by the defendant *to the court*, in a plea, in testimony, by stipulation, or by some similar or analogous means.'" *People v Smith*, 318 Mich App 281, 289 (2016), quoting *People v Garnes*, 316 Mich App 339, 344 (2016).

2.33 OV 20—Terrorism

Points	General Scoring Provisions for OV 20
100	The offender committed an act of terrorism by using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(a).
50	The offender committed an act of terrorism without using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(b).
25	The offender supported an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(c).
0	The offender did not commit an act of terrorism or support an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(d).

A. Scoring

OV 20 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22.

Step 1: Determine which statements addressed by the variable apply to the sentencing offense. MCL 777.49a(1).

Step 2: Assign the point value indicated by the applicable statement having the highest number of points. MCL 777.49a(1).

B. Issues

1. Application of *McGraw* Rule

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133 (2009). MCL 777.49a does not specifically authorize the court to consider facts outside the sentencing offense.

See Section 2.13(A) for a general discussion of the *McGraw* rule.

2. Circumstances Justifying 100 Point Score

Assessing 100 points for OV 20 is appropriate only when a defendant's use or threatened use of one of the substances or devices enumerated in MCL 777.49a also constitutes an act of terrorism as defined by MCL 750.543b(a); a score of 100 is

inappropriate when a defendant's threats to cause harm using certain substances or devices do not themselves constitute *acts* of terrorism. *People v Osantowski*, 481 Mich 103, 105 (2008). To merit 100 points, the plain language of MCL 777.49a(1)(a) "requires the offender to have '*committed an act of terrorism by* using or threatening to use' one of the enumerated substances or devices." *Osantowski*, 481 Mich at 105. In other words, "the use or threatened use must constitute the *means* by which the offender committed an *act* of terrorism." *Id*. at 109. "To constitute an act of terrorism, a threat must be a violent felony and *also* must itself be 'a willful and deliberate act' that the offender 'knows or has reason to know is dangerous to human life' and 'that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.'" *Id*., quoting MCL 750.543b(a). Here, the trial court properly concluded that the defendant would not have known his "e-mail messages to another teenager were *themselves* 'dangerous to human life,'" nor did the defendant actually intend "'to intimidate or coerce a civilian population or influence or affect'" government conduct when he e-mailed to another teenager his threats to engage in violent conduct. *Osantowski*, 481 Mich at 112, quoting MCL 750.543b(a)(*ii*)-(*iii*).

Chapter 3: Determining Recommended Minimum Sentence for Offender Not Sentenced as Habitual Offender

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3.1 Introduction

Chapter 3 discusses the method of determining the recommended minimum sentence ranges using the statutory sentencing guidelines and sentencing grids[1] for offenders *not* being sentenced as habitual offenders.

A standard procedure applies to most felonies to which the guidelines apply — enumerated in MCL 777.11a to MCL 777.17g. Special procedures apply to offenses predicated on the commission of an underlying felony and attempted offenses. See MCL 777.18; MCL 777.19. This chapter details calculation of the minimum sentence range under the guidelines for each of these types of offenses.

Note that in 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 365, 399 (2015), aff'g in part and rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[2] The *Lockridge* decision is discussed in detail in Section 1.4. See also the Michigan Judicial Institute's *Lockridge* flowchart. Sentencing courts are required to articulate both the justification for an out-of-guidelines sentence and the justification for the extent of the departure itself. *People v Steanhouse (On Remand) (Steanhouse III)*, 322 Mich App 233, 239 (2017), vacated in part 504 Mich 969 (2019).[3] See Chapter 5 for a detailed discussion of imposing an out-of-guidelines sentence.

3.2 Determining Minimum Sentence Range for Most Felony Offenses

To find the minimum sentence range for offenses listed in MCL 777.11a to MCL 777.17g complete the following steps:

Step 1: Find the offense category to which the sentencing offense belongs.[4] The offense category for every offense to which the guidelines

[1] See Section 1.7 for general discussion of the sentencing grids.

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

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

apply is indicated in Part 2 of the Code of Criminal Procedure, MCL 777.11 *et seq.*

Step 2: Calculate the offender's "OV level" by scoring only the OVs applicable to crimes in the sentencing offense's category.[5] MCL 777.21(1)(a). MCL 777.22 indicates which OVs are scored for which offense categories. The total number of points scored for all of the applicable OVs is the offender's "OV level." *Id.*

- An offender's OV level will be designated in roman numerals from I to VI on the sentencing grid. See Part 6 of the Code of Criminal Procedure, MCL 777.61 *et seq.* The OV level's numeric designation increases as the offender's OV point total increases so that the severity of the corresponding penalty increases as does the offender's OV level. *Id.*

Step 3: Calculate the offender's "PRV level" by scoring all seven PRVs. MCL 777.21(1)(b).[6] The total number of points scored for an offender's seven PRVs is the offender's "PRV level." *Id*.

- An offender's PRV level is designated on the sentencing grid by capital letters from A to F according to the offender's PRV point total. See Part 6 of the Code of Criminal Procedure, MCL 777.61 *et seq.* PRV level A represents the column with the fewest points and PRV level F represents the column with the most points. *Id.* The severity of the penalty increases with an offender's transit from PRV level A up to PRV level F. *Id.* The point values corresponding with PRV levels A through F are the same for all nine sentencing grids so that an offender's criminal history is equally weighted regardless of the severity of the sentencing offense. *Id.*

Step 4: Find the intersection of the OV level (vertical axis) and PRV level (horizontal axis) on the sentencing grid that corresponds to the offense class of the sentencing offense to arrive at the defendant's recommended minimum sentence. MCL 777.21(1)(c).

- For first-time offenders, or offenders not otherwise being sentenced as habitual offenders, the appropriate upper limit of a recommended minimum range is the number

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[4] See Section 3.3 for information on determining the offense category for felony offenses enumerated in MCL 777.18 (offenses predicated on an underlying felony).

[5] Chapter 1 provides an overview of the guidelines; offense categories are specifically discussed in Section 1.6(A). Chapter 2 discusses scoring instructions for each OV.

[6] Chapter 2 discusses scoring instructions for each PRV.

> corresponding to the empty "offender status" box on the sentencing grid (the top box in the vertical column of values).[7]

For example, in the sentencing grid example below,[8] the recommended minimum ranges for an individual being sentenced as a first-time offender are (in months): for level A-I, 0 to 3; for level B-I, 0 to 6; for level C-I, 0 to 9; for level D-I, 2 to 17; for level E-I, 5 to 23; and for level F-I, 10 to 23.

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

Multiple convictions. "If the defendant was convicted of multiple offenses, subject to [MCL 771.14 (presentence investigation report)[9]], score each offense as provided in [Part 3 of the Code of Criminal Procedure]," which includes MCL 777.21. MCL 777.21(2).

3.3 Felony Offenses Enumerated in § 777.18 (Offenses Predicated on an Underlying Felony)

Special scoring instructions apply to the offenses listed in MCL 777.18; these offenses are discussed in detail in this chapter and include:

[7] The "empty box" refers to the top box in each series of boxes down the right side of each grid—or specifically, the box in which HO2, HO3, or HO4 does not appear.

[8] Note that this is an abbreviated version of a sentencing grid; it is not a full grid.

[9] Under MCL 771.14(2)(e), only the crime with the highest crime class needs to be scored unless consecutive sentencing is authorized or required. See Section 6.10(C) for a detailed discussion of PSIR requirements.

- MCL 333.7410 (controlled substance offense or offense involving GBL on or near school property or library);
- MCL 333.7413(1) or MCL 333.7413(2) (subsequent controlled substance violations);
- MCL 333.7416(1)(a) (recruiting or inducing a minor to commit a controlled substance felony);
- MCL 750.157a(a) (conspiracy);
- MCL 750.157c (inducing minor to commit a felony);
- MCL 750.188 (voluntarily allowing prisoner to escape);
- MCL 750.237a (felony committed in a weapon-free school zone); and
- MCL 750.367a (larceny of rationed goods). MCL 777.21(4).

Offenses in MCL 777.18 are offenses predicated on an offender's commission of an underlying felony; the statutory maximum penalty is "variable" because the term of imprisonment is not limited to a specific number of years, but rather, is dependent on the punishment for the applicable underlying felony. See MCL 777.18. In addition, some of the felony offense provisions listed in MCL 777.18 provide for mandatory minimums or double or triple times the maximum terms of imprisonment authorized in the statutory language governing the underlying felonies themselves. *Id.*

When determining the minimum sentence range for the offenses listed in MCL 777.18, step 3 and step 4 (discussed in Section 3.2) are the same, see *People v Peltola*, 489 Mich 174, 182 (2011); however, when determining the offense category and the OV level (steps 1 and 2) both of the following apply:

> "(a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in [MCL 777.18].
>
> (b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G." MCL 777.21(4).

The offense class of the underlying offense determines which sentencing grid must be used to determine the offender's recommended minimum sentence range once the offender's PRV and OV levels have been calculated. See MCL 777.21(4)(b).

MCL 777.21(1)(b) requires PRVs to be scored against offenders falling within the purview of MCL 777.21(4) for offenses listed in MCL 777.18, notwithstanding the absence of a reference to PRVs in MCL 777.21(4). *Peltola*, 489 Mich at 188. The general rule of MCL 777.21(1)(b), requiring the scoring of PRVs for all offenses enumerated in MCL 777.11–MCL 777.19, applies to "*all* cases . . . unless the language in another subsection of the statute directs otherwise." *Peltola*, 489 Mich at 182. In *Peltola*, the defendant was convicted of a subsequent controlled substance violation (an MCL 777.18 offense), and his minimum and maximum sentences were doubled as permitted by MCL 333.7413(1).[10] *Peltola*, 489 Mich at 177. The defendant argued that MCL 777.21(1)(b), which directs the sentencing court to score a defendant's PRVs "[e]xcept as otherwise provided," does not apply to an offender who is being sentenced for a violation described in MCL 777.18 and who is therefore subject to the terms of MCL 777.21(4). *Peltola*, 489 Mich at 184 (alteration in original). The Court disagreed, holding that "MCL 777.21(1) sets forth the general rule for determining a defendant's minimum sentence range," and that because MCL 777.21(4) *does not direct otherwise* but instead "is merely intended to provide guidance regarding how to determine the OV level and offense class for offenders falling under MCL 777.18," the rule requiring the scoring of PRVs remains applicable to those offenders. *Peltola*, 489 Mich at 181, 191.

A. Controlled Substance Violations Involving Minors or Near School Property or a Library

MCL 333.7410, listed in MCL 777.18, addresses enhanced penalties for violations of MCL 333.7401 (by an adult) involving minors, library property, and school property:

- Delivery of less than 50 grams of cocaine or a narcotic drug listed in schedule 1 or 2[11] to a minor who is at least 3 years the defendant's junior, MCL 333.7410(1);
- Delivery of gamma-butyrolactone (GBL) or a controlled substance listed in schedules 1 to 5 to a minor who is at least 3 years the defendant's junior, MCL 333.7410(1);

[10]Formerly MCL 333.7413(2). See 2017 PA 266, effective March 28, 2018.

[11]Schedule 1 or 2 refers to the controlled substance schedules listed in Part 72 of Article 7 of the Public Health Code, MCL 333.7101 *et seq*. See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 1, for detailed discussion of the controlled substances schedules.

- Delivery of less than 50 grams of cocaine or a narcotic drug listed in schedule 1 or 2 within 1,000 feet of school property or a library, MCL 333.7410(2);

- Possession with intent to deliver less than 50 grams of cocaine or a narcotic drug listed in schedule 1 or 2 within 1,000 feet of school property or a library, MCL 333.7410(3);

- Possession of GBL or certain other controlled substances on or within 1,000 feet of school property or a library, MCL 333.7410(4); and

- Manufacturing methamphetamine within 1,000 feet of school property or a library, MCL 333.7410(6).

The felonies listed in MCL 333.7410 are discussed in detail in the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 2.

B. Subsequent Controlled Substance Violations

MCL 777.18 lists MCL 333.7413(1) and MCL 333.7413(2); MCL 333.7413(1) addresses discretionary enhanced penalties for repeat drug offenders and MCL 333.7413(2) addresses mandatory enhancement.

Note: The concurrent (or exclusive) application of the general habitual offender statutes and the penalties prescribed by the Public Health Code for subsequent controlled substance offenses are discussed in Section 4.5. See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 6, for additional discussion of MCL 333.7413.

1. Section 7413(1)

MCL 333.7413(1) provides the penalties possible for a person convicted of a second or subsequent offense under Article 7 of the Public Health Code, MCL 333.7101 to MCL 333.7545 (controlled substance offenses). MCL 333.7413(1) applies to "general" controlled substance offenses not otherwise addressed by the specific sentencing provisions of MCL 333.7413(2). See MCL 333.7413(1). Offenders convicted under MCL 333.7413(1) may be sentenced to a term of imprisonment up to twice the term authorized by the statute governing the specific offense, or may be fined up to two times the amount permitted for a violation of the specific offense, or both. MCL 333.7413(1).

"[MCL 333.7413(1)[12]], by authorizing a trial court to enhance the sentence of a defendant who is a repeat drug offender to a 'term not more than twice the term otherwise authorized,' allows the trial court to double *both* the defendant's minimum and maximum sentences." *People v Lowe*, 484 Mich 718, 719-720 (2009).

2. Section 7413(2)

MCL 333.7413(2) provides the penalty for a person convicted of a second or subsequent violation of MCL 333.7410(2) or MCL 333.7410(3).[13] All of the following apply to an offender convicted under MCL 333.7413(2):

- The offender must be sentenced to a mandatory minimum term of imprisonment of at least five years[14] but may not be sentenced to more than two times the term authorized in MCL 333.7410(2) and MCL 333.7410(3). MCL 333.7413(2).

- The offender may be fined up to three times the amount authorized by MCL 333.7410(2) and MCL 333.7410(3). MCL 333.7413(2).

- The offender is not eligible for probation or suspension of his or her sentence during the term of imprisonment. MCL 333.7413(2).

C. Recruiting or Inducing a Minor to Commit a Controlled Substance Felony

MCL 333.7416(1)(a), listed in MCL 777.18, provides the penalty for a person aged 17 years or older[15] who has recruited, induced, solicited, or coerced a minor less than 17 years of age to commit or attempt to commit a controlled substance offense that would be a felony if committed by an adult. Offenders may be fined up to the amount authorized for an adult convicted of the underlying offense. MCL 333.7416(1). In addition to any fine imposed, offenders convicted under MCL 333.7416(1) *must* be sentenced as follows:[16]

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[12] Formerly MCL 333.7413(2). See 2017 PA 266, effective March 28, 2018.

[13] Discussed in Section 3.3(A).

[14] The trial court may depart from the mandatory minimum for "substantial and compelling" reasons. MCL 333.7413(3).

[15] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014). Under the birthday rule, "a person attains a given age on the anniversary date of his or her birth." *Woolfolk*, 304 Mich App at 464 (quotation marks and citation omitted).

- to a mandatory minimum term not less than one-half the maximum term of imprisonment authorized for an adult convicted of the crime, MCL 333.7416(1)(a);

- to a maximum term of imprisonment that does not exceed the maximum term authorized by statute for an adult convicted of the crime, MCL 333.7416(1)(a);

- to imprisonment for life[17] if the act committed or attempted is a violation of MCL 333.7401(2)(a)(*i*), MCL 333.7416(1)(b); and

- an offender sentenced under MCL 333.7416(1) is not eligible for probation and the sentence received must not be delayed or suspended. MCL 333.7416(2).

MCL 333.7416(1)(a) does not apply to an act that is a violation of MCL 333.7401(2)(d) that involves the manufacture, delivery, or possession with intent to deliver marijuana. MCL 333.7416(4).

See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 3, Section 3.11 for additional discussion of MCL 333.7416.

D. Conspiracy

MCL 750.157a(a), listed in MCL 777.18, provides the penalty for a person who conspires with at least one other person to commit an act prohibited by law when commission of the prohibited act is punishable by at least one year of imprisonment. An offender convicted under MCL 750.157a(a) must be sentenced to a term of imprisonment equal to the term authorized for conviction of the offense the offender conspired to commit. *Id.* In addition to a term of imprisonment, the court may impose a $10,000 fine. *Id.*

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[16]The court may depart from the minimum term for "substantial and compelling" reasons. MCL 333.7416(3).

[17]Note, however, that a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a non-homicide offense). See also MCL 769.25; MCL 769.25a.Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Mandatory life imprisonment without parole sentences are discussed in Section 7.5(B). Additionally, detailed discussion of the constitutionality of sentencing juveniles and 18-year-olds to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, is in the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

E. Recruiting or Inducing a Minor to Commit a Felony

MCL 750.157c, listed in MCL 777.18, provides the penalty for a person aged 17 years or older[18] who recruits, induces, solicits, or coerces a minor under the age of 17 years to commit or attempt to commit an act that would be a felony if committed by an adult. Violators of MCL 750.157c are guilty of a felony and must be sentenced to a term not to exceed the maximum term authorized by law for conviction of the act committed or attempted.[19] *Id.* In addition to the mandatory term of imprisonment, the court may impose a fine on the offender of not more than three times the amount authorized by law for conviction of the act committed or attempted. *Id.*

F. Voluntarily Allowing a Prisoner to Escape

MCL 750.188, listed in MCL 777.18, provides the penalty for a jailor or other officer who voluntarily allows a prisoner in his or her custody to escape. Under MCL 750.188, an officer convicted of this offense must be sentenced to the same punishment and penalties to which the escaped prisoner was or would have been subject. *Id.*

G. Felony Offenses Committed in Weapon-Free School Zones

MCL 750.237a, listed in MCL 777.18, describes conduct prohibited in weapon free school zones and provides the penalties for convictions based on that conduct. MCL 750.237a is a separate felony offense based on an offender's violation of one of the enumerated underlying weapons-related statutes when the violation occurs in a weapon-free school zone. *Id.* An offender may be charged with and convicted of

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[18]"[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014). Under the birthday rule, "a person attains a given age on the anniversary date of his or her birth." *Woolfolk*, 304 Mich App at 464 (quotation marks and citation omitted).

[19]Note, however, that a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a non-homicide offense). See also MCL 769.25; MCL 769.25a.Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Mandatory life imprisonment without parole sentences are discussed in Section 7.5(B). Additionally, detailed discussion of the constitutionality of sentencing juveniles and 18-year-olds to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, is in the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

violating MCL 750.237a when he or she is a first-time offender of the following statutes:

- MCL 750.224 (manufacture, sale, or possession of specified weapons);
- MCL 750.224a (possession or sale of a device emitting an electrical current or impulse);
- MCL 750.224b (manufacture, transfer, or possession of a short-barreled shotgun or rifle);
- MCL 750.224c (manufacture, distribution, sale, or use of armor-piercing ammunition);
- MCL 750.224e (manufacture, sale, distribution, or possession of device to convert semiautomatic weapons to fully automatic weapons or demonstration of conversion);
- MCL 750.226 (going armed with a dangerous weapon with unlawful intent);
- MCL 750.227 (carrying a concealed weapon (CCW));
- MCL 750.227a (unlawful possession of a pistol by a licensee);
- MCL 750.227f (commission or attempted commission of a violent act while wearing body armor);
- MCL 750.234a (intentional discharge of a firearm from a motor vehicle, snowmobile, or ORV);
- MCL 750.234b (intentional discharge of a firearm in or at a dwelling or potentially occupied structure); or
- MCL 750.234c (intentional discharge of a firearm at an emergency or law enforcement vehicle). MCL 750.237a(1).

An offender may be charged with and convicted of violating MCL 750.237a for a second or subsequent violation of MCL 750.223(2) (knowingly selling a firearm longer than 26 inches to a person under the age of 18), when the violation occurred in a weapon-free school zone. MCL 750.237a(1).

Violators of MCL 750.237a(1) are guilty of a felony and subject to one or more of the following:

- imprisonment for not more than the maximum term authorized by the specific statutory section violated, MCL 750.237a(1)(a); or

- not more than 150 hours of community service, MCL 750.237a(1)(b); or

- a fine of not more than three times the fine authorized by the specific statutory section violated, MCL 750.237a(1)(c).

H. Larceny of Rationed Goods

MCL 750.367a, listed in MCL 777.18, provides the penalties for stealing "any goods, wares, or merchandise, the manufacture, distribution, sale or use of which is restricted or rationed by the federal government, or any of its agencies or instrumentalities, during a state of war between the United States and any other country or nation[.]" An offender convicted of an offense under MCL 750.367a must be punished no more than "double the fines and imprisonment" authorized for conviction of the underlying offense. *Id.*

3.4 Felony Offenses Enumerated in § 777.19 (Attempts)

Attempted offenses are subject to the statutory guidelines only if the offense attempted is a felony offense in class A, B, C, D, E, F, or G. MCL 777.19(1). Attempts to commit class H felonies are not scored under the guidelines.[20] *Id.*

The minimum sentence range for an offense listed in MCL 777.19 (attempts) is determined using the same four steps discussed in Section 3.2. See MCL 777.21(5). However, the OV level and PRV level is "based on the underlying attempted offense." MCL 777.21(5). See also MCL 777.19(2). For example, if an offender is convicted of attempted armed robbery, the OVs designated for scoring are those for the offense category "person" because armed robbery (the offense attempted) is categorized as a crime against a person. MCL 750.529; MCL 777.16y.

Once the offender's OV and PRV levels have been totaled for an attempted offense, the proper sentencing grid on which to find the recommended minimum sentence range is determined by the attempted offense's original offense class designation:

[20] Intermediate sanctions apply to attempted class H felonies punishable by more than one year of imprisonment. MCL 769.34(4)(b). See Section 1.8 for more information.

- Attempts to commit offenses in classes A, B, C, or D are classified as class E offenses. MCL 777.19(3)(a).
- Attempts to commit offenses in classes E, F, or G are classified as class H offenses. MCL 777.19(3)(b).

3.5 Sentencing a Sexually Delinquent Person[21]

A defendant charged with certain sex offenses may also be charged with and convicted of being a sexually delinquent person. Being a sexually delinquent person is not a stand-alone crime, and a charge of sexual delinquency may only be brought in conjunction with the following offenses:

- Crime against nature or sodomy, MCL 750.158;
- Indecent exposure, MCL 750.335a;
- Gross indecency between male persons, MCL 750.338;
- Gross indecency between female persons, MCL 750.338a;
- Gross indecency between male and female persons, MCL 750.338b.

"Conviction of sexual delinquency can be obtained only in conjunction with conviction on the principal charge. Yet, sexual delinquency is a matter of sentencing, unrelated to proof of the original charge." *People v Helzer*, 404 Mich 410, 417 (1978), overruled in part by *People v Breidenbach*, 489 Mich 1 (2011); see also *People v Franklin*, 298 Mich App 539, 547 (2012) (noting that "sexual delinquency is not an actual element of [indecent exposure; r]ather, a finding of sexual delinquency merely allows for an enhancement of the sentence for [an] indecent exposure offense").

A. Procedure

MCL 767.61a details the procedure for charging and sentencing a defendant as a sexually delinquent person. It provides that "an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life" may be imposed where the defendant is found to have been a sexually delinquent person at the time the principal charge was committed. *Id.* "Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense." *Id.*

[21]For additional discussion of sentencing a sexually delinquent person, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 3.

B. Sentencing

Each of the sexual delinquency principal offenses contains language stating that if the person was sexually delinquent at the time of the offense, he or she may be punished by imprisonment for an indeterminate term, and that the minimum term must be one day, and the maximum term must be life in prison. See MCL 750.158; MCL 750.335a; MCL 750.338; MCL 750.338a; MCL 750.338b. See also MCL 767.61a. The "1 day to life" sentence is not *required*, but provides "an *option* a sentencing judge could draw upon, alongside and not to the exclusion of other available options." *People v Arnold*, 502 Mich 438, 444, 469 (2018) (*Arnold I*) (construing the "1 day to life" provision in MCL 750.335a(2)(c)). The Court reiterated the sentencing scheme it set out in *Arnold I* and further held that the statutory sentencing guidelines do not apply to MCL 750.335a(2)(c) despite the fact that MCL 777.16q lists that offense; instead, "defendants found guilty under § 335a(2)(c) can be sentenced to the penalties in § 335a, along with any applicable enhancements, as discussed in . . . *Arnold I*." *People v Arnold*, 508 Mich 1, 26 (2021) (*Arnold II*).

"Sexual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme." *People v Kelly*, 186 Mich App 524, 528 (1990). See also *People v Winford*, 404 Mich 400, 404 n 5 (1978) ("the indeterminate penalty for a sexual delinquency conviction [i]s an alternate form of sentencing"; a defendant may only be sentenced once upon conviction of the principal charge and the sexual delinquency charge, i.e., the court has the discretion to sentence the defendant under the terms of the principal offense, or under the terms of the sexual delinquency offense, but not both).

If the trial court chooses to impose a "1 day to life" sentence it cannot be modified. *Arnold I*, 502 Mich at 469.

3.6 Juvenile Sentencing[22]

A full discussion of juvenile sentencing is outside of the scope of this benchbook. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapters 14-16, for information on sentencing a juvenile in *traditional waiver cases*, i.e., cases in which a juvenile is charged solely with an offense over which the family division has waived jurisdiction under MCL 712A.4; *designated proceedings*, i.e., cases in which a juvenile is tried

[22]As used in the Juvenile Code beginning October 1, 2021, the term *juvenile* generally refers to a person who is less than 18 years of age. See MCL 712A.1(1)(i); MCL 712A.2(a). "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014). Under the birthday rule, "a person attains a given age on the anniversary date of his or her birth." *Woolfolk*, 304 Mich App at 464 (quotation marks and citation omitted).

in an adult criminal proceeding within the family division of the circuit court, and where, if convicted, the court may sentence the juvenile as an adult, delay sentence, or order a juvenile disposition, see MCR 3.903(A)(6); MCL 712A.2d; or *automatic waiver cases*, i.e., criminal proceedings in circuit court concerning juveniles against whom the prosecution has authorized the filing of a criminal complaint charging a specified juvenile violation (instead of approving the filing of a petition in the family division of the circuit court), see MCL 764.1f; MCL 600.606; MCL 712A.2(a)(1). See Chapter 19 of the *Juvenile Justice Benchbook* for discussion of selected topics involving the imposition of adult sentence on juvenile offenders, including constitutional and statutory limitations on imposing a life-without-parole sentence on an offender who was under the age of 18 at the time of the offense.

Chapter 4: Sentencing Habitual Offenders

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4.1 Introduction

Michigan's sentencing law is designed so that the punishment possible for conviction of a crime may be increased in proportion to the offender's number of previous felony convictions. See MCL 777.21(3); MCL 769.10; MCL 769.11; MCL 769.12.

The "general" habitual offender statutes are codified in MCL 769.10 (one prior felony conviction), MCL 769.11 (two prior felony convictions), and MCL 769.12 (three or more prior felony convictions), and operate to raise the statutory *maximum* sentence allowed for repeat offenders based on both the defendant's number of prior felony convictions and the specific maximum penalty authorized for conviction of the sentencing offense.[1]

MCL 777.21 is the statutory provision that allows for an incremental increase in the upper limit of the recommended *minimum* sentence range (the "maximum-minimum" sentence) under the statutory sentencing guidelines based on the number of the defendant's previous felony convictions.

This chapter discusses the method of determining the recommended minimum sentence ranges using the statutory sentencing guidelines and sentencing grids[2] for habitual offenders under MCL 777.21. It also discusses permissible maximum sentences and other requirements under the general habitual offender statutes.

Note that in 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 365, 399 (2015), aff'g in part and rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[3]

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[1] Additionally, MCL 769.12, governing fourth habitual offender status, provides for a *mandatory minimum* sentence of 25 years' imprisonment for an offender who has been convicted of three or more prior felonies or felony attempts, including at least one listed prior felony and who commits or conspires to commit a subsequent serious crime. The 25-year mandatory minimum sentence imposed by MCL 769.12(1)(a) does not constitute cruel or unusual punishment. *People v Burkett*, 337 Mich App 631, 636, 642 (2021). See Section 4.4(C) for a detailed discussion.

[2] See Section 1.7 for general discussion of the sentencing grids.

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

The *Lockridge* Court did not address habitual-offender sentencing. However, "the top of the guidelines range does not implicate the Sixth Amendment[.]" *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the *upper* limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable *statutory maximum* sentence) may not be implicated by *Lockridge*.

The *Lockridge* decision is discussed in detail in Section 1.4. See also the Michigan Judicial Institute's *Lockridge* flowchart.

4.2 Establishing a Defendant's Habitual Offender Status

Sentence enhancement for habitual offenders is not required; the prosecuting attorney has discretion whether to seek an enhanced sentence. See MCL 769.13(1). The procedure for seeking an enhanced sentence is set out in MCL 769.13 and MCR 6.112(F).

A. Notice of Intent to Seek Enhancement

The prosecutor must file a written notice of intent to seek an enhanced sentence. MCL 769.13(1); MCR 6.112(F). The notice must "list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." MCL 769.13(2). If applicable, the notice must also contain "any mandatory minimum sentence required by law as a result of the sentence enhancement." MCR 6.112(F).

The prosecutor must file the notice with the court and serve it on the defendant or the defendant's attorney within the time provided in MCL 769.13(1), discussed in detail in Section 4.2(A)(1), Section 4.2(A)(2), and Section 4.2(A)(3). MCL 769.13(2). "The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings." *Id.* "The prosecuting attorney shall file a written proof of service with the clerk of the court." *Id.* However, failure to do so may be harmless "if the defendant receive[s] the notice of the prosecutor's intent to seek an enhanced sentence and the defendant [is] not prejudiced in his ability to respond to the habitual offender notification." *People v Head*, 323 Mich App 526, 543-544 (2018) (holding that "the prosecutor's failure to file a proof of service constituted a harmless error that [did] not require resentencing" where the "defendant had access to the charging documents, he had notice of the charges against him, including the habitual offender enhancement, and he also was informed of the

habitual offender enhancement at the preliminary examination"). See also *People v Burkett*, 337 Mich App 631, 643-647 (2021) (holding the prosecutor's failure to file proof of service was harmless error where defendant had timely actual notice, his ability to respond to the notice was not prejudiced, and he did not claim that the enhancement was inapplicable).

The prosecutor is not specifically required to sign the habitual offender notice. See *Head*, 323 Mich App at 545; MCL 769.13; MCR 6.112(F).

"The purpose of the notice requirement is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense." *Head*, 323 Mich App at 543 (quotation marks and citation omitted).

Violation of the notice requirement in MCL 769.13(1) does not deprive a trial court of subject-matter jurisdiction to apply the habitual offender sentencing enhancement. *People v Adams*, 508 Mich 1023, 1023-1024 (2022) (noting that "[s]ubject-matter jurisdiction concerns a court's authority to hear and determine a case and is dependent of the character or class of the case pending, not the particular facts of the case," and MCL 769.13 "does not address classes of case or contain any language relating to subject-matter jurisdiction") (quotation marks and citation omitted).

1. Notice After Arraignment

Notice must be filed "within 21 days after the defendant's arraignment on the information charging the underlying offense[.]" MCL 769.13(1). See also MCR 6.112(F).

"[T]he applicable time period for measuring the 21-day period begins with the date of 'defendant's *arraignment on the information* charging the underlying offense,'" meaning the date of the arraignment on the indictment or information not the date of the arraignment on the warrant or complaint. *People v Richards*, 315 Mich App 564, 588 (2016) (quoting MCL 769.13(1) and noting that "there is a distinction between an arraignment on the information and an arraignment on the warrant or complaint"), rev'd in part on other grounds 501 Mich 921 (2017) (additional citations omitted).[4] Accordingly, the prosecution's notice of intent to seek an enhanced sentence was timely filed where "[d]efendant was arraigned on the

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

information in circuit court . . . [and o]n that same day, the prosecution filed the first amended information, which contained a fourth-offense habitual offender notice." *Richards*, 315 Mich App at 589.

2. Notice Where No Arraignment

Where the defendant is not arraigned, the notice must be filed "within 21 days after the filing of the information charging the underlying offense." MCL 769.13(1); MCR 6.112(F).[5]

This rule applies "in the absence of an arraignment," even if the defendant "never formally waived arraignment." *People v Marshall*, 298 Mich App 607, 627 (2012) (holding that where "it [was] undisputed that defendant was never arraigned on the underlying offense in the circuit court, the first period [set out in MCL 769.13(1) was] not applicable," and that "MCL 769.13(1) clearly contemplates that in the absence of an arraignment, the period for filing the habitual-offender notice is to be measured from the date the information charging the underlying offense is filed"), vacated in part on other grounds 493 Mich 1020 (2013).[6]

3. Notice After Defendant Has Been Convicted

"The prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense, upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within [the 21-day period after the arraignment]." MCL 769.13(3).

However, note that "an arguable conflict exists between MCR 6.302(B)(2) and MCL 769.13(3)." *People v Brown*, 492 Mich 684, 701 (2012). Specifically, "MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea," and MCR 6.310(C)(3) permits a defendant who is not so apprised to elect either to allow his or her plea and

[5] Note that MCR 6.112(F) includes reference to the elimination of arraignment under MCR 6.113(E), which provides that "[a] circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence [pursuant to MCL 769.13], as provided in MCR 6.112(F)."

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

sentence to stand or to withdraw the plea. *Brown*, 492 Mich at 687. Noting that "MCL 769.13(3) . . . permits a prosecuting attorney to file a notice of intent to seek an enhanced sentence under the habitual-offender statute after a defendant has entered a plea," the Court concluded that "the remedy provided by [MCR 6.310(C)(3)] will apply [even] when a defendant is not notified of the enhancement until after pleading guilty." *Brown*, 492 Mich at 701-702 (remanding for the defendant to decide whether to allow his plea to stand or withdraw it where the defendant was not informed that he could receive an enhanced sentence as a habitual offender before pleading guilty).[7]

4. Amendment to Notice

Before, during, or after trial, the court may permit the prosecutor to amend the notice of intent to seek an enhanced sentence "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H).

B. Challenges to Prior Conviction(s)

A defendant charged as a habitual offender may challenge the accuracy or constitutional validity of any of the prior felony convictions listed in the prosecutor's notice of enhancement. MCL 769.13(4). To challenge a prior conviction, the defendant must file a written motion with the court and serve the prosecutor with a copy of the motion. *Id*.

1. Establishing Prior Conviction(s)

"The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing." MCL 769.13(5). See also *People v Green*, 228 Mich App 684, 699 (1998).

"The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

(a) A copy of a judgment of conviction.

[7] Note that *Brown* refers to MCR 6.310(C); however, after *Brown* was decided MCR 6.310 was amended, and the text of MCR 6.310(C) pertinent to the holding in *Brown* was renumbered as MCR 6.310(C)(3). See ADM File No. 2019-27.

(b) A transcript of a prior trial or a plea-taking or sentencing proceeding.

(c) A copy of a court register of actions.

(d) Information contained in a presentence report.

(e) A statement of the defendant." MCL 769.13(5).

The defendant failed to demonstrate plain error regarding the establishment of his prior convictions where "[t]he prior convictions were established by the unchallenged information in the presentence investigation report and [the defendant] acknowledg[ed] that the prior record variables, which reflected defendant's prior convictions, were properly scored." *People v Marshall*, 298 Mich App 607, 627 (2012), vacated in part on other grounds 493 Mich 1020 (2013).[8]

2. Resolution of Challenge

MCL 769.13(6) describes the process by which the trial court must resolve a defendant's properly raised challenge to the use of a prior conviction to enhance his or her sentence under the general habitual offender statutes:

- Challenges raised in a motion filed under MCL 769.13(4) can be resolved at sentencing or at a separate hearing before sentencing;
- Defendant must have the "opportunity to deny, explain, or refute any evidence or information" regarding prior conviction(s) before sentencing and to present relevant evidence;
- Defendant has "the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid";
- If defendant makes a prima facie showing of inaccuracy or unconstitutionality, the prosecuting attorney has the burden of proving by a preponderance of the evidence "that the information or evidence is accurate," or "that the prior conviction is constitutionally valid."

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

C. Specific Issues

1. Classification of the Prior Conviction[9]

The following types of convictions are prior felonies for purposes of the habitual-offender statutes (found in the Code of Criminal Procedure):

- Two-year misdemeanors, *People v Smith*, 423 Mich 427, 434 (1985);[10]

- Out-of-state convictions that involve a factual situation constituting a *felony* as that term is defined in Michigan, regardless of how the out-of-state offense is classified, *People v Quintanilla*, 225 Mich App 477, 478-479 (1997);[11]

- Prior convictions for offenses that were felonies at the time they were committed but were later reclassified as misdemeanors, *People v Odendahl*, 200 Mich App 539, 543-544 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686 (1996);[12] and

- Adult felony convictions resulting in a juvenile sentence, *People v Jones*, 297 Mich App 80, 85-86 (2012).[13]

2. Use of Certain Convictions Prohibited

Convictions statutorily prohibited. The habitual offender statutes expressly prohibit the use of a conviction to enhance a sentence "if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further

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[9]Note that "the habitual offender statute applies only when 'a person has been convicted of a felony' and then 'commits a subsequent felony[.]'" *People v Urbanski*, ___ Mich App ___, ___ (2023), quoting MCL 769.10(1). See also MCL 769.11 and MCL 769.12 (addressing habitual offenders with 2 or more prior felonies and three or more prior felonies and using language requiring a "felony" similar to MCL 769.10).

[10]For purposes of the Code of Criminal Procedure's habitual-offender statutes, *felony* includes two-year misdemeanors because they are punishable by more than one year in state prison. *People v Washington*, 501 Mich 342, 357 (2018), citing *Smith*, 423 Mich at 434.

[11]A prior conviction obtained in another state that, by offense title alone, would qualify only as a misdemeanor offense in Michigan, is not necessarily invalid for purposes of establishing a defendant's habitual offender status. *Quintanilla*, 225 Mich App at 478-479. "The [habitual offender statutes] require[] that the offense be a felony in Michigan under Michigan law, irrespective of whether the offense was or was not a felony in the state or country where originally perpetrated. Hence, the facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose, are determinative." *Id.* at 479.

[12]"[T]he purpose of the habitual offender statute [is] punishment for the recidivist, and . . . repealing a criminal law [does] not 'remove from the offender the character of being a violator of the law.'" *Odendahl*, 200 Mich App at 543, quoting *In re Jerry*, 294 Mich 689, 692 (1940).

enhancement under [the habitual offender statutes]." MCL 769.10(3); MCL 769.11(3); MCL 769.12(3). This prohibition is discussed in detail in Section 4.6. See also the Michigan Judicial Institute's table detailing the felony offenses for which an offender's previous conviction may not be used for enhancement under the general habitual offender statutes if it is used to enhance the offense under the statute prohibiting the criminal conduct.

Prior district court convictions without representation. "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction[.]" MCR 6.610(G)(3). Further, note that "the habitual offender statute applies only when 'a person has been convicted of a felony' and then 'commits a subsequent felony[.]'" *People v Urbanski*, ___ Mich App ___, ___ (2023), quoting MCL 769.10(1) (holding that if the defendant is retried and convicted of a misdemeanor OWI he must not be sentenced as a habitual offender because the habitual offender statute does not apply to a misdemeanor conviction).

3. Multiple Convictions From the Same Criminal Transaction

When counting prior felonies under Michigan's habitual offender statutes, each felony *conviction* that preceded the sentencing offense is counted, even if more than one conviction arose from the same criminal transaction. *People v Gardner*, 482 Mich 41, 44 (2008). The Court explained that the plain language of the habitual offender statutes, MCL 769.10, MCL 769.11, and MCL 769.12, "directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions." *Gardner*, 482 Mich at 44, 49-50 (holding that defendant was properly sentenced as a third-offense habitual offender where his two prior felony convictions of felonious assault and felony-firearm arose from the same criminal incident).[14]

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[13]An adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11. *Jones*, 297 Mich App at 85-86 (noting that "MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant's sentence"). MCL 769.10, governing second habitual offender status, and MCL 769.12, governing fourth habitual offender status, are textually similar to MCL 769.11, and would therefore presumably be subject to the same construction.

[14]However, for purposes of MCL 769.12(1)(a), which provides for a mandatory 25-year minimum sentence for certain fourth habitual offenders, "[n]ot more than 1 conviction arising out of the same transaction shall be considered a prior felony conviction[.]" See Section 4.4(C) for discussion of MCL 769.12(1)(a).

4. Convictions Older Than Ten Years

A trial court may consider felony convictions that are more than ten years old in determining a defendant's habitual offender status. *People v Zinn*, 217 Mich App 340, 349 (1996). This is unlike the "10-year gap" rule, MCL 777.50, that limits the age of previous convictions that may be counted against a defendant for the purposes of scoring his or her prior record variables under the statutory sentencing guidelines.

5. Double Jeopardy Challenges

Use of the same prior felony conviction to establish the crime of felony-firearm and the defendant's status as a habitual offender does not violate the constitutional prohibitions against double jeopardy. *People v Phillips*, 219 Mich App 159, 162-163 (1996) (noting that the relevant statutory language does not prohibit or preclude use of the same underlying felony).

The same prior felonies may be used to establish a defendant's habitual offender status for more than one subsequent felony conviction when the subsequent felonies were committed at different times. *People v Anderson*, 210 Mich App 295, 298 (1995). Because the habitual offender sentencing provisions do not create substantive offenses separate from the underlying prior convictions, a defendant's double jeopardy protection is not implicated. *Id.*

4.3 Determining a Habitual Offender's Recommended Minimum Sentence Range

The nine sentencing grids in MCL 777.61 to MCL 777.69 represent the proper sentence ranges for offenders *not* being sentenced as habitual offenders.[15] Separate grids reflecting the recommended sentence ranges for habitual offenders for the same nine crime classes (A through H, and second-degree murder, M2) do not exist in the statutes governing felony sentencing. However, MCL 777.12(3) provides authority for determining the upper limit of a habitual offender's recommended minimum sentence range by adding an incremental percentage of the range calculated for first-time offenders (or offenders who are not otherwise being sentenced as habitual offenders). The sentencing grids printed in the *Michigan Sentencing Guidelines Manual*, and the example shown in Section 4.3(B),

[15]Sentencing individuals who are not being sentenced as habitual offenders is discussed in detail in Chapter 3.

combine the ranges recommended under the guidelines for *all* offenders—first-time *and* habitual.[16]

A. Steps for Determining Minimum Range

To determine the minimum sentence range for a habitual offender, complete the following steps based on the underlying sentencing offense:

Step 1: Find the offense category and the offense class to which the sentencing offense belongs.[17] MCL 777.21(3). The offense category and class for every offense to which the guidelines apply is indicated in Part 2 of the Code of Criminal Procedure, MCL 777.11 *et seq*.

Step 2: Calculate the offender's "OV level" by scoring only the OVs applicable to crimes in the sentencing offense's category. MCL 777.21(3). This step is discussed in detail in Section 3.2.

Step 3: Calculate the offender's "PRV level" by scoring all seven PRVs. MCL 777.21(3). This step is discussed in detail in Section 3.2.

Step 4: Find the intersection of the OV level (vertical axis) and PRV level (horizontal axis) on the sentencing grid that corresponds to the offense class of the sentencing offense to arrive at the recommended minimum sentence range for a non-habitual offender. MCL 777.21(3). This step is discussed in detail in Section 3.2.

Step 5: Increase the recommended minimum sentence range for a non-habitual offender according to the defendant's habitual offender status:

- by 25% for a second-offense habitual offender (HO2), MCL 777.21(3)(a);
- by 50% for a third-offense habitual offender (HO3), MCL 777.21(3)(b); and
- by 100% for a fourth-offense habitual offender (HO4), MCL 777.21(3)(c).

When using the sentencing grids printed in the *Michigan Sentencing Guidelines Manual*, these increases are calculated[18] and depicted in the HO2, HO3, and HO4 cells.

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[16] Numeric values have been rounded down to the nearest whole month. The actual term in months may exceed the value indicated in the cell by a fraction of a month.

[17] See Section 1.6 for information on determining the offense category for felony offenses enumerated in MCL 777.18 (offenses predicated on an underlying felony).

B. Example Grid

In the grid below, the recommended minimum sentence range for an offender being sentenced as a second-offense habitual offender is indicated by the numeric values shown in the "HO2" cells of each sentencing grid; the recommended minimum sentence range for an offender being sentenced as a third-offense habitual offender is indicated by the numeric values shown in the "HO3" cells of each sentencing grid; and the recommended minimum sentence range for an offender being sentenced as a fourth-offense habitual offender is indicated by the numeric values shown in the "HO4" cells of each sentencing grid.

The minimum ranges recommended for a second-offense habitual offender, as calculated by the percentages outlined in MCL 777.21(3)(a), are (in months): for level A-I, 0 to 3; for level B-I, 0 to 7; for level C-I, 0 to 11; for level D-I, 2 to 21; for level E-I, 5 to 28; and for level F-I, 10 to 28.[19]

The minimum ranges recommended for a third-offense habitual offender, as calculated by the percentages outlined in MCL 777.21(3)(b), are (in months): for level A-I, 0 to 4; for level B-I, 0 to 9; for level C-I, 0 to 13; for level D-I, 2 to 25; for level E-I, 5 to 34; and for level F-I, 10 to 34.[20]

The minimum ranges recommended for a fourth-offense habitual offender, as calculated by the percentages outlined in MCL 777.21(3)(c), are (in months): for level A-I, 0 to 6; for level B-I, 0 to 12; for level C-I, 0 to 18; for level D-I, 2 to 34; for level E-I, 5 to 46; and for level F-I, 10 to 46.[21]

OV Level	PRV Level						Offender Status
	A 0 Points	B 1-9 Points	C 10-24 Points	D 25-49 Points	E 50-74 Points	F 75+ Points	

[18]Numeric values have been rounded down to the nearest whole month. The actual term in months may exceed the value indicated in the cell by a fraction of a month.

[19] Numeric values have been rounded down to the nearest whole month. The actual term in months may exceed the value indicated in the cell by a fraction of a month.

[20] Numeric values have been rounded down to the nearest whole month. The actual term in months may exceed the value indicated in the cell by a fraction of a month.

I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4

4.4 Maximum Sentences for Habitual Offenders

"'A trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence.'" *People v Bonilla-Machado*, 489 Mich 412, 429-430 (2011), quoting *People v Turski*, 436 Mich 878, 878 (1990) (remand was appropriate where the trial court "erroneously asserted that it was bound by law to enhance the maximum sentences").

A. Second Habitual Offender Status (HO2)

This discussion presumes the prosecutor is seeking an enhanced sentence under MCL 769.13. See Section 4.2 for more information on the prosecutor's right to seek an enhanced sentence.

A person is a second habitual offender if he or she is convicted of a felony or attempted felony and has been previously convicted of a felony or attempted felony in Michigan or in another state if the violation would have been a felony violation in Michigan. See MCL 769.10(1). A second habitual offender is subject to the following penalties, except as otherwise provided in MCL 769.10 and MCL 771.1:

- If the subsequent felony is punishable on first conviction by a term less than life imprisonment, the court "may place the person on probation[22] or sentence the person to imprisonment for a maximum term that is not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser term." MCL 769.10(1)(a).

- If the subsequent felony is punishable on first conviction by life imprisonment, the court "may place the person on probation[23] or sentence the person to imprisonment for life or for a lesser term." MCL 769.10(1)(b).

[21] Numeric values have been rounded down to the nearest whole month. The actual term in months may exceed the value indicated in the cell by a fraction of a month.

[22] See Section 9.2 for more information about probation.

- If the subsequent felony is a major controlled substance offense,[24] the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.10(1)(c).

Any term of years sentence must be indeterminate, meaning it must have a minimum and maximum sentence "in terms of years or a fraction of a year[.]" MCL 769.10(2). The maximum sentence must not be "less than the maximum term for a first conviction." *Id.*

B. Third Habitual Offender Status (HO3)

This discussion presumes the prosecutor is seeking an enhanced sentence under MCL 769.13. See Section 4.2 for more information on the prosecutor's right to seek an enhanced sentence.

A person is a third habitual offender if he or she is convicted of a felony or attempted felony and has been previously convicted of any combination of two or more felonies or attempted felonies in Michigan or in another state if the violations would have been felony violations in Michigan. A third habitual offender is subject to the following penalties, except as otherwise provided in MCL 769.11 and MCL 771.1:

- If the subsequent felony is punishable on first conviction by a term less than life imprisonment, the court "may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term." MCL 769.11(1)(a).

- If the subsequent felony is punishable on first conviction by life imprisonment, the court "may sentence the person to imprisonment for life or for a lesser term." MCL 769.11(1)(b).

- If the subsequent felony is a major controlled substance offense,[25] the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.11(1)(c).

Any term of years sentence must be indeterminate, meaning it must have a minimum and maximum sentence "in terms of years or a fraction of a year[.]" MCL 769.11(2). The maximum sentence must not be "less than the maximum term for a first conviction." *Id.*

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[23] See Section 9.2 for more information about probation.

[24] Sentences for subsequent major controlled substance offenses are discussed in Section 4.5.

[25] Sentences for subsequent major controlled substance offenses are discussed in Section 4.5.

C. Fourth Habitual Offender Status (HO4)

This discussion presumes the prosecutor is seeking an enhanced sentence under MCL 769.13. See Section 4.2 for more information on the prosecutor's right to seek an enhanced sentence.

A person is a fourth habitual offender if he or she is convicted of a felony or attempted felony and has been previously convicted of any combination of three or more felonies or attempted felonies in Michigan or in another state if the violations would have been felony violations in Michigan. A fourth habitual offender is subject to the following penalties:

- "If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section or [MCL 771.1], may sentence the person to imprisonment for life or for a lesser term." MCL 769.12(1)(b).

- "If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court, except as otherwise provided in this section or [MCL 771.1], may sentence the person to imprisonment for a maximum term of not more than 15 years." MCL 769.12(1)(c).

- If the subsequent felony is a major controlled substance offense,[26] the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.12(1)(d).

In addition to the general maximum sentence enhancement provisions set out in MCL 769.12 for fourth habitual offenders, MCL 769.12(1)(a) provides for a mandatory minimum sentence of 25 years' imprisonment for certain violent offenders. The sentencing court *must* impose a sentence of imprisonment for not less than 25 years if:

- the offender has been convicted of three or more prior felonies or felony attempts, including at least one listed prior felony,[27] and

- the subsequent felony that the offender is convicted of committing or conspiring to commit is a serious crime. MCL 769.12(1)(a).

[26] Sentences for subsequent major controlled substance offenses are discussed in Section 4.5.

For purposes of MCL 769.12(1)(a) only, "[n]ot more than [one] conviction arising out of the same transaction shall be considered a prior felony conviction[.]" MCL 769.12(1)(a).

The 25-year mandatory minimum sentence imposed by MCL 769.12(1)(a) does not constitute cruel or unusual punishment under the Michigan Constitution, Const 1963, art 1, § 16.[28] *People v Burkett*, 337 Mich App 631, 635-642 (2021) (rejecting what it characterized as a facial challenge to MCL 769.12(1)(a)). "Under the Michigan Constitution, the prohibition against cruel or unusual punishment includes a prohibition on grossly disproportionate sentences." *Burkett*, 337 Mich App at 636 (cleaned up). "Legislatively mandated sentences are presumptively proportional and presumptively valid," and "to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Id.* at 637 (quotation marks and citations omitted). A three-part test is used to determine whether a punishment is cruel or unusual: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." *Id.* at 636-637 (quotation marks and citation omitted). "Consideration of the three-part test leads to the conclusion that the minimum sentence mandated by MCL 769.12(1)(a) is neither cruel nor unusual" because the statute "only applies to individuals convicted of a serious felony who have previously been convicted of three or more felonies, at least one of which is a listed prior felony," and it "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Burkett*, 337 Mich App at 642 (quotation marks and citation omitted).

Any term of years sentence must be indeterminate, meaning it must have a minimum and maximum sentence "in terms of years or a

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[27]Only convictions under the specific *Michigan* statutes listed in MCL 769.12(6)(a) constitute listed prior felonies for purposes of MCL 769.12(1)(a); a conviction in another jurisdiction for an offense comparable to a listed offense does not constitute a *listed prior felony* for purposes of the mandatory 25-year minimum sentence under MCL 769.12(1)(a). *People v Pointer-Bey*, 321 Mich App 609, 622-623 (2017) (noting that, unlike the general rule of MCL 769.12(1) that comparable out-of-state convictions are considered when determining fourth-habitual offender status, "MCL 769.12(6)(a) contains no indication that convictions under comparable statutes from other jurisdictions should be considered 'listed prior felonies' for purposes of MCL 769.12(1)(a)," and holding that the defendant's conviction under a federal statute comparable to a Michigan statute listed in MCL 769.12(6)(a) could not be considered for purposes of MCL 769.12(1)(a)).

[28]"If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Burkett*, 337 Mich App 631, 636 (2021) (quotation marks and citation omitted).

fraction of a year[.]" MCL 769.12(2). The maximum sentence must not be "less than the maximum term for a first conviction." *Id.*

4.5 Sentencing an Offender for a Subsequent Major Controlled Substance Offense

When an offender has a previous felony conviction and is subsequently convicted of a major controlled substance offense, the habitual offender statutes require application of the sentencing provisions in Part 74 of the Public Health Code (PHC). MCL 769.10(1)(c); MCL 769.11(1)(c); MCL 769.12(1)(d). The PHC specifically permits, and in some cases requires, sentence enhancements for offenders who have second or subsequent convictions for offenses under Article 7 of the PHC, which covers controlled substance offenses. See MCL 333.7413.

See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 6, for a detailed discussion of sentencing habitual offenders under the PHC.

A. Application of General Habitual Offender Statutes

The general habitual offender provisions (MCL 769.10, MCL 769.11, and MCL 769.12) may be used to punish a defendant "convicted of a major controlled substance offense, who has no prior record of conviction of a drug offense, but has a prior record of conviction of another felony[.]" *People v Primer*, 444 Mich 269, 271-272 (1993). The Code of Criminal Procedure provisions requiring a person to be punished as provided in Article 7 of the PHC if a subsequent felony is a major controlled substance offense have a specific legislative purpose: "to assure that the mandatory sentences for the commission of a first or subsequent major controlled substance offense would not be ameliorated as the result of the exercise of discretion regarding the length of sentence provided in the habitual offender provisions in the Code of Criminal Procedure, and not to preclude enhancement of a sentence under the habitual offender provisions that might be imposed on a person who has a record of prior felony conviction, albeit not for a major controlled substance offense." *Id.*

See also *People v Wyrick*, 474 Mich 947, 947 (2005) (noting that "the prosecutor may seek a greater sentence under the habitual offender statute even when a defendant is sentenced under the Public Health Code" where the defendant had three prior felony convictions at the time he was sentenced for a major controlled substance offense); *People v Franklin*, 102 Mich App 591, 594 (1980) (where a defendant with no previous drug-related felony convictions was convicted of a major controlled substance offense, the Public Health Code's

enhancement provisions (MCL 333.7413(1) and MCL 333.7413(2)) were "inapplicable by [their] own terms," but "[u]se of the general habitual offender statutes" to impose an enhanced sentence on the defendant based on the defendant's multiple prior felony convictions "was permissible").

B. Double Enhancement Prohibited

Michigan courts have consistently held that a defendant's sentence cannot be doubly enhanced by application of the habitual offender statutes *and* any enhancement provisions contained in the statutory language prohibiting the conduct for which the defendant was convicted. *People v Elmore*, 94 Mich App 304, 305-306 (1979); *People v Edmonds*, 93 Mich App 129, 135 (1979). See also *People v Fetterley*, 229 Mich App 511, 540-541 (1998) (holding that double enhancement was improper where a defendant was convicted of offenses that were not major controlled substance offenses and his sentences were quadrupled when the trial court applied the enhancement provisions of Article 7 of the PHC and the habitual offender statutes to the defendant's underlying offenses).

4.6 Application of the Habitual Offender Provisions to Offenses Involving Statutory Escalation Schemes

Where the statute under which a defendant was convicted enhances the punishment based on prior convictions of that offense, use of the general habitual offender provisions is improper. *People v Fetterley*, 229 Mich App 511, 540-541 (1998). See also *People v Honeycutt*, 163 Mich App 757, 762 (1987) (because MCL 750.227b, the felony-firearm statute, mandates enhanced sentences for subsequent violations of that statute, application of the general habitual offender provisions is improper).

Enhancement under the general habitual offender statutes is also improper where the statutory language itself expressly prohibits the use of an offender's previous conviction to enhance a sentence under the general habitual offender statutes if the conviction is used to enhance the offense under an internal statutory escalation scheme. These offenses are listed in the Michigan Judicial Institute's Statutory Offense Enhancement Table.[29]

However, "[w]here the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted." *Fetterley*, 229 Mich App at 540-541.

The following subsections discuss several examples of offenses that have specific habitual offender provisions and may also be enhanced under the general habitual offender statutes.

A. Subsequent Sex Offenders Registration Act (SORA) Offenses[30]

"MCL 28.729(1)[31] sets forth a recidivism statutory scheme that creates three separate felonies that elevate on the basis of repeat offenses." *People v Allen*, 499 Mich 307, 326 (2016). Because the Legislature intended "to elevate each offense, not merely the punishment," a defendant convicted of a subsequent violation of SORA subject to an enhanced maximum sentence under MCL 28.729(1) may also be subject to enhancement of his or her maximum sentence under the general habitual offender statutes. *Allen*, 499 Mich at 311, 326-327.

Specifically, the *Allen* Court held that MCL 769.10 and MCL 28.729 do not conflict, and "the Court of Appeals mistakenly concluded that the phrase 'first conviction of that offense' in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)" rather than to the specific SORA offense of which the defendant was convicted. *Allen*, 499 Mich at 322-323 (holding that although "defendant was subject to a 7-year maximum term of imprisonment[for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing defendant [as a second-offense habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years").[32]

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[29]For example, the statutory language regarding first-degree retail fraud provides that a person who commits second-degree retail fraud and has one or more specified prior convictions may also be guilty of first-degree retail fraud under MCL 750.356c(2). Previously, caselaw supported applying the general habitual offender statutes under these circumstances. See, e.g., *People v Eilola*, 179 Mich App 315, 325 (1989) (holding that defendant's conviction for first-degree retail fraud that was based on second-degree retail fraud but elevated to first-degree because of previous larceny conviction was also subject to enhancement under the habitual offender statutes). However, effective January 1, 1999, 1998 PA 311 amended MCL 750.356c to specifically prohibit enhancement under the general habitual offender statutes. See also *People v Allen*, 499 Mich 307, 317-318 n 31 (2016). That prohibition is in MCL 750.356c(6), which provides: "If the sentence for a conviction under this section is enhanced by 1 or more prior convictions, those prior convictions shall not be used to further enhance the sentence for the conviction pursuant to . . . MCL 769.10, [MCL] 769.11, and [MCL] 769.12."

[30]See the Michigan Judicial Institute's *Sexual Assault Benchbook* for detailed discussion of SORA.

[31]MCL 28.729(1) sets out the penalties for first, second, or third (or subsequent) violations of SORA.

[32] MCL 769.11, governing third habitual offender status, and MCL 769.12, governing fourth habitual offender status, are textually similar to MCL 769.10, and would therefore presumably be subject to the same construction.

B. Third or Subsequent Convictions of Operating While Intoxicated or Operating With Any Amount of Certain Controlled Substances in the Body[33]

The general habitual offender statutes apply to felony convictions of MCL 257.625, including in cases where the underlying felony is itself a prior conviction of MCL 257.625. *People v Bewersdorf*, 438 Mich 55, 68-69, 71 (1991) (holding that the statutory scheme in MCL 257.625 establishes separate crimes, the general habitual offender statutes clearly apply when an individual has committed a subsequent felony, and the habitual offender act "makes no exceptions with respect to" convictions under MCL 257.625). See also *People v Stewart (On Remand)*, 219 Mich App 38, 43-44 (1996) (rejecting the defendant's argument that habitual offender charges should be dismissed because the prior felonies used to enhance defendant's sentence were two convictions of operating a motor vehicle while under the influence of intoxicating liquor, third offense, and reiterating that the general habitual offender statutes are "applicable to third and subsequent convictions" under MCL 257.625).

For offenses occurring after January 3, 2007,[34] a defendant's third or subsequent conviction under MCL 257.625(1) (operating while intoxicated) or MCL 257.625(8) (operating with any amount of certain controlled substances in the body) constitutes a felony regardless of the number of years that have elapsed between any prior conviction, i.e., even those convictions that occurred more than ten years before the defendant's third conviction. MCL 257.625(9)(c); *People v Perkins*, 280 Mich App 244, 245-246 (2008). A defendant's prosecution under MCL 257.625(9)(c), as amended by 2006 PA 564, does not violate the ex post facto clauses of the state or federal constitutions. *Perkins*, 280 Mich App at 251-252. The Michigan Court of Appeals explained that although the amended MCL 257.625(9)(c) "certainly works to [the defendant's] disadvantage, [it] did not attach legal consequences to [his] prior offenses, which occurred before the amendment's effective date. Rather, the amendment made the consequences of [the defendant's] current offense[], which occurred after January 3, 2007, more severe on the basis of [the defendant's] prior convictions." *Perkins*, 280 Mich App at 251. See also *People v Sadows*, 283 Mich App 65, 66 (2009) (MCL 257.625, as amended by 2006 PA 564, does not violate the prohibition against ex post facto laws and does not deny a

[33]For a detailed discussion of MCL 257.625 offenses, see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

[34] See 2006 PA 564, effective January 3, 2007, amending MCL 257.625(9)(c).

defendant his or her federal and state constitutional rights to equal protection and due process).

C. Subsequent Domestic Violence Convictions

A sentence for a subsequent conviction under the domestic violence statute, MCL 750.81, "which elevates an offense from a misdemeanor to a felony and increases the penalty for repeat offenses," is subject to habitual offender enhancement. *People v Stricklin*, 322 Mich App 533, 541 (2018). "The domestic-violence statute does not impose mandatory determinate sentences for its violation, nor is it explicitly excepted from the habitual offender act"; rather it "contains the type of statutory scheme of commonly charged offenses that courts have repeatedly found to be subject to habitual-offender enhancement." *Id*. at 541-542 (cleaned up).

Specifically, the court rejected the defendant's argument "that the domestic-violence statute contains a method for enhancing his punishment based on recidivism and that his sentence should therefore not also be enhanced by the habitual-offender statute, MCL 769.12," and held that the domestic-violence statute does "not merely enhance punishment based on recidivism but instead create[s] separate substantive crimes" to which the general habitual offender statute enhancements apply. *Stricklin*, 322 Mich App at 538, 540.

D. Subsequent Fleeing and Eluding Convictions

Both MCL 257.602a and MCL 750.479a prohibit fleeing and eluding a police or conservation officer. Any fleeing and eluding conviction is a felony offense, but both statutes set forth first-, second-, third-, and fourth-degree fleeing and eluding offenses with differing penalties. See MCL 257.602a; MCL 750.479a. Violation of both fleeing and eluding statutes can constitute a higher degree of fleeing and eluding on the basis of prior convictions. MCL 257.602a; MCL 750.479a. The general habitual offender statutes may be used to enhance a defendant's sentence for a subsequent fleeing and eluding conviction even where the fleeing and eluding statute already provided for an enhanced sentence based on the defendant's subsequent conviction of fleeing and eluding. *People v Lynch*, 199 Mich App 422, 424 (1993).

4.7 Application of the Habitual Offender Provisions to Subsequent Criminal Sexual Conduct (CSC) Convictions

A defendant convicted of a second or subsequent violation of MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), or MCL 750.520d (CSC-III) must be sentenced to a mandatory minimum term of *at least* five years. MCL 750.520f(1).[35] Additionally, a mandatory sentence of imprisonment for life without the possibility of parole must be imposed following conviction of CSC-I if the victim is less than 13 years of age and the defendant is 18 years of age or older and has a previous conviction of an enumerated sex crime against an individual less than 13 years of age. MCL 750.520b(2)(c).

Because the habitual offender statutes address a defendant's *maximum* possible sentence and the subsequent offense provisions of MCL 750.520f address a defendant's *minimum* possible sentence, enhancement under both statutes is permitted. *People v VanderMel*, 156 Mich App 231, 234-237 (1986). In addition, application of the habitual offender statutes and MCL 750.520f may be based on the same previous felony conviction. *People v James*, 191 Mich App 480, 482 (1991).

Similarly, MCL 750.145g requires persons convicted of a second or subsequent offense under MCL 750.145c (offenses involving child sexually abusive activity or material) be sentenced to a mandatory minimum sentence of not less than 5 years.[36] For purposes of MCL 750.145g, "an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the person has been convicted under [MCL 750.145c] or of another crime involving a sexual offense against a minor." MCL 750.145g.

In contrast to the habitual offender statutes,[37] additional notice is not required to proceed against a defendant charged as a subsequent offender under MCL 750.520f. *People v Eason*, 435 Mich 228, 249 n 35 (1990). See also MCL 750.520f.

4.8 Habitual Offender's Parole Eligibility and Judicial Authorization

MCL 769.12(4) provides:

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[35] See the Michigan Judicial Institute's *Sexual Assault Benchbook* for detailed discussion of CSC offenses.

[36] MCL 750.145g was added by 2018 PA 375, effective March 17, 2019.

[37] See Section 4.2(A).

> "An offender sentenced [as an habitual offender] under [MCL 769.10, MCL 769.11, or MCL 769.12] for an offense other than a major controlled substance offense is not eligible for parole until expiration of the following:
>
> > (a) For a prisoner other than a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law.
> >
> > (b) For a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge."

"MCL 769.12(4)(a) requires written approval before a prisoner otherwise selected for parole will become eligible for the actual grant of parole," but "[i]t does not require . . . written approval before a prisoner can even be considered for conditional release." *Hayes v Parole Bd*, 312 Mich App 774, 780 (2015). "Once that consideration is complete, if the [Parole] Board decides that parole is proper, then it must obtain [judicial] approval before granting parole, as required under MCL 769.12(4)(a)." *Hayes*, 312 Mich App at 781 (holding that a prisoner whose "net minimum date [had] passed" was entitled to a writ of mandamus compelling the Board to consider his parole request).

The language in MCL 769.12(4)(a) "plainly provides a court with *discretionary* authority to approve or not approve a request to designate a habitual offender eligible for early parole." *People v Grant*, 329 Mich App 626, 634 (2019). Accordingly, "a circuit court [must] render a decision [under MCL 769.12(4)(a)] and proffer an explanation for the decision such that the ruling falls within the range of reasonable and principled outcomes." *Grant*, 329 Mich App at 634-635. The trial court, which was the sentencing judge's successor, abused its discretion "by refusing to consider defendant's eligibility for parole before the calendar minimum date in deference to the minimum sentence imposed by the sentencing court 25 years earlier." *Id.* at 638. MCL 769.12(4)(a) authorizes the sentencing judge or the judge's successor to make the discretionary decision whether to approve eligibility for early parole, and "[n]owhere in the statutory language is it indicated that a successor judge must give deference to or abide by the sentencing judge's decision to impose a particular minimum sentence for purposes of contemplating a defendant's release before expiration of the minimum sentence." *Grant*, 329 Mich App at 638.

"The 'written approval' requirement of MCL 769.12(4)(a) is simply a prerequisite for a prisoner who has been sentenced as an habitual offender to be eligible for early parole; *it does not entail review of any Parole Board decision*." *Grant*, 329 Mich App at 635-636 (rejecting the defendant's argument that the Parole Board's decision to parole him should have

been reviewed by the trial court for a clear abuse of discretion when deciding the request to approve his eligibility for early parole and clarifying that the trial court "owes no deference to the Parole Board" when deciding whether to exercise its discretion to approve eligibility for early parole under MCL 769.12(4)(a)).

Additionally, note that "the parole board may grant a medical parole for a prisoner determined to be medically frail."[38] MCL 791.235(10).

[38]Except prisoners convicted of any crime punishable by a term of life imprisonment without parole or of a violation of MCL 750.520b. MCL 791.235(10).

Chapter 5: Imposition of Sentence and Appellate Review

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5.1 Introduction

This chapter addresses general sentencing objectives, proper and improper sentencing considerations, the factors a trial court must consider when deciding whether to impose an out-of-guidelines sentence, other special sentencing circumstances relevant to whether the sentence is an out-of-guidelines sentence, appellate review of sentences generally, appellate review in the context of claims of constitutional guidelines-scoring error under *People v Lockridge*, 498 Mich 358 (2015),[1] and the procedures applicable to resentencing in the context of claims of constitutional guidelines-scoring error under *Lockridge*.

5.2 Sentencing Objectives

The trial court's objective in sentencing a defendant is to tailor a penalty that is appropriate to the seriousness of the offense and the criminal history of the offender. See *People v Rice (On Remand)*, 235 Mich App 429, 445 (1999). The following objectives should be considered when crafting a sentence:

- the likelihood or potential that the offender could be reformed;
- the need to protect society;
- the penalty or consequence appropriate to the offender's conduct; and
- the goal of deterring others from similar conduct. *Rice*, 235 Mich App at 446, citing *People v Snow*, 386 Mich 586, 592 (1972).

The presentence report,[2] mandatory scoring of the advisory statutory sentencing guidelines,[3] and limitations on what factors may be considered during sentencing[4] provide the sentencing judge with "a broad, yet fair, knowledge of the defendant and the circumstances of the

[1]The *Lockridge* decision is discussed in detail in Section 1.4.

[2]"Proposed scoring of the [sentencing] guidelines shall accompany the presentence report." MCR 6.425(C). See Chapter 2 for a detailed discussion of scoring. See Section 6.9 for more information about presentence investigation reports.

[3]*Adams* was decided before the statutory sentencing guidelines were enacted and the reference to the "sentencing guidelines" was almost certainly referring to the judicial sentencing guidelines that were replaced by the legislative sentencing guidelines, enacted by 1998 PA 317. See *Adams*, 430 Mich at 687. However, the statutory sentencing guidelines, while advisory only, must be scored and considered. *People v Lockridge*, 498 Mich 358, 392 (2015). For a detailed discussion of *Lockridge* and the switch from mandatory guidelines to advisory guidelines, see Section 1.4. For a detailed discussion of scoring the statutory sentencing guidelines, see Chapter 2.

[4]See Section 5.3 for a discussion of proper and improper sentencing considerations.

crime of which he is convicted." *People v Adams*, 430 Mich 679, 687 (1988). "It remains the role of the sentencing judge to weigh facts deemed relevant to the sentencing decision." *Id.*

5.3 Permissible and Impermissible Sentencing Considerations

At the outset, ensure all information being considered is accurate; due process requires that "'[a] sentencing judge's exercise of discretion must be based on accurate information.'" *People v Bennett*, 335 Mich App 409, 434 (2021), citing *People v Miles*, 454 Mich 90, 100 (1997), and quoting *People v Smith*, 423 Mich 427, 448 (1985).

A. Proper Considerations

The following factors may be considered when imposing a sentence:

- The severity and nature of the crime committed. *People v Oliver*, 242 Mich App 92, 98 (2000).
- The circumstances surrounding the criminal conduct. *Oliver*, 242 Mich App at 98.
- The defendant's attitude toward his or her criminal behavior. *Oliver*, 242 Mich App at 98. See also *People v Warner*, 339 Mich App 125, 154 (2021) (holding trial court properly considered that defendant "blamed the victim and had a nonchalant demeanor that was very striking throughout the trial") (quotation marks omitted).
- The defendant's social and personal history. *Oliver*, 242 Mich App at 98.
- The defendant's criminal history, including subsequent offenses. *Oliver*, 242 Mich App at 98. See also *People v Beck*, 504 Mich 605, 626-627 (2019) (permitting consideration of uncharged conduct); *People v Ewing*, 435 Mich 443, 473 (1990) (court may consider prior convictions, matters of public record, admissions, and as long as a preponderance of the evidence supports it, the court may also consider uncharged criminal activity, activity for which criminal charges are still pending, and acquitted criminal activity); *People v Barnes*, 332 Mich App 494, 508-509 (2020) (citing *Beck* and holding other-acts evidence may be considered during sentencing).
    - Absent any other constitutional infirmity (and presumably subject to the 10-year gap requirement for prior record variable (PRV) scoring[5]), a

defendant's expunged juvenile records are properly considered when imposing sentence. *People v Smith*, 437 Mich 293, 302-304 (1991).

- The defendant's false testimony. *People v Adams*, 430 Mich 679, 688, 693 (1988) (false testimony may be considered "when the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to wilful, material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation").

- The defendant's post-arrest conduct in prison where that conduct is not accounted for by the sentencing guidelines. *People v Houston*, 448 Mich 312, 323 (1995). "[J]ust as an exemplary custodial record might be found to be a mitigating circumstance, misconduct in custody may be an aggravating circumstance indicating a disposition to violence or impulsiveness." *Id.*

- The defendant's potential for rehabilitation. *Houston*, 448 Mich at 323.

  - Evidence of a defendant's lack of remorse may be properly considered in determining his or her potential for rehabilitation. *Houston*, 448 Mich at 323.

  - "A reasonable sentence may include a limited consideration of a defendant's age in terms of other permissible and relevant individual factors such as the absence or presence of a prior record." *People v Fleming*, 428 Mich 408, 423 n 17 (1987). However, a sentencing court may not arbitrarily lengthen an offender's prison sentence for the expressed purpose of incarcerating the offender "beyond the age of violence." *People v Fisher (After Remand)*, 176 Mich App 316, 318 (1989). It is also inappropriate to consider a defendant's age in assessing the risk of recidivism where no evidence was presented to support the court's opinion of the defendant's probable recidivism. *People v McKernan*, 185 Mich App 780, 781-783 (1990).

- An adult defendant's juvenile records when imposing sentence, even when the juvenile records have been automatically expunged. *Smith*, 437 Mich at 304. See also MCL 712A.18e(13)(d).

[5]For a detailed discussion of scoring a defendant's PRVs, see Chapter 2.

- As long as the defendant has an opportunity to refute it, a court may consider a defendant's alleged criminal conduct even when the conduct does not result in conviction. *People v Wiggins*, 151 Mich App 622, 625 (1986). See also *People v Compagnari*, 233 Mich App 233, 236 (1998) (the court "may consider the evidence offered at trial, including other criminal activities established even though the defendant was acquitted of the charges") (citations omitted); *People v Granderson*, 212 Mich App 673, 679-680 (1995) (a trial court may properly consider facts underlying a defendant's previous acquittal of other charges); *People v Moore*, 70 Mich App 210, 213 (1976) (court properly considered criminal conduct arising from charges that were dismissed pursuant to a plea agreement where defendant did not deny the accuracy of the charges).[6]

- "[T]he effect of the crime on the victim." *Compagnari*, 233 Mich App at 236.

Note that the statutory sentencing guidelines have quantified many of the historical considerations discussed above. See Chapter 2 for a detailed discussion of scoring under the statutory sentencing guidelines.

B. Improper Considerations

The following factors may not be considered when imposing a sentence:

- Acquitted conduct. *People v Beck*, 504 Mich 605, 609 (2019) (vacating defendant's sentence where it was based in part on acquitted conduct because "[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime").[7]

- A defendant's refusal to provide authorities with information about other criminal conduct. *People v Johnson*, 203 Mich App 579, 584 (1994).

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[6]But a trial court may not rely on an independent, and unsupported, finding of guilt. *People v Grimmett*, 388 Mich 590, 608 (1972). See also *People v Shavers*, 448 Mich 389, 393 (1995) (it is not an independent finding of guilt when a court considers evidence presented at trial as an aggravating factor to determine the appropriate sentence); *People v Ewing (After Remand)*, 435 Mich 443, 462 (1990) ("[p]roperly understood, *Grimmett* stands for the general proposition that a sentence must be based on inferences drawn from accurate information and that, when disputed, an unverified offense or activity cannot be relied on at sentencing") (opinion by BOYLE, J.); *Compagnari*, 233 Mich App at 236 ("a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted").

[7]However, "a sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant." *People v Stokes*, 333 Mich App 304, 311 (2020). For additional discussion of the decision in *People v Beck*, 504 Mich 605, 629, 630 (2019), which held that a sentencing court may not consider acquitted conduct, see Section 2.13(E).

- The possibility of earlier release, good-time credits, or disciplinary credits. *People v Fleming*, 428 Mich 408, 428 (1987) (holding these considerations may not be used to enhance defendant's sentence). Similarly, the court may not consider the possibility that a defendant may be granted community placement, *People v McCracken*, 172 Mich App 94, 102 (1988), or a defendant's eligibility for parole, *People v Wybrecht*, 222 Mich App 160, 173 (1997).

- A defendant's refusal to admit guilt. *People v Dobek*, 274 Mich App 58, 104 (2007). "To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, [the Court of Appeals] focuses on three factors: '(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe.'" *Id.*, quoting *People v Wesley*, 428 Mich 708, 713 (1987).

    - Resentencing was required when a sentencing court implied that the defendant would be sentenced more leniently if he revealed the location of the weapon, thereby effectively admitting his guilt. *People v Conley*, 270 Mich App 301, 314-315 (2006).

    - The trial court did not improperly punish defendant for maintaining his innocence or claiming the victim was lying where it considered the fact that the he blamed the victim for his sexual assault because the court clearly noted defendant had an absolute right to maintain his innocence, but found that defendant's statements about the victim being the sexual aggressor as a justification for his conduct showed the defendant had a "low potential for rehabilitation and an unreasonable risk of reoffending." *People v Warner*, 339 Mich App 125, 156 (2021).

- An independent finding of guilt that is not supported by the record with regard to other offenses for which the defendant is facing charges.[8] *People v Grimmett*, 388 Mich 590, 608 (1972) (noting that "[a]t the time of the sentencing on the assault charge, defendant had not been found guilty on the murder charge," and holding "the trial judge acted improperly in assuming defendant was guilty of the murder charge when he sentenced defendant on the assault charge"), overruled on other grounds by *People v White*, 390 Mich 245 (1973).[9]

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[8]But see *People v Shavers*, 448 Mich 389, 393 (1995) (it is not an independent finding of guilt when a court considers evidence presented at trial as an aggravating factor to determine the appropriate sentence).

- A defendant's last-minute plea or exercise or waiver of his or her constitutional right to a jury trial. *People v Earegood*, 383 Mich 82, 85 (1970); *People v Godbold*, 230 Mich App 508, 512 (1998). See also *People v Pennington*, 323 Mich App 452, 468-469 (2018) (vacating the defendant's sentences where "the judge's sentencing policy was to impose the maximum recommended guidelines sentence when a defendant was convicted after going to trial," and holding that such a policy "ignores the requirement of individualized sentencing," punishes the defendant for going to trial, and violates due process).

- A defendant's polygraph results. *People v Anderson*, 284 Mich App 11, 16 (2009).

- Local sentencing policy, to the extent that it prevents an individualized sentence tailored to the circumstances of the offense and the offender. *People v Chapa*, 407 Mich 309, 311 (1979); *People v Catanzarite*, 211 Mich App 573, 583 (1995).

- Prior convictions obtained without counsel or without a proper waiver of counsel. *United States v Tucker*, 404 US 443, 449 (1972); *People v Carpentier*, 446 Mich 19, 31 n 6 (1994); *People v Moore*, 391 Mich 426, 437-438 (1974).[10]

- Successfully exercising the right to appeal. *Warner*, 339 Mich App at 156.[11]

- Eligibility for early probation discharge under MCR 6.441 "must not influence the court's sentencing decision regarding the length of the original probationary period." MCR 6.441(G).[12]

5.4 Indeterminate Sentences[13]

A first-time offender convicted of a felony punishable by imprisonment in a state prison may not be sentenced to a definite term of imprisonment; rather, the court must sentence the defendant to a minimum term and must state the maximum term of imprisonment for the record. MCL 769.8(1).[14] See also *People v Pinson (On Remand)*, 344 Mich App 305, 316-317 (2022) (holding MCL 769.8(1) "requires a court to impose an indeterminate sentence with a minimum and a maximum

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[9] *White*, 390 Mich 245, was overruled by *People v Nutt*, 469 Mich 565 (2004).

[10] For a discussion on challenging the constitutional validity of a prior conviction, see Section 6.14.

[11] "[A] sentence that punishes a defendant for successfully appealing a conviction is vindictive and therefore violates a defendant's due process rights." *Warner*, 339 Mich App at 157. For a detailed discussion of this issue, see Section 6.24.

[12] See Section 9.2(C) for a discussion of early discharge from probation.

term when a defendant is convicted for a first-time felony and the violated statute provides for imprisonment in a state prison").

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

Similarly, all sentences imposed under MCL 769.10, MCL 769.11, and MCL 769.12 (the general habitual offender statutes) must be indeterminate, meaning there is a minimum and maximum sentence "in terms of years or a fraction of a year[.]" MCL 769.10(2); MCL 769.11(2); MCL 769.12(2).

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

Where the punishment prescribed by law is life or any number of years, the court may sentence the defendant to life or to a term of years. MCL 769.9(2). If the court sentences the defendant to a term of years, the court must fix a minimum term and maximum term of years or fractions of years. *Id*. The court may not—in the same sentence—set the maximum sentence at life imprisonment and set the minimum sentence at a term of years. *Id*. For example, a sentence of "18 years to life" is invalid. *People v Phaneuf*, 478 Mich 862, 862 (2007). But see MCL 750.335a(2)(c) (providing that violation of MCL 750.335a(1) by a sexually delinquent person "is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life"); *People v Arnold*, 502 Mich 438, 482 (2018) (*Arnold I*) (holding that MCL 750.335a(2)(c) provides "an *option* a trial court could use its discretion to consider imposing alongside the other statutory penalties available under [MCL 750.335a]"); *People v Arnold*, 508 Mich 1, 6-7 (2021) (*Arnold II*) (holding "individuals convicted of an indecent-exposure offense under [MCL 750.335a] as

[13]Although, "[i]n [*People v Drohan*, 475 Mich 140, 153 n 10 (2006), where the Michigan Supreme Court] cited the definition of 'indeterminate sentence' from *Black's Law Dictionary* (8th ed): a sentence 'of an unspecified duration, such as one for a term of 10 to 20 years,'" and correctly concluded "that Michigan has an indeterminate sentencing scheme under that definition of the term," *People v Lockridge*, 498 Mich 358, 380 n 18 (2015), the *Lockridge* Court further explained that "Michigan's sentencing scheme is *not* 'indeterminate' as the United States Supreme Court has ever applied that term," *id*. at 380 (citations omitted; emphasis added). Rather, "the relevant distinction between constitutionally permissible 'indeterminate' sentencing schemes and impermissible 'determinate' sentencing schemes, as the United States Supreme Court has used those terms, . . . turns on whether judge-found facts are used to curtail judicial sentencing discretion by *compelling* an increase in the defendant's punishment[; i]f so, the system violates the Sixth Amendment[, and] Michigan's sentencing guidelines do just that." *Id*. at 383.

[14]Note that MCL 750.506 provides a specific exception to this rule authorizing an optional jail sentence for first-time offenders. MCL 750.506 provides: "Whenever any person shall be convicted of a first offense herein declared to be a felony, punishable by imprisonment for a term of not more than 5 years, the court may instead of imposing the sentence provided, sentence such convicted person to the county jail for a period not to exceed 6 months."

sexually delinquent persons must be sentenced pursuant to the penalties prescribed in that statute as described in [*Arnold I*]").

A. The *Tanner* Rule

The common-law "*Tanner* rule" applies to indeterminate sentences and requires that the minimum sentence not exceed two-thirds of the maximum sentence. *People v Tanner*, 387 Mich 683, 690 (1972). In other words, any minimum term of imprisonment that exceeds two-thirds of the maximum term imposed does not constitute an indeterminate sentence. *Id*. The *Tanner* rule was codified in MCL 769.34(2)(b), which provides that "[t]he court shall not impose a minimum sentence, including a departure,[15] that exceeds 2/3 of the statutory maximum sentence." See also *People v Garza*, 469 Mich 431, 435 (2003).

The *Tanner* rule does not apply to:

- crimes punishable with imprisonment for "life or any term of years," *People v Lewis*, 489 Mich 939, 939-940 (2011); see also *People v Harper*, 479 Mich 599, 617 n 31 (2007),
- mandatory life in prison sentences, *Tanner*, 387 Mich at 690, and
- where a statute provides a mandatory minimum sentence. *Id.*

The proper remedy for a violation of the *Tanner* rule is a reduction in the minimum sentence. *People v Thomas*, 447 Mich 390, 392-394 (1994).

B. The *Tanner* Rule Extended to Habitual Offenders

The *Tanner* rule applies to the interval between minimum and maximum sentences in cases involving habitual offenders. *People v Wright*, 432 Mich 84, 89, 93-94 (1989) (concluding "that the Legislature intended to provide a meaningful interval between minimum and maximum sentences imposed pursuant to [the habitual offender sentencing provisions]").

[15] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Lockridge*, 498 Mich at 365 n 1. Subsequently, MCL 769.34 was amended to omit the substantial and compelling language and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021. See Section 1.4 for discussion of *Lockridge*.

5.5 Effect of *Lockridge*

For felony convictions listed in MCL 777.11 through MCL 777.19 that occur on or after January 1, 1999, the statutory sentencing guidelines require a sentencing court to calculate the appropriate minimum sentence range under the version of the guidelines in effect at the time the crime was committed. MCL 769.34(2).[16] Previously, sentencing courts were generally *required* to either impose a minimum sentence within the appropriate minimum range as calculated under the sentencing guidelines, MCL 769.34(2), or to articulate "a substantial and compelling reason" to depart from that range, former MCL 769.34(3). However, in 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 365, 399 (2015).[17] The *Lockridge* Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory" and "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)."[18] *Lockridge*, 498 Mich at 391. Subsequently, MCL 769.34 was amended to omit the substantial and compelling language and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021. Accordingly, "the sentencing court may exercise its discretion to depart from [the applicable] guidelines range without articulating substantial and compelling reasons for doing so." *Id.* at 392. However, sentencing courts are required to articulate both the justification for an out-of-guidelines sentence and the justification for the extent of the departure itself. *People v Steanhouse (On Remand) (Steanhouse III)*, 322 Mich App 233, 239 (2017) ("An appellate court must evaluate whether reasons exist to depart from the sentencing guidelines and whether the *extent* of the departure can satisfy the principle of proportionality"), vacated in part 504 Mich 969 (2019).[19]

Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392. Further, note that because the guidelines are advisory only, sentencing courts are permitted to engage in judicial fact-finding when scoring the sentencing guidelines.[20] *People v Biddles*, 316 Mich App 148, 159-160 (2016).

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[16]Note that the advisory sentencing guidelines also apply to sentences imposed after a probation violation. *People v Hendrick*, 472 Mich 555, 557 (2005) (noting guidelines apply "even if the sentence follows the imposition and revocation of probation").

[17]The *Lockridge* decision is discussed in detail in Section 1.4.

[18] The *Lockridge* Court also stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Lockridge*, 498 Mich at 365 n 1.

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

5.6 Special Sentencing Circumstances

A. Sentences That Are Not Departures/Out-of-Guidelines Sentences

1. Mandatory Minimum Sentences

"If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose a sentence in accordance with that statute.[21] Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section." MCL 769.34(2)(a).

Specifically, for violations of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq.*, "[i]f the [MVC] mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the [MVC] authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section." MCL 769.34(2)(a).

Another example of a statute that imposes a mandatory minimum sentence is MCL 750.520b(2)(b), which "requires the imposition of a mandatory 25-year minimum sentence upon

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[20]For a detailed discussion of scoring the advisory sentencing guidelines, see Chapter 2.

[21]Note, however, that a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a non-homicide offense). See also MCL 769.25; MCL 769.25a.Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Mandatory life imprisonment without parole sentences are discussed in Section 7.5(B). Additionally, detailed discussion of the constitutionality of sentencing juveniles and 18-year-olds to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, is in the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

convicted CSC-I offenders who were 17 years or older who committed CSC-I offenses against victims under the age of 13" when a term-of-years sentence is imposed. *People v Roy*, ___ Mich App ___, ___ (2023).

2. Mandatory Determinate Sentences

"If a crime has a mandatory determina[te] penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime." MCL 769.34(5).[22]

For example, a mandatory sentence of imprisonment for life without the possibility of parole must be imposed following conviction of CSC-I if the victim is less than 13 years of age and the defendant is 18 years of age or older and has a previous conviction of an enumerated sex crime against an individual less than 13 years of age. MCL 750.520b(2)(c).

3. Enhancement Under the Repeat Offender Provision Applicable to Controlled Substance Offenses

When MCL 333.7413(1) permits a court to impose a sentence of not more than twice the term otherwise authorized, the enhancement authority extends to both the minimum and maximum terms. *People v Williams*, 268 Mich App 416, 428 (2005).[23] See also *People v Lowe*, 484 Mich 718, 719-720 (2009) (holding MCL 333.7413(1)[24] "allows the trial court to double *both* the defendant's minimum and maximum sentences"). For example, if the recommended minimum range under the

[22]Note, however, that a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 74-75, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a non-homicide offense). See also MCL 769.25; MCL 769.25a.Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Mandatory life imprisonment without parole sentences are discussed in Section 7.5(B). Additionally, detailed discussion of the constitutionality of sentencing juveniles and 18-year-olds to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, is in the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

[23]*Williams* references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when *Williams* was decided is now subsection (1).

[24]Formerly MCL 333.7413(2). See 2017 PA 266, effective March 28, 2018.

guidelines is 5 to 23 months, MCL 333.7413(1) permits an increase in both the upper and lower limit of the recommended range so that the allowable range would be 10 to 46 months. *Williams*, 268 Mich App at 431. When, subject to the ranges discussed above, a court imposes a minimum sentence of 38 months, the sentence falls within the enhanced range authorized by MCL 333.7413(1). *Williams*, 268 Mich App at 430-431 (holding that even though a term of 38 months exceeded the original range of 5 to 23 months, the sentence did not represent a departure for which the trial court was required to articulate a substantial and compelling reason).

B. Sentences Pursuant to Valid Plea Agreements

"[A] sentence that exceed[ed] the sentencing guidelines satisfie[d] the requirements of MCL 769.34(3) when the record confirm[ed] that the sentence was imposed as part of a valid plea agreement." *People v Wiley*, 472 Mich 153, 154 (2005). A defendant who enters into a plea agreement resulting in a downward departure from the guidelines waives appellate review of that sentence. *People v Seadorf*, 322 Mich App 105, 112 (2017). But see *People v Williams*, 501 Mich 966, 966 (2018) ("The decision in *People v Cobbs*, 443 Mich 276 (1993), does not exempt trial courts from articulating the basis for guidelines departures"; accordingly, where "the trial court failed to articulate any reason for imposing a minimum sentence that was below the applicable guidelines range," the case was remanded for the trial court to "consult the applicable guidelines range and take it into account when imposing a sentence" and to "justify the sentence imposed in order to facilitate appellate review.") (Quotation marks and citations omitted.)[25]

C. Determining Whether an Intermediate Sanction is an Authorized Alternative to Imprisonment

The legislative sentencing guidelines expressly authorize intermediate sanctions, including probationary terms,[26] for offenses subject to the guidelines when the recommended minimum sentence range falls within an intermediate sanction cell. MCL 769.31(b); MCL 769.34(4)(a).[27] However, even where the guidelines

[25] *Cobbs* agreements are discussed in detail in Section 7.11.

[26] For a detailed discussion of probation, see Chapter 9.

[27] Intermediate sanctions are also authorized when "an attempt to commit a felony designated in offense class H in part 2 of chapter XVII is punishable by imprisonment for more than 1 year," MCL 769.34(4)(b), and are expressly noted as a permissible sentence when "the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less," MCL 769.34(4)(c)(*ii*).

do not expressly authorize an intermediate sanction, "trial courts need not express substantial and compelling reasons to depart downward after [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Arnold*, 502 Mich 438, 477 (2018). See also MCL 769.34(4)(a) (amended by 2020 PA 395, effective March 24, 2021, to remove language referring to substantial and compelling reasons and providing that intermediate sanctions must be imposed "unless the court states on the record reasonable grounds to sentence the individual to incarceration"). "In accordance with the broad language of *Lockridge*, under [MCL 769.34(4)(a)], a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, 314 Mich App 181, 194-195 (2016), overruled in part on other grounds by *People v Posey*, 512 Mich 317, 326 (2023)[28] (holding, "[c]onsistently with the remedy explained in *Lockridge*," that "the word 'shall' in MCL 769.34(4)(a) [is replaced] with the word 'may'"). Moreover, "because, under *Lockridge*, an intermediate sanction is no longer mandated," a trial court does not violate *Alleyne v United States*, 570 US 99 (2013), by declining to impose an intermediate sanction under MCL 769.34(4)(a). *Schrauben*, 314 Mich App at 195.

Note that "MCL 769.34(4)(c) limits the imposition of an 'intermediate sanction' by right to situations in which the low end of the defendant's guidelines minimum sentence range is below 12 months," and "even if the court determine[s] that a downwardly departing sentence [is] warranted," MCL 769.8(1) requires the "imposition of an indeterminate sentence[.]" *People v Pinson (On Remand)*, 344 Mich App 305, 307-308, 312, 317 (2022) (holding that the trial court erred by imposing "an impermissible determinate six-month jail term"[29] where defendant was convicted of third-degree criminal sexual conduct and his minimum guidelines range was 21 to 35 months).

5.7 Out-of-Guidelines Sentences — Caselaw Examples

A. Disproportionate Sentence in Second-Degree Murder Case

An upward departure of 15 years for the defendant's conviction of second-degree murder was not "more reasonable and proportionate

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

[29]Note that at the time the defendant in *Pinson* committed the offense, MCL 769.31(b) still included jailtime in the definition of intermediate sanction; however, the current version of MCL 769.31 does not include jailtime. *People v Pinson (On Remand)*, 344 Mich App 305, 311 (2022).

than a sentence within the recommended guidelines range would have been." *People v Dixon-Bey*, 321 Mich App 490, 523, 529 (2017). In concluding that the 35-year minimum sentence violated the principle of proportionality, the Court noted the following:

- **Consideration of offender's background.** "Defendant's prior record variable score was zero," and "without a criminal history, the trial court had no basis to conclude that defendant was a recidivist criminal who deserved a greater punishment than that contemplated by the guidelines." *Dixon-Bey*, 321 Mich App at 525-526 (noting "the trial court offered no other explanation as to why defendant's background may warrant a departure sentence") (cleaned up).

- **Factors already contemplated by offense variables.** None of the factors referenced by the trial court regarding the nature of the offense "provided reasonable grounds for the departure" where "most, if not all, of the factors discussed by the trial court to support its departure sentence were contemplated by at least one offense variable (OV)." *Dixon-Bey*, 321 Mich App at 526. "The trial court emphasized that defendant had stabbed the victim twice in the chest. However, defendant's aggravated use of a lethal weapon [was] contemplated in the scoring of OV 1 (aggravated use of weapon), and OV 2 (lethal potential of weapon possessed or used)," and "[t]he trial court offered no rationale as to why that scoring was insufficient to reflect the nature of the stabbing." *Id*. at 526-527 (citations omitted). Similarly, "[t]he trial court also pointed to the impact of the victim's death on his family, but OV 5 (psychological injury to member of victim's family), was scored to reflect that impact," and "the trial court's reliance on the fact that defendant apparently failed to disclose the location of the murder weapon would ordinarily trigger the application of OV 19 (interfering with the administration of justice), not an upward departure." *Id*. at 527 (citations omitted). "The trial court also referred to the 'cold-blooded' nature of the crime," but "the trial court and parties apparently agreed that OV 7 (aggravated physical abuse), under which points may be assessed for excessive brutality, should not be scored given the facts and circumstances of this case." *Id*. (citation omitted).

- **Improper consideration of acquitted conduct.**[30] Where defendant was acquitted of first-degree murder but convicted of second-degree murder, and the jury

[30]In *People v Beck*, 504 Mich 605, 609, 629 (2019), the Court held that consideration of acquitted conduct to justify a longer sentence violates a defendant's right to due process. See Section 2.13(E) for a detailed discussion of *Beck*.

specifically "found that the element of premeditation was not established," it was "obvious what conduct should be considered 'acquitted.'" *People v Dixon-Bey*, 340 Mich App 292, 297 (2022). Accordingly, the trial court abused its discretion by imposing a departure sentence on the basis of its finding—contrary to the jury verdict—that the murder was premeditated and deliberate. *Id.*

- **Irrelevant factors.** Neither "the victim's standing in the community" nor the "defendant's attempts to minimize her role in the stabbing" was "unique to defendant's crime," and "[t]here [was] nothing on the record to indicate that defendant's marriage to a different man affected her relationship with the victim"; therefore, these factors were not "relevant to a proportionality determination." *Dixon-Bey*, 321 Mich App at 529.

B. Sentence Justified By Mix of Improper and Proper Reasons

Resentencing or further articulation of its reasons for the guidelines departure was required where the trial court failed to articulate adequate reasons for the extent of its upward departure of more than six years for the defendant's conviction of assault with intent to commit murder. *People v Steanhouse (On Remand) (Steanhouse III)*, 322 Mich App 233, 236 (2017), vacated in part 504 Mich 969 (2019).[31] Specifically, "two of the stated reasons for imposing a departure sentence were improper," "[t]he trial court only articulated a single valid reason for departing from the sentencing guidelines, and . . . it [was] unclear whether the court would have departed solely on the basis of" the single valid factor. *Id.* at 242.

1. Improper Consideration of Factors Already Contemplated by Offense Variables

"[T]wo of the stated reasons [(the brutality of the assault and the fact that the victim was weak or incapacitated by drug use)] for imposing a departure sentence were improper" because these factors could have been addressed under OV 7 and OV 10, for which zero points were assessed, "and the trial court offered no explanation for why they were given inadequate weight by the guidelines." *People v Steanhouse (On Remand) (Steanhouse III)*, 322 Mich App 233, 240, 242 (2017), vacated in part 504 Mich 969 (2019).[32] "[H]aving determined [when scoring zero points for OV 7] that the facts . . . only

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

encompassed the usual brutality of an assault with intent to murder, the trial court's later decision to use the brutality of the crime to support an upward departure was not a valid consideration." *Id*. at 241. Similarly, "[g]iven that the trial court determined that the [victim's] incapacitation was not significant enough to warrant a score under OV 10, . . . this was not a valid reason for departing upward." *Id*.

2. Consideration of Prior Relationship Between Defendant and Victim is Appropriate

The fact that the victim considered the defendant a friend was a valid reason for departing from the sentencing guidelines; a prior relationship between a defendant and a victim is a factor that "is not adequately reflected in the guidelines" and is therefore properly considered in imposing a departure sentence. *People v Steanhouse (On Remand) (Steanhouse III)*, 322 Mich App 233, 242 (2017), vacated in part 504 Mich 969 (2019).[33] "[A] prior relationship between the offender and the victim can be either a 'very mitigating circumstance or a very aggravating circumstance, depending upon the history of interaction between the parties.'" *Id*., quoting *People v Milbourn*, 435 Mich 630, 660-661 (1990). The trial court's finding that the prior relationship between the defendant and the victim constituted an aggravating circumstance was "supported by the record, which show[ed] that [the defendant] and the victim were frequently together at the victim's home, [which demonstrated] that there was a degree of familiarity and trust between them[; the defendant] breached that trust by stealing items from the victim's home, soliciting a 'reward' for their return, and then ultimately striking the victim with a wrench and slitting his throat." *Steanhouse III*, 322 Mich App at 242.

C. Proportionate Sentence in Voluntary Manslaughter Case

"[A] departure of 13 months over the maximum minimum sentence of 107 months" for the defendant's conviction of voluntary manslaughter "was proportional under [*People v Milbourn*, 435 Mich 630 (1990)], and accordingly . . . was reasonable under [*People v Lockridge*, 498 Mich 358 (2015)]." *People v Walden*, 319 Mich App 344, 353-355 (2017) (noting that "defendant was sentenced . . . after

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

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

Lockridge was decided," and that "although the trial court did not explicitly refer to the principle of proportionality," it "made specific reference to *Lockridge*, and it therefore was fully aware that any sentencing departure was subject to a reasonableness requirement"). "The trial court noted the seriousness of the offense as well as several factors not accounted for in the guidelines, relating in part to defendant's low potential for rehabilitation and lack of remorse[; t]he court noted, for example, that defendant was on bond for aggravated assault at the time he committed the [sentencing] offense[, which was] . . . a homicide carried out by way of yet another assault, this one carried out with a knife . . . with such a level of vicious brutality as to physically disembowel (and cruelly end the life of) his victim." *Walden*, 319 Mich App at 353-354. Additionally, "defendant immediately fled the scene, switched cars, and claimed to have been driven to [another city] by an individual he could not identify[, and t]he trial court expressed its belief that defendant had not given truthful testimony regarding the events that had occurred." *Id*. at 354. Furthermore, "defendant, by the age of 21, had a criminal history composed of three prior adult convictions (not including the aggravated assault charge for which he was on bond at the time of the [sentencing] offense . . .), and three juvenile convictions[.]" *Id*. (noting that the defendant "was also subject to an active personal protection order"). Finally, "[i]n relation to the prosecution's recommendation"—an upward departure of 180 to 270 months—"the upward departure imposed was modest indeed." *Id*. at 354-355.

D. Proportionate Sentence in Child Abuse Case

The defendant's sentence of one year in jail, which was an upward departure of one month from the guidelines range of 0 to 11 months, for her conviction of third-degree child abuse was reasonable and proportionate where "although the guidelines accounted for some degree of the harm the victim suffered, it was reasonable for the trial court to conclude that the factors it considered, especially the effects of defendant's behavior on the victim that culminated in [the victim's] stabbing another child and saying that he hated his life and that nobody loved him, were not adequately considered in the guidelines calculation." *People v Lawhorn*, 320 Mich App 194, 196, 205, 210-211 (2017). Further, "the extent of [the] departure—one month—was minor in light of all of the factors the trial court found demonstrating the seriousness of the offense and surrounding circumstances," including "that the victim murdered another child," illustrating "the likely detrimental effect that defendant's treatment of the victim and the accompanying home environment had on the victim"; the defendant's almost certain knowledge that her stepfather beat the victim; that "it was highly likely" the defendant was aware that there was cocaine in the home and that

her stepfather was using it; the "deplorable conditions inside the home"; and that the defendant had likely been involved in prior child abuse or neglect incidents. *Id.* at 207-211.

E. Proportionate Sentence in Criminal Sexual Conduct Case

Where the defendant, a registered sex offender who befriended the victim and his family, sexually assaulted the victim in the victim's home while he was sleeping, the sentence of "13 months above the high end of the guidelines range," "did not violate the principle of proportionality, and [was] reasonable" "considering the seriousness of the circumstances surrounding the offense and the offender[.]" *People v Lampe*, 327 Mich App 104, 130, 132 (2019). "The trial court identified two basic reasons for the departure: (1) defendant's grooming behavior, particularly defendant's grooming behavior in the context of his failure to disclose past sexual misconduct, and (2) the location and timing of the offense, which resulted in [the victim] feeling unsafe in his own home." *Id*. at 128. "[A]lthough OV 10 accounts to some degree for defendant's predatory conduct and grooming behavior, the trial court identified circumstances—namely, defendant's [undisclosed] past sexual misconduct and status as a registered sex offender—that made his grooming of [the victim] particularly egregious," and "the trial court did not err by considering these facts when sentencing defendant." *Id*. at 128-129 ("By withholding information about his past sexual misconduct and status as a registered sex offender until he had already befriended [the victim] and his family, defendant was in a position of trust that enabled him to be in [the victim's] home at night and to commit the sexual assault[.]"). Further, "the trial court did not err by concluding that the guidelines did not adequately account for the extent to which the timing and location of the assault resulted in [the victim's] loss of security"; "[the victim's] response—to not only the violation of his person but also the violation of his home—[was] not adequately accounted for by the scoring of OV 4," and "the trial court did not err by finding that OV 4 did not adequately account for the circumstances [of] the offense." *Id*. at 129.

"The trial court's reasons for the departure were proper, and they provided an adequate basis for its seven-year upward departure sentence" where it concluded that OV 4 (psychological injury to victim) did not adequately account for the victim's extreme psychological injury observed by the trial court when the victim testified at both the original sentencing hearing and the resentencing hearing three years later, and OV 13 (continuing pattern of criminal behavior) did not adequately account for the difference between "heinous felonies like CSC-I and other felonious acts like home invasion." *People v Barnes*, 332 Mich App 494, 506-507 (2020). Further, the trial court's "cursory analysis of the mitigating

circumstances offered by defendant" did not constitute error because "trial courts are not required to expressly or explicitly consider mitigating factors at sentencing." *Id.* at 507 (quotation marks and citation omitted).

The trial court's sentence of 60 months to 15 years in prison—exceeding the guidelines range by 20 months—was reasonable where the "defendant's minimum sentence is not exceptionally long, and defendant, a member of the bar, penetrated an extremely intoxicated woman and later referred to her as evil." *People v Carlson*, 332 Mich App 663, 676 (2020). Defendant argued "that his educational background and career as a lawyer made him less likely to reoffend," and was accordingly an improper reason for imposing an out-of-guidelines sentence; however, the Court rejected this argument and explained that the sentencing court was apparently referring to the fact "that defendant, as a lawyer, had knowledge of the law and was knowledgeable of, and subject to, professional standards of conduct and care." *Id.* at 674 (additionally rejecting defendant's argument that his background was not "objective and verifiable" because that standard was relevant to the substantial and compelling reasons analysis no longer required to impose a sentence outside of the guidelines range). Further, the trial court did not improperly rely on defendant's lack of remorse despite the fact that defense counsel expressed remorse on defendant's behalf where the trial court "emphasized defendant's 'arrogance' in calling [the victim] evil even when he knew he was being recorded during a telephone call from jail," and "the trial court focused on the fact that defendant seemed to have no empathy toward [the victim]." *Id.* at 674-676.

The trial court's sentence of 20 to 40 years in prison—instead of a sentence within the guidelines range of 51 to 127 months—was reasonable where "the trial court identified a number of factors it considered when sentencing defendant"; specifically, the "severe impact" of the assault on the victim, defendant's attempt "to justify his criminal sexual misconduct to police by providing extensive detail about how the victim was sexually aroused by him," defendant's consistent victim blaming and "nonchalant demeanor" during the trial, and the fact that "the guidelines did not account for how similar defendant's prior CSC-III conviction was to the sentencing offense, given that both defendant's prior conviction and the sentencing offense involved the sexual assault of an adolescent girl," which the trial court viewed as an indication that "defendant [was] unlikely to be reformed[.]" *People v Warner*, 339 Mich App 125, 154, 155 (2021) (quotation marks omitted). The Court further rejected the defendant's argument that "the trial court's sentence improperly punished him for blaming the victim at trial," because it was necessary for him to accuse the victim of lying in order to

maintain his innocence. *Id.* at 155. The Court concluded that there was "no indication that the trial court improperly attempted to force defendant to admit his guilt" or that it punished him for maintaining his innocence where the trial court specifically noted that the defendant had "an absolute right to maintain innocence, but without revictimizing the victim." *Id.* at 155, 156 (quotation marks omitted). The Court held that "the trial court's statements reflect that it considered defendant's statement to police that his criminal conduct was somehow justified or excused because the victim was the sexual aggressor," and "[t]he trial court properly considered defendant's unscripted statement to police because defendant's justification for his conduct suggested to the trial court that defendant ha[d] low potential for rehabilitation and an unreasonable risk of reoffending." *Id.* at 156.

F. Proportionate Sentence in Robbery Case

Where the trial court "identified several factors that it felt were not adequately reflected in defendant's guidelines scores," defendant was not scored as a fourth-offense habitual offender despite his criminal history because of a notice issue, and "each of defendant's current convictions carried a maximum penalty of life in prison," the imposition of minimum sentences of 360 to 720 months instead of the recommended guidelines minimum sentences of 126 to 210 months "was proportionate to the seriousness of defendant's crimes and background." *People v Odom*, 327 Mich App 297, 315-316 (2019). Specifically, the trial court imposed the out-of-guidelines sentences because the defendant "ha[d] committed six serious criminal offenses since he was 17 years old," and would have been subject to "a minimum sentence of up to 420 months in prison" as a fourth-habitual offender; the defendant was on probation when the sentencing offenses were committed, indicating that he "was not a strong candidate for reform"; and "the guidelines range did not accurately reflect [the defendant's] serious recidivism [or] the brazenness of his crimes[.]" *Id.*

G. Proportionate Sentence in Domestic Violence Case

An upward departure of 19 months from the guidelines maximum-minimum sentence of 281 months for assault with intent to commit murder was reasonable where the defendant attempted to suffocate his ex-wife with a pillow and strangle her with a belt while she lay in bed with her young child. *People v Rosa*, 322 Mich App 726, 744, 748 (2018). "Considering the record and the trial court's statements in support of the sentence, the trial court did not abuse its discretion in departing from the guidelines when sentencing defendant"; the "[d]efendant's long history of abusing [the victim], the presence of a

child during the assault, and the damage done to a family of four children were not fully accounted for by the guidelines." *Id*. at 748 (noting that the extent of the departure, which "was an increase of approximately 7%" from the guidelines maximum-minimum, was "a proportional increase given the nonguidelines considerations").

The trial court's downward departure sentence for an assault by strangulation was not an abuse of discretion where "the trial judge carefully explained his findings and reasons for imposing an out-of-guidelines sentence"—"that the sentencing guidelines inaccurately reflected the seriousness of the crime" and failed to account for the victim's conduct—and the record supported the trial court's findings and reasons. *People v Lydic*, 335 Mich App 486, 501-502 (2021). Specifically, the trial court viewed the 50 points assigned under OV 7 "as too harsh given the circumstances of [the] case," noting that OV 7 is an "all or nothing" variable that, when scored, places a "defendant's guidelines range in a whole new ballpark." *Id.* at 502 (quotation marks omitted). Additionally, the trial court explained that the victim provoked the defendant, and while that "provocation did not justify defendant's conduct," it played a part in the trial court's decision to impose a downward departure. *Id.*

H. Acquitted Conduct Cannot be Considered[34]

The defendant's right to due process was violated where the trial court "relied at least in part on acquitted conduct when imposing [a departure] sentence for the defendant's conviction of being a felon in possession of a firearm[.]" *People v Beck*, 504 Mich 605, 609-610 (2019) (defendant was acquitted of open murder but found guilty of felon-in-possession and felony-firearm; his guidelines range was 22 to 76 months, but the trial court imposed a sentence of 240 to 400 months based in part on its finding that a preponderance of the evidence supported the conclusion that defendant committed the homicide). See also *People v Roberts*, 506 Mich 938 (2020) (where the defendant was acquitted of an assault with intent to murder charge that was based on him passing a gun to another person who fired the gun into a crowd, the trial court improperly considered acquitted conduct where it departed from the recommended range in order to "deter gun violence on the city's streets").

However, "a sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant." *People v Stokes*, 333 Mich App 304, 311 (2020). The inclusion of information about acquitted conduct in a PSIR does not

[34]For additional discussion of the decision in *People v Beck*, 504 Mich 605, 629, 630 (2019), which held that a sentencing court may not consider acquitted conduct, see Section 2.13(E).

create a presumption that the sentencing court relied on acquitted conduct; rather, "[t]here must be some evidence in the record that the sentencing court relied on such information to warrant finding a *Beck* violation." *Id.* at 311-312 (noting that the acquitted conduct referenced in the PSIR was about a different and separate case and "the trial court did not refer to any acquitted conduct" nor did it "intimate that such conduct influenced its sentencing decisions").

I. Additional Examples of Adequately-Supported Departure Sentences

- *People v Jackson*, 505 Mich 873 (2019): The "modest departure" did not violate the principle of proportionality where "the trial court's justifications were addressed not only to the seriousness of the offense, but also to the danger posed by this particular offender, who intentionally and needlessly created an exceptionally dangerous situation and whose criminal behavior was escalating," and the trial court expressly stated "that the departure was a fair and proportionate sentence for the protection of society in these circumstances."

- *People v Ellen*, 505 Mich 873 (2019): Imposition of "the most severe sentence permitted" did not violate the principle of proportionality where "[t]he trial court adequately described the circumstances surrounding the offense as being at the most serious end of the spectrum of manslaughter cases and the defendant's efforts to silence witnesses[.]"

- *People v Naccarato*, 505 Mich 877 (2019): Imposition of a sentence of probation instead of incarceration did not violate the principle of proportionality where "[t]he trial court adequately explained why [the sentence of probation was more proportionate], in light of mitigating circumstances surrounding the offense and the offender[.]"

- *People v Abcumby-Blair*, 335 Mich App 210, 243-244 (2020): A 32-month departure sentence that was "less than midway between the maximum of the guidelines minimum range and what [the trial court] could have imposed through consecutive sentencing was not unwarranted" where discretionary consecutive sentences were not imposed, the "guidelines did not adequately account for the extensiveness of defendant's criminal record,[35] the frequency and rate of defendant's recidivism, and defendant's apparent resistance to rehabilitation."[36] The Court affirmed the departure sentence despite the trial

[35]Defendant's PRV score was 110, and the guidelines maximum is 75. *Abcumby-Blair*, 335 Mich App at 242.

court's failure to "expressly explain why a 32-month departure sentence was more fitting than a departure of some greater or lesser amount" in light of the trial court's stated reasons for departing and its discretionary sentencing authority, which if exercised would have resulted in a minimum sentence within the guidelines range of 152 months' imprisonment rather than the 108 months minimum sentence imposed. *Id.* at 243.

5.8 Appellate Review[37]

Both within-guidelines and out-of-guidelines sentences are reviewed for reasonableness. *People v Posey*, 512 Mich 317, 352 (2023);[38] *People v Lockridge*, 498 Mich 358, 392 (2015). A sentence is unreasonable if it violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 636 (1990).[39] *People v Steanhouse (Steanhouse II)*, 500 Mich 453, 459-460, 473 (2017). The principle of proportionality requires a sentence "to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 460 (quotation marks and citation omitted). Whether a sentence is reasonable is reviewed for an abuse of discretion. *Id.* at 459-460.[40] "Resentencing will be required when a sentence is determined to be unreasonable." *Lockridge*, 498 Mich at 392.

A. Proportionality Test

A sentence is proportionate when it reflects the seriousness of the circumstances surrounding the offense and the offender's criminal history. *People v Milbourn*, 435 Mich 630, 636 (1990).

In *Steanhouse I*, the Court of Appeals noted that under *Milbourn*, departures from the advisory judicial guidelines then in effect were appropriate "'where the guidelines do not adequately account for important factors legitimately considered at sentencing.'" *People v*

[36]Defendant was previously convicted of similar crimes, and was released from jail following a similar offense approximately five months before committing the sentencing offense. *Abcumby-Blair*, 335 Mich App at 242-243.

[37] Other postsentencing issues, such as motion for relief from judgment and setting aside a conviction, are discussed in the Michigan Judicial Institute's *Criminal Proceedings Benchbook Vol. 3.*

[38]In *Posey*, the Court held that "the portion of MCL 769.34(10) that requires appellate affirmation of within-guidelines sentences that are based on accurate information without scoring errors is unconstitutional," and the Court struck down that portion of MCL 769.34(10). *Posey*, 512 Mich at 352 (Justice WELCH did not join this section of the opinion, but she agreed that the first sentence of MCL 769.34(10) must be severed albeit for a different reason).

[39]The principle of proportionality was reaffirmed in *People v Babcock*, 469 Mich 247, 254 (2003), and *People v Smith*, 482 Mich 292, 304-305 (2008).

[40]Further, the *Steanhouse II* Court "decline[d] to import the approach to reasonableness review used by the federal courts, including the factors listed in 18 USC 3553(a), into [Michigan's] jurisprudence." *Steanhouse II*, 500 Mich at 460.

Steanhouse (Steanhouse I), 313 Mich App 1, 45 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017),[41] quoting *Milbourn*, 435 Mich at 657. Accordingly, an out-of-guidelines sentence should be imposed when "'the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime.'" *Steanhouse I*, 313 Mich App at 45, quoting *Milbourn*, 435 Mich at 657.

"Factors that may be considered by a trial court under the proportionality standard include, but are not limited to:

- 'the seriousness of the offense;
- factors that were inadequately considered by the guidelines; and
- factors not considered by the guidelines[.]'" *People v Walden*, 319 Mich App 344, 352 (2017), quoting *Steanhouse I*, 313 Mich App at 46 (bullets substituted for numerals).

Some examples of factors not considered by the guidelines include "the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation." *Walden*, 319 Mich App at 352-353 (quotation marks and citation omitted). See also *Steanhouse I*, 313 Mich App at 46; *People v Houston*, 448 Mich 312, 321-324 (1995); *Milbourn*, 435 Mich at 660-661.[42]

The proportionality of a defendant's sentence is considered separately and not in reference to any consecutive or concurrent mandatory sentence; accordingly, where a defendant is sentenced to multiple consecutive terms of imprisonment, the proportionality of the sentence is not determined by the cumulative effect of the defendant's sentences. *People v Miles*, 454 Mich 90, 94-95 (1997).

A trial court is not required to consider a codefendant's sentence when imposing sentence on another codefendant; that is, each individual convicted of a crime, when more than one individual participated in the same crime, is not entitled to receive a sentence

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

[42]The defendant's conduct while on probation was a proper consideration when determining whether there were substantial and compelling reasons to support a departure in a pre-*Lockridge* case. *People v Hendrick*, 472 Mich 555, 557 (2005). The Court specifically held that the Court of Appeals erred by concluding "that the acts giving rise to the probation violation . . . were already considered in connection with the prior record variables and offense variables." *Id.* Accordingly, a defendant's conduct while on probation may constitute another factor not adequately considered by the guidelines.

similar to the sentences received by other participants. *People v Colon*, 250 Mich App 59, 64 (2002).

See also the Michigan Judicial Institute's the Articulation of Reasons for Out-of-Guidelines Sentence sample form.

B. Presumptions

There is no presumption of unreasonableness for sentences outside the guidelines range. *People v Steanhouse (Steanhouse II)*, 500 Mich 453, 474-475 (2017) (while "the guidelines remain a highly relevant consideration in a trial court's exercise of sentencing discretion, . . . the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range") (quotation marks and citations omitted). However, within-guidelines sentences are subject to a nonbinding rebuttable presumption of proportionality that the defendant bears the burden of rebutting. *People v Posey*, 512 Mich 317, 360 (2023) (Justice WELCH agreed with this remedy). See also *People v McFarlane*, 325 Mich App 507, 538 (2018) (rejecting defendant's argument that his sentence was "not proportionate and amounted to cruel and unusual punishment," and holding that when a sentence is presumptively proportionate, the defendant has the burden to rebut the presumption by showing "that there was something unusual about the circumstances of [the] case that made the sentence disproportionate").

In *People v Posey (On Remand)*, ___ Mich App ___, ___ (2023), the Court conducted a reasonableness review of the defendant's within-guidelines sentence. The Court summarized the legal framework governing such a review, stating "reasonableness review requires a determination whether a sentence was proportionate," and that under the presumption of proportionality, "a within-guidelines sentence is not binding on the Court of Appeals," and "the defendant bears the burden of demonstrating that their within-guidelines sentence is unreasonable or disproportionate[.]" *Id.* at ___ (quotation marks and citations omitted). The Court concluded the defendant's sentence was reasonable, and rejected the defendant's argument that the sentence was "inherently unreasonable because the trial court did not deviate from those sentences after the guidelines range had been lowered by the court."[43] *Id.* at ___. The Court explained "[t]here is no supporting legal authority for the proposition that if a guidelines range is lowered, a trial court is mandated to also lower the minimum sentence on resentencing to render the sentence reasonable." *Id.* at ___. Further, because the defendant bears the burden to demonstrate that the sentences were unreasonable and disproportionate, the trial court was not required to further explain

its reasoning where it already noted "that defendant had committed the same crime for which he was on parole and . . . had used a firearm." *Id.* at ___ (noting "[t]his was a powerful reason for imposing a minimum sentence of 22 years' imprisonment given the patently serious nature of the [assault with intent to commit murder] offenses," and that "there is nothing in [the Supreme Court's decision in] *Posey* suggesting that a sentencing court needs to expressly explain why a within-guidelines sentence is reasonable and proportionate").

The defendant failed "to present any unusual circumstances sufficient to overcome the presumption of proportionality" for his within-guidelines 22-year sentence where he received a harsher sentence than his codefendants. *People v Ventour*, ___ Mich App ___, ___ (2023). The defendants' codefendants both pleaded guilty and received a 21-year sentence and a 16-year sentence; the Court noted that while "a sentencing court cannot base its sentence on a defendant's decision to exercise his constitutional right to a jury trial," a sentence "is not necessarily unconstitutional where it is higher following a trial than had he taken a plea." *Id.* at ___ (cleaned up). The Court concluded that there was no sentencing error where the trial court explained its imposition of a sentence near the top of the guidelines range and its "reasons for the different sentences." *Id.* at ___. The trial court noted the codefendants' sentences, and explained that the evidence demonstrated that defendant was "the conductor of everything that happened that day." *Id.* at ___ (cleaned up). The Court concluded that the sentencing court's "conduct at sentencing demonstrates that it thoroughly considered the circumstances of the offense and the applicable guidelines range to determine an appropriate penalty," and "[t]he record does not support defendant's claim that the trial court imposed a harsher sentence to punish him for exercising his right to a jury trial, or that his sentence is disproportionate or unreasonable because it is longer than the sentences received by the codefendants." *Id.* at ___.

C. Additional Appellate Considerations for Out-of-Guidelines Sentences

"'Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the

[43]In this case the defendant's minimum sentencing guidelines range was originally calculated at 18 years and 9 months to 46 years and 10 months and he was sentenced to 22 to 40 years' imprisonment; however, the guidelines range was re-calculated pursuant to an order entered by the Court of Appeals resulting in a lower minimum sentence range of 14 years and 3 months to 35 years and 7 months. *People v Posey (On Remand)*, ___ Mich App ___, ___ (2023). Despite the alteration of the guidelines range, the trial court imposed the same sentence of 22 to 40 years' imprisonment. *Id.* at ___.

variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.'" *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 45-46 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017),[44] quoting *People v Milbourn*, 435 Mich 630, 659-660 (1990).

"[R]eliance solely on a trial court's familiarity with the facts of a case and its experience in sentencing cannot 'effectively combat unjustified disparity' in sentencing because it construes sentencing review 'so narrowly as to avoid dealing with disparity altogether[.]'" *People v Dixon-Bey*, 321 Mich App 490, 530 (2017), quoting *Milbourn*, 435 Mich at 647.

Appellate courts may take the extent of a departure into account when determining reasonableness, and they must "use the sentencing guidelines as an aid when doing so assists in determining whether a sentence is proportionate." *Dixon-Bey*, 321 Mich App at 531.

D. Record on Appeal

When appealing a sentence under MCL 769.34, the appeal record must include:

- an entire record of the sentencing proceedings, MCL 769.34(8)(a);
- the defendant's presentence investigation report (PSIR), MCL 769.34(8)(b); MCR 7.212(C)(7);[45] and
- any other reports or documents the sentencing court used in imposing sentence, MCL 769.34(8)(c).

See also *People v Callon*, 256 Mich App 312, 332 (2003) (noting the defendant failed to perfect his sentencing appeal by failing to file a copy of the PSIR and any other reports or documents relied on by the sentencing court as required by MCL 769.34).

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

[45] "Any portion of the presentence investigation report exempt from disclosure by law is not a public record." MCL 769.34(8)(b). See Section 6.9 for more information on PSIRs.

E. Review of Guidelines Scoring

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438, 438 n 18 (2013) (citing *People v Osantowski*, 481 Mich 103, 111 (2008), and noting that, contrary to several Court of Appeals decisions, "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines") (additional citations omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438, citing *People v Babcock*, 469 Mich 247, 253 (2003).[46]

"[T]he 'right result—wrong reason' doctrine . . . [cannot] be employed to allow impermissible appellate fact-finding" in reviewing the propriety of an OV score; "[a] *trial court* determines the sentencing variables by reference to the record, not [the Court of Appeals]." *People v Thompson*, 314 Mich App 703, 712 n 5 (2016) (where "the trial court assessed 50 points for OV 7 solely on the basis of sadistic behavior, . . . [i]t would not be appropriate for [the Court of Appeals] to consider whether" the score would nevertheless have been appropriate on the alternative basis that the "defendant's conduct was designed to substantially increase the victim's fear and anxiety") (quotation marks and citations omitted). See also *People v Gloster*, 499 Mich 199, 209-210 (2016) (holding that the trial court erred as a matter of law in scoring OV 10 solely on the basis of the conduct of the defendant's co-offenders, and that the Court of Appeals additionally "erred by concluding that the trial court's scoring of OV 10 was supported by defendant's *own* conduct"; "[b]ecause the trial court did not *itself* find that defendant's own conduct was predatory in nature, the Court of Appeals failed to review the trial court's findings for clear error as required by [*Hardy*, 494 Mich at 438]") (emphasis added).

F. Unpreserved Sentencing Issues

Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. *People v Lockridge*, 498 Mich 358, 392

[46]"[G]iven the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*." *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 38 (2015), aff'd in part and rev'd in part on other grounds 500 Mich 453, 459-461 (2017), citing *Lockridge*, 498 Mich at 392 n 28; *Hardy*, 494 Mich at 438; *People v Gullett*, 277 Mich App 214, 217 (2007). For more information on the precedential value of an opinion with negative subsequent history, see our note.

(2015). "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *Id.* at 392-393. For claims of constitutional error in the scoring of the guidelines under *Lockridge*, see Section 5.9.

G. Waiver

"A defendant waives appellate review of proportionality when he has agreed to a sentence provided in the plea agreement." *People v Guichelaar*, ___ Mich App ___, ___ (2023). This is true even when a defendant does not agree to a specific sentence and instead enters "into an understanding a voluntary plea to be sentenced to a minimum term" within a specified range. *Id.* at ___. Further, when the sentencing agreement is "not contingent on its relationship to the sentencing guidelines" the defendant effectively agrees "to the proportionality and reasonableness of sentences within his sentencing range even if they [fall] outside of the guidelines calculated at sentencing." *Id.* at ___.

5.9 Review of Claims of Constitutional Guidelines-Scoring Error Under *Lockridge*

In 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US 99 (2013), and *Apprendi v New Jersey*, 530 US 466 (2000), held that "Michigan's sentencing guidelines . . . [are] constitutionally deficient[] . . . [to] the extent [that they] . . . *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range[.]" *People v Lockridge*, 498 Mich 358, 364 (2015). "To remedy the constitutional violation," the *Lockridge* Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory" and "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)," further holding that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," the legislative sentencing guidelines "are advisory only." *Lockridge*, 498 Mich at 365, 391, 399. Subsequently, MCL 769.34 was amended to omit the substantial and compelling language and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021.

Unpreserved *Lockridge* issues are reviewed "for plain error affecting substantial rights[.]" *Lockridge*, 498 Mich at 392, 392-393 n 29 (holding these errors are not structural) (citations omitted). Preserved *Lockridge* issues are reviewed for harmless error beyond a reasonable doubt. *People v Stokes (Stokes I)*, 312 Mich App 181, 198 (2015), vacated in part on other grounds 501 Mich 918 (2017).[47]

There are three types of cases in which plain error categorically cannot be established:

- Where sentencing facts were admitted by the defendant or found by the jury. *Lockridge*, 498 Mich at 394-395.[48] See also *People v Jackson (On Reconsideration)*, 313 Mich App 409, 436 (2015) (holding there was no *Lockridge* error regarding the scoring of OV 13 because it was based on offenses to which the defendant previously pleaded guilty).

- Where the trial court imposed a departure sentence, and accordingly, did not rely on the guidelines. *Lockridge*, 498 Mich at 394, 395 n 31 (where the defendant "received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines," he could not "show prejudice from any error in scoring the OVs in violation of *Alleyne*").

- Where correction of the alleged error would not change the applicable minimum sentence range. *Lockridge*, 498 Mich at 399. See also *People v Geddert*, 500 Mich 859, 859 (2016) (resentencing was required "[b]ecause correcting the OV score would change the applicable guidelines range").

The remand procedure from *United States v Crosby*, 397 F3d 103, 118 (CA 2, 2005) for possible resentencing applied to sentences imposed in violation of the Sixth Amendment under *Lockridge* on or before July 29, 2015. A detailed discussion of this procedure is not included in this benchbook because most of these challenged have been resolved. For information about the *Crosby* remand procedure, see the Michigan Judicial Institute's *Crosby* Remands Quick Reference Guide and *Crosby* Remands Flowchart.

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

[48]For purposes of determining "[w]hether any necessary facts were 'admitted by the defendant'" within the meaning of *Lockridge*, the phrase "'admitted by the defendant' . . . means *formally* admitted by the defendant *to the court*, in a plea, in testimony, by stipulation, or by some similar or analogous means." *People v Garnes*, 316 Mich App 339, 344 (2016). "[A] fact is not 'admitted by the defendant' merely because it is contained in a statement that is admitted." *Id*., citing *Apprendi v New Jersey*, 530 US 466, 469-471 (2000).

Chapter 6: The Sentencing Hearing

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6.1 Introduction

This chapter discusses the procedures relevant to the sentencing hearing, defendants' rights at the sentencing hearing, issues surrounding a defendant's presentence investigation report, allocution and crime victims' impact statements, issuance of the judgment of sentence, and select post-sentencing issues.

6.2 Sentencing Judge

Generally, a defendant should be sentenced by the judge who presided at his or her trial, or accepted his or her plea, if the judge is reasonably available.[1] *People v Bennett*, 344 Mich App 12, 14 (2022); *People v Lee*, 489 Mich 289, 300 n 7 (2011); *People v Pierce*, 158 Mich App 113, 115 (1987). See also MCR 6.440.[2] However, a defendant can waive any error regarding the sentencing judge by failing to object after being informed that a different judge would conduct the sentencing. See *People v Robinson*, 203 Mich App 196, 197-198 (1993).

For example, the Court of Appeals remanded a case "for a new sentencing hearing before [the plea-taking judge] if he is still 'reasonably available' to conduct that hearing" where the chief judge issued an administrative order that assigned the plea-taking judge to another courthouse before defendant's sentencing hearing and reassigned his case to a successor judge who sentenced him despite his objection. *Bennett*, 344 Mich App at 22-23 (noting that the facts of the case fall "squarely within the rule" that a defendant is entitled "to be sentenced before the judge who accepts the plea, provided that judge is reasonably available") (quotation marks and citation omitted).

Further, a defendant is entitled to a professional and unbiased judge during the sentencing hearing. See *People v Walker*, 504 Mich 267, 285-286 (2019) (remanding case to a different trial court judge where the "defendant indicated at least eight times during his allocution that he had nothing further to say, [and] the trial judge continued to bait him, engaging in name-calling," and where the trial court suggested that defendant "liked being in prison . . . and stated that it would have sentenced him more leniently but for his disrespect toward the court").

[1] However, if a felony plea is accepted by a district judge, a circuit judge must conduct the sentencing. MCL 766.4(3). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 6, for discussion of pleas.

[2] Note that MCR 6.440 also applies to misdemeanor cases. MCR 6.001(B).

6.3 Rules of Evidence Generally Do Not Apply

The rules of evidence do not apply to sentencing proceedings. See MRE 1101(b)(3); *People v Matzke*, 303 Mich App 281, 284 (2013).[3] Even when evidence is not admissible at the defendant's trial, a sentencing court may properly consider it in determining an appropriate sentence. *People v Uphaus*, 278 Mich App 174, 183-184 (2008).

6.4 Court-Appointed Foreign Language Interpreter[4]

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

6.5 Videoconferencing

The Court has held that a defendant may not be sentenced for a felony by videoconference because felony "[s]entencing by videoconference plainly contravenes MCR 6.006, which identifies the criminal proceedings in which two-way interactive video technology may be used," and does not include felony sentencing. *People v Heller*, 316 Mich App 314, 315-321 (2016). However, after the decision in *Heller*, MCR 6.006 was amended,[6] and the amended version of MCR 6.006 no longer specifically identifies the criminal proceedings in which two-way interactive video technology may or may not be used. Instead, it identifies proceedings in both circuit and district/municipal court for which videoconferencing technology is the preferred mode, and it presumes in-person appearance of the parties, witnesses, and other participations for all other proceedings while leaving the court discretion to permit videoconferencing. MCR 6.006(B)-(C). The amended rule recognizes a defendant's right to appear in person and requires in-person proceedings if a defendant makes an in-person demand. MCR 6.005(B)(5). The amended rule does not explicitly address felony sentencing; however, it broadly permits the use of videoconferencing technology, stating "[a] court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding." MCR

[3]However, the rules on privileges do apply to sentencing hearings. MRE 1101(b).

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

[5] In addition, "[t]he court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

[6]ADM File No. 2020-08, effective September 9, 2022.

6.006(A)(2). It further requires a court to "consider constitutional requirements" in addition to other factors when determining whether to utilize videoconferencing technology. MCR 6.006(A)(3). Accordingly, the *Heller* Court's holding based on a previous version of MCR 6.006 is not relevant to the current court rule, and it is unclear whether the Court's holding broadly prohibiting felony sentencing by videoconferencing technology is still good law.

While the amendments to MCR 6.006 may render the *Heller* Court's decision on the basis of the court rule irrelevant, the *Heller* Court further held that "sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present, and virtual appearance is not a suitable substitute for physical presence." *Id*. at 315, 318, 321 (citation omitted). Accordingly, the amendments to MCR 6.006 do not affect the *Heller* Court's holding to the extent it was premised on a defendant's constitutional right to be present. However, the holding in *Heller* does not address a defendant's ability to waive the right to be physically present for felony sentencing,[7] and the current version of MCR 6.006 appears to at least permit the use of videoconferencing technology for all sentencing hearings with the consent of the defendant. See MCR 6.006.

Violation of a defendant's constitutional right to be physically present for felony sentencing is not a structural error. *People v Anderson*, 341 Mich App 272, 284-286 (2022). Accordingly, in order to obtain relief for an unpreserved error regarding felony sentencing by videoconference, in addition to identifying a plain error, a "defendant must successfully establish that, had he been physically present in the courtroom, there is a reasonable probability that his sentence would have been different." *Id.* at 283. If a defendant demonstrates that the error affected their substantial rights, "it must be determined whether reversal is required because the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceeding." *Id.* at 284 (cleaned up). Defendant was not entitled to relief where there was "no indication on the record that defendant or his counsel either waived his right to appear in person or objected to proceeding by Zoom," and he did not raise any objections to the sentencing proceedings other than that he was not present in the courtroom; the record showed that "he and his counsel were active participants, and they were able to make any necessary arguments or statements in support of defendant's position," defendant was able to allocute, defense counsel addressed inaccuracies in the PSIR, the trial court explained its sentence—which was lower than the sentences requested by the prosecution and recommended by the guidelines—and

[7]The defendant in *Heller* "was not advised that he had an option to appear personally," and his "counsel was present in the courtroom but raised no objection to his client's physical absence." *Heller*, 316 Mich App at 315-316.

the trial court "appeared to have no difficulty listening to defendant, and it was familiar with him given that a bench trial had been conducted." *Id.* at 283, 287.

A defendant may waive the right to be physically present at sentencing. *People v Palmerton*, 200 Mich App 302, 303-304 (1993).[8] "A valid waiver cannot be established from a silent record." *Id*. at 303. Accordingly, "[w]here there is nothing on the record explaining the defendant's failure to appear [at his sentencing hearing], a valid waiver cannot be established." *Id.* at 303-304.

For additional information and resources pertaining to remote proceedings, visit the Virtual Courtrooms webpage.[9]

6.6 Sentencing Must Be Timely

A defendant's sentence, based on accurate information prepared in advance of the sentencing hearing for the purpose of fashioning an appropriate sentence, must be imposed "within a reasonably prompt time" after the defendant's conviction by plea or verdict unless the court has delayed the defendant's sentencing in a manner provided by law.[10] MCR 6.425(D)(1). The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges," and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US 437, 439-441 (2016) (holding "that the Clause does not apply to delayed sentencing"). However, "although the Speedy Trial Clause does not govern [inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at 439.

First-degree murder convictions. "A court shall hold the sentencing hearing not more than 45 days after a person is committed to the department of corrections under MCL 750.316(2)." MCL 750.316(3). MCL 750.316(2) requires the court to immediately enter an order committing a person convicted of first-degree murder to the jurisdiction of the

[8]Note that *Palmerton* pre-dates the adoption of MCR 6.006, and no published decision has directly addressed whether a defendant can waive the right to be present in order to be sentenced using two-way interactive video technology. Effective September 9, 2022, ADM File No. 2020-08 amended MCR 6.006, and the amended version states that "[a] court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding." MCR 6.006(A)(2). This broad language presumably would permit a defendant to waive their right to be present in order to be sentenced using two-way interactive video technology.

[9]Accessible at: https://www.courts.michigan.gov/covid-19-news-resources/virtual-courtrooms/.

[10] See Chapter 9 for more information on delayed sentences and other alternative sentencing options.

Department of Corrections for incarceration in a state correctional facility pending sentencing, but that commitment order only becomes effective if the sheriff agrees to transport the person to and from the state correctional facility for final sentencing, and the convicted person was not less than 18 years of age at the time they committed the offense for which they were convicted. MCL 750.316(2)(a)-(b). See also SCAO Form CC 520, *Commitment Order Pending Sentencing.*

6.7 Sentencing Procedure

A. Felony Sentencing

MCR 6.425(D) governs sentencing procedure:

> "At sentencing, the court must, on the record:
>
> (a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,[11]
>
> (b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (D)(2),
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,[12]
>
> (d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,[13]
>
> (e) if the sentence imposed is not within the guidelines range, articulate the reasons justifying that specific departure, and
>
> (f) order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim of the defendant's

[11] See Section 6.9 on the presentence report.

[12] See Section 6.15 on allocution and Section 6.16 on crime victim's impact statements.

[13] See Section 6.18 on the imposition of the sentence.

> course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(D)(1).[14]

Restitution challenges. "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 6.425(D)(2)(b).

See also the Michigan Judicial Institute's *Sample Felony Sentencing Guide*.

B. District Court Sentencing

In a district court sentencing proceeding, the court must:

> "(a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;
>
> (b) provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. A presentence investigation report shall not include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are

[14] See Section 6.18(H) on restitution.

> necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual.
>
> (c) inform the defendant of credit to be given for time served, if any.
>
> (d) order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate. 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(G)(1).

"The 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(D)(3)." MCR 6.610(G)(2). MCR 6.425(D)(3) prohibits the incarceration of a defendant or the revocation of probation for failure to comply with an order to pay money unless the court finds on the record that the defendant can comply without manifest hardship and has not made a good-faith effort to comply. See the Michigan Judicial Institute's *Ability to Pay Benchcard* for information on determining a defendant's ability to pay.

C. Consideration of Mitigating Factors

"[T]rial courts are not required to expressly or explicitly consider mitigating factors at sentencing." *People v Bailey*, 330 Mich App 41, 63 (2019) (rejecting defendant's argument that the trial court was required to consider mitigating factors on the record and noting that the trial court nonetheless did discuss the PSIR and clearly was aware of the defendant's diagnosed mental illness).

6.8 Right To Counsel

The sentencing hearing "is a critical stage at which a defendant has a right to counsel." *People v Pubrat*, 451 Mich 589, 594 (1996). Defendants have a right to counsel for all felonies and for misdemeanors where

incarceration is the actual penalty for conviction. *Gideon v Wainwright*, 372 US 335, 339-340 (1963); *Scott v Illinois*, 440 US 367, 373-375 (1979)[15]

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the trial court to "assure that each criminal defendant is advised of his or her right to counsel" and further requires that all adults, except those who have retained or waived counsel, be screened for eligibility for the appointment of counsel under the MIDCA. MCL 780.991(1)(c).[16] Even if a defendant has previously waived his or her right to counsel, the trial court is under a continuing duty to inform the defendant of the right to counsel and to obtain the defendant's valid waiver of that right at all proceedings, including sentencing. MCR 6.005(A); MCR 6.005(E).

Although the Court of Appeals has previously held that a criminal defendant does not have an absolute right to be represented at sentencing by the same attorney who represented him or her at trial, *People v Davis*, 277 Mich App 676, 679-680 (2008), vacated in part on other grounds 482 Mich 978 (2008),[17] the MIDCA requires that "[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case." MCL 780.991(2)(d). "However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription." *Id.*

A defendant's right to counsel also extends to certain ex parte presentence conferences:

- A trial court's conference with a probation officer is a critical stage of the proceedings at which the defendant has a right to be represented by counsel. *People v Oliver*, 90 Mich App 144, 149-150 (1979), rev'd on other grounds 407 Mich 857 (1979). See also *People v Smith*, 423 Mich 427, 458-459 (1985) (considering the standard to apply in determining whether an ex parte communication between a sentencing judge and a probation officer violates a defendant's right to counsel and concluding "resentencing is only necessary when the sentencing judge obtains information about the defendant from the probation officer that is not included in the written presentence report").

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[15] MCR 6.610(G)(1)(a) requires the presence of the defendant's attorney in a district court proceeding "unless the defendant does not have one or has waived the attorney's presence[.]"

[16] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4, for discussion of the MIDCA.

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

- A defendant has the right to be represented by counsel at a presentence conference between the trial judge and a prosecutor. *People v Von Everett*, 110 Mich App 393, 397 (1981).

- A defendant has the right to be represented by counsel at a presentence conference between the trial court and a police officer. *People v Vroman*, 148 Mich App 291, 295-296 (1985), overruled in part on other grounds by *People v Wright*, 431 Mich 282, 298 n 18 (1988).[18]

6.9 Presentence Investigation Report (PSIR)

A court must use a presentence investigation report (PSIR) when sentencing a defendant for a felony offense. MCL 771.14(1); *People v Hemphill*, 439 Mich 576, 579 (1992). Use of a PSIR in misdemeanor cases is discretionary. MCL 771.14(1).[19] MCR 6.610(G)(1)(b) governs the procedures relevant to PSIRs in district court proceedings.[20]

"The presentence report . . . allows the court to make an informed judgment as to possibilities for rehabilitation, and to effectively utilize sentencing alternatives. The presentence report has been widely regarded as an effective method of supplying information essential to an informed sentencing decision." *People v Lee*, 391 Mich 618, 635 (1974). See also *Morales v Parole Bd*, 260 Mich App 29, 45-46 (2003) (PSIR is a tool by which the sentencing court gathers information important to the court's ability to fashion a sentence appropriate to the criminal and to the circumstances under which the crime was committed).

A. Duty to Disclose

"The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing." MCR 6.425(B)

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

[19] But see MCR 6.008(E), which provides:

> "As 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."

It is unclear whether a PSIR is *required* when a defendant who was bound over to circuit court on a felony charge is instead convicted of, or pleads guilty to, a misdemeanor. For discussion of bindover, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7.

[20] See Section 6.7(B) for more information on the requirements of MCR 6.610(G).

(felonies); see also MCR 6.610(G)(1)(b), which requires disclosure within the same time frame for misdemeanor cases where a PSIR has been prepared;[21] MCL 771.14(7) (requiring disclosure of the PSIR and any amended PSIR). The prosecutor and defense counsel or the defendant, if he or she is not represented by an attorney, have the right to keep a copy of the report (and any amended report). MCR 6.425(B); MCR 6.610(G)(1)(b); MCL 771.14(7).

At the sentencing hearing, the court must determine that all parties (prosecutor, defendant, and defense attorney) have had an opportunity to read and discuss the PSIR. MCR 6.425(D)(1)(a).

"If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court." MCR 6.425(B). See also MCR 6.610(G)(1)(b), which contains substantially similar requirements in misdemeanor cases where a PSIR has been prepared.

"On written request or order of the court, the Department of Corrections must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with a copy of the report." MCR 6.425(E). Further, "[o]n written request, the court must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with copies of any documents that were presented for consideration at sentencing, including the court's initial copy of the presentence report if corrections were made after sentencing." *Id.* "If the court exempts or orders the exemption of any information from disclosure, it must follow the exemption requirements of [MCR 6.425(B)]." MCR 6.425(E).[22]

B. Information Exempt from Disclosure

"The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and

[21] See Section 6.7(B) for more information on the procedures related to district court sentencing.

[22] "Regardless of the sentence imposed, the Department of Corrections must retain the presentence report reflecting any corrections ordered under [MCR 6.425(D)(2)]." MCR 6.425(E).

state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review." MCR 6.425(B). See also MCL 771.14(3) (imposing similar requirements).

Note that MCR 6.610(G)(1)(b) prohibits the inclusion of certain identifying information in a PSIR prepared for a misdemeanor case.[23]

6.10 Content of PSIR

"Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court." MCR 6.425(A)(1). See also MCL 771.14. "On request, the probation officer must give the defendant's attorney notice and a reasonable opportunity to attend the presentence interview." MCR 6.425(A)(2).

A. PSIR Content Required for all Felony Offenses

The information that must be included in a PSIR is addressed by both statute and court rule. See MCL 771.14; MCR 6.425.

MCL 771.14(1) indicates that a PSIR is a probation officer's written report of information obtained through the officer's inquiry into the defendant's "antecedents, character, and circumstances[.]"[24] MCR 6.425(A)(1) requires that the probation officer verify material information included in the report.

MCR 6.425 and MCL 771.14(2) both require the PSIR to include:

- Based on factual information contained in the PSIR, an evaluation of and prognosis for the offender's community adjustment. MCL 771.14(2)(a); MCR 6.425(A)(1)(j).
- A written victim impact statement if requested and provided by a victim. MCL 771.14(2)(b); MCR 6.425(A)(1)(g).

[23] See Section 6.7(B) for more information on the procedures related to district court sentencing.

[24] Similarly, before a court imposes an adult sentence on a juvenile, DHHS must provide a written report about "the juvenile's antecedents, character, and circumstances[.]" MCL 771.14a(1). See also MCL 803.224(1). See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for additional information.

- A written recommendation for a specific disposition. MCL 771.14(2)(c); MCR 6.425(A)(1)(k). The recommended disposition should be based on "the evaluation and other information as prescribed by the assistant director of the department of corrections in charge of probation." MCL 771.14(2)(c).

- A statement from the prosecuting attorney regarding whether consecutive sentencing is mandatory or discretionary for the offender's sentencing. MCL 771.14(2)(d); MCR 6.425(A)(1)(i).

Additionally, depending on the circumstances of the offense and the offender, MCR 6.425 requires the PSIR to include:

> "(a) a description of the defendant's prior criminal convictions and juvenile adjudications,
>
> (b) a complete description of the offense and the circumstances surrounding it,
>
> (c) a brief description of the defendant's vocational background and work history, including military record and present employment status,
>
> (d) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,
>
> (e) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,
>
> (f) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,
>
> * * *
>
> (h) any statement the defendant wishes to make,
>
> * * *
>
> (*l*) any other information that may aid the court in sentencing." MCR 6.425(A)(1).

MCL 771.14(2)(e)-(h) require additional content in certain types of cases. They are discussed in Section 6.10(C) and Section 6.10(D).

Statement regarding identification documents. All PSIRs must include "[a] statement as to whether the person has provided the personal identification documents," such as a Social Security card, photographic identity document, or birth certificate, for purposes of obtaining an operator's license or state personal identification card upon release from incarceration. MCL 771.14(2)(h). See also MCL 791.234c(1)(b) and MCL 28.291(1).

Crimes involving alcohol or a controlled substance. "If a person is to be sentenced for a felony or for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance," the PSIR must contain a statement, if applicable, indicating that the person is licensed or registered under the public health code (MCL 333.16101 to MCL 333.18838). MCL 771.14(2)(f). See also MCL 769.1(14).

Diagnostic opinions. Unless a diagnostic opinion is exempt from disclosure under MCL 771.14(3), the PSIR must include available diagnostic opinions. MCL 771.14(2)(g).

B. Prohibited Content

A PSIR must "not include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual." MCL 771.14(2); MCR 6.425(A)(3).

See also MCR 6.610(G)(1)(b), which contains identical requirements for any PSIR used in district court proceedings.[25]

C. PSIR Content Required for Felony Offenses Under the Sentencing Guidelines[26]

The PSIR of an offender being sentenced for a felony offense under the advisory statutory sentencing guidelines must include:

[25] See Section 6.7(B) for more information on the procedures related to district court sentencing.

[26] For a discussion on how to score the guidelines when the defendant is convicted of multiple offenses, see Section 7.2(B).

- The appropriate sentence grid[27] showing the recommended minimum sentence range for each conviction subject to a mandatory or discretionary consecutive sentence. MCL 771.14(2)(e)(*i*).

- Unless a conviction is subject to consecutive sentencing, the sentence grid showing the recommended minimum sentence range for each crime having the highest crime class. MCL 771.14(2)(e)(*ii*).

- Unless a conviction is subject to consecutive sentencing, the computation of offense variable and prior record variable scores used to determine the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(*iii*). See also MCR 6.425(C).

- A statement regarding the applicability of intermediate sanctions. MCL 771.14(2)(e)(*iv*).

- The recommended sentence. MCL 771.14(2)(e)(*v*). See also MCR 6.425(C).

D. Changes to Report Before Sentencing

"If a prepared presentence investigation report is amended or altered before sentencing by the supervisor of the probation officer who prepared the report or by any other person who has the authority to amend or alter a presentence investigation report, the probation officer may request that the court strike his or her name from the report and the court shall comply with that request." MCL 771.14(4).

6.11 PSIR Must Be Reasonably Updated

The PSIR on which a sentencing court relies must be "reasonably updated." *People v Triplett*, 407 Mich 510, 515 (1980). See also *People v Hawkins*, 500 Mich 987, 987 (2017) (remanding for resentencing where "[t]here [was] no indication in the record that, at sentencing, the trial court considered an updated Sentencing Information Report, or applicable guidelines range, in imposing its sentence following the defendant's probation violations"). However, an updated PSIR may not be necessary where the sentencing court has no discretion in the length of the sentence imposed. *People v Hemphill*, 439 Mich 576, 581 (1992). See also *People v Foy*, 124 Mich App 107, 111-112 (1983) (no updated PSIR required where trial court directed to impose statutorily mandated two-

[27] Sentencing grids are found in MCL 777.61 to MCL 777.69. See also the *Michigan Sentencing Guidelines Manual*.

year term of imprisonment for the defendant's felony-firearm conviction).

A PSIR that is "several years old" is not "reasonably updated." See *Hemphill*, 439 Mich at 580-581. Even reports prepared within the year may not satisfy the reasonably updated requirement; for example, "[a] five-month-old report was found not to have been properly used where there were significant allegations that the defendant's circumstances had changed during the interim." *Id.* at 581 (citation omitted).

A. Supplemental Reports

The requirement that an updated PSIR be utilized at a defendant's sentencing may be satisfied by the submission of a supplementary report. *People v Hemphill*, 439 Mich 576, 581 (1992). Additionally, concerns about inaccurate or incomplete information in a PSIR can be alleviated if the trial court has the relevant and updated information from another source. *People v Odom*, 327 Mich App 297, 313 (2019) (finding the trial court's sentencing decision was based on updated information despite the fact that the PSIR "failed to include information about voluntary programs defendant completed while incarcerated" where the defendant provided "the trial court with documentation regarding the programs he voluntarily completed in prison"). "[W]hen it comes to sentencing, it is not particularly important how the information gets before the trial court; rather, it is important that the trial court have the relevant information available for sentencing." *Id.*, citing *Hemphill*, 439 Mich at 581-582.

B. Report Must be Prepared for Sentencing Offense

Reports prepared in connection with unrelated offenses are inadequate. *People v Hemphill*, 439 Mich 576, 581 (1992), citing *People v Anderson*, 107 Mich App 62, 66-67 (1981) and *People v McKeever*, 123 Mich App 533, 539-541 (1983).

"Without reaching the question of whether a four-month gap between the preparation of the original presentence report and sentencing comports with the reasonableness requirement of [*People v Triplett*, 407 Mich 510, 515 (1980),] . . . a defendant is entitled to be sentenced on the basis of a presentence report that is prepared especially for the offense for which he is being sentenced." *People v Anderson*, 107 Mich App 62, 66-67 (1981). See also *McKeever*, 123 Mich App at 540-541 (where the trial court used a five-month-old PSIR prepared for a different offense, the Court of Appeals held "that a defendant may not be sentenced on the basis of a presentence report prepared for another offense even though the defendant was convicted after a trial").

C. Waiver

A defendant may not waive the requirement that a PSIR be utilized at his or her sentencing hearing. *People v Hemphill*, 439 Mich 576, 581 (1992). However, a defendant may generally waive the right to an *updated* PSIR at the defendant's *resentencing* as long as the waiver is made intelligently, understandingly, and voluntarily and the PSIR is not "manifestly outdated[.]" *Id.* at 581-582 (noting the PSIR must be accurate or believed to be accurate by both parties). The prosecution may also waive completion of an updated PSIR at a resentencing hearing. *Id*. at 582.

6.12 Objections to Accuracy or Content of the PSIR

Due process requires that a defendant's sentence be based on accurate information and that the defendant be given an opportunity at sentencing to challenge the accuracy of the information on which the trial court bases the defendant's sentence. *People v Eason*, 435 Mich 228, 233 (1990). A sentence based on inaccurate information implicates a defendant's constitutional right to due process. US Const, Am XIV; Const 1963, art 1, § 17; *Townsend v Burke*, 334 US 736, 740-741 (1948); *People v Smith*, 423 Mich 427, 453-454 (1985). Accordingly, a sentence is invalid if it is based on inaccurate information.[28] *People v Miles*, 454 Mich 90, 96 (1997).

At the sentencing hearing, the court must "give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in [MCR 6.425(D)(2)]." MCR 6.425(D)(1)(b). See also MCL 771.14(6) ("At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report.").[29]

A. Procedure for Resolving Challenges

Challenges to the accuracy or relevancy of information in the PSIR must be made on the record. MCL 771.14(6); MCR 6.425(D)(1)(b).

The court may adjourn the sentencing hearing to permit the parties to prepare a challenge or a response to a challenge. MCL 771.14(6).

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[28] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1, for information on modifying an invalid sentence.

[29] In order to preserve a challenge to the validity of information contained in the PSIR for appeal, the challenge must be raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); MCR 6.429(C).

The sentencing court is obligated to respond to all challenges raised using any of the discretionary methods approved under the statute, court rule, and relevant case law. *People v McAllister*, 241 Mich App 466, 473 (2000); MCL 771.14(6); MCR 6.425(D)(1)(b); MCR 6.425(D)(2)(a). If the court finds a correction is warranted, "it must order the probation officer to correct the report." MCR 6.425(D)(2)(a).

1. Statute

"If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections." MCL 771.14(6).

2. Court Rule

"If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge, determines that it will not take the challenged information into account in sentencing, or otherwise determines that the report should be corrected, it must order the probation officer to correct the report. If ordered to correct the report, the probation officer must provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections, certify that the report has been corrected, and ensure that no prior version of the report is used for classification, programming, or parole purposes." MCR 6.425(D)(2)(a).

3. Caselaw

Duty to respond. "The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges." *People v Spanke*, 254 Mich App 642, 648 (2003), overruled in part on other grounds by *People v Barrera*, 500 Mich 14, 17 (2017).[30] "The court may determine the

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

accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id.* See also *People v Brooks*, 169 Mich App 360, 364-365 (1988) (the sentencing "court may hold an evidentiary hearing to determine the report's accuracy, may accept the defendant's unsworn statement, or may ignore the alleged misinformation while sentencing"). A trial court's duty to respond to PSIR challenges "involves something more than acknowledging that [it] has heard the defendant's claims regarding the contents of a presentence report." *People v Garvie*, 148 Mich App 444, 455 (1986) (quotation marks and citation omitted). The trial court "must indicate, in exercising [its] discretion, whether [it] believes those claims have merit." *Id.* (quotation marks and citation omitted).

Duty to strike. "If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections." *Spanke*, 254 Mich App at 649; MCL 771.14(6). Remand is necessary to correct factual inaccuracies in a defendant's PSIR. *Spanke*, 254 Mich App at 650. See also *People v Britt*, 202 Mich App 714, 718 (1993) (holding a trial court's decision that it will not consider information in a defendant's PSIR that the defendant claims is inaccurate does not conclude the trial court's responsibility regarding the challenged information; the trial court must direct the probation officer to strike the information from the PSIR).

Clear indication of decision required. If the court decides to disregard the challenged information, "it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence." *Spanke*, 254 Mich App at 649. Where the sentencing court's response to a defendant's allegation of inaccuracy is ambiguous, remand is necessary. *Brooks*, 169 Mich App at 364-365 (court's response of "okay" to defendant's challenge was ambiguous).

B. Challenge Resolution Examples

1. Factual Predicate Required

The defendant must establish a factual predicate for any claim of inaccuracy. *People v Odom*, 327 Mich App 297, 314 (2019) (rejecting defendant's argument "that the PSIR was inaccurate because it did not include a victim-impact statement by a different victim, who defendant claims would have professed his innocence" where the defendant failed to present any

"evidence that this alleged other victim had or could have provided such a statement").

2. Challenges to Content in Victim Impact Statements

The trial court erred by failing to consider the defendant's challenges to information in an impact statement included in the PSIR. *People v Maben*, 313 Mich App 545, 554-555 (2015). "[A] trial court is not required to strike a victim's subjective statements about the impact of a defendant's crime merely because a defendant disputes those statements"; however, "[t]o the extent that the impact section of the PSIR contain[s] factual allegations unrelated to [the defendant's] crime, and which [do] not involve [a victim's] subjective statements, [the defendant is] entitled to challenge the accuracy of the information, particularly considering that the content could have consequences in prison and with the parole board." *Id*. at 555. See also *People v Lampe*, 327 Mich App 104, 123 (2019) (rejecting defendant's argument "that victim impact statements should not have been included in the PSIR because there is no way to rebut the statements") (alteration and quotation marks omitted).

3. Required Proof of Information

"The prosecution has the burden to prove the challenged fact by a preponderance of the evidence upon an effective challenge by a defendant." *People v Norfleet*, 317 Mich App 649, 669 (2016) (quotation marks, citation, and alteration omitted). "[T]he trial court abused its discretion by holding that the prosecution met its burden to prove the challenged statement in the PSIR" where "[n]o evidence was submitted to support the allegations" that the defendant was affiliated with a gang. *Id.* Further, "[e]ven assuming the truth of the prosecutor's assertions, the assertions at most established that defendant was, at one time, affiliated with [the] gang," but they did "not establish that defendant *was affiliated* with the gang at the time of the alleged crimes or thereafter, as the PSIR suggest[ed]." *Id.*

4. Challenges to the Listed Sentence

No correction was necessary where the cover sheet of the defendant's PSIR listed "the maximum sentence *possible* for each of defendant's current convictions" rather than the sentence that was actually imposed by the trial court. *People v Brown*, 326 Mich App 185, 199 (2018) (noting that the PSIR cannot list a defendant's actual sentence because it is prepared before sentencing).

5. Challenges to Opinions in PSIR

An investigating officer's opinion need not be stricken from a defendant's PSIR when the opinion is not declared to be a statement of fact. *People v Spanke*, 254 Mich App 642, 649 (2003), overruled in part on other grounds by *People v Barrera*, 500 Mich 14, 17 (2017).[31] Similarly, a trial court need not "resolve a claimed inaccuracy in the presentence report where the defendant's objection was not to an alleged factual inaccuracy in the report but to a conclusion drawn from the undisputed facts." *People v Wybrecht*, 222 Mich App 160, 173 (1997) (quotation marks and citation omitted). See also *People v Lampe*, 327 Mich App 104, 121 n 6 (2019) (trial court properly declined to strike the phrase "'defendant is deemed a predator'" where the defendant engaged in predatory conduct, including a "pattern of sexually preying on sleeping victims"; the Court concluded "the term 'predator' cannot be considered inaccurate," and the lack of evidence that defendant was diagnosed as a predator was "irrelevant because the PSIR cannot plausibly be read to suggest that defendant was clinically diagnosed"); *People v Uphaus (On Remand)*, 278 Mich App 174, 181-182 (2008) (trial court properly declined to strike from the PSIR the investigator's comment suggesting that the defendant was "paranoid," where the term "paranoia" did not represent a clinical evaluation of the defendant's actual mental condition, but rather, it was a colloquial term used to characterize certain noteworthy statements made by the defendant).

C. Presumption of Accuracy

Unless a defendant effectively challenges the contents of his or her PSIR, the contents are presumed accurate, and the sentencing court may rely on them. *People v Grant*, 455 Mich 221, 233-234 (1997). "The presumption of accuracy applies only to unchallenged information." *People v Maben*, 313 Mich App 545, 554 (2015) (holding that the trial court erred in "fail[ing] to adequately resolve [the defendant's] challenges to the accuracy of the PSIR" based on its erroneous belief that "it was not required to resolve [the] challenges because the PSIR is presumptively accurate").

"[A] defendant is not precluded from challenging information in the presentence report that had appeared in an earlier presentence

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

report for a different offense but went unchallenged at that time." *People v Wade*, 500 Mich 936, 936 (2017).

D. Standard of Review

"[A] trial court's response to a defendant's challenge to the accuracy of a PSIR [is reviewed] for an abuse of discretion." *People v Maben*, 313 Mich App 545, 552 (2015) (quotation marks and citation omitted). "A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes." *Id.* (quotation marks and citation omitted).

E. Errors Not Requiring Remand

A trial court's failure to respond to a defendant's challenge to information contained in his or her PSIR or introduced at his or her sentencing hearing may be harmless error if the inaccuracies alleged by the defendant would have no effect on the sentence imposed. *People v McAllister*, 241 Mich App 466, 473-474 (2000) (it was harmless error where, although the defendant was employed part-time, his PSIR indicated that he was unemployed).

Where the defendant failed to preserve the issue for appeal, the Michigan Court of Appeals declined to remand the defendant's PSIR to correct the plain error regarding the crime for which the defendant was convicted. *People v McCrady*, 244 Mich App 27, 32 (2000) (the PSIR indicated defendant was convicted of first-degree premeditated murder but the jury actually convicted him of first-degree felony murder). The Court of Appeals acknowledged that the PSIR's misstatement constituted plain error, but held that remand for correction of the PSIR was unnecessary because the error did not deprive the defendant of any substantial right. *Id*.

6.13 Required Distribution of PSIR

MCL 771.14 requires that copies of the PSIR be distributed to specific people under specific circumstances.

Generally, a copy of the PSIR reviewed by the prosecutor, defendant, and defendant's attorney before sentencing and a copy of any PSIR that is amended as the result of a challenge must "be provided to the prosecutor and the defendant's attorney or the defendant if he or she is not represented by an attorney." MCL 771.14(7). See also MCR 6.425(B). "The copy of the report [reviewed by the prosecutor, defendant, and defendant's attorney before sentencing] shall be provided not less than 2 business days before sentencing unless that period is waived by the defendant." MCL 771.14(7). See also MCR 6.425(B). The parties "have the

right to retain a copy of the report and the amended report provided under this subsection." MCL 771.14(7). See also MCR 6.425(B).

Appeal. "On appeal, the defendant's attorney, or the defendant if proceeding pro se, shall be provided with a copy of the presentence investigation report and any attachments to the report with the exception of any information exempted from disclosure by the court under [MCL 771.14(3)]." MCL 771.14(8).

Persons committed to state correctional facility. "A copy or amended copy of the presentence investigation report and, if a psychiatric examination of the person has been made for the court, a copy of the psychiatric report shall accompany the commitment papers." MCL 771.14(9)(a). "If the person is sentenced by fine or imprisonment or placed on probation or other disposition of his or her case is made by the court, a copy or amended copy of the presentence investigation report, including a psychiatric examination report made in the case, shall be filed with the department of corrections." *Id.*

Parole interviews. "A prisoner under the jurisdiction of the department of corrections shall be provided with a copy of any presentence investigation report in the department's possession about that prisoner, except for information exempted from disclosure under [MCL 771.14(3)], not less than 30 days before a parole interview is conducted under . . . MCL 791.235." MCL 771.14(10).

6.14 Challenges to the Constitutional Validity of a Prior Conviction or Adjudication[32]

A defendant's prior felony conviction obtained without counsel because of an improper waiver of counsel must not be considered in sentencing. *United States v Tucker*, 404 US 443, 447, 449 (1972); *People v Moore*, 391 Mich 426, 437-438 (1974). Further, "where the record shows that the sentencing judge considered a conviction invalid under [*Gideon v Wainwright*, 372 US 335 (1963)[33]] an appellate court will remand for resentencing." *Moore*, 391 Mich at 440.

Challenges to the constitutional validity of a prior conviction ("*Tucker* claims") "should be initially decided by the sentencing judge," because that judge "is in the best position to explore and decide the factual issues

[32]Scoring an offender's prior record variables on the basis of prior convictions/adjudications is discussed in Chapter 2, and the use of a defendant's prior convictions to establish habitual offender status is discussed in Section 4.2.

[33]*Gideon* "established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." *Burgett v Texas*, 389 US 109, 114 (1967).

and, if necessary, the defendant can then be resentenced." *Moore*, 391 Mich at 440.

A prior misdemeanor conviction obtained without counsel but which did not result in a term of imprisonment may be used for enhancement purposes with respect to a subsequent offense. *People v Reichenbach*, 224 Mich App 186, 191 (1997). See also *Nichols v United States*, 511 US 738, 742-744, 749 (1994).

A. Prima Facie Showing Required

A defendant who raises a challenge to a previous conviction allegedly obtained in violation of his or her Sixth Amendment right to counsel bears the initial burden of establishing that the previous conviction was obtained without a proper waiver of counsel. *People v Moore*, 391 Mich 426, 440 (1974). To meet this burden the defendant must:

> "(1) present prima facie proof that a previous conviction was violative of *Gideon*, such as a docket entry showing the absence of counsel or a transcript evidencing the same; or
>
> (2) present evidence that he has requested such records from the sentencing court and it has failed to reply or has refused to furnish copies of records within a reasonable period of time, say four weeks." *Moore*, 391 Mich at 440-441. See also *People v Carpentier*, 446 Mich 19, 31 (1994).

1. Proof of Invalid Prior Conviction

Defendant successfully established prima facie proof that a prior juvenile adjudication was obtained without counsel where the presentence report contained "a notation to that effect." *People v Alexander (After Remand)*, 207 Mich App 227, 230 (1994).

The defendant failed to make a prima facie showing entitling him to an evidentiary hearing where the notation regarding the challenged prior conviction in his PSIR was silent about whether the defendant was represented by counsel or validly waived his right to counsel. *People v Zinn*, 217 Mich App 340, 344 (1996). "Mere silence regarding counsel is not the equivalent of the prima facie proof required by [*People v Moore*, 391 Mich 426, 440-441 (1974)] and [*People v Carpentier*, 446 Mich 19, 31 (1994)], or a presentence information report containing a

notation that a prior conviction was obtained without the benefit of counsel." *Zinn*, 217 Mich App at 344.

2. Sentencing Court Failing to Reply or Refusing to Furnish Records

The focus of the second approach to establishing entitlement to an evidentiary hearing is on the "actions or inactions of a sentencing court," and not on "whether a defendant actually receives requested records[.]" *People v Carpentier*, 446 Mich 19, 32-33 (1994). Accordingly, "a sentencing court must fail to *reply*, or *refuse* to furnish, requested evidence." *Id.* (cleaned up). The Court explained that the requirement set out in *People v Moore*, 391 Mich 426, 440-441 (1974) "is in part directed at those situations in which a sentencing court affirmatively and intentionally acts to deny a defendant access to requested trial records." *Carpentier*, 446 Mich at 33. "For example, where a sentencing court ignores a proper request for records, that court has 'failed to reply' within the meaning of *Moore*. Alternatively, where a court refuses to forward records in its possession or control, that court has 'refused to furnish' under *Moore*." *Carpentier*, 446 Mich at 33.

The sentencing court did not fail to reply or refuse to furnish copies within the meaning of *Moore* where the defendant never received requested records, but the court replied to the defendant with a letter explaining the defendant's records were unavailable because they were expunged. *Carpentier*, 446 Mich at 33-34. The absence or unavailability of a defendant's records does not satisfy the defendant's initial burden. *Id*. at 34 n 9.

B. Burden-Shifting Analysis

If a defendant makes a prima facie showing that a prior conviction or adjudication was obtained without counsel, the court must hold an evidentiary hearing (also referred to as a *Tucker*[34] hearing) where the prosecution has the burden of establishing that the prior conviction was constitutionally valid. *People v Moore*, 391 Mich 426, 441 (1974) (noting "if the prosecutor contends that the defendant waived counsel, the burden will be on him to show affirmative record evidence of waiver"). See also *People v Carpentier*, 446 Mich 19, 31 (1994).

[34] *United States v Tucker*, 404 US 443 (1972).

The prosecution may satisfy its burden by producing evidence that the defendant was actually represented by counsel or that the defendant validly waived the right to counsel. See *Moore*, 391 Mich at 441. Additionally, the prosecution may satisfy its burden by producing evidence that no right to counsel existed at the prior conviction or adjudication. See *People v Richert (After Remand)*, 216 Mich App 186, 194-195 (1996) (no right to counsel exists in misdemeanor cases if incarceration is not ultimately imposed).

6.15 Allocution

"'Allocution' generally refers to '[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.'" *People v Petty*, 469 Mich 108, 119 n 7 (2003), quoting Black's Law Dictionary (7th ed).

While the trial court is "not under any obligation to accept anything" a defendant states during allocution, and it may "state as much when imposing sentence," it must recognize that "allocution is the *defendant's* opportunity to *address the court*, not the court's opportunity to conduct an interrogation or deliver a lecture." *People v Dixon-Bey*, 340 Mich App 292, 302 (2022) (noting that during allocution, the trial court must give "the defendant a meaningful opportunity to speak"). Further, the principle expressed in Michigan Code of Judicial Conduct, Canon 3(A)(12)—that the trial court should avoid interruptions except for clarification and should not display premature judgment—"applies to a defendant's allocution." *Dixon-Bey*, 340 Mich App at 303.

Although MCR 6.425(D)(1)(c) "requires the trial court to provide a defendant an 'opportunity' to address the court before the sentence is imposed," it does not require a sentencing court to make a "personal and direct inquiry" of the defendant to determine whether he or she would like to speak on his or her own behalf. *People v Petit*, 466 Mich 624, 627-628 (2002). However, "exclusively addressing defense counsel [is] not sufficient to afford the defendant his right to personal allocution." *People v Parker*, ___ Mich ___, ___ (2024). In *Petit*, the Court held that the trial court complied with the mandate of MCR 6.425(D)(1)(c)[35] "by generally asking if there was 'anything further.'" *Petit*, 466 Mich at 629, 636. However, the Court noted that "asking generally if there is 'anything further' is certainly not the best way to provide a defendant with an opportunity to allocute. Rather, the best way to provide such an

[35]Formerly MCR 6.425(D)(2)(c), later amended to subrule (E)(1)(c), then effective January 1, 2021, ADM File No. 2018-33, ADM File No. 2019-20, and ADM File No. 2019-38 amended MCR 6.425 to reletter subrule (E) to subrule (D).

opportunity is to specifically ask the defendant if he has anything to say." *Id*. at 629 n 3.

A. Caselaw Examples

Defendant was denied his right to allocution where "the trial court, without justification, interrupted [the defendant] almost immediately" after asking him if he had anything to say before the court imposed the sentence, and "then proceeded to impose [the defendant's] sentence without providing [him] with the opportunity to speak further" in "clear violation of [MCR 6.425(D)(1)(c)[36]]." *People v Bailey*, 330 Mich App 41, 67 (2019). Further, the failure to comply with MCR 6.425(D)(1)(c) was plain error likely affecting the outcome of the proceedings because the defendant "was not given an opportunity to inform the trial court of 'any circumstances' that he believed the trial court should consider when crafting and imposing the sentence," and "[t]his could have resulted in [defendant] being given a longer sentence, and it most certainly affected the fairness of the judicial proceeding." *Bailey*, 330 Mich App at 67-68.

The "defendant was offered only an illusory and superficial opportunity for allocution" where "the trial court actively prevented defendant from expressing remorse and responsibility after the crime by focusing on the crime itself," and interrupting her to ask several questions focused on its interpretation of the crime. *People v Dixon-Bey*, 340 Mich App 292, 302, 303 (2022). Ultimately, "[d]efendant declined to speak further, following the trial court's dismissive response to her attorney's objection to the trial court grilling defendant instead of listening to her." *Id.* at 303. The Court of Appeals concluded that defendant's decision not to continue speaking could not "be construed as an expression of satisfaction," and was "far more likely to have been the result of intimidation in light of the fact that the trial court had abandoned its role as an impartial magistrate and instead usurped the role of prosecutor." *Id.* at 303.

Where no record evidence indicated that the trial court had decided on a particular sentence before the defendant's allocution, a defendant's right to allocute at his or her sentencing hearing is not rendered meaningless simply because the sentencing judge has prepared a written statement of reasons for departing from the sentencing guidelines before the sentence is actually imposed. *People v Grady*, 204 Mich App 314, 316 (1994).

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[36]Effective January 1, 2021, ADM File No. 2018-33, ADM File No. 2019-20, and ADM File No. 2019-38 amended MCR 6.425 to reletter subrule (E) to subrule (D).

B. Mandatory Sentences and Sentence Agreements

"[T]he mandatory nature of a sentence does not ipso facto render the common-law right to allocute inapposite." *Petty*, 469 Mich at 120-121 (noting allocution also ensures "sentencing reflects individualized circumstances," and maximizes "the perceived equity of the process") (quotation marks and citation omitted). Even where a defendant's statement will not affect the sentence imposed—as in a mandatory term or the penalty outlined in a sentence agreement—a defendant must be given the opportunity to allocute. *Id.* (requiring allocution in the context of sentencing for felony-murder). See also *People v Smith*, 96 Mich App 346, 348-349 (1980) (requiring allocution even where defendant entered into a sentence agreement).

C. Juvenile Defendants

A juvenile defendant who is convicted in a designated case proceeding and who receives an adult sentence must be given an opportunity to allocute at his or her sentencing hearing. *Petty*, 469 Mich at 121. "To deny a juvenile a meaningful opportunity to allocute at the only discretionary stage of a combined dispositional and sentencing proceeding would seriously affect the fairness and integrity of the judicial proceeding, particularly when the juvenile is subject to an adult criminal proceeding." *Id*. See MCR 3.955(A) (requiring the court to give the juvenile, juvenile's lawyer, the prosecutor, and the victim an opportunity to address the court regarding sentencing).

D. Statements From Others

In addition to the defendant, the court rule requires the court to give the defendant's lawyer, the prosecutor, and the victim "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]" MCR 6.425(D)(1)(c). Additionally, the court has discretion to allow a nonparty to address the court at sentencing. *People v Albert*, 207 Mich App 73, 74-75 (1994) (trial court did not abuse its discretion in allowing a victim's attorney in a civil case against the defendant to address the court, over the defendant's objection).

6.16 Crime Victim's Impact Statement[37]

A crime victim has a constitutional right "to make a statement to the court at sentencing." Const 1963, art 1, § 24. See also MCL 780.751 *et seq.* (Crime Victim Rights Act); MCR 6.425(D)(1)(c) (requiring the sentencing court to give the victim an opportunity to address the court); *People v Cobbs*, 443 Mich 276, 285 (1993) (recognizing a crime victim's right of allocution at sentencing).

A crime victim who is physically or emotionally unable to make an oral impact statement at the defendant's sentencing hearing may designate any other person (who is at least 18 years of age and who is not the defendant and who is not incarcerated) to make the impact statement on the victim's behalf. MCL 780.765(1) (felonies); MCL 780.793(1) (juveniles); MCL 780.825(1) (serious misdemeanors). The victim may elect to remotely provide the oral impact statement. MCL 780.765(1); MCL 780.793(1); MCL 780.825(1).

A. Defendant Must Be Present

Generally "the defendant must be physically present in the courtroom at the time a victim makes an oral impact statement under [MCL 780.765(1)]." MCL 780.765(2). However, the court has discretion to exclude the defendant if it determines "that the defendant is behaving in a disruptive manner or presents a threat to the safety of any individuals present in the courtroom[.]" *Id.* In determining whether the defendant should remain physically present in the courtroom, "the court may consider any relevant statement provided by the victim regarding the defendant being physically present during that victim's oral impact statement." *Id.* See also MCL 780.793; MCL 780.825. Pursuant to MCL 769.25(8) or MCL 769.25a(4)(c), the right to make an oral impact statement under MCL 780.765 extends to a sentencing or resentencing hearing under either of those provisions.

B. Court's Authority to Exempt from Disclosure Statements in PSIR

In addition to the victim impact statement given at the sentencing hearing, "[t]he 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," and, if requested by the victim, a written statement

[37] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 7, for detailed information about victim impact statements.

must be included in the PSIR. MCL 780.764. See also MCL 771.14(2)(b); MCL 780.792; MCL 780.824.

The prosecuting attorney has an obligation to inform the victim that the entire PSIR will be available to the defendant unless the court exempts certain portions from disclosure. MCL 780.763(1)(e). See also MCL 780.823(1)(e). The court has authority to exempt from disclosure "sources of information obtained on a promise of confidentiality." MCL 771.14(3). See also MCR 6.425(B). When information is exempted from disclosure, the court must state on the record its reasons for the exemption, inform the parties of the nondisclosure, and include a notation in the PSIR indicating the exemption. MCL 771.14(3); MCR 6.425(B).

C. Statements in PSIR

The sentencing court can consider victim impact statements included in the PSIR. See *People v Fleming*, 428 Mich 408, 418 (1987) (noting defendants did not challenge the victims' versions of the crime in the presentence report). Further, at a resentencing hearing, the trial court appropriately considered a victim impact statement that was added to the PSIR after the original sentencing hearing. *People v Davis*, 300 Mich App 502, 509-510 (2013).

6.17 Additional Statements the Court May Consider at Sentencing

For purposes of sentencing, a trial court may also consider statements of persons who are not victims because a sentencing court "is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics." *People v Albert*, 207 Mich App 73, 74 (1994) (attorney representing one of the victims in a civil case against the defendant was permitted to address the court at sentencing). See also *People v Kisielewicz*, 156 Mich App 724, 729 (1986) (letters from persons not considered victims that were attached to the PSIR concerning society's perceived need for protection from the offender were properly considered by the trial court at sentencing).

6.18 Imposition of Sentence[38]

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

See also the Michigan Judicial Institute's Sample Felony Sentencing Guide and—if imposing an out-of-guidelines sentence—the Articulation of Reasons for Out-of-Guidelines Sentence sample form.

A. Minimum and Maximum Prison Sentences

Unless a mandatory sentence is required, the court must state both the minimum and maximum sentence. MCL 769.8; MCL 769.9. The minimum sentence is discretionary, and the maximum sentence is the statutory maximum. *People v Maxson*, 163 Mich App 467, 471 (1987). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *People v Lockridge*, 498 Mich 358, 392 (2015), citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990).[39]

The minimum sentence cannot be more than two-thirds of the maximum sentence. *People v Tanner*, 387 Mich 683, 690 (1972). See Section 5.4(A) for a discussion of the *Tanner* rule.

B. Consecutive and Concurrent Sentences

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

See Chapter 7 for a comprehensive discussion of consecutive and concurrent sentences, and for a comprehensive discussion of how to

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[38] See SCAO Form CC 219b, *Judgment of Sentence Commitment to Department of Corrections*. For a detailed discussion on factors to consider when imposing a sentence, including an out-of-guidelines sentence, see Chapter 5. For more information on the sentencing hearing, including requirements and rights of the defendant, see Chapter 6.

[39] See Section 1.4 for discussion of *Lockridge*. For more information on the precedential value of an opinion with negative subsequent history, see our note.

score the guidelines when the defendant is convicted of multiple offenses, see specifically Section 7.2(B).

C. Habitual Offenders

MCL 769.10, MCL 769.11 and MCL 769.12 govern sentencing for habitual offenders. These provisions increase the statutory maximum for offenses depending on the number of the defendant's prior felony convictions.[40]

See Chapter 4 for a comprehensive discussion of sentencing habitual offenders.

D. Special Sentences

There are several types of sentences that trial courts may impose under certain conditions; for example, delayed sentencing, deferred adjudication of guilt, and special alternative incarceration units. For a detailed discussion of different types of sentences, see Chapter 9.

E. Jail Sentence[41, 42]

MCL 750.506 provides for an optional jail sentence for first offenders convicted of felonies ("[w]henever a person shall be convicted of a first offense herein declared to be a felony, punishable by a term of imprisonment for a term of not more than 5 years, the court may instead of imposing the sentence provided, sentence such convicted person to the county jail for a period not to exceed 6 months").

MCL 801.251(1)(a)-(e) provide that, except as provided in MCL 801.251(3)[43] and subject to MCL 801.251a,[44] a person sentenced to a

[40]Additionally, MCL 769.12, governing fourth habitual offender status, provides for a *mandatory minimum* sentence of 25 years' imprisonment for an offender who has been convicted of three or more prior felonies or felony attempts, including at least one listed prior felony and who commits or conspires to commit a subsequent serious crime. MCL 769.12(1)(a).

[41] See SCAO Form MC 219, *Judgment of Sentence/Commitment to Jail*.

[42]Note: effective March 24, 2021, 2020 PA 395 redefined *intermediate sanction* to specifically exclude imprisonment in a county jail. See MCL 769.31(b).

[43] MCL 801.251(3) prohibits a person convicted of the following crimes or attempted crimes from leaving the jail during his or her sentence, except for the purposes of medical treatment, substance abuse treatment, mental health counseling, or psychological counseling: MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520g, or murder in connection with sexual misconduct.

[44] MCL 801.251a(1) provides that "an individual convicted of a felony" may not be released from jail under MCL 801.251 to attend work or school "unless the county sheriff or the department has determined that the individual is currently employed or currently enrolled in school," and "[t]he order of release shall provide that release is contingent at all times upon the approval of the county sheriff."

county jail may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:

- job seeking;
- working at his or her job;
- conducting his or her own self-employed business or occupation (including housekeeping and caring for the needs of his or her family);
- attending school; and
- obtaining medical treatment, substance abuse treatment, mental health counseling, or psychological counseling.

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

F. Probation

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

See Section 9.2 for a comprehensive discussion of probation.

G. Fines and Costs

MCL 769.1k generally authorizes a court's to impose fines and costs. If a defendant pleads guilty or nolo contendere, or the defendant is found guilty following a trial, the court must impose the minimum state costs as set out in MCL 769.1j. MCL 769.1k(1)(a). Under MCL 769.1k(1)(b) and MCL 769.1k(2), the court may also impose:

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

- any cost "reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case";[45]
- the expenses of providing legal assistance to the defendant;[46]
- any assessment authorized by law;
- reimbursement under MCL 769.1f; and
- any additional costs incurred in compelling the defendant's appearance.

"The court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1).] . . . However, the information is not required to include the calculation of the costs involved in a particular case." MCL 769.1k(7). "A defendant must not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." MCL 769.1k(10). See also MCR 6.425(D)(3) (prohibiting the incarceration of a defendant or the revocation of probation for failure to comply with an order to pay money unless the court finds on the record that the defendant can comply without manifest hardship and has not made a good-faith effort to comply). See the Michigan Judicial Institute's *Ability to Pay Benchcard* for information on determining a defendant's ability to pay.

See Chapter 8 for a comprehensive discussion of fines and costs. See the Michigan Judicial Institute's *Table of General Costs* for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Michigan Judicial Institute's *Table of Felony Costs* and *Table of Misdemeanor Costs*.

H. Restitution[47]

Victims have a constitutional right to restitution. Const 1963, art 1, § 24. Additionally, restitution is mandatory under the Crime Victim's

[45] This provision is applicable "[u]ntil May 1, 2024[.]" MCL 769.1k(1)(b)(*iii*).

[46] "[W]hen authorized, the costs of prosecution imposed must bear some reasonable relation to the expenses actually incurred in the prosecution." *People v Dilworth*, 291 Mich App 399, 401 (2011) (quotation marks and citation omitted). "Furthermore, those costs may *not* include 'expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law.'" *Id.*, quoting *People v Teasdale*, 335 Mich 1, 6 (1952).

[47] For detailed information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. See *People v Garrison*, 495 Mich 362, 365 (2014). The sentencing court must, on the record, "order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(D)(1)(f); see also MCL 769.1a(2); MCL 780.766(2) (felony article); MCL 780.794(2) (juvenile article); MCL 780.826(2) (serious misdemeanor article).[48] "[B]oth [the CVRA[49] and MCL 769.1a(2)] impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete." *Garrison*, 495 Mich at 368 (noting that "the plain meaning of the word 'full' is 'complete; entire; maximum'") (citation omitted).

During sentencing, the court must specifically "order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim or the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(D)(1)(f). See also MCR 6.610(G)(1)(d) (including the same requirement for proceedings in district court).

"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 6.425(D)(2)(b). See also MCR 6.610(G)(1)(d) (including the same requirement for proceedings in district court).

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

MCR 6.430 governs postjudgment motions to amend restitution in both felony and misdemeanor cases. See MCR 6.001(A)-(B). For a discussion of MCR 6.430, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1.

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

[49] Although the *Garrison* Court specifically applied MCL 780.766(2) (the restitution provision in the felony article of the CVRA), the Court's definition of the term *full restitution* as "restitution that is maximal and complete" would presumably extend to the restitution provisions contained in the CVRA's juvenile article (MCL 780.794(2)) and serious misdemeanor article (MCL 780.826(2)) as well. See *Garrison*, 495 Mich at 367 n 11, 368 (noting that "MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)").

6.19 Judgment

Under MCR 6.427, the court[50] must date and sign a written judgment of sentence within seven days after sentencing that includes the following:

> "(1) the title and file number of the case;
>
> (2) the defendant's name;
>
> (3) the crime for which the defendant was convicted;
>
> (4) the defendant's plea;
>
> (5) the name of the defendant's attorney if one appeared;
>
> (6) the jury's verdict or the finding of guilt by the court;
>
> (7) the term of the sentence;
>
> (8) the place of detention;
>
> (9) the conditions incident to the sentence; and
>
> (10) whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant's Michigan driver's license number; and
>
> (11) the dollar amount of restitution that the defendant is ordered to pay."

"If the defendant was found not guilty or for any other reason is entitled to be discharged, the court must enter judgment accordingly. The date a judgment is signed is its entry date." MCR 6.427.

6.20 Motion to Correct Invalid Sentence

MCR 6.429 governs the correction of sentences. Generally, a court may correct an invalid sentence but may not modify a valid sentence except as provided by law. See MCR 6.429(A). For a detailed discussion of this issue, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1. See also see the Michigan Judicial Institute's *Motion to Correct an Invalid Sentence Checklist*.

[50] Note that MCR 6.427 applies to both felony and misdemeanor cases. See MCR 6.001(A)-(B).

6.21 Circuit Court's Responsibility in Providing Documents to Defendant Pursuing Postconviction Proceedings[51]

A. Appeals of Right

- "An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right." MCR 6.433(A).

- The court must order the preparation of document copies at no cost to the defendant, and if not already ordered, preparation of the transcript. MCR 6.433(A). See also MCR 6.425(G)(1)(f) (requiring an order appointing appellate counsel to direct the preparation and inclusion of the full transcript of all proceedings).[52]

B. Appeals by Leave

- "An indigent defendant who may file an application for leave to appeal may obtain copies of transcripts and other documents as provided in this subrule." MCR 6.433(B). See also MCR 6.425(G)(1)(f) (requiring an order appointing appellate counsel to direct the preparation and inclusion of the full transcript of all proceedings).[53]

- An indigent defendant must make a written request to the sentencing court for specified documents or transcripts indicating that they are required to prepare an application for leave to appeal. MCR 6.433(B)(1).

- "If the requested materials have been filed with the court and not provided previously to the defendant, the court clerk must provide a copy to the defendant." MCR 6.433(B)(2).

- If the requested materials have been previously provided to the defendant, the clerk is required to provide another copy if the defendant demonstrates good cause. MCR 6.433(B)(2).

- If the defendant requests the transcript of a proceeding that has not been transcribed, the court must order the

[51] For information on appeals from district court to circuit court, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*.

[52] See Section 6.22 for a complete discussion of the appointment of an appellate lawyer.

[53] See Section 6.22 for a complete discussion of the appointment of an appellate lawyer.

materials transcribed and filed with the court. MCR 6.433(B)(3). "After the transcript has been prepared, [the] court clerk must provide a copy to the defendant." *Id*.

C. Other Postconviction Proceedings

- "An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in [MCR 6.433(C)]." MCR 6.433(C).

- An indigent defendant "must make a written request to the sentencing court for specific court documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to the defendant." MCR 6.433(C)(1).

- "If the documents or transcripts have been filed with the court and not provided previously to the defendant, the clerk must provide the defendant with copies of such materials without cost to the defendant." MCR 6.433(C)(2).

- If the requested materials have been previously provided to the defendant, the clerk must provide another copy if the defendant demonstrates good cause. MCR 6.433(C)(2).

- "The court may order the transcription of additional proceedings if it finds that there is good cause for doing so." MCR 6.433(C)(3). See also *People v Caston*, 228 Mich App 291, 302 (1998) ("MCR 6.433(C)(3), by requiring an indigent defendant to demonstrate 'good cause' to obtain a transcript in a postconviction proceeding, does not violate [a] defendant's right to equal protection, even though a defendant with funds might decide to purchase a transcript"). After a transcript of additional proceedings has been prepared, the clerk must provide a copy to the defendant. MCR 6.433(C)(3).

- "Nothing in [MCR 6.433(C)] precludes the court from ordering materials to be supplied to the defendant in a proceeding under [MCR 6.501 *et seq*.]" MCR 6.433(C)(4).

6.22 Appointment of Appellate Lawyer

A. Required Advice

Following a trial. After imposing a sentence in a case involving a conviction following a trial, the trial court must immediately inform the defendant on the record that:

- the defendant is entitled to appellate review of the conviction and sentence;
- that a lawyer will be appointed if the defendant cannot afford one; and
- if seeking appointed counsel, the defendant must file a request for a lawyer within 42 days after sentencing. MCR 6.425(F)(1)(a)-(c).

Following a plea. After imposing a sentence in a case involving a conviction following a plea, the trial court must immediately inform the defendant on the record that:

- the defendant is entitled to file an application for leave to appeal;
- that a lawyer will be appointed if the defendant cannot afford one; and
- if seeking appointed counsel, the defendant must file a request for a lawyer within 42 days after sentencing. MCR 6.425(F)(2)(a)-(c).

"The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and filed within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so." MCR 6.425(F)(3).

"A request for counsel must be deemed filed on the date on which it is received by the court or the Michigan Appellate Assigned Counsel System (MAACS), whichever is earlier." MCR 6.425(F)(4).

If an out-of-guidelines sentence is imposed, the court must advise the defendant that an appeal can be pursued on the grounds that the sentence "is longer or more severe than the range provided by the sentencing guidelines." MCR 6.425(F)(5). See also MCL 769.34(7) ("If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of

the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.").[54]

Requirements in district court proceedings. "Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

> (a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the local indigent criminal defense system's appointing authority will appoint a lawyer to represent the defendant on appeal, and
>
> (b) the request for a lawyer must be made within 14 days after sentencing." MCR 6.610(G)(4).

B. Procedure for Appointment

MCR 6.425(G)(1) governs the appointment of an appellate lawyer and the preparation of transcripts in felony cases, and provides:

> "(a) All requests for the appointment of appellate counsel must be granted or denied on forms approved by the State Court Administrative Office and provided by [the Michigan Appellate Assigned Counsel System (MAACS)].
>
> (b) Within 7 days after receiving a defendant's request for a lawyer, or within 7 days after the disposition of a postjudgment motion if one is filed, the trial court must submit the request, the judgment of sentence, the register of actions, and any additional requested information to MAACS under procedures approved by the Appellate Defender Commission for the preparation of an appropriate order granting or denying the request. The court must notify MAACS if it intends to deny the request for counsel.

[54]Both MCR 6.425 and MCL 769.34 have been amended since the Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *People v Lockridge*, 498 Mich 358, 391 (2015). However, the text of the specific subrule and subsection of MCR 6.425(F)(5) and MCL 769.34(7) has not been affected by the respective amendments to the court rule and statute. MCL 769.34 was amended to omit language referring to substantial and compelling reasons and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021. Accordingly, it is not clear whether the requirement regarding departure sentences in either provision is still relevant. See Section 1.4 for a detailed discussion of *Lockridge*.

(c) Within 7 days after receiving a request and related information from the trial court, MAACS must provide the court with a proposed order appointing appellate counsel or denying the appointment of appellate counsel. A proposed appointment order must name the State Appellate Defender Office (SADO) or an approved private attorney who is willing to accept an appointment for the appeal.

(d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 42 days after entry of the judgment of sentence or, if applicable, within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal. An order denying a request for the appointment of appellate counsel must include a statement of reasons and must inform the defendant that the order denying the request may be appealed by filing an application for leave to appeal in the Court of Appeals in accordance with MCR 7.205.[55]

(e) In a case involving a conviction following a trial, if the defendant's request for a lawyer was filed within the time for filing a claim of appeal, the order must be entered on an approved form entitled 'Claim of Appeal and Appointment of Counsel.'[56] Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

(f) An appointment order must direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, the full transcript of all proceedings, and provide for the payment of the reporter's fees.

(g) The trial court must serve MAACS with a copy of its order granting or denying a request for a lawyer. Unless MAACS has agreed to provide the order to any of the following, the trial court must also serve a copy of its

[55]"Notwithstanding any other provision in [MCR 6.425], until further order of the Court, if the defendant is indigent, a request for the appointment of appellate counsel under MCR 6.425(F)(3) must be granted if it is received by the trial court or the Michigan Appellate Assigned Counsel System (MAACS) within six months after sentencing. This provision applies to all cases in which sentencing took place on or after March 24, 2020." MCR 6.425(H).

[56]See SCAO Form CC 403, *Claim of Appeal and Order Appointing Counsel.*

> order on the defendant, defense counsel, the prosecutor, and, if the order includes transcripts, the court reporter(s)/recorder(s). If the order is in the form of a Claim of Appeal and Appointment of Counsel, the court must also serve the Court of Appeals with a copy of the order and the judgment being appealed."

MCR 6.625 governs appeals and the appointment of appellate counsel in district court cases[57] and provides:

> "(A) An appeal from a misdemeanor case is governed by subchapter 7.100.
>
> (B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the local indigent criminal defense system's appointing authority must appoint a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. If the defendant makes a request on the record, the court shall inform the appointing authority of the request that same day. Unless there is a postjudgment motion pending, the appointing authority must act on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day of the appointment.
>
> (C) If indigency was not previously determined or there is a request for a redetermination of indigency, the court shall make an indigency determination unless the court's local funding unit has designated this duty to its appointing authority in its compliance plan with the Michigan Indigent Defense Commission. The determination of indigency and, if indigency is found, the appointment of counsel must occur with[in] 14 days of the request unless a postjudgment motion is pending. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition.

[57] For information on appeals from district court to circuit court, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*.

> (D) If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day the notice of appointment is filled with the court."

C. Scope of Appellate Lawyer's Responsibilities

"The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

> (a) in available postconviction proceedings in the trial court the lawyer deems appropriate,
>
> (b) in postconviction proceedings in the Court of Appeals,
>
> (c) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or [MCR] 7.211(C)(1), and
>
> (d) as appellee in relation to any postconviction appeal taken by the prosecutor." MCR 6.425(G)(2).

6.23 Restoration of Appellate Rights

"If the defendant, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or other factors outside the defendant's control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel." MCR 6.428.

An error within the purview of MCR 6.428 was committed where "defendant's previous counsel moved to dismiss his appeal in [the Court of Appeals] and then took no actions of record on defendant's previously filed motion for a new trial for over two years," and the "actions and inactions by prior counsel resulted in the trial court ruling that defendant had abandoned his motion for a new trial." *People v Byars*, ___ Mich App ___, ___ (2023). "Because of defendant's prior appellate counsel's errors, defendant was denied the right to appellate review"; "[a]ccordingly, defendant was and is entitled to have his appellate rights restored." *Id*. at ___. "Defendant's *in propria persona* motion under MCR 6.428 brought prior counsel's errors to the trial court's attention, appropriately invoked MCR 6.428, and requested restoration of defendant's appellate rights." *Byars*, ___ Mich App at ___ (holding the trial court abused its discretion when it denied defendant's motion under MCR 6.428 and refused to restore his appellate rights).

The Court rejected the defendant's argument that "he was denied the right to appellate review because his appellate counsel failed to timely file a motion to withdraw his plea pursuant to MCR 6.310." *People v Tardy*, ___ Mich App ___, ___ (2023). While "an appellate attorney's failure to move to withdraw a defendant's plea under MCR 6.310(C) falls within MCR 6.428's purview because it could ostensibly result in the loss of the right to appellate review of plea-based claims under MCR 6.310(D)," "[t]his is not a case where appellate review of defendant's plea-based claims was never pursued." *Tardy*, ___ Mich App at ___. "Instead, in defendant's delayed application for leave, defendant not only challenged the circuit court's dismissal of his motion to withdraw his plea as untimely, but raised each of the substantive issues challenging his plea that he raised in his motion to withdraw"; "[t]hus, despite the untimely motion, he raised those issues before [the Court of Appeals], which denied the application for lack of merit in the grounds presented." *Id*. at ___ (quotation marks omitted). Accordingly, "[a]lthough the amended version of MCR 6.428 retroactively applies here, defendant has not demonstrated that he was denied his right to appellate review and is not entitled to the restoration of his appellate rights." *Tardy*, ___ Mich App at ___ (holding "the trial court did not err in denying relief under MCR 6.428").

6.24 Resentencing on Remand

When an appellate court remands a case for resentencing, a trial court cannot "take action inconsistent with" the appellate opinion, but may otherwise "consider every aspect of defendant's sentence de novo." *People v Lampe*, 327 Mich App 104, 112 (2019) (where the Court of Appeals remanded for resentencing "without any specific instructions or any prohibitions on scoring OVs" on remand the trial court did not err by scoring OV 3 and OV 10 even though they were not scored at the original sentencing).

"[A] sentence that punishes a defendant for successfully appealing a conviction is vindictive and therefore violates a defendant's due-process rights." *People v Warner*, 339 Mich App 125, 157 (2021), citing *North Carolina v Pearce*, 395 US 711, 723-724 (1969), overruled in part on other grounds by *Alabama v Smith*, 490 US 794 (1989).

Presumption of vindictiveness. *Pearce* created a presumption of vindictiveness "'whenever a judge imposes a more severe sentence upon a defendant after a new trial,'" and the reasons for the sentence do not "'affirmatively appear'" on the record; however, that presumption was limited in later cases to apply only where "there is a reasonable likelihood that a sentence improperly punishes a defendant for exercising the right to appeal a conviction[.]" *Warner*, 339 Mich App at 158, quoting *Pearce*, 395 US at 726. "Where the possibility of judicial

vindictiveness is only speculative, a presumption of vindictiveness does not apply and the burden remains upon the defendant to prove actual vindictiveness." *Warner*, 339 Mich App at 158 (cleaned up).

Generally, "when the same judge resentences a defendant and increases the sentence, the increased sentence is presumptively vindictive." *Id.* at 159. However, the presumption does not arise "when the reason for the imposition of a greater sentence is apparent." *Warner*, 339 Mich App at 159. "Before the *Pearce* presumption can be invoked, an appellate court must examine the surrounding circumstances to determine whether there is a reasonable likelihood that the defendant was punished for successfully appealing his conviction." *Id.* at 160 (holding that there was no presumption of vindictiveness despite the fact that the same judge imposed a harsher sentence after the defendant successfully appealed where "defendant was convicted of CSC-I after his second trial, whereas defendant's first trial resulted in a conviction for CSC-II," and the statutory maximum sentence and the guidelines minimum sentence range for the CSC-I conviction was higher than it was for the CSC-II conviction).

Rebutting the presumption. "The presumption of vindictiveness is rebutted when events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities arise," and similarly, "where the judge at resentencing possessed information which was unavailable to the judge at the initial sentencing, even where that information does not concern conduct of the defendant occurring *after* the first trial," and "when the extent of the increase in the sentence bears a reasonable relationship to the new information." *Warner*, 339 Mich App at 161 (holding a presumption of vindictiveness would be rebutted where the defendant was convicted of a more serious offense after the second trial, an updated PSIR indicated that PPOs were obtained on behalf of defendant's minor children after his parental rights were terminated to those children, and while the victim did not appear at the first trial, she appeared at the second trial and shared new information about how the assault damaged her relationships and she requested a harsher sentence) (cleaned up).

Chapter 7: Additional Sentencing Considerations

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7.1 Introduction

This chapter addresses additional issues sentencing courts must consider; including consecutive sentencing, mandatory sentences, constitutional issues relevant to mandatory sentences, issues unique to juveniles, sentence credits, plea agreements, mandatory sentencing requirements for certain criminal sexual conduct offenders, and offenses for which medical testing must be mandated by the court.

Note that issues related to probation, including sentencing following a probation violation and a technical probation violation, are discussed in Chapter 9.

7.2 Concurrent and Consecutive Sentences

The court must impose a concurrent sentence unless there is statutory authority for imposing a consecutive sentence. *People v Sawyer*, 410 Mich 531, 534 (1981).

"The purpose of a consecutive sentencing statute is to deter persons convicted of one crime from committing other crimes by removing the security of concurrent sentencing." *People v Parker*, 319 Mich App 410, 414 (2017) (quotation marks and citation omitted). "Accordingly, consecutive sentencing statutes should be construed liberally in order to achieve the deterrent effect intended by the Legislature." *Id.* at 414-415 (cleaned up).

Where consecutive sentencing is authorized, the statutory language will indicate whether the consecutive nature of the sentence is mandatory or discretionary. See Section 7.3, discussing mandatory consecutive sentences and Section 7.4, discussing discretionary consecutive sentences.

"[U]nless the Legislature clearly manifests a contrary intent," sentencing provisions in effect at the time an offense is *committed* apply to a trial court's imposition of sentence, not the amended sentencing provisions that became effective after the offense was committed but before the defendant was sentenced. *People v Doxey*, 263 Mich App 115, 121-123 (2004) (quotation marks and citation omitted).

A. Judgment of Sentence

The trial court must specify in the judgment of sentence whether the sentence is concurrent or consecutive. MCL 769.1h(1).

1. Requirement to Provide Copies

The court must give a copy of the judgment of sentence to the prosecuting attorney, the defendant, and the defendant's counsel. MCL 769.1h(2).

2. Objections and Required Hearing

The prosecuting attorney or defense counsel, or the defendant, if he or she is not represented by an attorney, may file an objection to the consecutive or concurrent nature of sentences described in the judgment of sentence. MCL 769.1h(3). If an objection is filed the court must "promptly hold a hearing[.]" *Id.*

3. Computation of Sentence

A correctional facility computes the length of an offender's sentence by reference to the offender's judgment of sentence. MCL 791.264(3). Except where the sentencing offense is one of the five offenses expressly listed in MCL 791.264(4)-(5), if a judgment of sentence does not specify whether a sentence is to run concurrently or consecutively to an offender's other sentences, the sentence must be computed as if it is to be served concurrently. MCL 791.264(3).

4. Correction of Sentence or Judgment of Sentence[1]

MCR 6.435 governs the correction of mistakes; it applies in both felony and misdemeanor cases. MCR 6.001(B). "Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it." MCR 6.435(A). Courts are more restricted when correcting substantive mistakes: "After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous." MCR 6.435(B).

In felony cases,[2] MCR 6.429(A) provides courts with the authority to modify a sentence after a judgment has been entered: "The court may correct an invalid sentence, on its own

[1]For a detailed discussion of postjudgment motions, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1.

[2] See MCR 6.001(A)-(B).

initiative after giving the parties an opportunity to be heard, or on motion by either party. But the court may not modify a valid sentence after it has been imposed except as provided by law. Any 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."

An error involving concurrent or consecutive sentencing in the judgment of sentence can be a substantive mistake requiring a hearing or a clerical mistake depending on the circumstances. See *People v Thomas*, 223 Mich App 9, 15-16 (1997) (where consecutive sentence was required but the court mistakenly imposed a concurrent sentence, the due process afforded by a resentencing hearing is required because a defendant is exposed to a greater possible penalty); *People v Alexander*, 234 Mich App 665, 677-678 (1999) (where the court mistakenly imposed consecutive sentences without statutory authority to do so, a resentencing hearing was not required because the defendant's due process rights were not implicated because correction of the invalid sentence would result in a decrease in the defendant's overall prison term); *People v Howell*, 300 Mich App 638, 646-651 (2013) (due process does not require a resentencing hearing before the trial court corrects judgment when it lacks "discretion to sentence a defendant any differently," and further holding failure to specify statutorily required consecutive sentence could be corrected under MCR 6.435(A)); *People v Beard*, 327 Mich App 702, 706-707 (2019) (where the beginning date of the sentence in the original judgment of sentence was ambiguous, the defendant "was not seeking to correct an invalid sentence imposed by the trial court but rather was attempting to enforce the imposed sentence," and the defendant's motion was "best viewed as a motion to correct a mistake").

B. Sentencing Guidelines[3]

When a defendant is convicted of multiple offenses, MCL 777.21(2) and MCL 771.14(2)(e) govern which convictions must be scored to calculate a minimum sentence range.

Concurrent sentences. Under MCL 771.14(2)(e), where the defendant is being sentenced concurrently, the trial court is only required to score the highest class felony. *People v Lopez*, 305 Mich App 686, 692 (2014). See also *People v Mack*, 265 Mich App 122, 126-129 (2005). However, "when there are multiple convictions of the

[3]For a detailed discussion on scoring the OVs and PRVs, see Chapter 2.

same crime class and that shared crime class is the highest crime class, 'each' of those convictions must be scored." *People v Reynolds*, 334 Mich App 205, 210 (2020) (holding that where the defendant was convicted of two Class B crimes against a person, the sentences for which were to be served concurrently, the trial court erred by only calculating the guidelines range for one of the Class B crimes), aff'd in part and rev'd in part 508 Mich 388 (2021) (adopting this portion of the Court of Appeals' analysis). When scoring multiple convictions for different offenses within the same crime class leads to different guidelines ranges, MCL 771.14(2)(e)(*ii*) and MCL 771.14(2)(e)(*iii*) do not require the sentencing court to "use only the highest guidelines range among two equally classified felony offenses when imposing concurrent sentences for those offenses." *Reynolds*, 508 Mich at 395-396 (emphasis omitted). Rather, for concurrent-sentencing purposes, MCL 771.14(2)(e)(*ii*) and MCL 771.14(2)(e)(*iii*) require "that when two or more offenses fall within the same crime class and it is the highest applicable crime class, then not only must each offense be scored, but the defendant must also be sentenced based on the respective minimum sentencing guidelines ranges for each offense." *Reynolds*, 508 Mich at 396.

Further, "when imposing concurrent sentences, . . . [courts should] ensure that each individual sentence, irrespective of any guidelines calculations used, does not exceed its statutory maximum." *Lopez*, 305 Mich App at 692.

Note that when identical concurrent sentences are imposed for multiple convictions on the basis of the sentence for the highest class crime, the sentence for the lower class crime is a departure sentence despite the fact that it has "no practical effect" in light of the sentence for the highest class crime. *People v Gunn*, 503 Mich 908, 908 (2018) (remanding for resentencing where defendant was originally sentenced to 15 years for both placing explosives on or near property and second-degree arson on the basis of the guidelines score for placing explosives on or near property, then later received a reduced sentence on the placing explosives conviction but not the arson conviction; "[t]he arson sentence, being based on a higher class crime offense sentence that had been significantly reduced, was invalid because it was based on inaccurate information").

Consecutive sentences. The guidelines must be scored for every conviction that can be served consecutively. MCL 777.21(2); MCL 771.14(2)(e)(*i*). See also *People v Alfaro*, 497 Mich 1024, 1024 (2015) (noting that "MCL 771.14(2)(e) required the probation officer to include in the presentence report . . . both the 'sentence grid . . . that contains the recommended minimum sentence range' and the 'computation that determines' that range for all convictions for

which a consecutive sentence was authorized") (second alteration in original).

7.3 Mandatory Consecutive Sentences

The following table details the statutes that require consecutive sentencing.

Statutory Provision	Statutory Language Requiring Consecutive Sentencing (emphasis added)
MCL 768.7a(1) Crime committed during incarceration or escape	"A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state **shall**, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime **shall** begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state."
MCL 768.7a(2) Felony committed while on parole	"If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense **shall** begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense."
MCL 768.7b(2)(b) Major controlled substance offense committed while disposition of felony is pending	"[I]f a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense, . . . [i]f the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense **shall** run consecutively."
MCL 750.193(1) Prison break or escape/ attempted break or escape	"A person imprisoned in a prison of this state who breaks prison and escapes, breaks prison though an escape is not actually made, escapes, leaves the prison without being discharged by due process of law, attempts to break prison, or attempts to escape from prison, is guilty of a felony, punishable by further imprisonment for not more than 5 years. The term of the further imprisonment **shall** be served after the termination, pursuant to law, of the sentence or sentences then being served." See also MCL 750.193(3) (further defining persons who are guilty of violating MCL 750.193).
MCL 750.195(2) Jail break or escape/ attempted break or escape	"A person lawfully imprisoned in a jail for a term imposed for a felony who breaks jail and escapes, breaks jail though an escape is not actually made, escapes, leaves the jail without being discharged from the jail by due process of law, or attempts to escape from the jail, is guilty of a felony. A person who violates this subsection shall be imprisoned for the unexpired portion of the term of imprisonment the person was serving at the time of the violation, and any term of imprisonment imposed for the violation of this subsection **shall** begin to run at the expiration of that prior term of imprisonment."

MCL 750.197(2) Breaking or escaping or attempting to break or escape while awaiting court proceeding	"A person lawfully imprisoned in a jail or place of confinement established by law, awaiting examination, trial, arraignment, or sentence for a felony; or after sentence for a felony awaiting or during transfer to or from a prison, who breaks the jail or place of confinement and escapes; who breaks the jail, although no escape is actually made; who escapes; who leaves the jail or place of confinement without being discharged from the jail or place of confinement by due process of law; who breaks or escapes while in or being transferred to or from a courtroom or courthouse, or a place where court is being held; or who attempts to break or escape from the jail or place of confinement is guilty of a felony. A term of imprisonment imposed for a violation of this subsection **shall** begin to run at the expiration of any term of imprisonment imposed for the offense for which the person was imprisoned at the time of the violation of this subsection."
MCL 750.227b(3) Felony-firearm and felony-firearm with a pneumatic gun	"A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony and **shall** be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony."
MCL 750.349a Prisoner taking hostage	"A person imprisoned in any penal or correctional institution located in this state who takes, holds, carries away, decoys, entices away or secretes another person as a hostage by means of threats, coercion, intimidation or physical force is guilty of a felony and shall be imprisoned in the state prison for life, or any term of years, which **shall** be served as a consecutive sentence."

A. Offenses Committed During Incarceration or Escape — Issues

MCL 768.7a(1) provides: "A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state."

1. Institution Must be Located in Michigan

The unambiguous language of MCL 768.7a(1) indicates that the consecutive sentencing mandated by the statute applies only to offenders who commit a crime while incarcerated in a penal institution in Michigan, or while on escape from a penal institution in Michigan. *People v Alexander*, 234 Mich App 665, 676-677 (1999) (consecutive sentencing did not apply to the defendant's sentence for commission of a crime in Michigan while on escape from a Louisiana prison).

Mandatory consecutive sentencing also applies to sentences imposed for crimes committed by an offender during his or her incarceration in a federal penal or reformatory institution located in Michigan. *People v Kirkland*, 172 Mich App 735, 737 (1988).

2. Misdemeanors

The consecutive sentencing mandate of MCL 768.7a(1) applies when an offender commits a misdemeanor offense "punishable by imprisonment" while incarcerated in or on escape from a penal institution in Michigan. *People v Weatherford*, 193 Mich App 115, 119-121 (1992). Any sentence imposed for the offender's misdemeanor conviction must be served in the custody of the Department of Corrections and consecutively to the term of imprisonment the offender was serving at the time of the offense. *Id.* at 119.

3. Meaning of *Penal or Reformatory Institution*

"[F]or consecutive sentencing purposes, the term 'penal or reformatory institution' is broadly construed to include any grounds under the control of any person authorized by the Department of Corrections to have a prison inmate under care, custody or supervision either in an institution or outside an institution." *People v Parker*, 319 Mich App 410, 416 (2017) (quotation marks and citation omitted). "Literal confinement . . . is not a controlling factor if the person continues to be under the control of the Department of Corrections." *Id.* (quotation marks and citation omitted).

The following have been held to satisfy the requirement of incarceration in *a penal or reformatory institution* under MCL 768.7a:

- a person on "pre-parole" status, *Parker*, 319 Mich App at 416, citing *People v Larkin*, 118 Mich App 471, 474 (1982) (quotation marks omitted);
- inmates assigned to halfway houses, *Parker*, 319 Mich App at 416, citing *People v Kirkland*, 172 Mich App 735, 737 (1988);
- inmates participating in community corrections programs, *Parker*, 319 Mich App at 416, citing *Kirkland*, 172 Mich App at 737;
- inmates on extended furloughs, *Parker*, 319 Mich App at 416, citing *Kirkland*, 172 Mich App at 737; and

- county jails, *People v Sheridan*, 141 Mich App 770, 774 (1985).

However, where the Department of Corrections (DOC) erroneously released the defendant before she had completed her sentences for two prior offenses, the trial court erred by ordering that her sentences for new offenses committed following her release run consecutively to the completion of her previous sentences; the fact that the defendant had time remaining on her previous sentences was "not, by itself, sufficient to find that [she] was 'incarcerated in a penal or reformatory institution' within the meaning of MCL 768.7a(1)." *Parker*, 319 Mich App at 419. "[E]ven a liberal construction of the phrase 'incarcerated in a penal or reformatory institution' [did] not bring defendant within MCL 768.7a(1) for sentencing purposes," because "[a]fter the DOC erroneously released [her,] . . . the DOC's control over defendant or her activities ceased," and "[t]here [was] no evidence that the DOC was aware of defendant's erroneous release or that it attempted to contact [her] afterward." *Parker*, 319 Mich App at 416-417. "[M]erely being 'liable to serve' a sentence is [not] tantamount to being 'incarcerated in a penal or reformatory institution' for purposes of MCL 768.7a(1)." *Parker*, 319 Mich App at 419-421 (citing *People v Veilleux*, 493 Mich 914 (2012), and additionally rejecting the prosecution's argument "that defendant was subject to consecutive sentencing pursuant to MCL 768.7a(1) because she committed the [new] crimes . . . while 'temporarily outside the limits' of a penal or reformatory institution" within the meaning of MCL 768.7).

4. Stacking Consecutive Sentences

The Michigan Court of Appeals "has repeatedly interpreted the phrase 'or has become liable to serve' in MCL 768.7a(1) as allowing a sentencing court to 'stack' or cumulate a defendant's sentences for separate offenses committed while incarcerated or on escapee status." *People v Williams*, 294 Mich App 461, 475 (2011). "By way of example, assume a defendant was sentenced in 1981 for committing offense A, was sentenced in 1982 for committing offense B while incarcerated, and then was sentenced in 1983 for committing offense C while incarcerated. Pursuant to MCL 768.7a(1), the sentencing court would be required to make each sentence consecutive to the others. The defendant would serve his or her sentence for offense A before commencing the sentence for offense B and would serve the sentence for offense B before commencing the sentence for offense C." *Williams*, 294 Mich App at 475. See also

People v Piper, 181 Mich App 583 (1989); *People v McKee*, 167 Mich App 258 (1988); *People v Mandell*, 166 Mich App 620 (1987).

However, MCL 768.7a(1) may not be used "as a means of imposing consecutive sentences for convictions arising out of contemporaneous offenses that were tried together in one trial." *Williams*, 294 Mich App at 476. In *Williams*, the defendant was convicted of two offenses that were committed contemporaneously while he was serving a jail sentence for domestic violence. *Id*. at 465. The Court of Appeals held that although the trial court correctly applied MCL 768.7a(1) in ordering that the sentences for the two subsequent convictions run consecutively to the original domestic violence sentence, the trial court erred in further ordering that the sentences for the two subsequent convictions run consecutively to each other. *Williams*, 294 Mich App at 476-477. "[A] defendant 'has become liable to serve' a sentence [under MCL 768.7a(1)] only if that sentence was imposed (or the act underlying the sentence occurred) in the past"; accordingly, because "[t]he [defendant's two subsequent] offenses occurred at the same time, the charges were tried together, and the court imposed the sentences at one proceeding," the sentences for those offenses were required to run concurrently with each other. *Williams*, 294 Mich App at 476-477.

B. Offense Committed During Parole — Issues

MCL 768.7a(2) provides: "If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense."

1. When Sentence Begins to Run

In the context of the imposition of a consecutive, indeterminate prison term, the Court concluded that "the 'remaining portion' clause of [MCL 768.]7a(2) requires the offender to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve."*Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584 (1996).[4]

In the context of the imposition of a consecutive, fixed jail term, the Court held that "[w]hen a jail sentence is made to run

consecutively to an indeterminate prison sentence, the jail sentence does not begin to run until the defendant is paroled from the prison sentence or completes the maximum term of imprisonment." *People v Beard*, 327 Mich App 702, 710 (2019) (holding "the trial court erred by ruling that defendant's consecutive jail sentence ran from the date of sentencing" because the sentence "did not begin to run until his release from prison").

2. Federal Supervised Release

"[A] federal term of 'supervised release' [imposed under 18 USC 3583(a)] is not the same as 'parole' under Michigan's criminal justice system"; therefore, "MCL 768.7a(2) does not provide statutory authority" for a defendant's sentence to run consecutively to a federal sentence for which the defendant was on supervised release when the sentencing offense was committed. *People v Clark*, 315 Mich App 219, 225, 231 (2016) (noting that "even though the purpose of each is similar, there are significant differences between parole—under the plain meaning of that term and as practiced in Michigan—and federal supervised release").

C. Major Controlled Substance Offense When a Previous Felony Is Pending Disposition — Issues

MCL 768.7b(2)(b) requires consecutive sentencing if a defendant commits a major controlled substance offense while the disposition of another felony offense is pending. For a detailed discussion of issues related to major controlled substance offenses, see the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 6.

D. Felony-Firearm/Pneumatic Gun—Issues

A person is guilty of felony-firearm if they carry or have in their possession a firearm when they commit or attempt to commit a felony, MCL 750.227b(1); a person is guilty of felony-pneumatic gun when they carry or have in their possession a pneumatic gun and use that pneumatic gun in furtherance of committing or attempting to commit a felony, MCL 750.227b(2).[5]

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[4]In *Wayne Co Prosecutor*, 451 Mich at 571, the Court primarily considered how to determine "when a parolee who has been convicted of another felony committed while he is on parole is again subject to the jurisdiction of the Parole Board." The Court held that parole eligibility is computed "by adding the consecutive minimum terms of all the offenses for which [the defendant] is incarcerated in state prison." *Id.* at 579-580. Accordingly, consecutive sentences "commence to run when the total of the *minimum* sentences imposed for prior offenses has been served." *Id.* at 580.

The sentence imposed for a felony-firearm conviction under MCL 750.227b(1), or a felony-pneumatic gun conviction under MCL 750.227b(2), must be served consecutively with and preceding the sentence imposed for the felony or attempted felony on which the conviction is based. MCL 750.227b(3).[6] See also *People v Clark*, 463 Mich 459, 463-464 (2000) (remanding to correct judgment of sentence to indicate that each felony-firearm sentence is consecutive only to the corresponding conviction); *People v Coleman*, 327 Mich App 430, 441-442 (2019) (holding "[a] felony-firearm sentence must . . . be served consecutive with the sentence for the one predicate felony," and clarifying that where multiple, separate felony-firearm charges are brought, there are "options as to which felony would ultimately run consecutive to the felony-firearm sentence"); *People v Smith*, 506 Mich 1, 8-9 (2020) (reiterating "that when the finder of fact does not explicitly find that the defendant committed a particular predicate felony with a firearm, the felony-firearm sentence cannot be consecutive with the sentence for that predicate felony").[7]

A sentence for a violation of MCL 750.227b(1) or MCL 750.227b(2) is a determinate number of years depending on the number of the defendant's previous convictions under the applicable subsection. MCL 750.227b(1); MCL 750.227b(2).

There are four weapons offenses on which a conviction under MCL 750.227b(1) or MCL 750.227b(2) *cannot* be based:

- unlicensed sale of firearms and sales to convicted felons and minors, MCL 750.223;
- carrying a concealed weapon (CCW), MCL 750.227;

[5] Because "[a] jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses," a defendant may properly be convicted by jury of felony-firearm even if the jury acquits the defendant of the underlying felony. *People v Powell*, 303 Mich App 271, 274 (2013) (noting that MCL 750.227b "necessarily includes a finding that the defendant committed or attempted to commit a felony," and that "[t]he jury may have reached the conclusion that defendant was not guilty of possession of marijuana with intent to deliver under MCL 333.7401(2)(d)(*iii*)[(the underlying felony)], but that he did possess marijuana with intent to deliver for purposes of MCL 750.227b") (quotation marks and citation omitted).

[6] The common reference to "a felony-firearm sentence as 'consecutive to' another felony sentence is imprecise because it suggests that the felony-firearm sentence is served *after* the sentence for the predicate felony" when the sentence is actually "served *before* the sentence for the predicate felony." *People v Smith*, 506 Mich at 6 n 3 (2020).

[7] The Court further explained that while "the complaint and the information may list multiple and alternate felonies as the predicate felony for a single felony-firearm count," that charging decision requires that the jury find "that the defendant committed a particular predicate felony with a firearm" in order for the felony-firearm sentence to be consecutive with that predicate felony sentence. *Smith*, 506 Mich at 8 (noting that "the prosecutor might be better advised to file multiple felony-firearm counts, each of which is predicated upon a particular and unique felony").

- unlawful possession of a pistol by a licensee, MCL 750.227a; and
- alteration, removal, or obliteration of a firearm's identification mark, MCL 750.230.

If a conviction is based on a qualifying underlying felony (i.e., *not* MCL 750.223, MCL 750.227, MCL 750.227a, or MCL 750.230), the defendant may also be convicted of any of the four offenses exempted from the consecutive sentencing mandate, but the sentence imposed for the conviction must be concurrent to the felony-firearm/pneumatic gun sentence. See *People v Cortez*, 206 Mich App 204, 207 (1994) (trial court erred in ordering the defendant's felony-firearm sentence under MCL 750.227b to run consecutively to his sentence for carrying a concealed weapon under MCL 750.227 and held the felony-firearm conviction may run consecutive only to his intentional discharge of a firearm from a motor vehicle conviction).

The consecutive sentencing requirement applies only when the penalty imposed for the underlying felony is a term of imprisonment. *People v Brown*, 220 Mich App 680, 682 (1996). If the court imposes a sentence of probation for the felony offense underlying an offender's felony-firearm conviction, the mandatory two-year sentence must run concurrently with the term of probation. *Id.* at 682-685.

E. Proportionality Challenges

"[W]here a defendant receives consecutive sentences and neither sentence exceeds the maximum punishment allowed, the aggregate of the sentences will not be disproportionate under [*People v Milbourn*, 435 Mich 630 (1990)[8]]." *People v Miles*, 454 Mich 90, 95 (1997) (holding "a sentencing court need not consider the length of a consecutive or concurrent mandatory sentence when setting an indeterminate sentence").

7.4 Discretionary Consecutive Sentences

There are numerous statutes providing sentencing courts with discretionary authority to impose a consecutive sentence; this section discusses broadly applicable issues and examines some specific examples of discretionary consecutive sentencing authority. This section does **not**

[8]For a detailed discussion of the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 636 (1990), see Section 5.8.

provide a complete list of every offense for which a court has discretionary consecutive sentencing authority.

Discretionary sentencing is often authorized under the following circumstances:

- Sentences for convictions arising out of the same transaction, see, e.g., MCL 750.110a(8) (first-degree home invasion); MCL 750.529a(3) (carjacking); MCL 750.520b(3) (first-degree criminal sexual conduct);

- Sentences for certain convictions carry an authorization to impose a consecutive sentence to any other violation of law, including violations arising out of the same transaction, see, e.g., MCL 750.50(7) (various mistreatment of animal offenses); MCL 750.122(11) (various witness interference offenses);

- Sentences for an underlying misdemeanor or felony offense, see, e.g., MCL 750.145d(3) (using internet/computer to commit certain crimes); MCL 750.212a(1) (crimes involving a vulnerable target);

- Sentences for offenses committed pending the disposition of a prior felony charge. MCL 768.7b(2)(a) ("if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, . . . the sentences imposed for the prior charged offense and the subsequent offense may run consecutively").[9]

There are also many criminal statutes that specifically authorize consecutive sentencing under specified circumstances. See, e.g., MCL 400.609(2) (authorizing consecutive sentences for an offender's conviction of separate offenses under the Medicaid False Claim Act); MCL 750.411u(2) (authorizing consecutive sentencing for gang-related crimes).

A. Must Articulate Reasons for Consecutive Sentence

"[T]rial courts imposing one or more discretionary consecutive sentences are required to articulate on the record the reasons for each consecutive sentence imposed." *People v Norfleet*, 317 Mich App 649, 654 (2016).[10] "The decision regarding each consecutive sentence

[9]Consecutive sentencing is mandatory if the subsequent offense is a major controlled substance offense. See Section 7.3(C).

[10]A trial court's decision to impose a discretionary consecutive sentence is reviewed for an abuse of discretion; a trial court abuses its discretion when its decision is "outside the range of reasonable and principled outcomes." *Norfleet*, 317 Mich App at 654.

is its own discretionary act and must be separately justified on the record." *Id.* at 665. "While imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each consecutive sentence so as to allow appellate review." *Id*. at 665-666 (remanding for resentencing where the trial court, in imposing multiple consecutive sentences for five drug convictions, "spoke only in general terms" about the defendant's background and history and the nature of the offenses involved and "did not speak separately regarding each consecutive sentence" imposed under MCL 333.7401(3)). See also *People v Baskerville*, 333 Mich App 276, 289-291 (2020) (holding that the trial court's justification of its decision to impose a consecutive sentence was sufficient where it described the defendant's treatment of the trafficked minor victim was "akin to slavery," observed "it had never seen a sentencing guidelines score as high as defendant's score," and demonstrated its consideration of the offenses and the offender by discussing the defendant's actions during the offense and during his telephone calls from jail); *People v Norfleet (After Remand)*, 321 Mich App 68, 73 (2017) (holding that the trial court on remand properly ordered one of the defendant's sentences to be served consecutively and ordered the remaining sentences to be served concurrently; "[t]he trial court properly recognized that it could not impose multiple consecutive sentences as a single act of discretion," and it appropriately concluded that the single consecutive sentence was justified on grounds including the "defendant's extensive violent criminal history, multiple failures to rehabilitate, and the manipulation of several less culpable individuals in his ongoing criminal operation").

Note that while the decision to impose a consecutive sentence when not mandated by statute is reviewed for an abuse of discretion; the combined term itself is not subject to proportionality review. *Norfleet*, 317 Mich App at 664. See also *Baskerville*, 333 Mich App at 291 (rejecting the defendant's argument that the consecutive sentence was "disproportionate under the circumstances" of his case because his mandatory minimum sentence was already a "death sentence" given his age, and holding that "the aggregate of the sentences is not disproportionate" where each individual sentence did not exceed the maximum punishment allowed for each offense of which he was convicted).

B. Judicial Fact-Finding Permitted

"[T]he Sixth Amendment does not prohibit the use of judicial fact-finding to impose [discretionary] consecutive sentencing." *People v DeLeon*, 317 Mich App 714, 723, 726 (2016), adopting the rationale of *Oregon v Ice*, 555 US 160, 164 (2009). "Although consecutive

sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense," and *Apprendi v New Jersey*, 530 US 466 (2000), *Alleyne v United States*, 570 US 99 (2013), and *People v Lockridge*, 498 Mich 358 (2015), do not "compel[] the conclusion that consecutive sentencing in Michigan violates a defendant's Sixth Amendment protections." *DeLeon*, 317 Mich App at 723, 726 (additionally noting that "the trial court's imposition of consecutive sentences [would not] be affected by whether the sentencing guidelines are mandatory or advisory"). Therefore, although the jury's verdict "did not necessarily incorporate a finding that [the defendant's first-degree criminal sexual conduct] conviction 'ar[ose] from the same transaction' as did his [second-degree criminal sexual conduct] conviction, . . . defendant [had] no Sixth Amendment right to have a jury make that determination" before the trial court could impose a consecutive sentence under MCL 750.520b(3). *DeLeon*, 317 Mich App at 726, quoting MCL 750.520b(3) (second alteration in original).

C. Discretionary Consecutive Sentencing — Issues

1. Controlled Substance Offenses

A sentence imposed for a controlled substance offense under MCL 333.7401(2)(a)[11] may be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. MCL 333.7401(3). For a detailed discussion of issues related to controlled substance offenses, see the Michigan Judicial Institute's C*ontrolled Substances Benchbook*, Chapter 6.

2. Violations Arising Out of the Same Transaction as the Sentencing Offense — Criminal Sexual Conduct

"The court may order a term of imprisonment imposed [for first-degree criminal sexual conduct under MCL 750.520b] to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.520b(3).

"[A]n ongoing course of sexually abusive conduct involving episodes of assault does not in and of itself render the crimes part of the same transaction"; rather, "[f]or multiple penetrations to be considered as part of the same transaction,

[11] MCL 333.7401(2)(a) prohibits the manufacture, creation, delivery, or possession with the intent to manufacture, create or deliver a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine-related substances).

they must be part of a 'continuous time sequence,' not merely part of a continuous course of conduct." *People v Bailey*, 310 Mich App 703, 725 (2015). See also *People v Brown*, 495 Mich 962, 962-963 (2014), quoting *People v Ryan*, 295 Mich App 388, 402-403 (2012) (holding that "[t]he trial court imposed an invalid sentence when it imposed seven consecutive sentences for the defendant's seven convictions of first-degree criminal sexual conduct"; "the trial court had discretion to impose consecutive sentences for *at most* three of the . . . convictions, because the three sexual penetrations that resulted in those convictions . . . 'grew out of a continuous time sequence' and had 'a connective relationship that was more than incidental'").

The phrase "any other criminal offense" in MCL 750.520b(3) "means a different sentencing offense," and can include another CSC-I conviction. *Ryan*, 295 Mich App at 404-406 (rejecting the defendant's assertion that the phrase "any other criminal offense arising from the same transaction" in MCL 750.520b(3) permits consecutive sentencing for a CSC-I offense only when the other sentence is for an offense *other* than CSC-I).

3. Pending Felonies

With the exception of major controlled substance offenses, MCL 768.7b(2)(a) authorizes discretionary consecutive sentencing for an offense committed pending disposition of a prior felony charge. Consecutive sentencing is mandatory if the subsequent offense is a major controlled substance offense.[12] MCL 768.7b(2)(b).

The discretionary authority to impose consecutive sentences applies only to the "last in time" sentencing court. *People v Chambers*, 430 Mich 217, 231 (1988).

Two-year misdemeanors are considered "felonies for purposes of the Code of Criminal Procedure's . . . consecutive sentencing statutes." *People v Smith*, 423 Mich 427, 433-434 (1985) (noting that the Code of Criminal Procedure "defines 'felony' as an offense punishable by more than one year in the state prison"). However, under the Penal Code, two-year misdemeanors cannot be considered felonies. *Id.* "[A] two-year misdemeanor conviction arising out of the first felony charge may serve as the conviction of the prior charged offense required for

[12]See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 6, for a detailed discussion of major controlled substance offenses and consecutive sentencing.

consecutive sentencing" under MCL 768.7b. *Smith*, 423 Mich at 434 (quotation marks and citation omitted). "[A] charge remains 'pending' for purposes of [MCL 768.7b] until a defendant is sentenced on a conviction arising out of the offense, and until the original charge arising out of the offense is dismissed." *Smith*, 423 Mich at 434.

7.5 Mandatory Sentences

A. Sentencing Guidelines Do Not Apply to Mandatory Sentences

If a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, the court is required to impose that penalty. MCL 769.34(5). The sentencing guidelines are inapplicable to mandatory sentences. *Id*.

B. Life Imprisonment Without the Possibility of Parole (LWOP)

Certain homicide and nonhomicide crimes are generally punishable under Michigan law by mandatory life imprisonment without the possibility of parole. See MCL 791.234(6)(a)-(f).[13] However, an offender who was under the age of 18 at the time of the commission of an offense is not subject to the imposition of a mandatory sentence of life imprisonment without the possibility of parole. *Miller v Alabama*, 567 US 460, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense).[14]

Further, the Court agreed that "no meaningful neurological bright line exists between age 17 and age 18," and "to treat those two classes of defendants differently in [Michigan's] sentencing scheme is disproportionate to the point of being cruel under [Michigan's] Constitution." *People v Parks*, 510 Mich 225, 266 (2022) (quotation marks and citation omitted). The *Parks* Court considered an 18-year-

[13] MCL 791.234(6)(a)-(f) provides that prisoners who are sentenced to life imprisonment for certain enumerated offenses are not eligible for parole, and are instead subject to the provisions of MCL 791.244 or MCL 791.244a (both sections govern reprieves, commutations, and pardons).

[14] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014). Under the birthday rule, "a person attains a given age on the anniversary date of his or her birth." *Id*. at 464 (quotation marks and citation omitted).

old defendant convicted of first-degree murder, and did not discuss the mandatory imposition of life without parole sentences for 18-year-old defendants convicted of other offenses. *Id.* at 268 (concluding that "mandatorily subjecting 18-year-old defendants convicted of first-degree murder to a sentence of life without parole violates the principle of proportionality derived from the Michigan Constitution, . . . and thus constitutes unconstitutionally cruel punishment under Const 1963, art 1, § 16"). Accordingly, "the Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like other older adults." *Parks*, 510 Mich at 244. The Court of Appeals concluded that the holding in *Parks* was substantive, not procedural, and applied its holding to order resentencing for a defendant who sought relief on collateral review. *People v Poole*, ___ Mich App ___, ___ (2024) (defendant was an 18-year-old in 2001 when he committed the acts that resulted in a conviction of first-degree murder and a sentence of life without the possibility of parole).

However, imposition of a life without the possibility of parole sentence following a first-degree premeditated murder conviction does not violate the Michigan Constitution where the defendant was 21 years old at the time he committed the crime. *People v Adamowicz (On Second Remand)*, ___ Mich App ___, ___ (2023) (noting its holding is based on binding Michigan Supreme Court precedent and an examination of the factors set forth in *Parks*). Similarly, "defendant's mandatory life-without-parole sentence for a first-degree murder committed at the age of 19 continues to not be cruel or unusual punishment under Const 1963, art 1, § 16" following the decision in *Parks* because the Court in *Parks* "explicitly stated that its 'opinion today does not affect *Hall's*[15] holding as to those older than 18,'" and *Hall* "upheld the constitutionality of a sentence of life without parole for a defendant convicted of felony murder, expressly rejecting the defendant's argument that such a sentence constitutes cruel or unusual punishment[.]" *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___, ___ (2023), quoting *Parks*, 510 Mich at 255 n 9.

In order to comply with *Miller*, 567 US 460, MCL 769.25 and MCL 769.25a establish sentencing and resentencing procedures applicable to certain juvenile offenders and 18-year-old offenders who are convicted of certain offenses carrying mandatory life-without-parole sentences.[16] Under circumstances in which MCL 769.25 or MCL 769.25a applies to an offender,[17] the prosecuting

[15] *People v Hall*, 396 Mich 650 (1976).

attorney must file a motion if he or she intends to seek imposition of a life sentence without the possibility of parole, MCL 769.25(3); MCL 769.25a(4)(b), and the sentencing court must conduct a hearing and consider the factors set out in *Miller*, 567 US 460,[18] before imposing sentence, MCL 769.25(6); MCL 769.25a(4)(b). At a sentencing hearing held under MCL 769.25, "the prosecutor bears the burden to rebut a presumption that LWOP is a disproportionate sentence," and "[t]he standard for rebuttal is clear and convincing evidence." *People v Taylor*, 510 Mich 112, 120 (2022). If the prosecution fails to file a timely motion for a life-without-parole sentence, or fails to rebut the presumption that a LWOP sentence is disproportionate, the court must impose a term-of-years sentence as specified in MCL 769.25(9) or MCL 769.25a(4)(c). See *Taylor*, 510 Mich at 138-139. Further, even when a term-of-years sentence is imposed, the court "must consider youth as a mitigating factor at sentencing hearings conducted under MCL 769.25 or MCL 769.25a"; "however, this consideration need not be articulated on the record." *People v Boykin*, 510 Mich 171, 193 (2022).

"[T]he decision to sentence a juvenile to life without parole is to be made by a judge and . . . this decision is to be reviewed under the traditional abuse-of-discretion standard" because "[t]he trial court remains in the best position to determine whether each particular defendant is deserving of life without parole." *People v Skinner (Skinner II)*, 502 Mich 89, 97, 137 (2018) (holding that "MCL 769.25 does not violate the Sixth Amendment because neither the statute nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead, life without parole is authorized by the jury's verdict alone"), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). "[A]ll *Miller* requires sentencing courts to do is to consider how children are different before imposing life without parole on a juvenile." *Skinner II*, 502 Mich at 129-130 (explaining that trial courts are not required to "explicitly find that a defendant is 'rare' or 'uncommon' before it

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[16]Effective March 4, 2014, 2014 PA 23, which added MCL 769.25 and MCL 769.25a, also amended several provisions of the Michigan Penal Code governing offenses that are subject to the mandatory imposition of life-without-parole sentences to provide exceptions to the mandatory sentences as set out in MCL 769.25 and MCL 769.25a.

[17] MCL 769.25 applies to new cases and to pending cases that were not final for purposes of direct review at the time that *Miller*, 567 US 460, was decided. See MCL 769.25(1). MCL 769.25a provides guidance for applying MCL 769.25 retroactively in cases that were final for purposes of direct review at the time that *Miller* was decided, including procedures for resentencing. See MCL 769.25a(1); MCL 769.25a(4)-(6). "[A] concurrent sentence for a lesser offense is invalid if there is reason to believe that it was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *People v Turner*, 505 Mich 954 (2020). "Accordingly, at a *Miller* resentencing, the trial court may exercise its discretion to resentence a defendant on a concurrent sentence if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Id.*

can impose life without parole"). See also *Jones v Mississippi*, 593 US ___, ___ (2021) (holding "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient").

For additional discussion of sentencing juvenile and 18-year-old offenders to life without parole, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19. For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

C. No Judicial Discretion to Deviate From Mandatory Sentence

Where a statute mandates the imposition of a sentence of imprisonment for an offense, the trial court may not sentence the defendant to an at-home electronic monitoring program "in lieu of the statutorily required . . . incarceration[.]" *People v Pennebaker*, 298 Mich App 1, 4-9 (2012) (holding that because MCL 257.625(7)(a)(*ii*)(B) "unequivocally [requires a] trial court [to] sentence a defendant to a minimum of 30 days in the county jail" for a second violation of MCL 257.625(7)(a), "the trial judge did not have discretion to sentence defendant to less than 30 days in jail"; furthermore, "[t]he placement of an electronic-monitoring device on defendant [was] not 'imprisonment in the county jail' as required by the statute," and the statute did not authorize participation in a work-release program).

7.6 Information Must Allege Fact Triggering Mandatory Minimum

Under MCL 750.520b(2)(b), a first-degree criminal sexual conduct (CSC-I) "offense committed by an individual 17 years old or older against an individual under the age of 13 carries a 25-year mandatory minimum sentence." *People v Beck*, 510 Mich 1, 27 (2022). "If the defendant's age is

[18] "The [*Miller*] Court indicated that the following factors should be taken into consideration: '[defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences'; 'the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional'; 'the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him'; whether 'he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys'; and 'the possibility of rehabilitation . . . .'" *People v Skinner (Skinner II)*, 502 Mich 89, 104-105 (2018), quoting *Miller*, 567 US at 477-478 (second and third alterations in original).

not charged and found by the jury, there is no mandatory minimum." *Id.* at 28. "Accordingly, this fact increases the minimum penalty of the crime and therefore is an element that must be charged." *Id.* at 28-29.[19] The trial court plainly erred when it "applied the mandatory minimum to both counts of CSC-I despite only one of them being charged as 'Defendant 17 years of age or older.'" *Id.* at 29. In order to impose the mandatory minimum, "the information must allege the fact triggering the mandatory minimum for each count subject to that minimum." *Id.* at 27.

7.7 Sentencing Juveniles for Second-Degree Murder

"[A] parolable life sentence for a defendant who commits second-degree murder while a juvenile violates Article 1, § 16 of the Michigan Constitution," which forbids cruel or unusual punishment, including "unusually excessive imprisonment." *People v Stovall*, 510 Mich 301, 313, 322 (2022). Accordingly, while the statutory penalty for second-degree murder is imprisonment for life or any term of years, MCL 750.317, *Stovall* limits the sentencing court's discretion in cases involving juvenile offenders.

For a discussion of the constitutionality of mandatory life without parole sentences as applied to juveniles and 18-year-old defendants, see Section 7.5(B).

7.8 Sentence Credit[20]

"Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing." MCL 769.11b.

- "[T]he primary purpose of the sentence credit statute is to equalize as far as possible the status of the indigent and less

[19]Under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490 (2000); see also *Blakely v Washington*, 542 US 296, 303-304 (2004). In *Alleyne v United States,* 570 US 99, 112 (2013), the United States Supreme Court extended the *Apprendi/Blakely* rule to "mandatory minimum" sentences. "[A] fact is an element when it 'increases the punishment above what is otherwise legally prescribed' or 'increase[s] the mandatory minimum sentence.'" *People v Beck*, 510 Mich 1, 28 (2022), quoting *Alleyne*, 570 US at 108 (alteration in original). The *Beck* Court noted that "[t]his rule applied to jury findings in *Alleyne*, but it also applies to what must be charged in an indictment." *Beck*, 510 Mich at 28.

[20]"Courts have used the terms 'sentence credit' and 'jail credit' synonymously when describing the credit awarded for time spent in jail under MCL 769.11b." *People v Allen*, 507 Mich 597, 605 n 13 (2021).

financially well-circumstanced accused with the status of the accused who can afford to furnish bail." *People v Prieskorn*, 424 Mich 327, 340 (1985) (quotation marks and citation omitted). In light of the purpose of MCL 769.11b, "a showing that presentence confinement was the result of inability to post bond is an essential prerequisite to the award of sentence credit under the statute." *People v Whiteside*, 437 Mich 188, 196 (1991). See also *People v Allen*, 507 Mich 597, 606, 613 (2021) (noting "individuals who are detained in jail for some reason other than the denial of or inability to furnish bond are not entitled to jail credit" and finding that a parolee is entitled to sentence credit when they are incarcerated and the Michigan Department of Corrections (MDOC) has not yet filed a parole detainer because "parolees who are not arrested or detained under MCL 791.238 or arrested under MCL 791.239 who spend time in jail because of the denial of or inability to furnish bond are entitled to jail credit until the MDOC files a parole detainer under MCL 791.239").

Accordingly, MCL 769.11b only applies when the presentence incarceration is (1) for the sentencing offense, and (2) due to denial or inability to furnish bond. *Whiteside*, 437 Mich at 196; *Prieskorn*, 424 Mich at 340-341.

There are several circumstances under which a defendant is **not** entitled to sentence credit:

- **Defendant incarcerated for unrelated offense.** "[T]he sentence credit statute neither requires nor permits sentence credit in cases . . . where a defendant is released on bond following entry of charges arising from one offense and, pending disposition of those charges, is subsequently incarcerated as a result of charges arising out of an unrelated offense or circumstance and then seeks credit in the former case for that latter period of confinement." *Prieskorn*, 424 Mich at 340. See also *People v Bailey*, 330 Mich App 41, 65 (2019) (holding defendant not entitled to credit for time served while jailed for offenses unrelated to the sentencing offense).

- **Defendant already incarcerated.** Where a defendant is serving time on a sentence and a subsequent offense is adjudicated during the incarceration, the defendant is not entitled to credit against the second offense for time served before sentencing because he or she was incarcerated and serving time on an unrelated offense. *People v Givans*, 227 Mich App 113, 125-126 (1997).

- **Defendant serving consecutive sentence.** A defendant is not entitled to credit for time served against a sentence that must run consecutively to a sentence the defendant was serving at the time of the subsequent offense. *People v Conner*, 209 Mich App 419, 431-432 (1995).[21] Time spent incarcerated while awaiting disposition of the subsequent offense is "presentence time served that [the defendant] was already obliged to serve under a prior sentence." *Id.* at 431.

- **Crime committed while on parole.** "[T]he jail credit statute does not generally apply to parolees who commit new felonies while on parole[.]" *People v Idziak*, 484 Mich 549, 562 (2009).[22] See also *Allen*, 507 Mich at 613 ("*Idziak* broadly stands for the proposition that once the parole officials properly invoke their statutory authority to detain a parolee, that parolee is not entitled to jail credit under MCL 769.11b"); *People v Filip*, 278 Mich App 635, 643 (2008) (holding "the incarceration of a parole detainee is not credited toward the new sentence"). However, a parolee is entitled to sentence credit for any time they spend incarcerated before the filing of a parole detainer. *Allen*, 507 Mich at 608.

  - **Dead time.** Refuting the popular argument of recidivist parolees that time spent awaiting sentence on a new conviction is "dead" time, the Michigan Court of Appeals explained in *People v Johnson*, 283 Mich App 303, 312-313 n 4 (2009), that regardless of whether parole is revoked or not revoked, time served awaiting a subsequent conviction is credited toward the conviction for which the defendant was on parole. "If parole is revoked, the defendant is obligated to serve out the balance of the maximum sentence for the conviction that formed the basis for parole." *Id.* at 311, citing MCL 791.238(5) and MCL 791.234. "If parole is not revoked, the defendant continues to accrue time toward his or her ultimate discharge for the conviction upon which the defendant enjoys parole." *Johnson*, 283 Mich App at 311, citing MCL 791.238(6). "The

[21]Note that the defendant's name is misspelled as "Connor" as the case name in the Michigan Appeals Reports.

[22]Specifically, the Court explained: "[T]he jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not because of being denied or unable to furnish bond for the new offense, but for an independent reason." *Idziak*, 484 Mich at 562-563. See also *Allen*, 507 Mich at 606 ("once the individual is held for the parole violation, his or her continued detention has nothing to do with a denial of or inability to furnish bond in the new criminal proceeding[, a]nd once the individual is not being held because he or she was denied or unable to furnish bond in that proceeding, he or she is no longer entitled to jail credit under MCL 769.11b toward any sentence imposed in the new proceeding").

only time a defendant stops accruing time toward his or her ultimate discharge from the Department of Corrections is when a parolee has a warrant issued for a parole violation and the parolee remains at large. After a warrant is issued, '[t]he time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.'" *Johnson*, 283 Mich App at 311, quoting MCL 791.238(2) (alteration in original). See also *Allen*, 507 Mich at 612 n 25 (holding "the period from the violation to the parolee's capture . . . is considered 'dead time' that is not counted toward the parole violator's *original* sentence"). Whether "dead time" occurs when "the MDOC takes no action to detain the parolee until after his or her arrest on charges" has not been decided by any binding caselaw. See *id.*

- **Residential reentry program.** *People v Armisted*, 295 Mich App 32, 50-51 (2011) (defendant was considered a parolee while he was in a residential reentry program, and accordingly, was not entitled to jail credit).

- **Boot camp.** A defendant is not entitled to credit for time spent in boot camp when the defendant's participation in the program was not due to his being denied bond or being unable to furnish bond. *People v Wagner*, 193 Mich App 679, 682 (1992) (the defendant was sentenced after he failed to complete a boot camp program originally imposed in lieu of prison; he was not entitled to sentence credit for the time in boot camp because it did not result from a denial or inability to post bond).

- **Tether program.** A defendant is not entitled to credit for time spent in a tether program when the defendant's participation in the program was not due to his being denied bond or being unable to furnish bond. *People v Reynolds*, 195 Mich App 182, 183 (1992).

- **Rehabilitation program.** A defendant is not entitled to credit for time spent in a drug rehabilitation program, even when participation in the program was a condition of probation, unless the defendant's placement in the program was due to his or her inability to furnish bond. *Whiteside*, 437 Mich at 196-197. See also *People v Scott*, 216 Mich App 196, 199-200 (1996) (where a defendant's placement in a treatment or rehabilitation facility is not due to his being denied bond or being unable to furnish bond, MCL 769.11b does not apply).

- **Incarceration in other jurisdictions.** MCL 769.11b does not require sentence credit "for time spent incarcerated in other jurisdictions, for offenses committed while [a defendant] was free on bond for the offense for which he seeks such credit,

from the time that a detainer or hold either was or could have been entered against him by authorities in the jurisdiction where the defendant is to be sentenced." *People v Adkins*, 433 Mich 732, 734 (1989). See also *People v Patton*, 285 Mich App 229, 239 (2009) (the defendant was "not entitled to sentence credit for time served from the date a detainer could have, or was, lodged against him," because his incarceration in a federal penitentiary was not the result of his being denied or unable to furnish bond for the Michigan charge at issue).

- **Federal supervised release.** See *People v Clark*, 315 Mich App 219, 234 (2016) (rejecting the defendant's argument that, because he committed the sentencing offense while serving a federal supervised release term under 18 USC 3583(a), he was entitled to sentencing credit "based on his being on supervised release or incarcerated for his federal convictions").

A. Life Imprisonment Without Parole

"A defendant is entitled to credit for time served before sentencing [under MCL 769.11b] even if the defendant is sentenced to serve a mandatory term of life imprisonment without parole." *People v Seals*, 285 Mich App 1, 18-19 (2009).

B. Double Jeopardy Considerations

The Fifth Amendment's guarantee against multiple punishments for the same offense seeks to ensure "that the total punishment does not exceed that authorized by the Legislature." *People v Whiteside*, 437 Mich 188, 200 (1991) (cleaned up). "Sentence credit under the double jeopardy clauses [(US Const, Am V; Const 1963, art 1, § 15)] is only required for confinements amounting to time spent 'in jail' as that term is commonly used and understood." *People v Reynolds*, 195 Mich App 182, 184 (1992) (quotation marks and citation omitted).[23] See also *Whiteside*, 437 Mich at 202.

A special alternative incarceration (SAI) unit was the equivalent of being in jail where its "purposes [were] both rehabilitation and incarceration," and "[t]he discipline, regimentation, and deprivation of liberties are greater [at the SAI unit] than at any minimum security prison," and it is enclosed by an 18-foot high barbed wire fence. *People v Hite (After Remand)*, 200 Mich App 1, 3, 5-6 (1993).[24] Compare *Whiteside*, 437 Mich at 202 (participation in private rehabilitation program was not the equivalent of being "in

[23]Time spent in a private rehabilitation center did not constitute time served "in jail," and accordingly, neither MCL 769.11b nor the Double Jeopardy Clause required sentence credit. *Whiteside*, 437 Mich at 202. See also *Reynolds*, 195 Mich App at 184 (tether program is not the same thing as being in jail).

jail" where "[t]he purpose of such a program is treatment and rehabilitation, rather than incarceration").

C. No Double Credit for Consecutive Sentences

A defendant is not entitled to "double credit" when a consecutive sentence is imposed. *People v Cantu*, 117 Mich App 399, 403 (1982). Any jail credit to which the defendant is entitled should be applied toward the first sentence of the consecutive sentences. *Id.* "In giving a defendant credit for time served, a court acknowledges that, for all practical purposes, the defendant has already served a portion of his sentence. It follows logically that the credit should be given on the first of any consecutive sentences." *Id*. See also *People v Watts*, 186 Mich App 686, 689-690 (1991) (holding defendant was not entitled to double credit).

D. Sentence Reductions Due to Overcrowding

"[W]here a defendant is sentenced to probation, and the terms of probation include incarceration in the county jail, and the defendant thereafter violates probation and is sentenced to prison, he or she is not entitled to credit on his or her new sentence for any time by which his or her original incarceration in the county jail was reduced under MCL 801.57."[25] *People v Grazhidani*, 277 Mich App 592, 601 (2008). The *Grazhidani* Court explained:

> "Obviously the days that defendant did not serve on his sentence because of his early release from the county jail under the jail overcrowding act are not time spent 'in jail.' Because we read *Whiteside*[26] as concluding that the Legislature only intended to grant credit for time actually spent 'in jail,' we conclude that defendant is not entitled to credit for time that he otherwise would have spent in jail except for his early release under the jail-overcrowding act." *Grazhidani*, 277 Mich App at 599.

7.9 Sheriff's Good-Time/Disciplinary Credits

"Michigan law formerly awarded prisoners a 'good-time' allowance, but this scheme was subsequently replaced with a less generous scheme that allow[s] 'disciplinary credits' for only some categories of offenders. MCL 800.33(5)." *People v Tyrpin*, 268 Mich App 368, 371 (2005).

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[24]See Section 9.4(N) for a discussion of SAI programs.

[25]MCL 801.57 addresses reduction of sentences in response to jail overcrowding.

[26] *People v Whiteside*, 437 Mich 188 (1991).

MCL 800.33 permits the reduction of a Department of Corrections prisoner's sentence if their record shows that there are no violations of the rules and regulations; the statute refers to "good time" credits, "disciplinary credits," and "special disciplinary credits"; these terms all generally refer to sentence reductions. See also *People v Fleming*, 428 Mich 408, 422 n 16, 423-425 (1987) (discussing credits under MCL 800.33). Similarly, MCL 51.282 entitles county jail prisoners without any violations of rules and regulations to specified sentence reductions. A detailed discussion of credits prisoners can earn is outside the scope of this benchbook; this section addresses selected issues related to prisoner credits that impact sentencing courts.

Probation.[27] "[A] sentencing court may not revoke good-time credit that a defendant already has earned while serving a jail sentence as a condition of probation." *People v Resler*, 210 Mich App 24, 28 (1995) (holding the defendant was entitled to credit for both the time actually served in jail as a condition of probation and the good-time credit he earned while in jail against a subsequent prison term imposed as part of the sentence for violating that probation). But see *People v Grazhidani*, 277 Mich App 592, 595-601 (2008) (questioning and declining to extend *Resler* and concluding a defendant is not entitled to sentence credit for days not served because of early release under the jail overcrowding act, specifically MCL 801.57). "[A]lthough there is no constitutional right to good-time credit, once a good-time credit provision is adopted and a prisoner earns that credit, the deprivation of good-time credit constitutes a substantial sanction, and a prisoner may claim that a deprivation of good-time credit is a denial of a protected liberty interest without due process of law." *People v Cannon*, 206 Mich App 653, 656 (1994). Accordingly, a trial court cannot deny a defendant the good-time credit opportunities provided in MCL 51.282(2). *Cannon*, 206 Mich App at 657. That is, in a defendant's probation order, a court cannot impose a specific term of imprisonment and indicate the date on which the defendant is to be released. *Id*.

Invalid sentence. Good-time credit earned during a sentence that is later declared invalid does not transfer to the sentence imposed after the first sentence was declared invalid, where the defendant was not legally entitled to the good-time credit for the first sentence. *Tyrpin*, 268 Mich App at 371 (holding that "the trial court correctly determined that defendant should not benefit from a sentence credit that would not have been granted but for an error of law in defendant's original sentencing").

Ex Post Facto Clause. MCL 769.25a(6), which proscribes the inclusion of good time and disciplinary credits when resentencing juvenile offenders to sentences in which they are eligible for parole, cannot "be used to

[27] See Chapter 9 for a detailed discussion of probation.

prevent [those offenders] from receiving disciplinary credits on their minimum and maximum sentences." *People v Wiley*, 324 Mich App 130, 149-150, 168 (2018) (holding that MCL 769.25a(6) "violates the Ex Post Facto Clause of the United States and Michigan Constitutions, US Const art I, § 10; Const 1963, art 1, § 10, because it precludes [juveniles (or former juvenile offenders) who are being resentenced] from having disciplinary credits applied to their term-of-years sentences, and thus, MCL 769.25a(6) is a retroactive provision that increases their potential sentences or punishments"). See also *Hill v Snyder*, 900 F3d 260, 269 (CA 6, 2018) (adopting the same reasoning as *Wiley*, 324 Mich App 130, and holding that MCL 769.25a(6) violates the Ex Post Facto Clause of the United States Constitution).[28]

Sentencing order may not prohibit good time credit in advance. The Court held that MCL 51.282(2)[29] was violated where the trial court's sentencing orders specified that the respondent was not entitled to credit on the basis of a local sheriff's policy that categorically prohibited certain offenders from earning good-time credit, including offenders incarcerated for contempt of court. *ARM v KJL*, 342 Mich App 283, 301-303 (2022). MCL 51.282(2) does not give a sheriff discretion to determine whether a prisoner is eligible to earn credit in the first instance, and similarly, "a sentencing court is not permitted to circumvent or nullify the statutory scheme by taking away good-time credits in advance." *ARM*, 342 Mich App at 302 (quotation marks and citation omitted). Accordingly, "a local sheriff's policy cannot trump the Legislature's duly enacted statute," and "a court may not deprive a prisoner of good-time credit to which the prisoner may be entitled under statute before that prisoner has even begun serving the term of imprisonment." *Id*. at 302-303 (quotation marks and citation omitted).

7.10 Plea Agreements — Court Rule Requirements for Sentencing

Where a defendant's sentence will result from a plea-based conviction,[30] the trial court must determine whether the parties have made a plea agreement, "which may include an agreement to a sentence to a specific term or within a specific range[.]" MCR 6.302(C)(1). Any agreement "must be stated on the record or reduced to writing and signed by the

[28] Decisions of lower federal courts are not binding on Michigan courts, but they may be persuasive and instructive. *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004).

[29] MCL 51.282(2) provides that every prisoner whose record shows that there are no violations of rules and regulations shall be entitled to a reduction from his or her sentence on the basis of a specified formula.

[30] A comprehensive discussion of the requirements of a plea hearing is beyond the scope of this chapter. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 6, for more information. Additionally, the Michigan Judicial Institute has several Quick Reference Materials regarding pleas.

parties,"[31] and "[t]he written agreement shall be made part of the case file." *Id*. See also MCR 6.610(F)(5) (requiring court to make plea agreement part of the record).

"If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant." MCR 6.302(C)(2).

Before a trial court may sentence a defendant whose guilty or no contest plea is part of a plea agreement, the court must comply with the procedure in MCR 6.302(C)(3), in addition to the other plea-taking requirements set forth in MCR 6.302.

MCR 6.302(C)(3) provides:

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

If there is a plea agreement, the court must ask the defendant:

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[31] "The parties may memorialize their agreement on a form substantially approved by the SCAO." MCR 6.302(C)(1). See SCAO Form MC 414, *Plea Agreement*.

"(a) . . . whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty." MCR 6.302(C)(4).

7.11 *Killebrew* and *Cobbs* Plea Agreements

Generally, a plea agreement is an agreement between the defendant and the prosecutor where the defendant agrees to plead guilty in exchange for a sentence to a specified term or within a specified range (a sentence agreement) or in exchange for the prosecutor's recommendation for a sentence of a specified term or within a specified range (a sentence recommendation). See *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part by ADM File No. 2011-19,[32] and *People v Cobbs*, 443 Mich 276 (1993).

The trial court does not participate in negotiating a *Killebrew* plea agreement; however, a *Cobbs* plea agreement may be based in part on the trial court's statement of what it believes to be an appropriate sentence. *Killebrew*, 416 Mich at 205; *Cobbs*, 443 Mich at 283.[33]

A. *Killebrew* Pleas

In *Killebrew* the Court explained the trial court's involvement in two different types of plea agreements: (1) sentence agreements and (2) sentence recommendations. *People v Killebrew*, 416 Mich 189, 206-210 (1982).

Sentence agreements. Where "the sentence bargain includes a sentence agreement" that states the defendant will "plead guilty in exchange for a specific sentence disposition, the court must accept or reject the agreement or defer action until the judge has had the opportunity to consider the presentence report." *Killebrew*, 416 Mich at 206-207.

The sentencing court's next actions depend on whether it chooses to accept or reject the plea agreement:

- Accepts sentence agreement. If the court agrees to impose the sentence that the defendant and prosecutor agreed to, it

[32] Effective January 1, 2014. See 495 Mich clxxxvi-clxxxviii (2013).

[33] For a detailed discussion on the court's role in plea negotiation and sentence bargaining, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 6.

must "inform the defendant, accept the plea, and embody the terms of the plea agreement in the judgment and sentence." *Killebrew*, 416 Mich at 207.

- Rejects sentence agreement. If the court "finds that the bargain is not tailored to reflect the particular circumstances of the case or the particular offender," it must "reject the plea at that time." *Id.* If the court rejects the plea it must "on the record, inform the defendant that the court will not accept the plea or be bound by the agreement." *Killebrew*, 416 Mich at 207.

The prosecution is entitled to withdraw from the plea agreement if the sentencing court "intends to impose a sentence lower than the agreement calls for." *People v Siebert*, 450 Mich 500, 504 (1995) (holding "a court may not accept a plea bargain containing a sentence agreement but impose a lower sentence than that agreed to").

Sentence recommendations. Where "the plea agreement offered to the court by the prosecutor and defendant includes a non-binding prosecutorial recommendation of a specific sentence," the court can "accept the guilty plea (after consideration of the presentence report), yet refuse to be bound by the recommended sentence." *Killebrew*, 416 Mich at 209. If the court declines to impose the recommended sentence, it must:

- "explain to the defendant that the recommendation was not accepted by the court" and

- "state the sentence that the court finds to be the appropriate disposition." *Killebrew*, 416 Mich at 209.

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).[34]

Where the defendant entered into a *Killebrew* agreement to accept a minimum sentence within the specified range of 250 to 400 months he could not later challenge the sentence on the basis of it being above his advisory sentencing guidelines because by accepting the

[34]In *Killebrew*, the Court held that when the sentencing court does not accept the recommendation it must also "give the defendant the opportunity to affirm or withdraw his guilty plea." *Killebrew*, 416 Mich at 209-210. However, ADM File No. 2011-19, effective January 1, 2014, amended MCR 6.302(C) to state that the defendant is not entitled to withdraw the plea under these circumstances, effectively superseding that part of the *Killebrew* holding. See 495 Mich clxxxvi-clxxxviii (2013). But see *People v Foster*, 319 Mich App 365, 373 (2017) (holding that where the trial court imposed a $500 fine that was not 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 defendant an opportunity to affirm or withdraw his plea after the fine was imposed").

plea agreement he effectively agreed "to the proportionality and reasonableness of sentences within his sentencing range even if they fell outside of the guidelines calculated at sentencing." *People v Guichelaar*, ___ Mich App ___, ___ (2023) (noting that the "sentencing agreement was not contingent on its relationship to the sentencing guidelines," and no "specific reference to the anticipated guidelines" was made as part of the agreement). Further, the trial court was not required to articulate its basis for the guidelines departure because the agreement was not a *Cobbs* agreement. *Guichelaar*, ___ Mich App at ___.

B. *Cobbs* Plea[35]

"In addition to the procedures approved in *Killebrew*,"[36] a sentencing court may participate in sentence discussions by stating "*on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *People v Cobbs*, 443 Mich 276, 283 (1993). The sentencing court may not make a statement about the appropriate sentence on its own initiative. *Id.*

Specifically, the procedure for a *Cobbs* plea agreement includes:

- A request from the defendant or the prosecution for the sentencing court to state what sentence appears appropriate under the circumstances. *Cobbs*, 443 Mich at 283.

- The court's preliminary sentence evaluation is based on the information then available and the court retains discretion over the actual sentence imposed. *Cobbs*, 443 Mich at 283.

    - The preliminary evaluation does not bind the court's ultimate sentencing discretion "since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources." *Cobbs*, 443 Mich at 283.

- If the court decides it cannot impose the preliminary sentence, the defendant must be given an opportunity to withdraw his or her plea. *Cobbs*, 443 Mich at 283.

    - The court cannot indicate the sentence it would impose if the defendant decides to allow the plea to

[35] See also the Michigan Judicial Institute's *Cobbs Hearing Memorandum*, an optional guide for use during a *Cobbs* plea.

[36] *People v Killebrew*, 416 Mich 189 (1982).

stand. *People v Williams*, 464 Mich 174, 180 (2001).[37] See also MCR 6.310(B)(2)(b).

A sentencing court does not have to participate in a *Cobbs* procedure; the court may decline to disclose its preliminary assessment of the case. *Cobbs*, 443 Mich at 286.

7.12 Other Plea Agreement Issues

A. Violation of Plea Agreement

Fundamental fairness requires that promises made during plea negotiations should be respected, provided that the person making the promise was authorized to do so and the defendant relied on the promise to his or her detriment. *People v Ryan*, 451 Mich 30, 41 (1996). The remedy for a violation of a plea agreement by the defendant or the prosecutor can be specific performance, withdrawal from the plea agreement, or vacation of the plea. See *In re Guilty Plea Cases*, 395 Mich 96, 127 (1975); *People v Siebert*, 201 Mich App 402, 430-431 (1993); MCR 6.310. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 6 for a detailed discussion.

B. Defendant's Violation of Precondition

Where a "defendant violate[s] a precondition of [a] plea agreement," he or she "is not entitled to the benefit of [the] bargain," and "the trial court [is neither] bound by the preliminary sentencing evaluation[nor] . . . required to afford defendant an opportunity to withdraw [the] plea." *People v White*, 307 Mich App 425, 434-435 (2014) (holding that where the defendant failed to make a restitution payment that "was a specific precondition of being sentenced in accordance with the *Cobbs*[38] evaluation," he was not entitled to withdraw his plea after sentencing on the ground that the

[37] *Williams* distinguished the procedures under *Killebrew* and *Cobbs*, explaining that under a *Killebrew* sentence recommendation, "the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant," and "[t]he judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand, is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report." *Williams*, 464 Mich at 179. "By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process." *Id.* at 179-180.

[38] *People v Cobbs*, 443 Mich 276 (1993).

sentence imposed exceeded the preliminary evaluation) (citation omitted). See also *People v Kean*, 204 Mich App 533, 535-536 (1994) (holding the defendant did not have the right to withdraw his plea where he failed to remain in a treatment program or turn himself in as required by the plea agreement, which was a sentencing recommendation agreement).

C. Plea Agreements Involving Probation

A trial court may impose additional conditions on a defendant's sentence of probation, even when the sentence is part of the defendant's plea agreement and did not contain the additional conditions. *People v Johnson*, 210 Mich App 630, 632, 634-635 (1995) (rejecting defendant's motion to withdraw his plea or force specific performance of the sentence agreement). The Court explained that "probation is a matter of grace in lieu of a prison sentence aimed, in part, at rehabilitation and is at all times alterable and amendable," and accordingly, "a sentencing court may place conditions on a defendant's probation regardless of whether it was covered in the plea agreement." *Id*. at 634-635 (further holding defendant does not need to be informed of additional conditions before pleading).

D. Agreement to Sentence Within Guidelines Range

"[A] defendant who pleads guilty under a *Cobbs* agreement and agrees to a sentence at the low end of the guidelines range is entitled to a sentence at the low end of the *properly scored* guidelines range," even if the parties "agreed to an incorrect, higher guidelines range"; under these circumstances, "due process requires that the trial court sentence defendant to a minimum sentence at the low end of the appropriate guidelines range." *People v Smith*, 319 Mich App 1, 5, 9 (2017). Where the applicable guidelines range, as reflected in the presentence investigation report, "was far below the range calculated by the parties," and the record established that "defendant entered his plea with the understanding that he would receive a sentence at the low end of the correct guidelines range," sentencing him "within the higher guidelines range [would deny him] his right to due process because a defendant must enter a guilty plea with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 8-9 (noting that if the trial court determined on remand that it could not impose a sentence at the low end of the properly-scored guidelines range, the court "must provide defendant the opportunity to withdraw his guilty plea") (quotation marks and citation omitted).

E. Plea Agreement Resulting in Out-of-Guidelines Sentence

"The decision in *People v Cobbs*, 443 Mich 276 (1993), does not exempt trial courts from articulating the basis for guidelines departures"; accordingly, where "the trial court failed to articulate any reason for imposing a minimum sentence that was below the applicable guidelines range," the case was remanded for the trial court to "consult the applicable guidelines range and take it into account when imposing a sentence" and to "justify the sentence imposed in order to facilitate appellate review" as required under *People v Lockridge*, 498 Mich 358, 392 (2015). *People v Williams*, 501 Mich 966, 966 (2018) (quotation marks omitted).[39]

However, "a sentence that exceed[ed] the sentencing guidelines satisfie[d] the requirements of MCL 769.34(3) when the record confirm[ed] that the sentence was imposed as part of a valid plea agreement." *People v Wiley*, 472 Mich 153, 154 (2005). A defendant who enters into a plea agreement resulting in a downward departure from the guidelines waives appellate review of that sentence. *People v Seadorf*, 322 Mich App 105, 112 (2017).

Where the defendant entered into a *Killebrew* agreement to accept a minimum sentence within the specified range of 250 to 400 months he could not later challenge the sentence on the basis of it being above his advisory sentencing guidelines because by accepting the plea agreement he effectively agreed "to the proportionality and reasonableness of sentences within his sentencing range even if they fell outside of the guidelines calculated at sentencing." *People v Guichelaar*, ___ Mich App ___, ___ (2023) (noting that the "sentencing agreement was not contingent on its relationship to the sentencing guidelines," and no "specific reference to the anticipated guidelines" was made as part of the agreement). Further, the trial court was not required to articulate its basis for the guidelines departure because the agreement was not a *Cobbs* agreement. *Guichelaar*, ___ Mich App at ___.

F. Withdrawal of Plea

A detailed discussion of withdrawing a plea is located in the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 6.

MCR 6.310 governs the withdrawal of pleas; a "defendant has a right to withdraw any plea until the court accepts the plea on the record." MCR 6.310(A). However, "[t]here is no absolute right to

[39]Note that *Williams* does not address plea agreements under *People v Killebrew*, 416 Mich 189 (1982), and it is not clear whether its holding applies to sentences imposed under *Killebrew* agreements.

withdraw a guilty plea once it has been accepted by the trial court." *People v Montrose*, 201 Mich App 378, 380 (1993). MCR 6.310(B) sets out the requirements for withdrawing a plea after the court accepts it, but before the court imposes sentence.

Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin*, 491 Mich 916, 916 (2012).

MCR 6.310(C) governs withdrawal of a plea after sentencing. A detailed discussion of this issue is in the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1.

7.13 Lifetime Electronic Monitoring[40]

The court must order lifetime electronic monitoring as part of the defendant's sentence for certain first-degree criminal sexual conduct (CSC-I) and second-degree criminal sexual conduct (CSC-II) offenses. MCL 750.520n(1). Specifically, MCL 750.520n(1) provides:

> "A person convicted under [MCL 750.520b] or [MCL 750.520c] for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under . . . MCL 791.285."

"[A] person convicted under [MCL 750.520b (CSC-I)], regardless of the ages involved, is to be sentenced to lifetime electronic monitoring"; the age limitation in MCL 750.520n(1) only applies to CSC-II convictions. *People v Johnson*, 298 Mich App 128, 136 (2012).[41]

"[L]ifetime electronic monitoring applies only to persons who have been released on parole or from prison, or both[.]" *People v Kern*, 288 Mich App 513, 519 (2010) (the defendant, who was sentenced to five years of probation, with 365 days to be served in jail, was not subject to lifetime electronic monitoring). See also MCL 791.285(1); *People v Comer (Comer II)*, 500 Mich 278, 290 n 28 (2017) (noting that "the lifetime electronic monitoring requirement does not apply to individuals sentenced to imprisonment for life without the possibility of parole under [MCL 750.520b(2)(c)]"), superseded in part on other grounds by ADM File No. 2015-04, 501 Mich ci (2018).[42]

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[40]For a detailed discussion of postconviction and sentencing matters specific to sex offenders, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 9. Discussion of lifetime electronic monitoring requirements is also included in Chapter 2.

[41] See Section 7.13(A) for more information on lifetime electronic monitoring for CSC-I offenses, and Section 7.13(B) for more information on lifetime electronic monitoring for CSC-II offenses.

When statutorily required, lifetime electronic monitoring is "part of the sentence itself." *People v Cole*, 491 Mich 325, 327 (2012).[43] Accordingly, failure to include it in the judgment of sentence when it is required renders the sentence invalid. *Comer II*, 500 Mich at 292. See also *People v Pendergrass*, ___ Mich App ___, ___ (2023) (holding the trial court made a substantive mistake when it failed to include the statutorily required lifetime electronic monitoring in the judgment of sentence).

A. CSC-I Convictions

"Lifetime electronic monitoring must be imposed [as an additional punishment for a CSC-I conviction] (1) when a defendant receives a sentence of life in prison or any term of years under [MCL 750.520b(2)(a)]; *or* (2) when a defendant also receives a mandatory minimum sentence under [MCL 750.520b(2)(b)] because the crime was 'committed by an individual 17 years of age or older against an individual less than 13 years of age.' Thus, the Legislature has mandated lifetime electronic monitoring for all CSC-I sentences except when the defendant is sentenced to life without the possibility of parole under [MCL 750.520b(2)(c)]." *People v Comer (Comer II)*, 500 Mich 278, 289 (2017).

B. CSC-II Convictions

In contrast to CSC-I convictions under MCL 750.520b, CSC-II convictions under MCL 750.520c(2)(b) only require lifetime electronic monitoring "when the offender was 17 years of age or older and the victim was less than 13 years of age." *People v Comer (Comer II)*, 500 Mich 278, 291-292 (2017) (concluding that, because "[no] contrary intention appears," "the modifying phrase 'for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age' in [MCL 750.520n(1)] . . . is confined solely to the last antecedent," and therefore, "the age limitation only applies to convictions for CSC-II"). See also *People v Johnson*, 298 Mich App 128, 136 (2012) (lifetime electronic monitoring properly imposed where defendant was convicted of CSC-I even though the victim was not less than 13 years because that age limitation only applies to CSC-II convictions).

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[42]Effective September 1, 2018, ADM File No. 2015-04 superseded *Comer II* in part by amending MCR 6.429(A) to permit trial courts to *sua sponte* address erroneous judgments of sentence. See 501 Mich ci (2018).

[43]Because lifetime electronic monitoring "is part of the sentence itself," the trial court must advise and ensure the defendant understands the lifetime electronic monitoring requirement. *Cole*, 491 Mich at 327. See also MCR 6.302(B)(2) (addressing plea hearing requirements).

C. Constitutional Issues

Lifetime electronic monitoring has been challenged on several constitutional grounds; specifically, that it constitutes cruel and/or unusual punishment, that it constitutes an unreasonable search in violation of the Fourth Amendment, and that it imposes multiple punishments for the same offense in violation of the prohibition against double jeopardy. *People v Hallak*, 310 Mich App 555, 560 (2015), rev'd in part on other grounds 499 Mich 879 (2016).[44] However, the Court rejected all of the constitutional challenges to lifetime electronic monitoring. *Id.* at 567-583. For a detailed discussion of these constitutional issues, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 2.

7.14 Sex Offenders Registration Act (SORA)

SORA requires individuals convicted of certain offenses to register as sex offenders. See generally MCL 28.723. A discussion of SORA is outside the scope of this benchbook. See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10, for a detailed discussion of SORA.

7.15 Student Offenders — Additional Sentence Conditions Required for Criminal Sexual Conduct Convictions

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

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

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

7.16 Convictions Requiring Court-Ordered Medical Testing

The court must order that a defendant convicted of certain specified offenses involving intravenously using controlled substances, prostitution, solicitation, and gross indecency be tested for a sexually transmitted infection, hepatitis B infection, hepatitis C infection, and HIV or an antibody to HIV. MCL 333.5129. See also SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection,* which includes a list of all violations requiring court-ordered testing.

"The court also shall order the defendant or child to receive counseling regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum, information regarding treatment, transmission, and protective measures." MCL 333.5129(4).

The tests must be administered confidentially, and the results are confidential and may only be disclosed to the defendant, certain health officials, the victim or the victim's guardian if the victim is a minor, or other person potentially exposed during the course of the crime. MCL 333.5129(3)-(6).

Chapter 8: Court-Ordered Financial Obligations

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8.1 Introduction

This chapter addresses issues relevant to court-ordered financial obligations included in the defendant's sentence. Specifically, it addresses the court's duty to impose minimum state costs and its discretionary authority to impose additional fines, costs, and/or assessments. This chapter also discusses the court's obligation to assess a person's ability to pay before incarcerating that person for nonpayment.

See the Michigan Judicial Institute's *Table of General Costs* for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Michigan Judicial Institute's *Table of Felony Costs* and *Table of Misdemeanor Costs*.

For information on options to assist the court with collections issues that may arise, see the State Court Administrative Office's *Trial Court Collections Best Practices Manual*.

8.2 Statutory Authority to Impose Fines, Costs, and Assessments

"[C]ourts may impose costs in criminal cases only where such costs are authorized by statute." *People v Cunningham (Cunningham II),* 496 Mich 145, 149 (2014).

MCL 769.1k[1] provides a general statutory basis for a court's authority to impose fines and costs. Under MCL 769.1k(1)(a), the court *must* impose the minimum state costs as set out in MCL 769.1j[2] at the time the defendant is sentenced, at the time the defendant's sentence is delayed, or at the time entry of judgment is statutorily deferred. MCL 769.1k(1)(a). Under MCL 769.1k(1)(b) and MCL 769.1k(2), the court *may* also impose:

- "Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty." MCL 769.1k(1)(b)(*i*).

[1]Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k in response to the Michigan Supreme Court's holding in *Cunningham II*, 496 Mich at 145. In *Cunningham II*, the Court held that MCL 769.1k(1)(b)(*ii*)— which, at the time, provided for the imposition of "[a]ny cost in addition to the minimum state cost"—did "not provide courts with the independent authority to impose 'any cost'"; rather, it "provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 147, 158-159 (concluding that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs"). 2014 PA 352 added MCL 769.1k(1)(b)(*iii*) to provide for the imposition of "any cost reasonably related to the actual costs incurred by the trial court[.]"

[2]See Section 8.11 for discussion of minimum state costs.

- "Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty." MCL 769.1k(1)(b)(*ii*).

- "[A]ny cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case,[3] 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*).[4]

- "The expenses of providing legal assistance to the defendant." MCL 769.1k(1)(b)(*iv*).

- "Any assessment authorized by law." MCL 769.1k(1)(b)(*v*).[5]

- "Reimbursement under [MCL 769.1f]. MCL 769.1k(1)(b)(*vi*).[6]

- "[A]ny additional costs incurred in compelling the defendant's appearance." MCL 769.1k(2).

See also MCL 769.34(6) ("As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments."). "MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute," and "does not provide courts with the independent authority to impose any fine or cost." *Cunningham II,* 496 Mich at 158 n 11.

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[3]Court costs may be awarded under MCL 769.1k(1)(b)(*iii*), as amended by 2014 PA 352, effective October 17, 2014. *People v Konopka (On Remand)*, 309 Mich App 345, 357 (2015). See Section 8.7 for additional discussion of 2014 PA 352 and the imposition of "court costs."

[4]MCL 769.1k(1)(b)(*iii*) is applicable "[u]ntil May 1, 2024[.]" Courts must annually report to the State Court Administrative Office (SCAO) certain information regarding the imposition and collection of costs under MCL 769.1k(1)(b)(*iii*). MCL 769.1k(8).

[5]For example, under MCL 780.905, the court must "order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment" of $130.00 if the offense is a felony or $75.00 if the offense is a misdemeanor or ordinance violation. MCL 780.905(1)(a)-(b). In contrast to the minimum state cost, which may be ordered for each conviction arising from a single case, only one crime victim assessment per criminal case may be ordered, even when the case involves multiple offenses. MCL 780.905(2). See also the SCAO Crime Victim Assessment and Minimum State Cost Charts.

[6]See Section 8.10 for additional discussion of reimbursement under MCL 769.1f.

A. Information Must be Provided to Defendant

"The court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1)], including information about any cost imposed under [MCL 769.1k(1)(b)(*iii*)]. However, the information is not required to include the calculation of the costs involved in a particular case." MCL 769.1k(7).

B. Probation Sentences

The authorized fines, costs, and assessments set out in MCL 769.1k(1) and MCL 769.1k(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3); see also *People v Cunningham (Cunningham II),* 496 Mich 145, 152 (2014).

Ordering the payment of fines, costs, and assessments as a condition of probation is discussed in Section 8.9. Probation as a sentence in general is discussed in Chapter 9.

C. Scope of Costs Incurred in Compelling Appearance

"Under MCL 769.1k(2), the court may order the defendant to pay any additional costs incurred in compelling the defendant's appearance." *People v Godfrey*, ___ Mich App ___, ___ (2023) (quotation marks omitted). The Court concluded that MCL 769.1k(2) permits imposition of fees related to a defendant's GPS tether because "[a] GPS tether device is a tool used by courts to remotely surveil defendants," and "[g]iven this capability, a tether may also secure a criminal defendant's appearance at later court hearings." *Godfrey*, ___ Mich App at ___. In order to require "a defendant to bear the cost of a GPS tether" under MCL 769.1k(2), "there must also be evidence demonstrating that the GPS tether was imposed for the purpose of securing a defendant's appearance." *Godfrey*, ___ Mich App at ___ (concluding the trial court did not err by imposing tether-related fees in defendant's sentence where there was sufficient evidence "demonstrating the GPS tether was to secure defendant's appearance at later court hearings" based on the fact that the tether was ordered in the context of bond sufficient to guarantee the appearance of defendant).

D. Conditional Sentences

MCL 769.3(1) provides:

> "If a person is convicted of an offense punishable by a fine or imprisonment, or both, the court may impose a

> conditional sentence and order the person to pay a fine, with or without the costs of prosecution, and restitution as provided under [MCL 769.1a] or the crime victim's rights act, . . . MCL 780.751 to [MCL] 780.834, within a limited time stated in the sentence and, in default of payment, sentence the person as provided by law."

Additionally, except for defendants convicted of first- or third-degree criminal sexual conduct, MCL 769.3(2) authorizes the court to sentence the defendant to probation, conditioned on the probationer's payment of costs, among other things. MCL 769.3(2).[7]

8.3 Payment and Collection

Ordinarily, a defendant must pay all fines, costs, penalties, and other financial obligations at the time the court orders them. MCL 600.4803(1); MCR 1.110. However, "[t]he court may provide for the amounts imposed under [MCL 769.1k] to be collected at any time." MCL 769.1k(5). "The court shall order a specific date on which the penalties, fees, and costs are due and owing." MCL 600.4803(1).

An individual who fails to satisfy in full a penalty, fee, or costs imposed by the court within 56 days after the amount was due is subject to a late penalty equal to 20 percent of the amount owed. MCL 600.4803(1).[8] The court must inform an individual that a late penalty will be assessed if payment is not made within 56 days of the order. *Id*. The court may waive the late penalty upon request. *Id*.

If the court permits delayed payment of the amount due or permits the individual to pay the amount in installments, the court must inform the individual of the date on which, or time schedule under which, the total or partial amount of the fees, costs, penalties, and other financial obligations is due. MCL 600.4803(1).

"The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under [MCL 769.1k] by wage assignment." MCL 769.1k(4).

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[7]Note, however, that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(D)(3)(a). See Section 8.4 for discussion of MCR 6.425(D)(3) and a defendant's ability to pay court-ordered financial obligations.

[8]The 20-percent penalty imposed under MCL 600.4803(1) is not usurious; nor does it violate the equal protection and due process clauses of the federal and state constitutions. *People v Shenoskey*, 320 Mich App 80, 86-87 (2017).

"Except as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine, cost, fee, or assessment that the same defendant owes in any other case." MCL 769.1k(6).]

Ability to pay. "The plain language of MCL 769.1k does not require the trial court to consider a defendant's ability to pay before imposing discretionary costs and fees other than those for the expense for a court-appointed attorney."[9] *People v Wallace*, 284 Mich App 467, 469-470 (2009) (noting the Legislature has included such a requirement in other statutes but did not include it in MCL 769.1k).[10]

However, "[a] defendant must not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under this section 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).[11]

8.4 Imprisonment for Failure to Pay Court-Ordered Financial Obligations: Determination of Ability to Pay

"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." MCR 6.425(D)(3)(a). See also MCL 769.1k(10) ("A defendant must not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under this section 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.").

The court is required to determine a defendant's ability to pay in the following types of cases where incarceration or probation revocation is possible:

- Misdemeanor cases. MCR 6.001(B); MCR 6.425(D).
- District court proceedings. MCR 6.610(G)(2) (requiring district courts to comply with MCR 6.425(D)(3)).

[9]Costs of a court-appointed attorney are discussed in Section 8.8.

[10]While MCL 769.1k has been amended since the decision in *Wallace*, explicit statutory language requiring the assessment of a defendant's ability to pay has not been added.

[11]See Section 8.4 for a discussion of ability to pay issues.

- Probation violation hearings in felony and misdemeanor cases. MCR 3.944(F); MCR 3.956(C); MCR 6.001(B); MCR 6.445(G); MCR 6.933(J).

- Contempt proceedings. MCR 3.606(F); MCR 3.928(D).

- Juvenile proceedings, including the juvenile and/or the parents. MCR 3.928(D) (contempt); MCR 3.944(F) (probation violation); MCR 3.956(C) (review hearing); MCR 6.933(J) (juvenile probation revocation).

A. 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." MCR 6.425(D)(3)(c).

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." MCR 6.425(D)(3)(b).

C. Additional Resources

See the Michigan Judicial Institute's *Ability to Pay Benchcard* for a summary of the court's obligations regarding determining a defendant's ability to pay.

See also the SCAO Ability to Pay Workgroup's *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay*, April 20, 2015,

and the SCAO Memorandum, *Ability to Pay Court Rule Amendments*, August 16, 2016, for more information on determining a defendant's ability to pay court-ordered financial obligations.

8.5 Fines

The imposition of excessive fines is prohibited by US Const, Am VIII and Const 1963, art 1, § 16. The Eighth Amendment's Excessive Fines Clause, guarding "against abuses of government's punitive or criminal-law-enforcement authority," is a safeguard "fundamental to our scheme of ordered liberty, with deep roots in our history and tradition." *Timbs v Indiana*, 586 US ___, ___ (2019) (cleaned up). Accordingly, the Excessive Fines Clause is "incorporated by the Due Process Clause of the Fourteenth Amendment." *Id.* at ___.

At the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose "[a]ny fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty." MCL 769.1k(1)(b)(*i*).

MCL 769.1k(1)(b)(*i*) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted. *People v Johnson*, 315 Mich App 163, 198-199 (2016); *People v Johnson*, 314 Mich App 422, 423 (2016).

The language of the applicable penal statute often includes a specific authority to impose a fine, and the maximum amount of that fine. For example, an offender convicted of violating MCL 750.72 (first degree arson), may be punished "by imprisonment for life or any term of years or a fine of not more than $20,000.00 or 3 times the value of the property damaged or destroyed, whichever is greater, or both imprisonment and a fine." MCL 750.72(3).

If a statute authorizes the imposition of a fine but is silent with regard to the amount, the maximum fine permitted for a felony conviction is $5,000, MCL 750.503, and the maximum fine permitted for a misdemeanor conviction is $500, MCL 750.504.

Whenever an offense is punishable by a fine and imprisonment, the court has discretion to impose a sentence comprised of any combination of those penalties: a fine and no imprisonment, imprisonment and no fine, or both a fine and imprisonment. MCL 769.5(1)-(2). However, there is a rebuttable presumption in favor of imposing a nonjail or nonprobation sentence when an individual is convicted of a misdemeanor that is not a serious misdemeanor. MCL 769.5(3). See Section 1.2 for discussion of this misdemeanor sentencing presumption.

8.6 Costs Authorized by Statute

MCL 769.1k(1)(b)(*ii*) provides that, at the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose "[a]ny cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty."

See the Michigan Judicial Institute's *Table of General Costs* for a list of generally-applicable cost provisions and the categories of offenses to which they apply.

For specific cost provisions applicable to individual criminal offenses such as statutes authorizing imposition of costs of prosecution, see the Michigan Judicial Institute's *Table of Felony Costs* and the *Table of Misdemeanor Costs*.

8.7 Court Costs

MCL 769.1k(1)(b)(*iii*) authorizes what are generally referred to as "court costs." It provides:

> "Until May 1, 2024, [the court may impose] any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:
>
> > (A) Salaries and benefits for relevant court personnel.
> >
> > (B) Goods and services necessary for the operation of the court.
> >
> > (C) Necessary expenses for the operation and maintenance of court buildings and facilities." MCL 769.1k(1)(b)(*iii*).

If a court imposes costs under MCL 769.1k(1)(b)(*iii*), the court must report certain information to the State Court Administrative Office each year. MCL 769.1k(8).

A. Legal History Regarding the Authorization to Impose Court Costs

Effective October 17, 2014, 2014 PA 352 was enacted in response to the Michigan Supreme Court's decision in *People v Cunningham (Cunningham II),* 496 Mich 145 (2014), which held that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as

independent authority to impose $1,000 in court costs[.]" *Cunningham II*, 496 Mich at 159. Before being amended by 2014 PA 352, MCL 769.1k(1)(b)(*ii*) provided simply for the imposition of "[a]ny cost," and MCL 769.1k did not contain any separate authorization for the imposition of "court costs." The *Cunningham II* Court concluded that "[former] MCL 769.1k(1)(b)(*ii*) [did] not provide courts with the independent authority to impose 'any cost,'" but instead "allow[ed] courts to impose those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 153. Accordingly, the Legislature enacted 2014 PA 352 as "a curative measure that addresses the authority of courts to impose costs under . . . MCL 769.1k[.]" See 2014 PA 352, enacting section 2. The Legislature added MCL 769.1k(1)(b)(*iii*) to specifically provide for the imposition of court costs. See 2014 PA 352.

B. Factual Basis Required

"MCL 769.1k(1)(b)(*iii*) independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense," and "[a] trial court possesse[s] the authority under MCL 769.1k, as amended by 2014 PA 352, to order [a] defendant to pay court costs." *People v Konopka (On Remand)*, 309 Mich App 345, 350, 358 (2015). "However, without a factual basis for the costs imposed, [the Court] cannot determine whether the costs imposed were reasonably related to the actual costs incurred by the trial court, as required by MCL 769.1k(1)(b)(*iii*)." *Konopka*, 309 Mich App at 359-360 (remanding for the trial court to establish a factual basis for the imposed costs). See also *People v Posey*, 334 Mich App 338, 364 (2020), overruled in part on other grounds 512 Mich 317 (2023)[12] (holding "the trial court plainly erred by failing to articulate the factual basis for the court costs imposed," but declining to remand where it was clear that the trial court relied on the SCAO calculation of the average cost of processing a case in that county, defendant did not preserve the issue with an objection, and defendant failed to demonstrate prejudice on appeal).

C. Constitutional Challenges

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. *People v Konopka (On Remand)*, 309 Mich App 345, 365, 367-370, 376 (2015).

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

Furthermore, "although it imposes a tax" without expressly stating that it does, MCL 769.1k(1)(b)(*iii*) "is neither obscure nor deceitful, and therefore, it does not run afoul of the Distinct Statement Clause of Michigan's Constitution"; moreover, "because a 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 so that it does not run afoul of the separation-of-powers provision of" the Michigan Constitution. *People v Cameron*, 319 Mich App 215, 236 (2017).

In *People v Johnson*, 336 Mich App 688, 691 (2021), the defendant brought a facial challenge to MCL 769.1k(1)(b)(*iii*), arguing that it "deprives criminal defendants of their due-process right to an impartial decisionmaker and violates separation-of-powers principles." The Court held that MCL 769.1k(1)(b)(*iii*) is not facially unconstitutional. *Johnson*, 336 Mich App at 691 (leaving "open the question whether a successful as-applied challenge could be made"). Judges are not rendered impartial by the statute because rather than granting total discretion, MCL 769.1k(1)(b)(*iii*) requires costs to be reasonably related to actual costs, it does not authorize trial courts to increase costs imposed as a means for generating more revenue, there is not a "direct nexus between a judge's compensation and any fees or costs imposed," and there is no evidence that costs imposed under the statute are "funneled into a special or specific fund to be administered by judges[.]" *Johnson*, 336 Mich App at 701-702. Further, there is no separation-of-powers violation because the statute does not make "it impossible for trial courts to fulfill their constitutional mandates"; specifically, "defendant has not shown that this statute creates a situation where there exists no set of circumstances under which a judge in this state is impartial, nor has he shown that all trial judges must be disqualified because the statute creates a financial interest in the judiciary to cause them to ignore their constitutional mandates." *Id*. at 704-705 (cleaned up).

8.8 Costs of a Court-Appointed Attorney

"If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution." MCR 6.005(C). MCL 769.1k(1)(b)(*iv*) specifically permits a court to impose on a defendant "[t]he expenses of providing legal assistance to the defendant."

A. Finding of Guilt Prerequisite to Imposition of Fees

"A court may not impose upon [a] defendant the expenses of providing his legal assistance [under MCL 769.1k(1)(b)(*iv*)] until [that] defendant is found guilty, enters a plea of guilty, or enters a plea of nolo contendere." *People v Dyer*, 497 Mich 863, 863 (2014) (noting that "if defendant withdraws his plea [under MCR 6.310(A)], imposition of attorney fees is not appropriate at [that] time").

Under MCL 768.34,[13] the court cannot order a defendant to repay the cost of appointed counsel if the prosecution files an order of *nolle prosequi*. *People v Jose*, 318 Mich App 290, 296 (2016). "MCL 768.34 precludes a trial court from ordering reimbursement of any costs—including the cost of court-appointed counsel—for a defendant whose prosecution is suspended or abandoned." *Jose*, 318 Mich App at 297, 299 (additionally holding that MCR 6.005(C) does not provide authority for the trial court to order reimbursement for the work appointed counsel performed before trial where "[t]he court never determined that defendant was 'able to pay part of the cost of a lawyer' and never 'require[d] contribution'" under MCR 6.005(C)) (second alteration in original).

B. Factual Findings Must Support Attorney Fees

Trial courts must make factual findings regarding the cost of providing legal services to a defendant in support of attorney fees assessed under MCL 769.1k(1)(b)(*iv*). *People v Lewis*, 503 Mich 162, 163-164 (2018) (noting that "the language of MCL 769.1k(1)(b)(*iii*), which gives trial courts the authority to assess costs without 'separately calculating those costs involved in the particular case,' [does not apply] to the attorney-fee provision in [MCL 769.1k(1)(b)(*iv*)], which authorizes the imposition of expenses for legal assistance to a defendant").

C. Defendant's Ability to Pay

A trial court is not required to analyze a defendant's ability to pay a court-appointed attorney fee before imposing the fee; it is only required to do so when the fee is actually enforced. *People v Jackson*, 483 Mich 271, 275 (2009). However, "once an ability-to-pay assessment is triggered, the court must consider whether the

[13] MCL 768.34 provides:

> "No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he was in custody."

defendant remains indigent and whether repayment would cause manifest hardship." *Id.*

"[R]emittance orders of prisoner funds, under MCL 769.1*l*, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment because the statute is structured to only take monies from prisoners who are presumed to be nonindigent." *Jackson*, 483 Mich at 275.

D. Reasonableness of the Fee Must be Considered

The trial court erred where it limited an award of attorney fees to the maximum allowed for plea cases under the county's fee schedule without consideration of "the reasonableness of the fee in relation to the actual services rendered[.]" *In re Ujlaky Attorney Fees*, 498 Mich 890, 890 (2015). "Although the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, ipso facto, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may." *Id.* (directing the trial court, on remand, to "either award the requested fees, or articulate on the record its basis for concluding that such fees are not reasonable").

E. Contingency Fee Arrangement Impermissible

"[T]he trial court's policy of not paying [appointed appellate] counsel for time spent in preparing a delayed application for leave to appeal or for preparing [appellate] motions . . . when [the Court of Appeals] ultimately denies leave to appeal 'for lack of merit in the grounds presented' or denies relief on the motions constitute[d] an abuse of discretion." *In re Foster Attorney Fees*, 317 Mich App 372, 376 (2016). "[A]ttorneys are not allowed to enter into contingency-fee arrangements in criminal matters under the Michigan Rules of Professional Conduct. MRPC 1.5(d). Therefore, no attorney in the state of Michigan could agree to be a court-appointed attorney . . . under [the trial] court's current policy because to do so would require entering into a contingency-fee arrangement in violation of the attorney's professional responsibilities." *Foster*, 317 Mich App at 377.

8.9 Payment of Fines, Costs, and Assessments as a Condition of Probation[14]

The costs authorized by MCL 769.1k(1) and MCL 769.1k(2) are available when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). Additionally, MCL 771.3—which addresses probation condition requirements—includes mandatory and discretionary payment conditions.

Mandatory payment conditions. Among other requirements not related to payment, a sentence of probation must include:

- if sentenced in circuit court, an order to pay a probation supervision fee,[15] MCL 771.3(1)(d);
- an order to pay restitution,[16] MCL 771.3(1)(e);
- an order to pay an assessment under MCL 780.905 (crime victim rights),[17] MCL 771.3(1)(f); and
- an order to pay the minimum state cost,[18] MCL 771.3(1)(g); MCL 769.1j(3).

If costs are ordered under MCL 769.1f, reimbursement must be made a condition of probation. MCL 769.1f(5). See Section 8.10 for discussion of reimbursement to the state or the local unit of government for emergency response and prosecution expenses.

Discretionary payment conditions. A sentence of probation may also include an order that the probationer pay immediately (or within the probation period) any fine imposed, pay any costs "incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer," and pay any assessment other than a crime victim rights assessment under MCL 780.905. MCL 771.3(2)(b)-

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[14]See Chapter 9 for more information on probation.

[15]Discussed in Section 8.9(A).

[16]Discussed in Section 8.12.

[17]Under MCL 780.905, the court must "order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment" of $130.00 if the offense is a felony or $75.00 if the offense is a misdemeanor or ordinance violation. MCL 780.905(1)(a)-(b). The crime victim rights assessment cannot be waived. See *id.* In contrast to the minimum state cost, which may be ordered for each conviction arising from a single case, only one crime victim assessment per criminal case may be ordered, even when the case involves multiple offenses. MCL 780.905(2). See also the SCAO Crime Victim Assessment and Minimum State Cost Charts.

[18]Discussed in Section 8.11.

(d); MCL 771.3(5). Specific limitations and requirements apply to discretionary costs imposed under MCL 771.3(2); see Section 8.9(C).

A. Probation Supervision Fees

Fees without electronic monitoring. Unless the court determines the supervised individual is indigent and waives the fee pursuant to MCL 771.3c(2), "the circuit court shall include in each order of probation for a defendant convicted of a crime that the department of corrections collect a probation supervision fee of $30.00 multiplied by the number of months of probation ordered, but not more than 60 months, if a defendant is placed on probation supervision without an electronic monitoring device." MCL 771.3c(1).

Fees with electronic monitoring. Unless the court determines the supervised individual is indigent and waives the fee pursuant to MCL 771.3c(2), "[i]f a defendant is placed on probation supervision with an electronic monitoring device under this subsection, the circuit court's order shall include in its order that the department of corrections collect a probation supervision fee of $60.00 multiplied by the number of months of probation ordered, but not more than 60 months." MCL 771.3c(1).

Regardless of whether electronic monitoring is ordered, "the fee is payable when the probation order is entered, but the fee may be paid in monthly installments if the court approves installment payments for that probationer." MCL 771.3c(1).

"The fee must be collected as provided . . . MCL 791.225a." MCL 771.3c(1).

"A person must not be subject to more than 1 supervision fee at the same time. If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration." MCL 771.3c(1).

"If a person who is subject to a probation supervision fee is also subject to any combination of fines, costs, restitution orders, assessments, or payments arising out of the same criminal proceeding, the allocation of money collected for those obligations must be as otherwise provided in [MCL 775.22]." MCL 771.3c(3).

MCL 771.3c "does not apply to a juvenile placed on probation and committed under . . . MCL 803.301 to [MCL] 803.309." MCL 771.3c(4).

B. Payment Requirements

The court may require a probationer to "[a]gree to pay by wage assignment any restitution, assessment, fine, or cost imposed by the court." MCL 771.3(2)(f).

"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." MCL 771.3(7).

C. Ordering Discretionary Costs—Issues

1. Limitation of Costs

"If the court requires the probationer to pay costs under [MCL 771.3(2)], the costs must be limited to expenses specifically incurred in prosecuting the defendant or[19] providing legal assistance to the defendant and supervision of the probationer." MCL 771.3(5).

For example, a trial court may impose costs to reimburse the prosecution for the expense of engaging an expert witness for trial. *People v Brown*, 279 Mich App 116, 140 (2008).

Assessments. However, "MCL 771.3(2)(d) does not provide trial courts with the independent authority to impose any assessment as a condition of probation, but rather permits courts to impose only those assessments that are separately authorized by statute." *People v Juntikka*, 310 Mich App 306, 313-315 (2015) (holding that "[t]he trial court erred by imposing [a] probation enhancement fee," which "accounted for general operating costs incurred by the probation department," because the "fee was not separately authorized by statute[] and . . . was not a cost 'specifically incurred' in defendant's case [as required] under MCL 771.3(5)") (additional citations omitted).[20]

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[19]In *People v Humphreys*, 221 Mich App 443, 452 (1997), the Court of Appeals held that "the Legislature intended the 'or' in [former MCL 771.3(4), now MCL 771.3(5),] to mean 'and,'" and, therefore, that "the trial court properly ordered defendant to pay those costs relating to both the prosecution and the defense of his case."

[20]Similarly, the Juvenile Code does not authorize the imposition, in a delinquency proceeding, of a flat-rate probation supervision fee that does not take into account the actual costs expended on a specific juvenile. *In re Killich*, 319 Mich App 331, 342-343 (2017) (citing *Juntikka*, 310 Mich App at 308-309, 314, and holding that a flat-rate $100 probation supervision fee was not authorized under MCL 712A.18). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 18, for discussion of the imposition of costs in juvenile proceedings.

Court costs. MCL 771.3(5) does not authorize court costs. *People v Butler-Jackson*, 499 Mich 963, 963 (2016) ("[t]hough probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing her with legal assistance are authorized under [MCL 771.3(5)], court costs are not").

2. Ability to Pay Determinations

"If the court imposes costs under [MCL 771.3(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 [MCL 771.3(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 [MCL 771.3(2)], the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.
>
> (b) A probationer who is required to pay costs under [MCL 771.3(1)(g) (minimum state cost) or MCL 771.3(2)(c) (expenses specifically incurred in the case)] 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." MCL 771.3(6)(a)-(b).

MCL 771.3(6)(a)[21] "does not require that a hearing be held to determine whether a defendant, who has not asserted an inability to pay costs, is able to make such payment[.]" Instead, the statute provides that "the court may not require payment unless the probationer is able to pay"; "[t]hus the statute makes a distinction between *imposition* and *payment*." *People v Music*, 428 Mich 356, 359-360 (1987) (quotation marks and citation omitted). See also *People v Jackson*, 483 Mich 271, 291

[21]Formerly MCL 771.3(5)(a). At the time *Music* was decided, MCL 771.3(5)(a) addressed restitution in addition to costs. That provision has since been amended, both substantively and ministerially. However, the amendments did not add a specific hearing requirement. Accordingly, it does not appear that the *Music* analysis was impacted by the subsequent amendments to MCL 771.3.

(2009) (an ability to pay determination "is only required at the time payment is required, i.e., when the imposition is enforced"), citing *Music*, 428 Mich at 360. If the probationer "timely asserts an inability to pay," the trial court is required to hear the challenge and determine whether the costs are within the probationer's means. *Music*, 428 Mich at 362 (citation omitted).

A trial court may consider a defendant's potential for employment when determining the defendant's ability to pay. *People v Brown*, 279 Mich App 116, 139-140 (2008). Where the defendant opted to attend school full-time instead of working full-time, the trial court concluded that the defendant could pay if he chose to do so and properly imposed costs under MCL 771.3. *Brown*, 279 Mich App at 139-140.

Ability to pay must also be considered before revoking probation for failure to meet payment obligations. See MCL 771.3(8). See Section 8.9(F).

D. Special Sentences

1. Conditional Sentences

Except for defendants convicted of first- or third-degree criminal sexual conduct, MCL 769.3(2) authorizes a sentencing court to sentence a defendant to probation, conditioned on the probationer's payment of costs, among other things. The court may establish a time within which the defendant must make repayment in installments, and if the probationer defaults on any payment, the court may sentence him or her to the sentence provided by law. *Id*.[22]

2. Deferred or Delayed Judgment in Circuit Court

"If entry of judgment is deferred in the circuit court, the court shall require the individual to pay a supervision fee in the same manner as is prescribed for a delayed sentence under [MCL 771.1(3)], shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j (minimum state costs)], and may impose, as applicable, the conditions of probation described in subsection (1), and subject to subsection

[22]Note, however, that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(D)(3). See Section 8.4 for discussion of MCR 6.425(D)(3) and a defendant's ability to pay court-ordered financial obligations.

(11), the conditions of probation described in subsections (2) and (3)." MCL 771.3(9).

3. Deferred or Delayed Judgment in District or Municipal Court

"If sentencing is delayed or entry of judgment is deferred in the district court or in a municipal court, the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j] and may impose, as applicable, the conditions of probation described in subsection (1), and subject to subsection (11), the conditions of probation described in subsections (2) and (3)." MCL 771.3(10).

E. Cost of Electronic Monitoring

A probationer who is permitted to be released from jail for purposes of attending work or school under MCL 771.3(2)(a) and who is ordered to wear an electronic monitoring device under MCL 771.3e must pay for the installation, maintenance, monitoring, and removal of the device. MCL 771.3e(1).

F. Probation Revocation[23]

Compliance with a court's order to pay costs must be made a condition of probation. MCL 771.3(8). Subject to MCL 771.4b,[24] "the court may only sanction a probationer to jail or revoke the probation of a probationer who fails to comply with the order if the probationer has the ability to pay and has not made a good-faith effort to comply with the order." MCL 771.3(8). To determine whether an individual's probation should be revoked on the basis of unpaid costs, the court must consider the following:

- the probationer's employment status, earning ability, and financial resources;
- the willfulness of the probationer's failure to pay; and
- any other circumstances that may impact the probationer's ability to pay. MCL 771.3(8).[25]

[23]See Chapter 9 for more information on probation revocation.

[24]Technical probation violations are addressed by MCL 771.4b; this is not specific to revocation for failure to pay. Probation is discussed in detail in Chapter 9.

[25]These proceedings are in addition to the proceedings provided in MCL 771.4, which are not specific to revocation for failure to pay. Probation is discussed in detail in Chapter 9.

See also MCL 769.1f(5) (discussing probation revocation for failure to reimburse the state or a local unit of government for expenses incurred in relation to the crime, including emergency response and prosecution). The revocation procedure under MCL 769.1f(5) is substantially similar to MCL 771.3(8); however, it additionally instructs the court to also consider the probationer's number of dependents. MCL 769.1f(5).

Further, "[t]he court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence investigation reports)] and [MCR 6.425(D) (governing sentencing procedure)]." MCR 6.445(G). MCR 6.425(D)(3) requires the court to 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 before revoking probation for failure to comply with an order to pay money. See Section 8.4 for discussion of MCR 6.425(D)(3) and a defendant's ability to pay court-ordered financial obligations.

8.10 Costs of Emergency Response and Prosecution

MCL 769.1k(1)(b)(*vi*) authorizes the court to impose reimbursement under MCL 769.1f.

MCL 769.1f authorizes[26] or requires[27] the court to order the defendant to reimburse federal, state, or local units of government "for expenses incurred in relation to [the defendant's commission of an offense specifically enumerated in the statute] including, but not limited to, expenses for an emergency response and expenses for prosecuting the person[.]" MCL 769.1f(1); MCL 769.1f(9).

For a comprehensive list of offenses to which MCL 769.1f applies, see the Michigan Judicial Institute's *Table of Felony Costs* and the *Table of Misdemeanor Costs*.

A. Allowable Expenses

Allowable expenses include:

[26] For offenses set out in MCL 769.1f(1)(a)-(*l*), a sentencing court has *discretion* to order a defendant to pay the costs authorized under MCL 769.1f.

[27] Reimbursement for expenses listed in MCL 769.1f(2)-(8) *must* be ordered against an offender for a conviction arising from any violation or attempted violation of the statutes enumerated in MCL 769.1f(9).

- "The salaries or wages, including overtime pay, of law enforcement personnel for time spent responding to the incident from which the conviction arose, arresting the person convicted, processing the person after the arrest, preparing reports on the incident, investigating the incident, transportation costs, and collecting and analyzing evidence, including, but not limited to, determining bodily alcohol content and determining the presence of and identifying controlled substances in the blood, breath, or urine." MCL 769.1f(2)(a).

- "The salaries, wages, or other compensation, including overtime pay, of fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, for time spent in responding to and providing fire fighting, rescue, and emergency medical services in relation to the incident from which the conviction arose." MCL 769.1f(2)(b).

- "The cost of medical supplies lost or expended by fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, in providing services in relation to the incident from which the conviction arose." MCL 769.1f(2)(c).

- "The salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction." MCL 769.1f(2)(d).

- "The cost of extraditing a person from another state to this state including, but not limited to, all of the following:

  (*i*) Transportation costs.

  (*ii*) The salaries or wages of law enforcement and prosecution personnel, including overtime pay, for processing the extradition and returning the person to this state." MCL 769.1f(2)(e).

B. Payment

A defendant must immediately pay costs ordered under MCL 769.1f unless the court authorizes the individual to pay the amount ordered within a certain period of time or in specific installments. MCL 769.1f(4). If personnel from more than one unit of government incurred any of the expenses described in MCL 769.1f(2), the court may require the defendant to reimburse each unit of government for its expenses related to the incident. MCL 769.1f(3).

> "Notwithstanding any other provision of this section, a person shall not be imprisoned, jailed, or incarcerated for a violation of parole or probation, or otherwise, for failure to make a reimbursement as ordered under this section unless the court determines that the person has the resources to pay the ordered reimbursement and has not made a good faith effort to do so." MCL 769.1f(7).

8.11 Minimum State Costs

MCL 769.1k(1)(a) expressly requires a court to "impose the minimum state costs as set forth in [MCL 769.1j.]" If a defendant is ordered to pay any combination of a fine, costs, or applicable assessments, the court must order the defendant to pay costs of not less than $68 if convicted of a felony or $50 if convicted of a misdemeanor or ordinance violation. MCL 769.1j(1)(a)-(b). Accordingly, imposition of state costs is only required if two or more other fines, costs, or assessments are imposed. See *id.* (requiring imposition of minimum state costs "if the court orders a person convicted of an offense to pay any *combination* of a fine, costs, or applicable assessments") (emphasis added). See also MCL 712A.18m (setting forth the minimum state costs for juvenile proceedings). Minimum state costs can be waived under the conditions set out by MCL 771.3(6)(b).

Although "the costs imposed under MCL 769.1j(1)(a) are . . . a tax," MCL 769.1j(1)(a) does not violate the separation of powers under Const 1963, art 3, § 2, or the Distinct-Statement Clause, Const 1963, art 4, § 32, for the same reasons expressed in *People v Cameron*, 319 Mich App 215, 218 (2017), with respect to MCL 769.1k(1)(b)(*iii*). *People v Shenoskey*, 320 Mich App 80, 83-84 (2017). *Cameron* is discussed in Section 8.7(C).

See also the SCAO Crime Victim Assessment and Minimum State Cost Charts.

8.12 Restitution[28]

Victims have a constitutional right to restitution. Const 1963, art 1, § 24. Additionally, restitution is mandatory under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. See *People v Garrison*, 495 Mich 362, 365 (2014). The sentencing court must, on the record, "order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(D)(1)(f); see also MCL 769.1a(2); MCL 780.766(2) (felony article);

[28]For detailed information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

MCL 780.794(2) (juvenile article); MCL 780.826(2) (serious misdemeanor article).[29] "[B]oth [the CVRA[30] and MCL 769.1a(2)] impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete." *Garrison*, 495 Mich at 368 (noting that "the plain meaning of the word 'full' is 'complete; entire; maximum'") (citation omitted).

During sentencing, the court is required to specifically "order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(D)(1)(f). See also MCR 6.610(G)(1)(d) (including the same requirement for proceedings in district court).[31]

"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 6.425(D)(2)(b). See also MCR 6.610(G)(1)(d) (including the same requirement for proceedings in district court).

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

MCR 6.430 governs postjudgment motions to amend restitution in both felony and misdemeanor cases. See MCR 6.001(A)-(B). For a discussion of MCR 6.430, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 1.

8.13 Use of Bail Money to Pay Court-Ordered Financial Obligations

A defendant who pays his or her bail or bond by a cash deposit must be notified that on conviction "the cash deposit may be used to collect a fine, costs, restitution, assessment, or other payment pursuant to [MCL

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

[30] Although the *Garrison* Court specifically applied MCL 780.766(2) (the restitution provision in the felony article of the CVRA), the Court's definition of the term *full restitution* as "restitution that is maximal and complete" would presumably extend to the restitution provisions contained in the CVRA's juvenile article (MCL 780.794(2)) and serious misdemeanor article (MCL 780.826(2)) as well. See *Garrison*, 495 Mich at 367 n 11, 368 (noting that "MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)").

[31] For additional guidance regarding ordering and amending restitution, see the State Court Administrative Office's Memorandum, issued June 12, 2019. Note that the link to this resource was created using Perma.cc and direct the reader to an archived record of the page.

765.15(2)]." MCL 765.6c. See also MCL 780.66(1) and MCL 780.67(1)(a), which contain substantially similar language for a bail deposit or bail bond collected for traffic offenses and misdemeanors.

"If bond or bail is discharged, the court shall enter an order with a statement of the amount to be returned to the depositor. If the court ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court shall order the fine, costs, restitution, assessment, or other payment collected out of cash bond or bail personally deposited by the defendant under this chapter, and the cash bond or bail used for that purpose shall be allocated as provided in [MCL 775.22]." MCL 765.15(2). See also MCL 780.66(8) and MCL 780.67(7), which contain substantially similar language for a bail deposit or bail bond collected for traffic offenses and misdemeanors.

Allocation of the funds available under MCL 765.15, and of payments made by a defendant toward the total amount owed, is governed by MCL 775.22. Provisions in the Crime Victim's Rights Act concerning the allocation of funds mirror those in MCL 775.22. See MCL 780.766a, MCL 780.794a, and MCL 780.826a. For a detailed discussion of allocation of payments, see the *Crime Victim Rights Benchbook*, Chapter 8.

8.14 Effect of Conviction Invalidation on Payment of Court-Ordered Financial Obligations

"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 US 128, 130, 134 (2017) (holding that a Colorado statute requiring a petitioner to "prove 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").

In Michigan, there are no statutes or court rules providing a process for the return of costs, fees, and restitution in the event of the reversal or vacation of a criminal conviction. However, in *People v Nance*, 214 Mich App 257, 258-260 (1995), the Michigan Court of Appeals held that criminal fines and costs assessed as a result of a criminal conviction must be refunded to the defendant, without the bringing of a separate action, following the reversal of the conviction. The *Nance* Court noted that "[a] court may not impose fines or costs unless there is express provision for them in [an] underlying statute," and held that there is no longer an express provision for fines and costs in an underlying statute if a

defendant's conviction is reversed. *Id*. at 259 (reversing the trial court's denial of the defendant's motion, following reversal of his conviction on appeal, for reimbursement of fines and costs assessed under "the substantive criminal statute, MCL 750.227; . . . the probation statute, MCL 771.3; . . . and the statute creating the Crime Victims Compensation Board, MCL 18.352").

However, in *People v Diermier*, 209 Mich App 449, 450-451 (1995), the Court of Appeals held that the county was not obligated, under MCL 600.1475,[32] to refund restitution paid by the defendant for uncharged crimes where the restitution order was subsequently invalidated "on the ground that the prosecution had failed to prove that no person other than defendant could have" committed the uncharged crimes. Noting that "the county had simply acted as a conduit in channeling defendant's restitution payments to the victim" and no longer had "the restitutional amount in its possession," the *Diermier* Court concluded "that it would be unreasonable to require the county to reimburse defendant for monies it paid which the county simply channeled to the victim." *Diermier*, 209 Mich App at 451.

The continued validity of *Diermier*, 209 Mich App 449, is uncertain in the wake of the United States Supreme Court's decision in *Nelson*, 581 US 128.

Note that the application of the following Michigan statutes may be impacted by *Nelson*:

- the Wrongful Imprisonment Compensation Act, MCL 691.1751 *et seq*. (providing that an individual who was convicted and imprisoned for a crime he or she did not commit may bring a cause of action against the state for compensation and for reimbursement, under MCL 691.1755(2)(b), "of any amount awarded and collected by [the] state under the state correctional facility reimbursement act," MCL 800.401 *et seq*., but not otherwise providing for a refund of fees, costs, and restitution);

- MCL 600.4835 (providing that the circuit court has discretion to "remit any penalty, or any part thereof," but further providing that MCL 600.4835 "does not authorize [the] court to remit any fine imposed by any court upon a conviction for any criminal offense, nor any fine imposed by any court for an actual contempt of such court, or for disobedience of its orders or process"); and

[32] MCL 600.1475 provides that "[i]n case any amount is collected on any judgment or decree, if such judgment or decree be afterward reversed the court shall award restitution of the amount so collected, with interest from the time of collection."

- MCL 780.622(2) and MCL 712A.18e(11)(a) (providing that an applicant moving to set aside a criminal conviction or juvenile adjudication, respectively, "is not entitled to the remission of any fine, costs, or other money paid as a consequence of" the conviction or adjudication that is set aside).[33]

The preceding list is not meant to be exhaustive.

[33] *Nelson*, 581 US 130, requires a refund of conviction-related assessments following the *invalidation* of a conviction. It is unknown whether the reasoning of *Nelson* will be extended to convictions that are *set aside* (expunged), rather than vacated or reversed on appeal. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3, for a discussion of setting aside criminal convictions. For discussion of setting aside juvenile adjudications, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21.

Chapter 9: Alternative Sentences

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9.1 Introduction

This chapter addresses circumstances where sentencing courts have alternatives available in lieu of imposing a traditional sentence of incarceration.

9.2 Probation—Generally

Except for the felonies listed in MCL 771.1(1), probation is generally available as an alternative sentence for any felony, misdemeanor, or ordinance violation if the court finds that (1) the defendant is unlikely "to engage in an offensive or criminal course of conduct" again, and (2) "the public good does not require that the defendant suffer the penalty imposed by law[.]" MCL 771.1(1). See also *People v McKeown*, 228 Mich App 542, 545 (1998) ("the Legislature did not include the attempt statute [(MCL 750.92)] in the list of felonies for which a defendant could not be given probation," and that omission "evidenced an intent to include probation as another alternative sentence under the attempt statute").

Probation is **not** permitted for convictions of:

- murder;
- treason;
- first-degree criminal sexual conduct;
- third-degree criminal sexual conduct;
- armed robbery; or
- major controlled substance offenses. MCL 771.1(1).

Note that the legislative sentencing guidelines expressly authorize probationary terms for offenses subject to the guidelines when the recommended minimum sentence range falls within an intermediate sanction cell. See MCL 769.31(b).[1]

[1] See Section 1.8 for discussion of intermediate sanctions.

A. Defendant May Decline Probation Sentence

"[A] defendant may decline a sentence of probation and instead seek a sentence of incarceration." *People v Bensch*, 328 Mich App 1, 13 (2019). See also MCL 771.4(1) (probationer must agree to granting and continuance of probation).

B. Probation Period[2]

Except as provided in MCL 771.2a (dealing with probation periods for various stalking, child abuse, violent felony, and sex offenses[3]) and MCL 768.36 (establishing sentencing and probation requirements for a person found guilty but mentally ill[4]), a probation period imposed on a defendant "convicted of an offense that is not a felony" must not exceed two years. MCL 771.2(1).[5]

Similarly, except as provided in MCL 771.2a and MCL 768.36, the term of probation imposed on a defendant convicted of a felony offense must not exceed three years. MCL 771.2(1). "However, the probation term for a felony under this subsection may be extended not more than 2 times for not more than 1 additional year for each extension if the court finds that there is a specific rehabilitation goal that has not yet been achieved, or a specific, articulable, and ongoing risk of harm to a victim that can be mitigated only with continued probation supervision." *Id*.

MCL 771.2(1) "does not apply to a juvenile placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4)] to an institution or agency described in . . . MCL 803.301 to [MCL] 803.309." MCL 771.2(14).

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[2]Effective March 1, 2003, 2002 PA 666 eliminated the "lifetime probation" provision in MCL 771.1(4). Before the amendment, a trial court could sentence a defendant to lifetime probation for violating or conspiring to violate MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*) (certain controlled substance offenses). MCL 771.2(12) still references the previous version of MCL 771.1(4), stating: "A defendant who was placed on probation under [MCL 771.1(4)] as it existed before March 1, 2003 for an offense committed before March 1, 2003 is subject to the conditions of probation specified in [MCL 771.3], including payment of a probation supervision fee as prescribed in [MCL 771.3c], and to revocation for violation of these conditions, but the probation period must not be reduced other than by a revocation that results in imprisonment or as otherwise provided by law."

[3]Discussed in Section 9.6.

C. Early Discharge from Probation

Both MCL 771.2 and MCR 6.441 govern early probation discharge.

"Except as provided in [MCL 771.2(10) (setting out offenses that are not eligible for reduced probation[6])], [MCL 771.2a (dealing with probation periods for various stalking, child abuse, violent felony, and sex offenses)[7]], and [MCL 768.36 (establishing sentencing and probation requirements for a person found guilty but mentally ill)[8]], after the defendant has completed 1/2 of the original felony or misdemeanor probation period, he or she may be eligible for early discharge[.]" MCL 771.2(2). See also MCR 6.441(A) (stating probationer is eligible for early discharge, except as otherwise provided in statute, after completing half of the original probationary period and all required programming). "The defendant must be notified at sentencing of his or her eligibility and the requirements for early discharge from probation, and the procedure provided under [MCL 771.2(3)] to notify the court of his or her eligibility." MCL 771.2(2). See also MCR 6.441(A) (stating "[t]he court must notify the probationer at the time of sentencing, either orally or in writing, about the probationer's early probation discharge eligibility and the notice process contained in this rule").

"If the court reduces a defendant's probationary term under [MCL 771.2], the period by which that term was reduced must be reported to the department of corrections." MCL 771.2(11).[9]

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[4]"If a defendant who is found guilty but mentally ill is placed on probation under the jurisdiction of the sentencing court as provided by law, the trial judge, upon recommendation of the center for forensic psychiatry, shall make treatment a condition of probation. Reports as specified by the trial judge shall be filed with the probation officer and the sentencing court. Failure to continue treatment, except by agreement with the treating agency and the sentencing court, is grounds for revocation of probation. The period of probation shall not be for less than 5 years and shall not be shortened without receipt and consideration of a forensic psychiatric report by the sentencing court. Treatment shall be provided by an agency of the department of community health or, with the approval of the sentencing court and at individual expense, by private agencies, private physicians, or other mental health personnel. A psychiatric report shall be filed with the probation officer and the sentencing court every 3 months during the period of probation. If a motion on a petition to discontinue probation is made by the defendant, the probation officer shall request a report as specified from the center for forensic psychiatry or any other facility certified by department of community health for the performance of forensic psychiatric evaluation." MCL 768.36(4).

[5]For purposes of the Code of Criminal Procedure's probation statute, "felony" includes two-year misdemeanors. *People v Smith*, 423 Mich 427, 434 (1985).

[6]MCL 771.2(10) provides that a defendant convicted of one or more of the following crimes is not eligible for reduced probation under MCL 771.2: a domestic violence related violation of MCL 750.81, MCL 750.81a, an offense involving domestic violence as that term is defined in MCL 400.1501, a violation of MCL 750.84, MCL 750.411h, MCL 750.411i, MCL 750.520c, MCL 750.520e, a listed offense, an offense for which a defense was asserted under MCL 768.36 (insanity and related defenses), or a violation MCL 750.462a to MCL 750.462h or former section MCL 750.462i or MCL 750.462j.

1. Early Discharge Eligibility Notification Procedure

Probation department notifies. "If a probationer has completed all required programming, the probation department may notify the sentencing court that the probationer may be eligible for early discharge from probation." MCL 771.2(3). See also MCR 6.441(B) (stating essentially the same). The Court rule further requires that "[t]he notice must be served on the prosecuting attorney and probationer." *Id.*

Probationer notifies. "If the probation department does not notify the sentencing court as required under this subsection and the probationer has not violated probation in the immediately preceding 3 months, the probationer may notify the court that he or she may be eligible for early discharge from probation" using SCAO Form MC 512, *Notice Regarding Eligibility for Early Discharge from Probation*. MCL 771.2(3). See also MCR 6.441(B) (stating essentially the same). The Court rule further requires that the probationer serve copies of the notice on the prosecuting attorney and the probation department. *Id.*

Prosecutor objections. "The prosecuting attorney must file any written objection to early probation discharge within 14 days of receiving service of the notice." MCR 6.441(B).

Court's discretion. "This subsection does not prohibit the court from considering a probationer for early discharge from probation at the court's discretion." MCL 771.2(3). See also MCR 6.441(H) (stating MCR 6.441 "does not prohibit a defendant from motioning, a probation officer from recommending, or the court from considering, a probationer for early discharge from probation at the court's discretion at any time during the duration of the probation term").

2. Required Case Review

"Upon receiving notice [of eligibility for early discharge under MCR 6.441(B)], the court must conduct a preliminary review of the case to determine whether the probationer's behavior

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[7]Discussed in Section 9.6.

[8]In relevant part, MCL 768.36(4) provides that "[t]he period of probation shall not be for less than 5 years and *shall not be shortened* without receipt and consideration of a forensic psychiatric report by the sentencing court." (Emphasis added.)

[9]The Department of Corrections is required to report to various legislative committees information about felony probationers released early. MCL 771.2(9).

warrants a reduction in the original probationary term." MCR 6.441(C).

3. Early Discharge Without a Hearing

Both the statute and the court rule provide for early discharge without a hearing. The statute provides that: "Upon notification as provided under [MCL 771.2(3)], the sentencing court may review the case and the probationer's conduct while on probation to determine whether the probationer's behavior warrants an early discharge. Except as provided in [MCL 771.2(7)], if the court determines that the probationer's behavior warrants a reduction in the probationary term, the court may grant an early discharge from probation without holding a hearing." MCL 771.2(5).

The court rule provides in relevant part: "Except as provided in [MCR 6.441(E)], the court must discharge a probationer from probation, without a hearing, if the prosecutor does not submit a timely objection and the court's review in [MCR 6.441(C)] determines the probationer

> (1) is eligible for early probation discharge;
>
> (2) achieved all the rehabilitation goals of probation; and
>
> (3) is not a specific, articulable, and ongoing risk of harm to a victim that can only be mitigated with continued probation supervision." MCR 6.441(D).

Ability to pay. Note that "[a] probationer must not be considered ineligible for early discharge because of an inability to pay for the conditions of his or her probation, or for outstanding court-ordered fines, fees, or costs, so long as the probationer has made good-faith efforts to make payments. However, nothing in this subsection relieves a probationer from his or her court-ordered financial obligations after discharge from probation." MCL 771.2(4). See also MCR 6.441(C) (stating substantially the same).

Restitution. "Before granting early discharge to a probationer who owes outstanding restitution, the court must consider the impact of early discharge on the victim and the payment of outstanding restitution. If a probationer has made a good-faith effort to pay restitution and is otherwise eligible for early discharge, the court may grant early discharge or retain the probationer on probation up to the maximum allowable probation term for the offense, with the sole condition of

continuing restitution payments." MCL 771.2(5). See also MCR 6.441(C)-(D) (stating substantially the same).

4. When Hearing Required

Under the statute, a hearing is required under two circumstances: (1) when the court does not grant early discharge without a hearing; or (2) when the person is on probation for certain specified felonies.

Specifically, "[i]f after reviewing the case under [MCL 771.2(5)], the court determines that the probationer's behavior does not warrant an early discharge, the court must conduct a hearing to allow the probationer to present his or her case for an early discharge and find on the record any specific rehabilitation goal that has not yet been achieved or a specific, articulable, and ongoing risk of harm to a victim that can only be mitigated with continued probation supervision." MCL 771.2(6).

Further, "[t]he sentencing court shall hold a hearing before granting early discharge to a probationer serving a term of probation for a felony offense eligible for early discharge that involves a victim who has requested to receive notice under . . . [the following provisions of the Crime Victim's Rights Act,] MCL 780.768b, [MCL] 780.769, [MCL] 780.769a, [MCL] 780.770, and [MCL] 780.770a, or for a misdemeanor violation of . . . MCL 750.81, [MCL] 750.81a, and [MCL] 750.136b, that is eligible for early discharge." MCL 771.2(7).

Under MCR 6.441(E), "[t]he court must hold a hearing after conducting the review in [MCR 6.441(C)] if

> (1) the prosecutor submits a timely objection, or
>
> (2) a circumstance identified in MCL 771.2(7) is applicable, or
>
> (3) the court reviewed the case and does not grant an early discharge or retain the probationer on probation with the sole condition of continuing restitution payment."

5. Hearing Procedures and Considerations

Required notices for hearing. The prosecutor is required to notify the victim of the date and time of any hearing held under MCL 771.2(7), "and the victim must be given an opportunity to be heard." MCL 771.2(8). See also MCR 6.441(E)

(stating substantially the same, but further providing that in addition to the victim, the probationer must also "be given an opportunity to be heard at the hearing").

Discharge After Hearing. "Upon the conclusion of the hearing, the court must either grant early discharge or, if applicable, retain the probationer on probation with the sole condition of continuing restitution payments, if the probationer proves by a preponderance of the evidence that he or she

> (1) is eligible for early probation discharge;
>
> (2) achieved all the rehabilitation goals of probation; and
>
> (3) is not a specific, articulable, and ongoing risk of harm to a victim that can only be mitigated with continued probation supervision." MCR 6.441(F).

See also MCL 771.2(7) (stating "[i]f a probationer owes outstanding restitution, the court must consider the impact of early discharge on the payment of outstanding restitution and may grant early discharge or retain the probationer on probation up to the maximum allowable probation term for the offense, with the sole condition of continuing restitution payments").

D. Probation Order

"The court shall, by order to be entered in the case as the court directs by general rule or in each case, fix and determine the period, conditions, and rehabilitation goals of probation." MCL 771.2(11). "The order is part of the record in the case." *Id.*

"In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition." MCL 771.4(3).

"The court may amend the [probation] order in form or substance at any time." MCL 771.2(11). However, after a probationary period expires, the circuit court lacks authority to extend or otherwise amend the probationary order under MCL 771.2(11). *People v Vanderpool*, 505 Mich 391, 399-400, 409 (2020).[10] The phrase "at any time" as used in MCL 771.2(11) means "at any time while defendant was under the order of probation," and does not give the court

[10] *Vanderpool* refers to MCL 771.2(5); however, that subsection was renumbered by 2020 PA 397, effective April 1, 2021.

authority to amend a probation order after the expiration of the probation term. *Vanderpool*, 505 Mich at 400.

A probation order generally "may be amended ex parte[.]" *People v Britt*, 202 Mich App 714, 716 (1993). A defendant is not entitled to notice or an opportunity to be heard regarding an amendment, unless the amendment would result in a fundamental change in his or her liberty interest, such as confinement. *Id*. at 716-717 (placement in an electronic tether program "is not the equivalent of confinement"; accordingly, due process protections do not attach before amendment of a probation order to include placement in an electronic tether program).

See also SCAO Form MC 243, *Order of Probation.*

E. Plea Agreements and Orders of Probation

A defendant is not entitled to withdraw his or her plea or to demand specific performance of a plea agreement when a trial court imposes otherwise valid conditions on the defendant's probation even if the conditions were not included in the plea agreement. *People v Johnson*, 210 Mich App 630, 634-635 (1995).

The proper remedy was withdrawal of the plea and vacation of the plea agreement where a defendant pleaded guilty pursuant to a plea agreement that was later determined to impose a penalty contrary to statutory requirements regarding permissible penalties for technical probation violations.[11] *People v Jackson*, ___ Mich App ___, ___ (2023). The Court rejected the defendant's request "to order the trial court to reform the plea agreement in a manner that would allow him to keep the plea but change the penalty." *Id.* at ___. It explained that if the court rejected the "sentence while keeping the rest of the agreement" it would be imposing a plea bargain upon the prosecution to which it did not agree. *Id.* at ___ (quotation marks and citation omitted). Instead, the Court held that where it is discovered that the penalty imposed as a result of a plea bargain was improper, "the trial court must give the prosecutor the opportunity to withdraw the plea" even if the defendant does not request withdrawal. *Id.* at ___.

[11]The trial court was not aware of the amendments to MCL 771.4b made by 2020 PA 397, effective April 1, 2021, and revoked the defendant's probation and sentenced him to 30 months to 15 years in prison in violation of MCL 771.4b(1)(b)(*ii*) and MCL 771.4b(4) because the probation violation was defendant's second technical probation violation; accordingly, the maximum allowable sentence was 30 days in jail and his probation should not have been revoked. *People v Jackson*, ___ Mich App ___, ___ (2023). See Section 9.2(I) for a discussion of technical probation violations.

F. Delegation of Authority

"[O]nly the trial court can impose the conditions of probation[.]" *People v Peters*, 191 Mich App 159, 166 (1991). Accordingly, it is an abuse of discretion to delegate this authority. *Id*. However, the court "can delegate the normal supervision of those conditions," and thus, "[i]t is not an improper delegation of authority to set conditions of probation that allow probation department employees to act in an advisory capacity to the court." *Id.* at 165-166 ("[r]equiring defendant to be bound by the internal rules and procedures of [a probation enhancement program] was nothing more than requiring him to abide by the parameters of a program established to provide a structure within which his probation and rehabilitation could proceed to successful conclusion"; accordingly, there was no improper delegation of authority). *Id.* at 166.

G. Termination of the Probation Period

When a probationer's term of probation terminates, the probation officer must report to the court that the probation period has ended. MCL 771.5(1) The officer must also inform the court of the probationer's conduct during the probation period. *Id*. "Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded." *Id*.

After a probationary period expires, the circuit court lacks authority to extend the probationary period under MCL 771.5(1). *People v Vanderpool*, 505 Mich 391, 399-400, 409 (2020) (holding that where the defendant's probation officer did not notify the circuit court or report on the defendant's conduct on or before the date that his probation ended, his probation terminated on that date and the trial court could not extend the probation period upon request of the probation officer after the date of termination).

"When a probationer is discharged upon the expiration of the probation period, or upon its earlier termination by order of the court, entry of the discharge shall be made in the records of the court, and the probationer shall be entitled to a certified copy thereof." MCL 771.6. A "circuit court's failure to carry out its duty to [enter a discharge order under MCL 771.6 does] not expand its authority to extend defendant's term of probation," and it "does not result in defendant having to comply with the expired order." *Vanderpool*, 505 Mich at 402-403 (holding that defendant is discharged from probation on the date the order terminates regardless of whether the court meets its statutory obligation to enter an order of discharge).

H. Revoking Probation and Probation Violation Sentencing

"It is the intent of the legislature that the granting of probation is a matter of grace requiring the agreement of the probationer to its granting and continuance." MCL 771.4(1).[12] "All probation orders are revocable subject to the requirements of [MCL 771.4b[13]], but revocation of probation, and subsequent incarceration, should be imposed only for repeated technical violations, for new criminal behavior, as otherwise allowed in [MCL 771.4b], or upon request of the probationer. MCL 771.4(2). However, probation may not be revoked upon the medical use of marijuana because "the revocation of probation is a penalty or the denial of a privilege," and the Michigan Medical Marihuana Act (MMMA), MCL 333.26424(a), protects a person "from penalty in any manner, or denial of any right or privilege, for the lawful use of medical marijuana." *People v Thue*, 336 Mich App 35, 48 (2021).[14] "Therefore, a court cannot revoke probation because of a person's use of medical marijuana that otherwise complies with the terms of the MMMA." *Id.*

The court must revoke probation if the probationer "willfully violates the sex offenders registration act." MCL 771.4a.

A trial court's jurisdiction to revoke a defendant's probation and sentence him or her to imprisonment is limited to the duration of the probationary period; if the probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass*, 288 Mich App 399, 408 (2010).[15]

"Hearings on the revocation must be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials." MCL 771.4(2). "The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing." MCL 771.4(4). Subject to MCL 771.4b, "the court may investigate and enter a disposition of the probationer as the court determines best serves the public interest." MCL 771.4(5). "If a probation order is revoked, the court may

[12]Note that MCL 771.4 does not apply to certain juvenile offenders. See MCL 771.4.

[13]Discussed in Section 9.2(I).

[14]For a detailed discussion of the Michigan Medical Marihuana Act, see the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 8.

[15]However, effective April 1, 2021, 2020 PA 397 amended MCL 771.4 and omitted the statute's reference to the "probation period," which is the statutory language that Court in *Glass*, and the cases *Glass* cites, relied on to conclude that the Court may not revoke probation after the probation period has expired. The current version of MCL 771.4 does not reference the "probation period" at all, and this omission makes it unclear whether the holding in *Glass* is still valid.

sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." *Id.* See also MCR 6.445(G) (procedure for sentencing after violation of probation).[16]

MCL 771.4 "does not apply to a juvenile placed on probation and committed under [MCL 803.301(3) or [MCL] 803.301(4).]" MCL 771.4(6).

I. Technical Probation Violations

Temporary incarceration for a technical probation violation is permitted for a specified amount of time, depending on whether the person was convicted of or pleaded guilty to a misdemeanor or felony and whether it is a first, second, third, or fourth or subsequent technical violation. MCL 771.4b(1). Note that a "court may not impose a sentence of incarceration or revoke probation for acknowledging a technical probation violation under [MCR 6.450], but the court may count the acknowledgment for the purpose of identifying the number of technical probation violations under MCL 771.4b." MCR 6.450(B). A jail sanction for a technical probation violation "may be extended to not more than 45 days if the probationer is awaiting placement in a treatment facility and does not have a safe alternative location to await treatment." MCL 771.4b(3). When counting technical probation violations, violations that "arise[] out of the same transaction" must be counted as a single probation violation for purposes of MCL 771.4b. MCL 771.4b(5).

"A probationer may acknowledge a technical probation violation in writing without a hearing before the court being required." MCL 771.4b(2). See also SCAO Form MC 521, *Technical Probation Violation Acknowledgment.* MCR 6.450 governs the procedure for acknowledgement of a technical probation violation. For a detailed discussion of this procedure, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2.

"Subject to the exception in [771.4b(6)[17]], the court shall not revoke probation on the basis of a technical probation violation unless a probationer has already been sanctioned for 3 or more technical

[16]However, in district court cases, "[u]nless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, . . . the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction." MCR 6.610(G)(3). In circuit court cases, the court must comply with MCR 6.425(B) and MCR 6.425(D) before incarcerating a defendant for a probation violation. MCR 6.445(G). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2, for more information on sentencing a defendant following a probation violation. See also the Michigan Judicial Institute's *Probation Violation Quick Reference Materials*.

probation violations and commits a new technical probation violation." 771.4b(4). Further, a court may not revoke probation for acknowledging a technical probation violation under MCR 6.450. MCR 6.450(B).

"[T]here is a rebuttable presumption that the court shall not issue a warrant for arrest for a technical probation violation and shall issue a summons or order to show cause to the probationer instead." MCL 771.4b(7). A warrant may be issued if the court overcomes the presumption by stating on the record "a specific reason to suspect" that the probationer (1) "presents an immediate danger to himself or herself, another person, or the public"; (2) has left court-ordered inpatient treatment without permission; or (3) has already failed to appear after being issued a summons or order to show cause. *Id.*

When a probationer is arrested and detained for a technical probation violation hearing, the hearing must be held "as soon as is possible," and "[i]f the hearing is not held within the applicable and permissible jail sanction, as determined under [MCL 771.4b(1)(a)-(b)], the probationer must be returned to community supervision." MCL 771.4b(8).

For a detailed discussion of probation violations and the procedures involved in probation revocation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2. See also the Michigan Judicial Institute's checklist describing probation violation sentencing and the Michigan Judicial Institute's flowchart describing the procedures that apply to probation violations, including sentencing.

9.3 Mandatory Conditions of Probation

During the term of an individual's probation, he or she must comply with all of the mandatory conditions of probation:

- the probationer must not violate any criminal law or ordinance, MCL 771.3(1)(a);
- the probationer must not leave Michigan without the court's consent, MCL 771.3(1)(b);
- the probationer must report (in person, virtually, or in writing) to his or her probation officer each month, or as often as the probation officer requires, MCL 771.3(1)(c);[18]

[17] MCL 771.4b(6) provides that MCL 771.4b(1) is not applicable to a probationer who is on probation for a domestic violence violation of MCL 750.81 or MCL 750.81a, an offense involving domestic violence, or a violation of MCL 750.411h or MCL 750.411i. MCL 771.4b(6).

- if the probationer is sentenced in circuit court, he or she must pay a probation supervision fee as set out in MCL 771.3c,[19] MCL 771.3(1)(d);

- the probationer must pay restitution to the victim of the probationer's course of conduct leading to the conviction, or to the victim's estate, MCL 771.3(1)(e);

- the probationer must pay a crime victim assessment as set out in MCL 780.905, MCL 771.3(1)(f);

- the probationer must pay the minimum state cost as set out in MCL 769.1j, MCL 771.3(1)(g); see also MCL 769.1k(1)(a);[20] and

- if required, the probationer must comply with the sex offenders registration act (MCL 28.721 to MCL 28.736), MCL 771.3(1)(h).[21]

If a defendant is placed on probation for a listed offense, the defendant's probation officer must register the defendant or must accept the defendant's registration. MCL 771.2(7).

Additional restrictions must be included in an order of probation for students who are convicted of, or juvenile-students adjudicated for, certain criminal sexual conduct offenses. MCL 750.520o(1). See Section 9.6(D) for a detailed discussion.

If entry of the judgment is deferred in the circuit court, the court must require payment of a supervision fee as set out in MCL 771.1(3) and the minimum state costs prescribed by MCL 769.1j. MCL 771.3(9). If sentencing is delayed or entry of judgment is deferred in the district court or a municipal court, the court must require payment of the minimum state costs prescribed by MCL 769.1j. MCL 771.3(10).

9.4 Discretionary Conditions of Probation

"[T]he trial court has broad discretion in determining the conditions to impose as part of probation." *People v Breeding*, 284 Mich App 471, 479-480 (2009), citing *People v Oswald*, 208 Mich App 444, 446 (1995); MCL

[18]This requirement does not apply to a juvenile placed on probation and committed under MCL 769.1(3) or MCL 769.1(4) to an institution or agency described in the Youth Rehabilitation Services Act, MCL 803.301 *et seq*.

[19]See Section 8.9(A) for a discussion of MCL 771.3c.

[20]MCL 769.1k(1) applies "even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

[21]See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10, for detailed information concerning the Sex Offenders Registration Act.

771.4. "Such discretion is obviously necessary to allow trial judges to tailor sentences to the differing circumstances of those convicted of crimes and to meet the requirement of individualized sentencing." *People v Peters*, 191 Mich App 159, 165 (1991). Indeed, "[t]he conditions of probation imposed by the court under [MCL 771.4(2) and MCL 771.4(3)] must be individually tailored to the probationer, must specifically address the assessed risks and needs of the probationer, must be designed to reduce recidivism, and must be adjusted if the court determines adjustments are appropriate." MCL 771.3(11). Additionally, the court must "consider the input of the victim," and "specifically address the harm caused to the victim, as well as the victim's safety needs and other concerns, including, but not limited to, any request for protective conditions or restitution." *Id*.

MCL 771.3(2)(a)-(q) list discretionary terms and conditions the trial court may elect to impose, subject to MCL 771.3(11), discussed in the following subsections. In addition, subject to MCL 771.3(11), "[t]he court may impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper." MCL 771.3(3).

The court has discretion to impose, as applicable and subject to MCL 771.3(11), the probation conditions described in MCL 771.3(1)-(3) if entry of the judgment is deferred in the circuit court or if sentencing is delayed or entry of judgment is deferred in the district court or a municipal court. MCL 771.3(9); MCL 771.3(10).

"There is no ultimate catalogue of legal or illegal terms," and the trial court must decide "whether there is a rational relationship between the restriction and rehabilitation." *People v Johnson*, 92 Mich App 766, 768-769 (1979) (holding a condition requiring the defendant to cooperate in anti-drug efforts was lawful and rationally related to rehabilitation because it "would promote defendant's withdrawal from the drug scene rather than impede it") (citation omitted). See also *People v Johnson*, 210 Mich App 630, 634 (1995) ("[i]n setting additional conditions [under MCL 771.3(3)], a sentencing court must be guided by factors that are lawfully and logically related to the defendant's rehabilitation").

For example, a probation condition that defendant could not play college or professional basketball was unlawful where "no rational reason [was] suggested in justification," and the Court concluded the restriction was "more likely to impede rehabilitation than promote it[.]" *People v Higgins*, 22 Mich App 479, 481-482 (1970).

Additionally, while MCL 771.3 provides a court broad discretion to impose conditions of probation, "provisions of the probation act that are inconsistent with the [Michigan Medical Marihuana Act (MMMA)] do not apply to the medical use of marijuana." *People v Thue*, 336 Mich App 35, 47 (2021). "[A] condition of probation prohibiting the use of medical

marijuana that is otherwise used in accordance with the MMMA is directly in conflict with the MMMA and is impermissible." *Id.* at 37, 47 (reversing "the district court's order denying defendant's motion to modify the terms of his probation to allow him to use medical marijuana").[22]

A. Jail Time

The court may order the probationer to imprisonment in the county jail for a maximum period of 12 months or up to the maximum period of confinement allowed for the charged offense if the statutory maximum is less than 12 months. MCL 771.3(2)(a).

Additionally:

- the period of incarceration may be served at one time or in consecutive or nonconsecutive intervals, MCL 771.3(2)(a);
- the probationer may be allowed day parole as authorized under MCL 801.251 to MCL 801.258, MCL 771.3(2)(a);
- the probationer may be permitted to be released from jail to work at his or her existing job or to attend a school in which he or she is enrolled as a student, subject to MCL 771.3d and MCL 771.3e, MCL 771.3(2)(a).
    - MCL 771.3d(1) provides that the court must not order release for work or school "unless the county sheriff or the [Department of Corrections] has determined that the individual is currently employed or currently enrolled in school," and establishes requirements for ordering and providing this verification.
    - MCL 771.3e(1) requires the court to order a probationer to wear an electronic monitoring device if the probationer was convicted of a felony and the court permits him or her "to be released from jail under [MCL 771.3] for purposes of attending work or school[.]" However, MCL 771.3e "applies only if the court has in place a program to provide for the electronic monitoring of individuals placed on probation that complies with the requirements of [MCL 771.3e]." MCL 771.3e(2).

[22]While not at issue in the case, the Court observed that courts "may still impose probation conditions related to the recreational use of marijuana and revoke probation for such recreational use as well as for marijuana use in violation of the MMMA." *People v Thue*, 336 Mich App 35, 48 (2021) (quotation marks omitted).

- "[T]he meaning of the term 'county jail' used in [MCL 771.3(2)(a)] is narrow and does not include residential treatment facilities." *People v Chamberlain*, 136 Mich App 642, 650 (1984).

B. Payment of Fines

The court may order the probationer to "[p]ay immediately or within the period of his or her probation a fine imposed when placed on probation." MCL 771.3(2)(b).

MCL 771.3(2)(b) authorizes the imposition of a fine as a condition of probation, and the statute "does not restrict the amount of that fine." See *People v Oswald*, 208 Mich App 444, 445 (1995). Accordingly, the Court rejected the defendant's argument that the trial court was limited to imposing a fine no greater than the fine authorized by the statute he violated. *Id.* at 445-446 ($1,500 fine imposed as a condition of probation was valid despite fact that the underlying statute caps the allowable fine at $1000). But see MCL 769.1k(1)(b)(*i*) (giving the court discretion to impose "[a]ny fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty").[23]

C. Payment of Statutory Costs

The court may order the probationer to pay costs "limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer." MCL 771.3(2)(c); MCL 771.3(5).

A defendant may be ordered to pay the costs of prosecution *and* the costs of defense. *People v Humphreys*, 221 Mich App 443, 452 (1997). See also MCL 769.1k(1)(b)(*ii*)-(*iii*) (authorizing the imposition of various costs); MCL 769.1k(2) (allowing imposition of additional costs incurred in compelling the defendant's appearance).[24] MCL 771.3(5) does not authorize court costs. *People v Butler-Jackson*, 499 Mich 963, 963 (2016). However, court costs are authorized under MCL 769.1k(1)(b)(*iii*), which is effective until May 1, 2024.

For a detailed discussion of issues regarding costs ordered as a condition of probation, see Section 8.9(C).

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[23] MCL 769.1k(1) applies "even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

[24] MCL 769.1k(1)-(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

D. Payment of Statutory Assessments

The court may order the probationer to: "Pay any assessment ordered by the court other than an assessment described in [MCL 771.3(1)(f) (describing the mandatory crime victim's rights assessment)]." MCL 771.3(2)(d). See also MCL 769.1k(1)(b)(*v*).[25]

For a detailed discussion of issues regarding assessments ordered as a condition of probation, see Section 8.9(C).

E. Expense Reimbursement

The court may order the probationer to: "Reimburse the county for expenses incurred by the county in connection with the conviction for which probation was ordered as provided in . . . MCL 801.81 to [MCL] 801.93." MCL 771.3(2)(p).[26] See also MCL 769.1k(1)(b)(*vi*) (providing discretionary authority to order reimbursement under MCL 769.1f).[27] MCL 769.1f requires that reimbursement ordered under MCL 769.1f must be included as a condition of probation. MCL 769.1f(5).

The Prisoner Reimbursement to the County Act (PRCA), MCL 801.81 *et seq*. MCL 801.83 states in relevant part:

> "(1) The county may seek reimbursement for any expenses incurred by the county in relation to a charge for which a person was sentenced to a county jail as follows:

[25]MCL 769.1k(1) applies "even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

[26]Note that in *People v Houston*, 237 Mich App 707 (1999), the Court held that the trial court lacked authority to require the defendant to reimburse the state for the expense of his imprisonment as a condition of probation because MCL 771.3 "makes no mention of reimbursement for the expenses of housing the defendant in prison," and "the [State Correctional Facility Reimbursement Act] sets forth detailed procedures by which the Attorney General may file a *civil* action in the circuit court for reimbursement to the state for expenses incurred in the housing of prisoners," citing MCL 800.403 and MCL 800.404. *Houston* does not mention the language in MCL 771.3(2)(p) permitting the trial court to order reimbursement to the county for expenses in connection with the conviction, possibly because the defendant was ordered to reimburse the state. But, *Houston* cites *People v Kramer*, 137 Mich App 324, 326 (1984) (holding that the trial court lacked authority to order the defendant to reimburse the county for medical expenses as a condition of probation because there is no express authorization by the Legislature), and *People v Gonyo*, 173 Mich App 716, 719 (1989) (holding that the trial court did not have authority to order the defendant to pay room and board for time spent in jail before release as a condition of probation and that such costs can be recovered under the Prisoner Reimbursement to the County Act) in support of its decision; however, at the time both *Kramer* and *Gonyo* were decided, MCL 771.3 did not include MCL 771.3(2)(p) allowing reimbursement to the county for expenses incurred in connection with the conviction for which probation was ordered. See 1998 PA 449, effective August 1, 1999 (adding MCL 771.3(2)(p)). *Houston* was decided October 1, 1999; however, the defendant in *Houston* was sentenced by the trial court *before* the statute's effective date (August 1, 1999).

> (a) From each person who is or was a prisoner, not more than $60.00 per day for the expenses of maintaining that prisoner or the actual per diem cost of maintaining that prisoner, whichever is less, for the entire period of time the person was confined in the county jail, including any period of pretrial detention."

MCL 801.83(2) specifically states that reimbursement under the Prisoner Reimbursement to the County Act "may be ordered a probation condition entered pursuant to . . . MCL 771.3."

State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 ***et seq*****.** The SCFRA provides statutory authority to collect amounts owed by an offender using any appropriate legal action. See MCL 800.404a; MCL 800.405.

F. Wage Assignment

The court may order the probationer to "[a]gree to pay by wage assignment any restitution, assessment, fine, or cost imposed by the court." MCL 771.3(2)(f).

G. Community Service

The court may order the probationer to "[e]ngage in community service." MCL 771.3(2)(e).

H. Program Participation and/or Completion

The court may order the probationer to:

- "Participate in inpatient or outpatient drug treatment, or a drug treatment court under . . . MCL 600.1060 to [MCL] 600.1084." MCL 771.3(2)(g).
    - Note that a drug treatment court may accept participants from any other jurisdiction based on the participant's residence or the unavailability of a drug treatment court in the jurisdiction where the participant is charged, if the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving court, and the prosecutor of the receiving drug treatment court's funding unit agree to the defendant's

[27] MCL 769.1k(1) applies even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

participation in the drug treatment court. MCL 600.1062(4)(a)-(d). See Section 9.14(A) for more information on drug treatment courts.

- "Participate in mental health treatment." MCL 771.3(2)(h).
- "Participate in mental health or substance abuse counseling." MCL 771.3(2)(i).
- "Participate in a community corrections program." MCL 771.3(2)(j).
- "Participate in a residential probation program." MCL 771.3(2)(m).
- "Satisfactorily complete a program of incarceration in a special alternative incarceration unit as provided in [MCL 771.3b]."[28] MCL 771.3(2)(n).
- Complete a high school education or the equivalent by attaining a general education development (GED) certificate. MCL 771.3(2)(q)

I. House Arrest and Electronic Monitoring

The court may order the probationer to:

- "Be under house arrest." MCL 771.3(2)(k).
- "Be subject to electronic monitoring." MCL 771.3(2)(*l*).

J. Protection of Persons

The court may order the probationer to "[b]e subject to conditions reasonably necessary for the protection of 1 or more named persons." MCL 771.3(2)(o).

K. Conditions Regarding Good-Time Credits

"[T]he trial court erred in setting a specific term of imprisonment in the county jail, with a specific release date, as a condition of probation." *People v Cannon*, 206 Mich App 653, 657 (1994). Specifically, that "condition violated [MCL 51.282(2) (entitling prisoners to good-time credit under certain circumstances)] because it prohibited defendant from obtaining good-time credit that he was lawfully entitled to earn." *Cannon*, 206 Mich App at 657.

[28] See Section 9.4(N) for more information.

For detailed discussion of good-time credits, see Section 7.9.

L. Conditions Restricting Internet Use

No binding legal authority has directly addressed probation conditions restricting internet use. However, in *Packingham v North Carolina*, 582 US 98, 101, 109 (2017), the United States Supreme Court struck down a North Carolina statute that made it a felony for registered sex offenders to access certain "commercial social networking" websites, including Facebook and Twitter because it found the statute suppressed lawful speech in violation of the First Amendment. Specifically, the Court noted that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment Rights." *Id.* at 108. The Court specifically found it "unsettling" that "persons who have completed their sentences" were prohibited from using certain websites because of their status as convicted sex offenders. *Id.* While a person on probation has not completed their sentence, *Packingham's* general holding that restrictions on internet use implicate First Amendment rights is instructive when imposing probation conditions restricting internet use. See *id.* at 107 (noting that "it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor").

For discussion of probation conditions restricting internet use, see *People v Wilson*, unpublished per curiam opinion of the Court of Appeals, issued July 27, 2017 (Docket No. 330799) (vacating a probation condition prohibiting the defendant from owning, possessing, or using any computer or device that can connect to the internet or residing at a residence where such a device is present without first getting written permission because it was overly broad and not tailored to the defendant's rehabilitation). Note that unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).[29]

M. Probation Camp

"A person under 22 years of age who is convicted of a crime in this state for which a sentence in a state prison may be imposed may be required under a probation order to spend not more than 1 year of the probation period, as the court directs, in a probation camp made

[29]The Michigan Judicial Institute (MJI) does not monitor unpublished opinions, and unpublished opinions are not included in updates to MJI materials.

available to the court by the department of corrections." MCL 771.3a(1).

MCL 771.3a(1) additionally provides:

- the Department of Corrections must provide prior consent for admission to probation camp;
- the Department of Corrections must have custody of the probationer for the period the court directs;
- escape from a probation camp is treated like an escape from a penal institution; and
- rule violations constitute sufficient grounds to revoke the probation order.

MCL 771.3a "does not restrict or limit the court's jurisdiction to place a person on probation in another facility suitable and available to the court." MCL 771.3a(1).

"The expense of transporting a probationer to and from the probation camp shall be borne by the county from which the probationer was committed to the department of corrections." MCL 771.3a(1).

MCL 771.3a "does not apply to a person placed on probation under [MCL 771.1(3) or MCL 771.2(3)] or to a juvenile placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.3a(2).

N. Special Alternative Incarceration (SAI) Units

"In addition to any other terms or conditions of probation provided for under [Chapter XI of the Code of Criminal Procedure], the court may require under a probation order that a person convicted of a crime, except a crime specified in [MCL 771.3b(17)[30]], for which a sentence in a state correctional facility may be imposed shall satisfactorily complete a program of incarceration in a special alternative incarceration unit, and a period of not less than 120 days of probation under intensive supervision." MCL 771.3b(1).

The SAI units provide a program of physically strenuous work and exercise, modeled after military basic training. MCL 798.14(1). "A

[30] A defendant convicted of committing or attempting to commit any of the following crimes is not eligible for placement in an SAI program: MCL 750.72, MCL 750.73, MCL 750.75, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, or MCL 750.520g. MCL 771.3b(17)(a)-(c).

term of special alternative incarceration shall be served in the manner provided in the special alternative incarceration act, . . . MCL 798.11 to [MCL] 798.18." MCL 771.3b(14).

"The court also may require the person to satisfactorily complete a local residential program of vocational training, education, and substance abuse treatment, pursuant to [MCL 771.3b(9) or MCL 771.3b(10)]." MCL 771.3b(1).

"In order for a person to be placed in a special alternative incarceration program, the person shall meet all of the following requirements:

> (a) The person has never served a sentence of imprisonment in a state correctional facility.
>
> (b) The person would likely be sentenced to imprisonment in a state correctional facility.
>
> (c) The felony sentencing guidelines upper limit for the recommended minimum sentence for the person's offense is 12 months or more, as determined by the department. This subdivision does not apply in either of the following circumstances:
>
> > (*i*) The person's offense is not covered by the felony sentencing guidelines.
> >
> > (*ii*) The reason for the person being considered for placement is that he or she violated the conditions of his or her probation.
>
> (d) The person is physically able to participate in the special alternative incarceration program.
>
> (e) The person does not appear to have any mental disability that would prevent participation in the special alternative incarceration program." MCL 771.3b(2).[31]

Additionally, before a court can order a person to participate in an SAI program:

- the person must consent to placement, MCL 771.3b(6);
  - "Special alternative incarceration can only be imposed as a *condition* of probation, and the statute permits a defendant to object to that condition even if

[31]Failure to meet these requirements results in a person being returned to the court for sentencing. MCL 771.3b(5).

> he otherwise 'accepts' probation." *People v Bensch*, 328 Mich App 1, 13 (2019) (noting there is no "conflict between the general rule that probation may be declined and a rule that even when a defendant 'accepts' probation, he or she may still be granted a right by statute to decline a specific provision of that probation").

- a probation officer must complete an initial investigation establishing that the person meets the requirements of MCL 771.3b(2)(a)-(b), MCL 771.3b(4); and

- the person must not have been incarcerated in an SAI unit previously unless the person was returned to the court because of a medical condition existing at the time of the placement, MCL 771.3b(15)-(16).

Generally, placement in an SAI program cannot exceed 120 days. MCL 771.3b(8). Exceptions to this time period are set out in MCL 771.3b(8)-(12).

"Upon receiving a satisfactory report of performance in the program from the department of corrections, the court shall authorize the release of the person from confinement in the special alternative incarceration unit." MCL 771.3b(13).

"The receipt of an unsatisfactory report shall be grounds for revocation of probation as would any other violation of a condition or term of probation." MCL 771.3b(13).

A probationer is entitled to credit for time spent in an SAI program if probation is later revoked and he or she is sentenced to a term of imprisonment on the underlying crime. *People v Hite (After Remand)*, 200 Mich App 1, 2 (1993). See Section 7.8 for a discussion of sentence credit.

9.5 Requirements When Costs Are Imposed as Probation Condition

If costs are imposed on a probationer under MCL 771.3(2) as part of a sentence of probation, all of the provisions of MCL 771.3(6) apply. MCL 771.3(6)(a)-(b) provide:

> "(a) The court shall not require a probationer to pay costs under [MCL 771.3(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 [MCL 771.3(2)], the court shall take into account the probationer's financial resources and the nature of the burden that

> payment of costs will impose, with due regard to his or her other obligations.
>
> (b) A probationer who is required to pay costs under [MCL 771.3(1)(g) or MCL 771.3(2)(c)] and who is not in willful default of 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."

If a probationer is required to pay costs as part of a sentence of probation, the court may require him or her to pay the costs:

- immediately, or
- within a specified time period, or
- in installments. MCL 771.3(7).

Whenever a probationer is ordered to pay costs as part of his or her sentence of probation, compliance with that order must be a condition of probation. MCL 771.3(8). "[T]he court may only sanction a probationer to jail or revoke the probation of a probationer who fails to comply with the order [to pay costs] if the probationer has the ability to pay and has not made a good-faith effort to comply with the order." *Id*.[32] In deciding whether to revoke probation, the court must consider the factors set out in MCL 771.3(8):

- the probationer's employment status;
- the probationer's earning ability;
- the probationer's financial resources;
- the willfulness of the probationer's failure to pay; and
- any other special circumstances that may impact a probationer's ability to pay.

"The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without

[32]The procedures in MCL 771.3(8) are in addition to the revocation procedures provided by MCL 771.4 and are subject to the requirements of MCL 771.4b. MCL 771.3(8).

having complied with the provisions set forth in MCR 6.425(B) [(governing presentence investigation reports)] and [MCR 6.425(D) (governing sentencing procedure)]." MCR 6.445(G).

"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." MCR 6.425(D)(3)(a). See Section 8.4 for additional discussion of MCR 6.425(D)(3) and a defendant's ability to pay court-ordered financial obligations.

See also MCL 769.1k(1)(a) (requiring the imposition of minimum state costs under MCL 769.1j); MCL 769.1k(1)(b)(*ii*)-(*iii*) (authorizing the imposition of various costs); MCL 769.1k(2) (authorizing the imposition of additional costs incurred in compelling the defendant's appearance).[33] For a detailed discussion of issues regarding costs ordered as a condition of probation, see Section 8.9(C).

9.6 Probation—Offenses with Special Rules

MCL 771.2a addresses special probation periods for certain types of offenses. However, MCL 771.2a(1)-(5) are not applicable to a juvenile placed on probation and committed under MCL 769.1(3) or MCL 769.1(4) to an institution or agency described in the Youth Rehabilitation Services Act, MCL 803.301 *et seq*. MCL 771.2a(6).

"The court shall by order, to be filed or entered in the cause as the court directs by general rule or in each case, fix and determine the period, conditions, and rehabilitation goals of probation." MCL 771.2a(5). "The order is part of the record in the cause," and "[t]he court may amend the order in form or substance at any time." MCL 771.2a(5).

A. Stalking Offenses and Orders of Probation

1. Stalking

In accord with the general rule in MCL 771.2(1), an individual convicted of violating MCL 750.411h (stalking) may be sentenced to no more than five years of probation. MCL 771.2a(1); MCL 750.411h(3). A probationary period imposed for a stalking conviction is subject to the terms and conditions of probation contained in MCL 750.411h(3) and MCL 771.3.[34]

[33] MCL 769.1k(1)-(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

MCL 771.2a(1). In addition to other lawful conditions imposed, MCL 750.411h(3) permits a court to order a defendant sentenced to probation to:

- "Refrain from stalking any individual during the term of probation." MCL 750.411h(3)(a).
- "Refrain from having any contact with the victim of the offense." MCL 750.411h(3)(b).
- "Be evaluated to determine the need for psychiatric, psychological, or social counseling and if, determined appropriate by the court, to receive psychiatric, psychological, or social counseling at the individual's own expense." MCL 750.411h(3)(c).

2. Aggravated Stalking

An individual who is sentenced to probation for a violation of MCL 750.411i (aggravated stalking) may be sentenced to probation for any term of years, but the court must sentence the individual to a term of probation of not less than five years. MCL 771.2a(2); MCL 750.411i(4). A probationary period imposed for an aggravated stalking conviction is subject to the terms and conditions of probation contained in MCL 750.411i(4) and MCL 771.3.[35] MCL 771.2a(2). MCL 750.411i(4) permits a court to order a defendant sentenced to probation to:

- "Refrain from stalking any individual during the term of probation." MCL 750.411i(4)(a).
- "Refrain from any contact with the victim of the offense." MCL 750.411i(4)(b).
- "Be evaluated to determine the need for psychiatric, psychological, or social counseling and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense." MCL 750.411i(4)(c).

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[34]See Section 9.3 for mandatory and Section 9.4 for discretionary conditions of probation under MCL 771.3.

[35] See Section 9.3 for mandatory and Section 9.4 for discretionary conditions of probation under MCL 771.3.

B. Child Abuse Offense and Probation

"The court may place an individual convicted of a violation of . . . MCL 750.136b, that is designated as a misdemeanor on probation for not more than 5 years." MCL 771.2a(3).

C. Violent Felony Offenses and Probation

"Except as provided in [MCL 771.2a(2) and MCL 771.2a(6)], the court may place an individual convicted of a violent felony on probation for not more than 5 years." MCL 771.2a(4).

D. Sex Offenders and Probation Orders

Generally, offenders convicted of a listed offense may be placed on probation "for any term of years but not less than 5 years."[36] MCL 771.2a(7).

The sentence of probation must comply with the requirements of MCL 771.2a(8)-(13), which require additional conditions of probation. MCL 771.2a(7). Specifically, the court must order an individual placed on probation under MCL 771.2a(7) **not** to do any of the following:

- "Reside within a student safety zone," MCL 771.2a(8)(a);
- "Work within a student safety zone," MCL 771.2a(8)(b); or
- "Loiter within a student safety zone," MCL 771.2a(8)(c).

However, MCL 771.2a(9)-(12) provide circumstances where some of the conditions required by MCL 771.2a must not be imposed, and MCL 771.2a(13) provides circumstances where the court may exempt an individual convicted of a listed offense from probation under MCL 771.2a(7).

Student offenders. If the defendant is a student at a school in Michigan and is convicted of (or if a juvenile is adjudicated for) a violation of MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g, the order of probation must include an order prohibiting the defendant or juvenile from "[a]ttending the same school building that is attended by the victim of the violation," and "[u]tilizing a school bus for transportation to and from any

[36] Except as otherwise provided by law, MCL 771.2a(6); for example, MCL 771.1(1) provides that defendants convicted of first-degree or third-degree criminal sexual conduct cannot be sentenced to probation.

school if the individual or juvenile will have contact with the victim during use of the school bus." MCL 750.520o(1).

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

9.7 Probation—Special Issues

A. Medical Probation

"Subject to [MCL 771.3g(4)], a court may enter an order of probation placing a prisoner on medical probation under the charge and supervision of a probation officer if the court finds that the prisoner requires acute long-term medical treatment or services, or that the prisoner is physically or mentally incapacitated with a medical condition that renders the prisoner unable to perform activities of basic daily living and the prisoner requires 24-hour care." MCL 771.3g(3).

1. Notification of Eligibility from County Sheriff

"A county sheriff may notify the court in writing that a prisoner may be eligible for medical probation if the county sheriff has consulted with a physician and the physician determined either of the following:

> (a) The prisoner is physically or mentally incapacitated due to a medical condition that renders the prisoner unable to perform activities of basic daily living, and the prisoner requires 24-hour care. The physician shall evaluate when the physical or mental incapacitation arose.
>
> (b) The prisoner requires acute long-term medical treatment or services." MCL 771.3g(1).

"A county sheriff's notification submitted to the court under [MCL 771.3g(1)] must be accompanied with the evidence the physician considered in making a determination under [MCL 771.3g(1)(a) or MCL 771.3g(1)(b)]." MCL 771.3g(2).

2. Preconditions for Medical Probation

"A court shall not place a prisoner on medical probation unless all of the following apply:

(a) A placement option has been secured for the prisoner in the community. A placement option may include, but is not limited to, home confinement or a medical facility.

(b) The county sheriff has made a reasonable effort to determine whether expenses related to the prisoner's placement secured under [MCL 771.3g(4)(a)] are covered by Medicaid, a health care policy, a certificate of insurance, or another source for the payment of medical expenses or whether the prisoner has sufficient income or assets to pay for expenses related to the placement.

(c) The court conducted a public hearing in which the prosecuting attorney of the county and each victim who requests notice in the manner provided in the [William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq.*], are provided adequate notice of the hearing and an opportunity to be heard during the hearing." MCL 771.3g(4).

3. Reimbursement of Expenses

"If a court's placement of a prisoner on medical probation results in expenses incurred by the county that are not covered by a payment source identified under [MCL 771.3g(4)(b)], to the extent permitted under applicable law, the county may seek reimbursement for those expenses." MCL 771.3g(5).

4. Reexamination of Prisoner

"An order of medical probation entered under [MCL 771.3g(3)] may include as a condition of the medical probation that the prisoner submit to reexamination by a physician to assess whether the prisoner continues to meet the requirements for medical probation under [MCL 771.3g(3)]." MCL 771.3g(6).

"At any time while the prisoner is placed on medical probation, the court or probation officer may require the prisoner to submit to a reexamination." MCL 771.3g(6).

"If, after the prisoner is reexamined, the court finds that the requirements for medical probation under [MCL 771.3g(3)] are no longer met, the court shall revoke medical probation and order the prisoner committed to the county jail for a term of imprisonment that does not exceed the penalty that was imposed, less time served, for the offense for which the

prisoner was originally convicted and placed on medical probation." MCL 771.3g(6).

B. Compassionate Release

"Subject to [MCL 771.3h(3)], a court may grant compassionate release to a prisoner if the court finds that the prisoner has a life expectancy of not more than 6 months and that the release of the prisoner would not reasonably pose a threat to public safety or the prisoner. If a court grants a prisoner compassionate release, the court shall enter an amended judgment of sentence specifying that the prisoner is released from the term of imprisonment imposed for the offense for which the prisoner was originally convicted." MCL 771.3h(2).

1. Notification of Eligibility from County Sheriff

"A county sheriff may notify the court in writing that a prisoner may be eligible for compassionate release if the county sheriff has consulted with a physician and the physician determined that the prisoner has a life expectancy of not more than 6 months." MCL 771.3h(1). "The notification must be accompanied with the evidence the physician considered in making the determination regarding the prisoner's life expectancy." *Id.*

2. Preconditions for Compassionate Release

"A court shall not grant a prisoner compassionate release unless all of the following apply:

> (a) A placement option has been secured for the prisoner in the community. A placement option may include, but is not limited to, placement in the prisoner's home or a medical facility.
>
> (b) The sheriff has made a reasonable effort to determine whether expenses related to the prisoner's placement secured under [MCL 771.3h(3)(a)] are covered by Medicaid, a health care policy, a certificate of insurance, or another source for the payment of medical expenses or whether the prisoner has sufficient income or assets to pay for expenses related to the placement.
>
> (c) The court conducted a public hearing in which the prosecuting attorney of the county and each victim who requests notice in the manner provided

> in the [William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq.*], are provided adequate notice of the hearing and an opportunity to be heard during the hearing." MCL 771.3h(3).

3. Reimbursement of Expenses

> "If a court's grant of compassionate release to a prisoner results in expenses incurred by the county that are not covered by a payment source identified under [MCL 771.3h(3)(b)], to the extent permitted under applicable law, the county may seek reimbursement for those expenses." MCL 771.3h(4).

C. Swift and Sure Sanctions Probation Program

The statutory authority for the swift and sure sanctions probation program is codified in Chapter XIA of the Code of Criminal Procedure, MCL 771A.1 *et seq.* See also MCL 600.1086 (permitting a circuit court to adopt or institute a swift and sure sanctions court to carry out the purposes of the Swift and Sure Sanctions Act and setting procedures for transfers from other jurisdictions).

The swift and sure sanctions probation program is designed for high-risk felony offenders and involves closer monitoring and immediate sanctions for probation violations. See MCL 771A.5.

Defendants charged with a crime under MCL 750.316, MCL 750.317, MCL 750.520b, MCL 750.520d, MCL 750.529, and MCL 750.544, or a major controlled substance offense, except for violation of MCL 333.7403(2)(a)(*v*), are not eligible to participate in a swift and sure sanctions probation program. See MCL 771A.6(3).

The State Court Administrative Office has several resources for courts operating a swift and sure sanctions probation program on its website, accessible here.

9.8 Delayed Sentencing[37]

"In an action in which the court may place the defendant on probation,[38] 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[.]" MCL 771.1(2). See also

[37]Note that MCL 771.1 does not apply to certain juvenile offenders. See MCL 771.1(4).

[38]MCL 771.1(1) sets out certain offenses for which probation may not imposed. See Section 9.2.

People v Salgat, 173 Mich App 742, 745-746 (1988) ("The purpose of a delayed sentence is to give the defendant an opportunity to demonstrate that he can fairly be placed on probation rather than be sentenced to prison.").

"When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records." MCL 771.1(2). "[A] delayed sentence means that no sentence is initially imposed, and the charge against the defendant remains pending." *Salgat*, 173 Mich App at 746.

"The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay." MCL 771.1(2). See Section 9.8(C) for additional discussion of the court's sentencing jurisdiction.

See SCAO Form MC 294, *Order Delaying Sentence*.

A. Conditions During Delay

"Reasonable conditions may be imposed for the delay if they will give the defendant an opportunity to prove his or her eligibility for probation or leniency." *People v Saenz*, 173 Mich App 405, 409 (1988). See also *People v Salgat*, 173 Mich App 742, 746 (1988).[39]

The statute includes "participation in a drug treatment court" as an example of a way for the defendant to prove his or her eligibility for probation or leniency. See MCL 771.1(2).

The Court has stated that "[r]equiring that defendant obtain psychiatric treatment, in a proper case, may be a valid condition." *Saenz*, 173 Mich App at 409. In another case, the Court noted it is proper to impose conditions similar to probation conditions, specifically opining that "the trial court could reasonably require that as a condition of the delayed sentence the defendant not violate any further laws, pay court costs, not associate with known felons and pay restitution." *People v Cannon*, 145 Mich App 100, 104 (1985).[40]

Requiring the defendant to have no contact with his parents was a valid condition of a delayed sentence where the defendant's parents were the victims of defendant's crime and the condition was "designed to protect the parents from being further victimized by defendant," and "to ensure defendant's willingness to be bound by

[39] "The imposition of . . . conditions or restrictions [during a delayed sentence period] should not be confused with a sentence of probation, even though they are similar to those associated with probation." *Salgat*, 173 Mich App at 746.

reasonable restrictions upon his conduct which might have governed any grant of probation." *People v Coleman*, 130 Mich App 639, 641 (1983).

The trial court did not err by imposing conditions during delayed sentencing that required the defendant "(1) to refrain from drinking alcoholic beverages; (2) to stay away from bars and taverns; and (3) to report each week to a probation officer" because the conditions were "reasonably well designed to assist the court in determining whether or not she would be eligible for probation when the six-month [delayed sentence] period ended." *People v Clyne*, 36 Mich App 152, 153-155 (1971) (rejecting the defendant's challenge that she was entitled to a summary hearing because the imposed conditions "actually placed her on a probationary status").

Incarceration in jail is not a valid condition of a delayed sentence because "it is the precise type of punishment authorized by the Legislature for the offense," and not a means by which the defendant could "prove his or her eligibility for probation or leniency." *Saenz*, 173 Mich App at 409.

Note that MCL 771.3(10) states that "[i]f sentencing is delayed or entry of judgment is deferred in the district court or in a municipal court, the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1)], and subject to [MCL 771.3(11)], the conditions of probation described in [MCL 771.3(2), and MCL 771.3(3)]," and MCL 771.3(2)(a) permits the court to order imprisonment in the county jail. MCL 771.3(9) similarly permits the *circuit* court to "impose, as applicable, the conditions of probation described in [MCL 771.3(1)], and subject to [MCL 771.3(11)], the conditions of probation described in [MCL 771.3(2), and MCL 771.3(3)]," but that section applies only in cases in which "entry of judgment is deferred," and unlike MCL 771.3(10), MCL 771.3(9) does not state that it also applies to cases in which sentencing is *delayed*.

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[40]Note that the *Saenz* Court stated "that the *Cannon* Court's view of [MCL 771.1(2)] was too limited in scope since the statute also authorized a delay to give the defendant an opportunity to prove his eligibility for 'other leniency compatible with the ends of justice and the rehabilitation of the defendant,'" and the *Cannon* Court's holding considered only eligibility for probation. *Saenz*, 173 Mich App at 409. Note that MCL 771.1 has been amended since the *Saenz* decision, but its language remains substantially similar in relevant part, now stating: "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[.]" MCL 771.1(2). The Court agreed "with *Cannon* to the extent that it holds that a jail term is not a valid condition of a delay." *Saenz*, 173 Mich App at 409.

B. Violation of Condition and Sentencing After Delay

A defendant generally does not have a right to a formal hearing on whether he or she violated a condition of a delayed sentencing arrangement. *People v Salgat*, 173 Mich App 742, 746 (1988).

The due process required at a sentencing hearing following a delay in sentencing is the same required at any sentencing hearing. See *People v Saylor*, 88 Mich App 270, 274-275 (1979) (holding defendant's right to due process was not violated where a copy of the presentence investigation report (PSIR) was provided to his attorney, defendant and his attorney were allowed to respond to the information in the PSIR, and were able to present any other relevant information; the procedures that apply to probation revocation hearings do not apply in the context of delayed sentencing).

"The sentence ultimately imposed should be based upon all of the circumstances of the defendant's background. Among the factors to be considered in sentencing is the defendant's failure to comply with the conditions and restrictions imposed in conjunction with the sentence delay." *Salgat*, 173 Mich App at 746. For a detailed discussion of sentencing considerations, see Section 5.3.

C. Court's Sentencing Jurisdiction

"[T]he plain language of MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence[.]" *People v Smith*, 496 Mich 133, 142-143 (2014), overruling *People v Boynton*, 185 Mich App 669 (1990); *People v Dubis*, 158 Mich App 504 (1987), *People v Turner*, 92 Mich App 485 (1979); and *People v McLott*, 70 Mich App 524 (1976) (overruling these cases "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 is worthy of leniency, and the judge is required to sentence defendant as provided by law." *Smith*, 496 Mich at 142.

D. Speedy Trial Clause Not Applicable

A defendant's sentence, based on accurate information prepared in advance of the sentencing hearing for the purpose of fashioning an appropriate sentence, must be imposed "within a reasonably prompt time" after the defendant's conviction by plea or verdict unless the court has delayed the defendant's sentencing in a manner provided by law. MCR 6.425(D)(1). The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty

at trial or has pleaded guilty to criminal charges," and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US 437, 439-441 (2016) (holding "that the Clause does not apply to delayed sentencing"). However, "although the Speedy Trial Clause does not govern [inordinate delay in sentencing,] a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at 439.

E. Mandatory Supervision Fees and Minimum State Costs[41]

In cases involving delayed sentencing in the circuit court, supervision fees are generally required under MCL 771.1(3). The court may waive the supervision fee owed by a defendant if it finds the defendant indigent. MCL 771.1(5). The delayed sentence order must order the Department of Corrections to collect a supervision fee from the defendant as provided in MCL 771.1(3).

MCL 771.1(3) sets out the amount of the supervision fee, which depends on whether the defendant is subject to electronic monitoring. Unlike the supervision fee ordered when a defendant is *sentenced* to a probationary period that may be for as many as 60 months (MCL 771.3c(1)), the supervision fee ordered in cases of delayed sentencing can be for no more than 12 months. MCL 771.1(3). A defendant cannot be subject to more than one supervision fee at a time. *Id*. "If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration." *Id*.

In addition to a supervision fee, a defendant whose sentencing is delayed must pay the minimum state costs detailed in MCL 769.1j.[42] MCL 769.1k(1)(a).

MCL 769.1k[43] provides a general statutory basis for a court's authority to impose fines and costs. MCL 769.1k(1)(b) and MCL 769.1k(2) provide authority to impose numerous additional discretionary court-ordered financial obligations. Victims have a constitutional right to restitution. Const 1963, art 1, § 24. Additionally, restitution is mandatory under the Crime Victim's

[41]Note that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(D)(3). See Section 8.4 for discussion of MCR 6.425(D)(3) and a defendant's ability to pay court-ordered financial obligations.

[42]See Section 8.11 for discussion of minimum state costs.

Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. See *People v Garrison*, 495 Mich 362, 365 (2014). For a detailed discussion of court-ordered financial obligations, see Chapter 8.

F. Offenses Reported to Secretary of State

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. *In re McCann Driving Record*, 314 Mich App 605, 614 (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 of State 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*, 314 Mich App at 614.

See the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 1, for a detailed discussion of procedures for traffic offenses, including the trial court's responsibility for forwarding conviction abstracts.

9.9 Deferred Adjudication of Guilt

Deferred adjudication is statutorily authorized for certain crimes and refers to an arrangement where the defendant[44] pleads or is found guilty of a charged offense, but instead of entering an adjudication of guilt, the defendant is placed on probation; the case is discharged and dismissed without a judgment of guilt if the defendant successfully completes probation. See MCL 333.7411 (specified controlled substance offenses); MCL 436.1703(1)(b) (minor in possession); MCL 750.430 (impaired healthcare professional); MCL 769.4a (domestic violence/spousal abuse); MCL 750.350a (parental kidnapping); MCL 750.451c (prostitution by human trafficking victim).

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[43]Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k in response to the Michigan Supreme Court's holding in *People v Cunningham (Cunningham II)*, 496 Mich 145 (2014). In *Cunningham II*, the Court held that MCL 769.1k(1)(b)(*ii*)— which, at the time, provided for the imposition of "[a]ny cost in addition to the minimum state cost"—did "not provide courts with the independent authority to impose 'any cost'"; rather, it "provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 147, 158-159 (concluding that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs"). 2014 PA 352 added MCL 769.1k(1)(b)(*iii*) to provide for the imposition of "any cost reasonably related to the actual costs incurred by the trial court[.]"

[44]The defendant or the juvenile; however, for ease of reference this section uses the term "defendant" to refer to all persons subject to deferred adjudication of guilt.

Deferred adjudication is also permitted in certain circumstances for offenders admitted to a state-certified treatment court. See Section 9.14 for discussion of these specialized courts. Additionally, certain crimes committed by youthful offenders are eligible for deferred adjudication under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*. See Section 9.10 for a discussion of HYTA.

The crime of desertion and non-support under MCL 750.161 provides the court with authority to defer sentencing, but differs from the other statutory sections discussed in this section because it does not address the same factors. MCL 750.161(2)-(3). The statute states in relevant part:

> "(1) A person who deserts and abandons his or her spouse or deserts and abandons his or her children under 17 years of age, without providing necessary and proper shelter, food, care, and clothing for them, and a person who being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse or his or her children under 17 years of age, is guilty of a felony, punishable by imprisonment in a state correctional facility for not less than 1 year and not more than 3 years, or by imprisonment in the county jail for not less than 3 months and not more than 1 year.
>
> (2) If at any time before sentence the defendant enters into bond to the people of the state of Michigan in such penal sum for such term and with such surety or sureties as may be fixed by the court, conditioned that he or she will furnish his or her spouse and children with necessary and proper shelter, food, care, and clothing, or will pay to the clerk of the court, or other designated person, such sums of money at such times as the court shall order to be used to provide food, shelter, and clothing for his or her spouse and children, or either of them, then the court may make an order placing the defendant in charge of a probation officer. The court may require that the defendant shall from time to time report to the probation officer as provided by law. The court may extend the period of probation from time to time **or the court may defer sentence in the cause**, but no term of any bond or any probation period shall exceed the maximum term of imprisonment as provided for in this section.
>
> (3) Upon failure of the defendant to comply with any of the conditions contained in the bond, the defendant may be ordered to appear before the court and show cause why sentence should not be imposed, whereupon the court may pass sentence, or for good cause shown **may modify the order and further defer sentence as may be just and proper**.

Whenever the whereabouts of the defendant is unknown, the court may summarily issue a bench warrant for the arrest of the defendant." MCL 750.161(1)-(3) (emphasis added).

Deferred Sentencing Authorization and Eligibility Requirements

Statutory Authorization for Deferred Adjudication of Guilt	Previous Conviction Requirements	Establishment of Guilt Requirements	Consent Required	Number of Permitted Discharge and Dismissals
MCL 333.7411 Possession/use of controlled substances offenses: • MCL 333.7403(2)(a)(*v*) (felony); • MCL 333.7403(2)(b) (felony); • MCL 333.7403(2)(c) (misdemeanor); • MCL 333.7403(2)(d) (misdemeanor); • MCL 333.7404 (misdemeanor); or • MCL 333.7341—second offense (misdemeanor).	• To be eligible for deferral, defendant cannot have any previous convictions for an offense listed under Article 7 of the Public Health Code or an offense under any other state or federal statute related to narcotic drugs, cocaine, marijuana, stimulants, depressants, or hallucinogenic drugs. MCL 333.7411(1). • A conviction entered simultaneously with the charge to be deferred under § 7411 is not a "previous conviction," and does not make the defendant ineligible for deferral. *People v Ware*, 239 Mich App 437, 442 (2000).	Must plead guilty or be found guilty of an enumerated offense. MCL 333.7411(1).	Defendant must consent to deferral. MCL 333.7411(1).	Only one discharge and dismissal permitted. MCL 333.7411(1).
MCL 436.1703(1)(b) Minor in possession (misdemeanor)	To be eligible for deferral, defendant or juvenile must have only one prior judgment. MCL 436.1703(1)(b); MCL 436.1703(3).	Must plead guilty to or offer a plea of admission to a misdemeanor violation of MCL 436.1703(1)(b). MCL 436.1703(3).	Defendant or juvenile must consent to deferral. MCL 436.1703(3).	Only one discharge and dismissal permitted. MCL 436.1703(3).

Statutory Authorization for Deferred Adjudication of Guilt	Previous Conviction Requirements	Establishment of Guilt Requirements	Consent Required	Number of Permitted Discharge and Dismissals
MCL 750.430 Impaired healthcare professional (misdemeanor) Deferral only permitted if conduct did not result in physical harm or injury to the patient, MCL 750.430(9).	To qualify for deferral, defendant must not have a previous conviction for violating MCL 750.430(1). MCL 750.430(9).	MCL 750.430(9) does not explicitly require a plea or other finding of guilt prior to deferral, but it does refer to entry of an adjudication of guilt upon failure to comply with terms, an act that implicitly requires that the defendant's guilt be established. MCL 750.430(9).	Defendant and the prosecuting attorney must consent to deferral. MCL 750.430(9).	Only one discharge and dismissal permitted. MCL 750.430(9).
MCL 769.4a Domestic assault offenses: • MCL 750.81, assault—first offense (misdemeanor); and • MCL 750.81a, assault causing serious injury—first offense (misdemeanor). The victim must be: • defendant's spouse/ former spouse; • an individual with whom the defendant has a child in common; • an individual who is dating or has dated the defendant; or • an individual residing in or who has resided in the same household as the defendant. MCL 769.4a(1).	To qualify for deferral, defendant must have no previous convictions of an assaultive crime. The court must contact the department of state police to check police records to see if defendant has previously been convicted of an assaultive crime, and if the records show an arrest without a disposition, the court must contact the arresting agency and court with jurisdiction over the violation to determine the disposition of the arrest. MCL 769.4a(1).	Must plead guilty or be found guilty of an enumerated offense. MCL 769.4a(1).	Defendant and the prosecuting attorney (who must consult with the victim) must consent to deferral. MCL 769.4a(1).	Only one discharge and dismissal permitted. MCL 769.4a(5).

Statutory Authorization for Deferred Adjudication of Guilt	Previous Conviction Requirements	Establishment of Guilt Requirements	Consent Required	Number of Permitted Discharge and Dismissals
MCL 750.350a Parental kidnapping (felony)	To qualify for deferral, defendant must have no previous convictions of: • MCL 750.349 (kidnapping), • MCL 750.350 (taking a child under age 14 from the child's parent, adoptive parent, or legal guardian), • MCL 750.350a (adoptive or natural parent taking a child), or • any other state or federal statute related to kidnapping. MCL 750.350a(4).	Must plead guilty or be found guilty of MCL 750.350a. MCL 750.350a(4).	Defendant must consent to deferral. MCL 750.350a(4).	Only one discharge and dismissal permitted. MCL 750.350a(4).
MCL 750.451c Certain prostitution offenses committed as a direct result of being a human trafficking victim: • MCL 750.448; • MCL 750.449; • MCL 750.450; and • MCL 750.462 (misdemeanors or felonies if 2 or more prior convictions, • MCL 750.451).	MCL 750.451c contains no prior conviction constraints affecting eligibility for discharge and dismissal. See 2017 PA 34 (amending MCL 750.451c to eliminate the requirement).	Must plead guilty or be found guilty of an enumerated offense. MCL 750.451c(2). Defendant bears the burden of proving by a preponderance of the evidence that the violation was a direct result of being a victim of human trafficking, and can prove that claim by stating "under oath that he or she meets the conditions described in [MCL 750.451c(1)] with facts supporting his or her claim that the violation was a direct result of being a victim of human trafficking." MCL 750.451c(2)(a)-(b).	Defendant and the prosecuting attorney must consent to deferral. MCL 750.451c(2).	MCL 750.451c contains no limitation on the number of discharges and dismissals under MCL 750.451c. See 2017 PA 34 (amending MCL 750.451c to eliminate the restriction).

A. Probation During Deferred Proceedings

When all of the requirements regarding statutory authorization, prior convictions, establishment of guilt, consent, and previous deferrals detailed in the preceding table are satisfied, the court places the defendant on probation, further proceedings are deferred, and no judgment or adjudication of guilt is entered. MCL 333.7411(1); MCL 436.1703(3); MCL 750.430(9); MCL 769.4a(1); MCL 750.350a(4); MCL 750.451c(2); MCL 750.451c(4).

Each statutory section authorizing deferred sentencing includes mandatory and discretionary conditions of probation specific to the particular offense.[45] These specific provisions will be discussed in the following sub-subsections.

Additionally, MCL 771.3(9) (deferrals in circuit court) and MCL 771.3(10) (deferrals in district court) provide broadly-applicable requirements that apply in every case where judgment is deferred.

MCL 771.3(9) provides:

> "If entry of judgment is deferred in the circuit court, the court shall require the individual to pay a supervision fee in the same manner as is prescribed for a delayed sentence under [MCL 771.1(3)[46]], shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j], and may impose, as applicable, the conditions of probation described in [MCL 771.3(1)], and subject to [MCL 771.3(11)], the conditions of probation described in [MCL 771.3(2), and MCL 771.3(3)]."

MCL 771.3(10) provides:

> "If sentencing is delayed or entry of judgment is deferred in the district court or in a municipal court, the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j,] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1)], and subject to [MCL 771.3(11)], the conditions of probation described in [MCL 771.3(2), and MCL 771.3(3)]."

Note that while the procedures for deferral in circuit and district or municipal court are similar, only MCL 771.3(9), regarding deferrals

[45] See Section 9.2 for detailed information regarding terms and conditions of probation.

[46] For discussion of delayed sentencing see Section 9.8.

in circuit court, expressly requires the individual to pay a supervision fee. MCL 771.3(9). No express language requires that a supervision fee be imposed on a defendant whose adjudication is deferred in district or municipal court; however, discretionary authority to impose a supervision fee is provided in MCL 771.3(5), which is specifically referenced by MCL 771.3(2)(c), which is in turn specifically referenced by MCL 771.3(10). Accordingly, in cases involving deferral of a felony, a supervision fee is a mandatory condition of probation under MCL 771.3(9), and in cases involving deferral of a misdemeanor, a supervision fee is a discretionary condition of probation under MCL 771.3(10).

For a detailed discussion of minimum state costs, see Section 8.11. For a detailed discussion of the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3), see Section 9.3 and Section 9.4.

1. Conditions Specific to Deferral Under § 7411

In addition to the conditions applicable in all cases of deferred sentencing set forth in MCL 771.3(9) (circuit court) and MCL 771.3(10) (district and municipal courts),[47] MCL 333.7411 provides that:

- payment of a probation supervision fee as prescribed in MCL 771.3c[48] **must** be included as a term and condition of probation, and
- participation in a drug treatment court **may** be included as a term and condition, MCL 333.7411(1).

MCL 333.7411(1) provides that the terms and conditions are not limited to the mandatory supervision fee.

2. Conditions Specific to Deferral for Minor in Possession (MIP) Offense

In addition to the conditions applicable in all cases of deferred sentencing set forth in MCL 771.3(10) (district and municipal courts),[49] MCL 436.1703(3) provides "[t]he terms and conditions of that probation include, but are not limited to":

[47]Discussed in Section 9.9(A).

[48]See Section 8.9(A) for a discussion of MCL 771.3c, which requires the circuit court to include a probation supervision fee in each order of probation.

[49]Discussed in Section 9.9(A).

- "the sanctions set forth in" MCL 436.1703(1)(c), which include:
  - "imprisonment for not more than 60 days, if the court finds that the minor violated an order of probation, failed to successfully complete any treatment, screening, or community service ordered by the court, or failed to pay any fine for that conviction or juvenile adjudication,"
  - a fine of not more than $500;
  - participation in substance use disorder services;
  - community service;
  - substance abuse screening and assessment at his or her own expense as described in MCL 436.1703(5), MCL 436.1703(1)(c);
- payment of costs including the minimum state cost described in MCL 712A.18m and MCL 769.1j,[50] MCL 436.1703(3); and
- payment of probation costs required by MCL 771.3. MCL 436.1703(3).

3. Conditions Specific to Deferral for Impaired Healthcare Professional Offense

In addition to the conditions applicable in all cases of deferred sentencing set forth in MCL 771.3(10) (district and municipal courts),[51] MCL 750.430(9) provides that the probation terms and conditions **must** include, but are not limited to, participation in the health professional recovery program established by MCL 333.16167. The statutory provision also expressly mentions that a defendant **may** be ordered to participate in a drug treatment court as a condition of his or her probation. MCL 750.430(9).

4. Conditions Specific to Deferral for Domestic Violence-Related Offenses

In addition to the conditions applicable in all cases of deferred sentencing set forth in MCL 771.3(10) (district and municipal courts),[52] MCL 769.4a(3) specifically provides that "[a]n order

[50] See Section 8.11 for a discussion of minimum state costs.

[51] Discussed in Section 9.9(A).

of probation entered under [MCL 769.4a(1)] **may** include any condition of probation authorized under [MCL 771.3], including, but not limited to, requiring the accused to participate in a mandatory counseling program." MCL 769.4a(3) (emphasis added). The statute also provides the court **may** order the accused to:

- pay reasonable costs of the mandatory counseling program;
- participate in a drug treatment court; and/or
- be imprisoned for not more than 12 months at a time or at consecutive or nonconsecutive intervals within the period of probation (court may also grant day parole as authorized under MCL 801.251 to MCL 801.258, and/or work or school release). MCL 769.4a(3).[53]

5. Conditions Specific to Deferral for Parental Kidnapping Offense

In addition to the conditions applicable in all cases of deferred sentencing set forth in MCL 771.3(9) (circuit court),[54] MCL 750.350a provides that the accused **may** be placed "on probation with lawful terms and conditions," and states that those terms and conditions "may include participation in a drug treatment court[.]" MCL 750.350a(4).

6. Conditions Specific to Deferral for Prostitution Offenses Committed by Human Trafficking Victims

In addition to the conditions applicable in all cases of deferred sentencing set forth in MCL 771.3(9) (circuit court) and MCL 771.3(10) (district and municipal courts),[55] MCL 750.451c(4) provides that an order of probation **may** include, but is not limited to:

- any condition of probation authorized under MCL 771.3;
- participation in a mandatory counseling program;

[52]Discussed in Section 9.9(A).

[53]Any imprisonment cannot exceed the maximum period of imprisonment authorized for the offense if the maximum is less than 12 months. MCL 769.4a(3).

[54]Discussed in Section 9.9(A).

[55]Discussed in Section 9.9(A).

- pay reasonable costs of the mandatory counseling program;
- participate in a drug treatment court; and
- imprisonment for not more than 93 days at a time or at consecutive or nonconsecutive intervals within the period of probation (court may also grant day parole as authorized under MCL 801.251 to MCL 801.258, and/or work or school release).[56]

B. Failure to Successfully Complete the Probationary Period

Generally, the court has discretion to enter a judgment of guilt and proceed to sentencing when a defendant violates a term or condition of his or her probation. See MCL 333.7411(1); MCL 436.1703(3); MCL 750.430(9); MCL 769.4a(1); MCL 750.350a(4); MCL 750.451c(2); MCL 750.451c(4).

1. § 7411

"Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided." MCL 333.7411(1).

MCL 333.7411(5) provides discretionary authority to impose additional terms as part of the sentence. Specifically:

> "Except as provided in [MCL 333.7411(6)], if an individual is convicted of a violation of [Article 7 of the PHC], other than a violation of [MCL 333.7401(2)(a)(*i*)-(*iv*) or MCL 333.7403(2)(a)(*i*)-(*iv*)[57]], the court as part of the sentence, during the period of confinement or the period of probation, or both, may require the individual to attend a course of instruction or rehabilitation program approved by the department on the medical, psychological, and social effects of the misuse of drugs. The court may order the individual to pay a fee, as approved by the director, for the instruction or program. Failure to complete the instruction or program is a violation of the terms of probation." MCL 333.7411(5).

[56]Any period of imprisonment must not exceed the maximum period of imprisonment authorized for the offense if the maximum period is less than 93 days. MCL 750.451c(4).

[57]Note that deferred sentencing is not permitted for violation of these offenses. MCL 333.7411(1).

Similarly, MCL 333.7411(6) provides additional requirements that apply "[i]f an individual is convicted of a second violation of [MCL 333.7341(4) (use/possession of an imitation controlled substance).]" The statute provides that "before imposing sentence under [MCL 333.7411(1)]," the court must "order the person to undergo screening and assessment by a person or agency designated by the office of substance abuse services, to determine whether the person is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs." MCL 333.7411(6). The court has discretionary authority, "[a]s part of the sentence imposed under [MCL 333.7411(1)]," to "order the person to participate in and successfully complete 1 or more appropriate rehabilitative programs." MCL 333.7411(6). "The person shall pay for the costs of the screening, assessment, and rehabilitative services. Failure to complete a program is a violation of the terms of the probation." MCL 333.7411(6).

2. Minor in Possession ("MIP")

"If a court finds that an individual violated a term or condition of probation or that the individual is utilizing [deferral under MCL 436.1703(3)] in another court, the court may enter an adjudication of guilt, or a determination in a juvenile delinquency proceeding that the individual has committed the offense, and proceed as otherwise provided by law." MCL 436.1703(3).

3. Impaired Healthcare Professional

"Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided under [MCL 750.430(8)]." MCL 750.439(9). MCL 750.430(8)(a) provides that a first violation of MCL 750.430 is punishable by imprisonment for not more than 180 days or a fine of not more than $1,000, or both.

4. Domestic Violence/Spousal Abuse

"Upon a violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided in this chapter." MCL 769.4a(2). However, the court **must** "enter an adjudication of guilt and proceed as otherwise provided in [Chapter IX of the Code of Criminal Procedure, Judgment and Sentence] if any of the following circumstances exist:

> (a) The accused commits an assaultive crime during the period of probation.
>
> (b) The accused violates an order of the court that he or she receive counseling regarding his or her violent behavior.
>
> (c) The accused violates an order of the court that he or she have no contact with a named individual." MCL 769.4a(4).

5. Parental Kidnapping

"Upon a violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided." MCL 750.350a(4).

6. Prostitution Offenses Committed by Human Trafficking Victims

"Upon a violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided in this chapter." MCL 750.451c(3).

However, the court **must** "enter an adjudication of guilt and proceed as otherwise provided in [Chapter LXVII of the Michigan Penal Code, Prostitution] if any of the following circumstances exist:

> (a) The accused commits a violation of [MCL 750.448, MCL 750.449, MCL 750.450, or MCL 750.462] or a local ordinance substantially corresponding to [one of those statutes] during the period of probation.
>
> (b) The accused violates an order of the court that he or she receive counseling regarding his or her violent behavior.
>
> (c) The accused violates an order of the court that he or she have no contact with a named individual." MCL 750.451c(5).

C. Successful Completion of the Probationary Period

A court must discharge the defendant and dismiss the proceedings against him or her when the defendant has fulfilled the terms and conditions of his or her probationary period. MCL 333.7411(1); MCL

436.1703(3); MCL 750.430(9); MCL 769.4a(5); MCL 750.350a(4); MCL 750.451c(6).

Generally, an individual may obtain only one discharge and dismissal under each respective statutory provision, MCL 333.7411(1); MCL 436.1703(3); MCL 750.430(9); MCL 769.4a(5); however, in the case of eligible prostitution offenses committed as a direct result of being a human trafficking victim, the deferral statue contains no limitation, see MCL 750.451c.

1. § 7411

"Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings." MCL 333.7411(1).

"Discharge and dismissal under [MCL 333.7411] shall be without adjudication of guilt and, except as otherwise provided by law, is not a conviction for purposes of [MCL 333.7411] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under [MCL 333.7413 (enhancing penalties for second or subsequent violations of Article 7 of the PHC)]." MCL 333.7411(1).

When a defendant has successfully completed the term of probation imposed under MCL 333.7411, the felony charge is dismissed and is not a felony conviction for purposes of the concealed pistol licensing act (CPLA), MCL 28.421 *et seq*. *Carr v Midland Co Concealed Weapons Licensing Bd*, 259 Mich App 428, 438 (2003).

A discharge and dismissal following a defendant's successful fulfillment of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring prior record variable (PRV) 5. *People v James*, 267 Mich App 675, 679-680 (2005).

2. Minor in Possession ("MIP")

"If an individual fulfills the terms and conditions of probation, the court shall discharge the individual and dismiss the proceedings." MCL 436.1703(3).

"A discharge and dismissal under [MCL 436.1703] is without adjudication of guilt or without a determination in a juvenile delinquency proceeding that the individual has committed the offense and is not a conviction or juvenile adjudication for

purposes of disqualifications or disabilities imposed by law on conviction of a crime." MCL 436.1703(3).

3. Impaired Healthcare Professional

"Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings." MCL 750.430(9).

"Discharge and dismissal under [MCL 750.430] shall be without adjudication of guilt and are not a conviction for purposes of [MCL 750.430] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including additional penalties imposed for second or subsequent convictions under this subsection."[58] MCL 750.430(9).

4. Domestic Violence/Spousal Abuse

"Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person." MCL 769.4a(5). "Discharge and dismissal under [MCL 769.4a] must be without adjudication of guilt and is not a conviction for purposes of [MCL 769.4a] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime[.]" MCL 769.4a(5).

However, discharge and dismissal "is a prior conviction in a prosecution under [MCL 750.81(4) or MCL 750.81(5) (certain repeat offenses involving domestic assault or assault of a pregnant individual), and MCL 750.81a(3) (aggravated domestic assault with one or more previous domestic assault convictions)]." MCL 769.4a(5).

5. Parental Kidnapping

"Upon fulfillment of the terms and conditions of probation, the court shall discharge from probation and dismiss the proceedings against the parent." MCL 750.350a(4).

"Discharge and dismissal under [MCL 750.350a(4)] shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including any additional penalties

[58] While the statute says "under this subsection" in MCL 750.430(9), MCL 750.430(8)(b) sets out the penalties for a second or subsequent offense.

imposed for second or subsequent convictions." MCL 750.350a(4).

6. Prostitution Offenses Committed by Human Trafficking Victims

"Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person." MCL 750.451c(6).

"Discharge and dismissal under [MCL 750.451c] must be without adjudication of guilt and is not a conviction for purposes of [MCL 750.451c] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." MCL 750.451c(6).

D. Record of Deferred Adjudication

1. § 7411

All court proceedings under MCL 333.7411 are open to the public. MCL 333.7411(2). "[I]f the record of proceedings . . . is deferred under [MCL 333.7411], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 333.7411(2). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 333.7411(3). This nonpublic record is open, for limited purposes as set out in MCL 333.7411(3)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Michigan Commission on Law Enforcement Standards (MCOLES), the Department of Corrections, and the Department of Health and Human Services. MCL 333.7411(3).

An offender whose adjudication of guilt is deferred under MCL 333.7411 and whose case is dismissed after successful completion of the terms of probation does not qualify as "not guilty" for purposes of MCL 28.243(10), and is therefore not entitled to the destruction of his or her fingerprints and arrest card. *People v Benjamin*, 283 Mich App 526, 527-528, 537 (2009).[59]

[59] *Benjamin* refers to MCL 28.243(8); however, effective June 12, 2018, 2018 PA 67 amended MCL 28.243 to renumber MCL 28.243, and the relevant language now appears in MCL 28.243(10).

2. Minor in Possession ("MIP")

"The court shall maintain a nonpublic record of the matter while proceedings are deferred and the individual is on probation and if there is a discharge and dismissal under [MCL 436.1703(3)]." MCL 436.1703(3). Additionally, "[t]he secretary of state shall retain a nonpublic record of a plea and of the discharge and dismissal under [MCL 436.1703(3)]." MCL 436.1703(3).

This nonpublic record is open, for limited purposes as set out in MCL 436.1703(3)(a)-(b), to courts, prosecutors, police agencies, the Department of Corrections, and law enforcement agencies. MCL 436.1703(3).

3. Impaired Healthcare Professional

"Unless the court enters a judgment of guilt under [MCL 750.430(9)], the records and identifications division of the department of state police shall retain a nonpublic record of the arrest, court proceedings, and disposition under [MCL 750.430(9)]." MCL 750.430(9).

This nonpublic record is open, for limited purposes as set out in MCL 750.430(9)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, and the Department of Corrections. MCL 750.430(9).

4. Domestic Violence/Spousal Abuse

All court proceedings under MCL 769.4a are open to the public. MCL 769.4a(6). "[I]f the record of proceedings . . . is deferred under [MCL 769.4a], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 769.4a(6). Unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 769.4a(7). This nonpublic record is open, for limited purposes as set out in MCL 769.4a(7)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 769.4a(7).

An offender whose adjudication of guilt was deferred under MCL 769.4a and whose case is dismissed after successful completion of a diversionary program does not qualify as "not guilty" and is not entitled to the destruction of his or her

fingerprint card under MCL 28.243(10). *McElroy v Mich State Police Criminal Justice Info Ctr*, 274 Mich App 32, 33 (2007).[60]

5. Parental Kidnapping

All court proceedings under MCL 750.350a are open to the public. MCL 750.350a(5). "[I]f the record of proceedings . . . is deferred under [MCL 750.350a], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 750.350a(5). Unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 750.350a(6). This nonpublic record is open, for limited purposes as set out in MCL 750.350a(6)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 750.350a(6).

6. Prostitution Offenses Committed by Human Trafficking Victims

All court proceedings under MCL 750.451c are open to the public. MCL 750.451c(7). "[I]f the record of proceedings . . . is deferred under [MCL 750.451c], the record of proceedings during the period of deferral must be closed to public inspection." MCL 750.451c(7). Unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 750.451c(8). This nonpublic record is open, for limited purposes as set out in MCL 750.451c(8)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 750.451c(8).

E. Court-Ordered Financial Obligations[61]

A defendant whose sentencing is deferred must still satisfy court-ordered financial obligations. See MCL 769.1k. Specifically, a defendant whose sentencing is deferred must pay the minimum state costs detailed in MCL 769.1j.[62] MCL 769.1k(1)(a).

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[60] *McElroy* refers to MCL 28.243(8); however, effective June 12, 2018, 2018 PA 67 amended MCL 28.243 to renumber MCL 28.243, and the relevant language now appears in MCL 28.243(10).

[61] Note that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(D)(3). See Section 8.4 for discussion of MCR 6.425(D)(3) and a defendant's ability to pay court-ordered financial obligations.

MCL 769.1k provides a general statutory basis for a court's authority to impose fines and costs. MCL 769.1k(1)(b) and MCL 769.1k(2) provide authority to impose numerous additional discretionary court-ordered financial obligations. Victims have a constitutional right to restitution. Const 1963, art 1, § 24. Additionally, restitution is mandatory under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., and Michigan's general restitution statute, MCL 769.1a. See *People v Garrison*, 495 Mich 362, 365 (2014). For a detailed discussion of court-ordered financial obligations, see Chapter 8.

9.10 Holmes Youthful Trainee Act (HYTA)—Deferred Adjudication

The Holmes Youthful Trainee Act (HYTA), MCL 762.11 to MCL 762.15, "provides a mechanism for individuals who commit certain crimes between the time of their seventeenth and [twenty-sixth[63]] birthdays to be excused from having a criminal record." *People v Rahilly*, 247 Mich App 108, 113 (2001). "The HYTA evidences a legislative desire that persons in this age group not be stigmatized with criminal records for unreflective and immature acts." *People v Khanani*, 296 Mich App 175, 178 (2012) (quotation marks and citation omitted).

A. Eligibility Requirements

Unless the individual committed a crime listed in MCL 762.11(3) or is a person described in MCL 762.11(4),[64] he or she may be eligible to be assigned as a youthful trainee. Beginning October 1, 2021,[65] to be assigned as a youthful trainee the individual must:

- plead guilty to a criminal offense, MCL 762.11(2);
- commit the crime on or after his or her 18th birthday but before his or her 26th birthday, MCL 762.11(2);

[62] See Section 8.11 for discussion of minimum state costs.

[63] Although HYTA previously applied to individuals who committed crimes between their 17th and 21st birthdays, MCL 762.11(1) was amended by 2015 PA 31, effective August 18, 2015, to raise the maximum eligible age to 24 years of age. The age was raised again when MCL 762.11 was amended by 2020 PA 396, effective March 24, 2021, to extend the age of HYTA eligibility, beginning on October 1, 2021, from 24 years of age to 26 years of age. Until October 1, 2021, the statute applies to individuals who are 17 to 24 years of age. MCL 762.11(1).

[64] See Section 9.10(B) for more information on these exceptions.

[65] Before October 1, 2021, the eligibility requirements are substantially the same *except* that the age range is on or after the individual's 17th birthday but before the individual's 24th birthday, and the prosecutor is not required to consult with the victim. See MCL 762.11(1).

  - or be an individual over 14 years of age whose jurisdiction has been waived under MCL 764.27, MCL 762.15;

- consent to the assignment of youthful trainee status, MCL 762.11(2);

- and if the offense was committed on or after the person's 21st birthday, the prosecutor must also consent, MCL 762.11(2);

  - the prosecutor must consult with the victim regarding a person's eligibility for youthful trainee status if the person was charged with an offense listed in MCL 762.11(3) but pleaded guilty to any other offense or will be eligible for youthful trainee status under MCL 762.11(4), MCL 762.11(2).

See SCAO Form MC 242, *Assignment to Youthful Trainee Status*.

1. Caselaw Interpreting Eligibility Requirements

Defendants who plead nolo contendere or are found guilty following a trial are not eligible for HYTA status. *People v Harns*, 227 Mich App 573, 579-580 (1998), vacated in part on other grounds 459 Mich 895 (1998);[66] *People v Dash*, 216 Mich App 412, 414 (1996).

The statute governing an individual's assignment to the status of youthful trainee does not contain any language limiting the number of times an individual may utilize the provisions of the statute. See MCL 762.11 *et seq*. A "defendant [i]s not ineligible for sentencing under [HYTA] solely because he was convicted of two criminal offenses." *People v Giovannini*, 271 Mich App 409, 410 (2006). "Interpreting MCL 762.11 to permit placement under [HYTA] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Giovannini*, 271 Mich App at 417.

2. Decision to Assign Youthful Trainee Status is Discretionary

A trial court's decision concerning a defendant's assignment under the HYTA is discretionary, and accordingly, is reviewed for an abuse of discretion. *People v Khanani*, 296 Mich App 175,

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

177-178 (2012); *People v Giovannini*, 271 Mich App 409, 411 (2006). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Khanani*, 296 Mich App at 178 (citation and quotation marks omitted).

MCL 762.11 is remedial "and should be construed liberally for the advancement of the remedy."*People v Bobek*, 217 Mich App 524, 529 (1996). However, "[i]n exercising its discretion, a trial court should consider the seriousness of the offense as a factor on an equal footing with the defendant's age." *Khanani*, 296 Mich App at 179.

The trial court did not abuse its discretion by **denying** youthful trainee status where:

- A 17-year-old defendant was charged with "breaking and entering an occupied dwelling with the intent to commit larceny, punishable by a maximum of 15 years incarceration, and arson of a dwelling house, which carries a 20-year maximum sentence[.]" *People v Fitchett*, 96 Mich App 251, 254 (1980) (noting the trial court "properly consider[ed] the species of offenses in its exercise of discretion").

- A 17-year-old defendant committed armed robbery. *People v Teske*, 147 Mich App 105, 106-109 (1985) (noting the trial court properly considered the defendant's age in combination with the seriousness of the offense and additional information about the defendant's background presented to it).[67]

"[T[he trial court's decision to grant youthful-trainee status fell outside the range of reasonable and principled outcomes in light of the relevant circumstances, including defendant's age, [(19 years old),] the seriousness of the home-invasion offense and the timing of its commission a mere three weeks after being placed on bond pending sentencing for the earlier offenses and even being instructed at that time by the trial court and his probation officer of the benefits of HYTA treatment and that he could be referred for HYTA consideration." *Khanani*, 296 Mich App at 179-182 (rejecting the defendant's argument that he was a follower, not a leader, because he "exploit[ed] his knowledge of [the] home to invade it" because he had a relationship with the family, and noting that the trial court stated that the defendant was

[67]Note that under the current version of MCL 762.11, a defendant convicted of armed robbery is not eligible for HYTA status because armed robbery is punishable by life imprisonment. MCL 762.11(3)(a); MCL 750.529.

"frighten[ing]," and appeared to agree with the prosecution's statement that the defendant was "a serious predator"). The Court also noted that the trial court justified granting HYTA status based in part on its belief that "the defendant's parents deserved acknowledgement for their efforts to raise defendant to be a productive citizen," and held that this "was not a principled basis on which to grant youthful-trainee status." *Id.* at 182.

3. Sentencing Guidelines

A trial court's decision to grant sentencing under HYTA "should not be reviewed as a decision to depart from the guidelines." *People v Khanani*, 296 Mich App 175, 183 (2012). "[T]he sentencing guidelines have not been held to apply to the decision whether to grant youthful-trainee status." *Id.*[68]

B. Individuals Who Are Not Eligible—Statutory Exceptions

An individual is not eligible for youthful trainee status if the offense he or she committed is any of the following:

- A felony punishable by life imprisonment. MCL 762.11(3)(a).
- A major controlled substance offense. MCL 762.11(3)(b).
- A traffic offense. MCL 762.11(3)(c).
- A violation, attempted violation, or conspiracy to violate MCL 750.520b (first-degree criminal sexual conduct (CSC-I)); MCL 750.520c (second-degree criminal sexual conduct (CSC-II)); MCL 750.520d (third-degree criminal sexual conduct (CSC-III), other than MCL 750.520d(1)(a) (victim 13 to 15 years old); or MCL 750.520e (fourth-degree criminal sexual conduct (CSC-IV), other than MCL 750.520e(1)(a) (victim 13 to 15 years old and actor 5 or more years older than victim). MCL 762.11(3)(d).
- A violation, attempted violation, or conspiracy to violate MCL 750.520g (assault with intent to commit CSC), with the intent to commit CSC-I, CSC-II, CSC-III (other than

[68]The *Khanani* Court explains that in *People v Johnson*, 488 Mich 860 (2010), "the Michigan Supreme Court remanded the case to this Court for consideration as on leave to appeal granted 'whether the sentencing guidelines apply to conditions imposed by a court under MCL 762.13 of the Holmes Youthful Trainee Act.' However, as the prosecution observes, this Court later dismissed the appeal in *Johnson* on the stipulation of the parties." *Khanani,* 296 Mich App at 182 n 4, citing *People v Johnson*, unpublished order of the Court of Appeals, entered February 4, 2011 (Docket No. 294396).

MCL 750.520d(1)(a)); or CSC-IV (other than MCL 750.520e(1)(a)). MCL 762.11(3)(e).

In addition, an individual is not eligible for youthful trainee status if any of the following apply:

- The individual was previously convicted of, or adjudicated for, a listed offense for which registration is required under the Sex Offenders Registration Act (SORA).[69] MCL 762.11(4)(a).

- The individual is charged with a listed offense for which registration is required under the SORA, and the individual fails to carry the burden of proving by clear and convincing evidence that he or she is not likely to engage in further listed offenses. MCL 762.11(4)(b).

- The court determines that the offense involved a factor set out in MCL 750.520b(1)(a)-(h) (CSC-I); MCL 750.520c(1)(a)-(*l*) (CSC-II), MCL 750.520d(1)(b)-(e) (CSC-III), or MCL 750.520e(1)(b)-(f) (CSC-IV). MCL 762.11(4)(c).

C. Terms and Conditions Imposed When Youthful Trainee Status is Assigned

Once a person is granted assignment as a youthful trainee, the court is required to take certain actions depending on whether the underlying charge was an offense punishable by imprisonment for a term of more than one year or a year or less. See MCL 762.13.

1. Offenses Punishable by More Than One Year

"If an individual is assigned to the status of a youthful trainee and the underlying charge is an offense punishable by imprisonment for a term of more than 1 year, the court shall do 1 of the following:

[69]See the Michigan Judicial Institute's *Sexual Assault Benchbook* for a detailed discussion of the Sex Offenders Registration Act, MCL 28.721 *et seq*.

(a) Except as provided in [MCL 762.13(2)[70]], commit the individual to the department of corrections for custodial supervision and training for not more than 2 years. If the individual is less than 21 years of age, he or she must be committed to an institutional facility designated by the department for that purpose.

(b) Place the individual on probation for not more than 3 years subject to probation conditions as provided in [MCL 771.3].[71] The terms and conditions of probation may include participation in a drug treatment court . . . .

(c) Commit the individual to the county jail for not more than 1 year.[72]

(d) Except as provided in [MCL 762.13(2)[73]], commit the individual to the department of corrections under subdivision (a) or to the county jail under subdivision (c), and then place the individual on probation for not more than 1 year subject to probation conditions as provided in [MCL 771.3]."[74] MCL 762.13(1).

2. Offenses Punishable by One Year of Less

"If an individual is assigned to the status of youthful trainee and the underlying charge is for an offense punishable by imprisonment for 1 year or less, the court shall place the individual on probation for not more than 2 years, subject to probation conditions as provided in [MCL 771.3]." MCL 762.13(3).

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[70] MCL 762.13(2) provides that an individual assigned to HYTA status may *not* be committed to the Department of Corrections for custodial supervision and training under MCL 762.13(1)(a) or MCL 762.13(1)(d) if the underlying charge is for a violation of any of the following: a controlled substance violation under Article 7 of the Public Health Code, MCL 333.7101 to MCL 333.7545; breaking and entering a building with intent to commit a felony or larceny, MCL 750.110; third-degree home invasion, MCL 750.110a(4); certain crimes involving financial transaction devices, MCL 750.157n to MCL 750.157v and MCL 750.157w(1)(c); carrying a concealed weapon (CCW), MCL 750.227; larceny, MCL 750.356; larceny from a person, MCL 750.357; unlawfully driving away a motor vehicle (UDAA), MCL 750.413; unarmed robbery, MCL 750.530; certain offenses involving receiving and concealing stolen property, MCL 750.535(3); or receiving and concealing a stolen motor vehicle, MCL 750.535(7).

[71] If an individual is committed to the county jail as a probation condition, "the court may authorize work release or release for educational purposes." MCL 762.13(5).

[72] if an individual is committed to the county jail under MCL 762.13(1)(c), "the court may authorize work release or release for educational purposes." MCL 762.13(5).

3. Probation Terms and Conditions—Mandatory and Discretionary

"An individual placed on probation under [MCL 762.13] **must** be under the supervision of a probation officer." MCL 762.13(4) (emphasis added). "Upon commitment to and receipt by the department of corrections, a youthful trainee is subject to the direction of the department of corrections." *Id.*

If the court orders an individual committed to the county jail as a condition of probation, "the court **may** authorize work release or release for educational purposes." MCL 762.13(5) (emphasis added).

Electronic monitoring. An individual assigned to HYTA status for an offense committed on or after his or her twenty-first birthday **may** be subject to electronic monitoring during his or her probationary term as provided under MCL 771.3. MCL 762.11(6) (emphasis added).

Supervision fee. Unless waived under MCL 762.13(7),[75] the trial court **must** order payment of a probation supervision fee in each order of probation for an individual placed on probation under MCL 762.13. MCL 762.13(6). The fee is payable when probation is ordered, but may be paid in installments upon approval by the court. *Id.* MCL 762.13(6) sets out the amount of the supervision fee, which depends on whether the individual is subject to electronic monitoring.

"A person must not be subject to more than 1 supervision fee at the same time. If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration." MCL 762.13(6).

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[73]MCL 762.13(2) provides that an individual assigned to HYTA status may *not* be committed to the Department of Corrections for custodial supervision and training under MCL 762.13(1)(a) or MCL 762.13(1)(d) if the underlying charge is for a violation of any of the following: a controlled substance violation under Article 7 of the Public Health Code, MCL 333.7101 to MCL 333.7545; breaking and entering a building with intent to commit a felony or larceny, MCL 750.110; third-degree home invasion, MCL 750.110a(4); certain crimes involving financial transaction devices, MCL 750.157n to MCL 750.157v and MCL 750.157w(1)(c); carrying a concealed weapon (CCW), MCL 750.227; larceny, MCL 750.356; larceny from a person, MCL 750.357; unlawfully driving away a motor vehicle ("UDAA"), MCL 750.413; unarmed robbery, MCL 750.530; certain offenses involving receiving and concealing stolen property, MCL 750.535(3); or receiving and concealing a stolen motor vehicle, MCL 750.535(7).

[74]"If an individual is placed on probation following a commitment to the department of corrections under [MCL 762.13(1)(d)], a youthful trainee must be reassigned to the supervision of a probation officer." MCL 762.13(4). Additionally, if an individual is committed to the county jail under MCL 762.13(1)(d), "the court may authorize work release or release for educational purposes." MCL 762.13(5).

[75]MCL 762.13(7) permits the court to waive the fee "if the court determines the supervised individual is indigent."

Amendment of probation terms. The trial court has discretion to amend the terms of probation imposed under HYTA. *People v Bobek*, 217 Mich App 524, 531 (1996) (noting HYTA does not prohibit modification, and MCL 771.2 permits the court to alter and amend a probation order at any time). However, the trial court abused its discretion by discharging the defendant from youthful trainee status after the media found out about her case because the discharge "was unrelated to her rehabilitation[.]" *Bobek*, 217 Mich App at 531-532 (holding a court must not discharge a defendant from probation without "sufficient reason").

4. Employment or School Requirements

"If the court assigns an individual to the status of youthful trainee under [MCL 762.11], the court may require the individual to maintain employment or to attend a high school, high school equivalency program, community college, college, university, or trade school," or require the individual "to actively seek employment or entry into a high school, high school equivalency program, community college, college, university, or trade school." MCL 762.11(5).

5. Mandatory Costs and Crime Victim Assessment[76]

Under MCL 769.1k(1)(a), the court *must* impose the minimum state costs as set out in MCL 769.1j[77] at the time the defendant is sentenced, at the time the defendant's sentence is delayed, or at the time entry of judgment is statutorily deferred. MCL 769.1k(1)(a).

In addition, an individual assigned to youthful trainee status who is charged with a felony offense must pay a $130 crime victim assessment. MCL 780.905(1)(a). An individual who commits a misdemeanor or ordinance violation must pay a $75 crime victim assessment. MCL 780.905(1)(b). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

D. Termination or Revocation of Youthful Trainee Status

A youthful trainee is entitled to a hearing before the court revokes his or her status. *People v Webb*, 89 Mich App 50, 53 (1979); *People v Roberson*, 22 Mich App 664, 668-669 (1970).

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[76]See Section 8.2 for additional discussion of the imposition of fines, costs, and assessments.

[77]See Section 8.11 for discussion of minimum state costs.

1. Discretionary Revocation

"Subject to [MCL 762.12(2)], the court of record having jurisdiction over the criminal offense referred to in [MCL 762.11] may, at any time, terminate its consideration of the individual as a youthful trainee or, once having assigned the individual to the status of a youthful trainee, may at its discretion revoke that status any time before the individual's final release." MCL 762.12(1).

2. Mandatory Revocation

Under MCL 762.12(2), a court *must* revoke HYTA status if the individual pleads guilty to or is convicted of any of the following offenses during the period of HYTA assignment:

- a felony for which the maximum penalty is life imprisonment;
- a major controlled substance offense;
- a firearm offense; or
- a violation, attempted violation, or conspiracy to violate any of the following:
  - MCL 750.82 (felonious assault);
  - MCL 750.84 (assault with intent to do great bodily harm less than murder);
  - MCL 750.88 (assault with intent to rob while unarmed);
  - MCL 750.110a (home invasion);
  - MCL 750.224f (felon in possession of a firearm);
  - MCL 750.226 (going armed with a dangerous weapon with unlawful intent);
  - MCL 750.227 (carrying a concealed weapon (CCW));
  - MCL 750.227a (unlawful possession of a pistol by a licensee);
  - MCL 750.227b (felony-firearm or possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony);

- MCL 750.520b (first-degree criminal sexual conduct (CSC-I));
- MCL 750.520c (second-degree criminal sexual conduct (CSC-II));
- MCL 750.520d (third-degree criminal sexual conduct (CSC-III)), *except* under MCL 750.520d(1)(a) (victim at least 13 but under 16 years of age);
- MCL 750.520e (fourth-degree criminal sexual conduct (CSC-IV)), *except* under MCL 750.520e(1)(a) (victim at least 13 but under 16 years of age, and defendant 5 or more years older than the victim);
- MCL 750.520g (assault with intent to commit criminal sexual conduct), with the intent to commit a violation of MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), MCL 750.520d (CSC-III), or MCL 750.520e (CSC-IV), *except* with intent to violate MCL 750.520d(1)(a) (victim at least 13 but under 16 years of age) or MCL 750.520e(1)(a) (victim at least 13 but under 16 years of age, and defendant 5 or more years older than the victim);
- MCL 750.529a (carjacking); or
- MCL 750.530 (unarmed robbery).

Additionally, willful violation of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* requires revocation of HYTA status. MCL 762.12(3).[78]

3. Adjudication of Guilt and Imposition of Sentence

"Upon termination of consideration or revocation of status as a youthful trainee, the court may enter an adjudication of guilt and proceed as provided by law." MCL 762.12(3).

"If the status of youthful trainee is revoked, an adjudication of guilt is entered, and a sentence is imposed, the court in

[78]Note that retroactive application of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* to a defendant who pleaded guilty under HYTA before the Legislature enacted SORA violated the defendant's right to due process under US Const, Am XIV and Const 1963, art 1, § 17, where he "pleaded guilty in reasonable reliance on the possibility of receiving a sentence under HYTA and benefitting from its express promise that upon successful completion of his youthful training, he would not have a conviction on his record or suffer any related civil disabilities." *People v Temelkoski (Temelkoski II)*, 501 Mich 960, 961-962 (2018), rev'g *People v Temelkoski (Temelkoski I)*, 307 Mich App 241 (2014). For additional discussion of SORA, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10.

imposing sentence shall specifically grant credit against the sentence for time served as a youthful trainee in an institutional facility of the department of corrections or in a county jail." MCL 762.12(3). See also *Carr v Midland Co Concealed Weapons Licensing Bd*, 259 Mich App 428, 435 (2003) (noting, in the context of determining whether a person who successfully completes probation under § 7411 may obtain a concealed pistol license, that the Legislature's intent in designing HYTA was to "require a guilty plea that will automatically result in a conviction and sentencing upon failure by the defendant to successfully complete the program").

E. Successful Completion Under HYTA

"If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in [MCL 762.12], upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings." MCL 762.14(1).

Except in the circumstances listed below, assignment of an individual to youthful trainee status "is not a conviction for a crime," and "the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." MCL 762.14(2).

The following are exceptions to the general rule that assignment to youthful trainee status is not a conviction:

- Assignment to youthful trainee status before October 1, 2004 for a listed offense constitutes a conviction for purposes of registering under the SORA; however, "[a]n individual who is assigned to and successfully completes a term of supervision under [HYTA] is not convicted for purposes of [the SORA]." MCL 28.722(a)(*ii*); see also MCL 762.14(3). Further, an individual is not considered convicted if "a petition was granted under [MCL 28.728c] at any time allowing the individual to discontinue registration under [the SORA], including a reduced registration period that extends to or past July 1, 2011, regardless of the tier designation that would apply on and after that date." MCL 28.722(a)(*ii*).[79]

- Assignment to youthful trainee status constitutes a conviction that is counted for purposes of scoring the prior record variables in the sentencing guidelines. MCL 777.50(4)(a)(*i*).

F. Record of Deferral

"Unless the court enters a judgment of conviction against the individual for the criminal offense under [MCL 762.12], all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the [Department of Health and Human Services], law enforcement personnel[,] and . . . prosecuting attorneys for use only in the performance of their duties." MCL 762.14(4).

As used in MCL 762.14(4), the term "all proceedings" means "*all* matters brought before a court in an action in which youthful trainee status has been granted." *People v Bobek*, 217 Mich App 524, 530 (1996) (holding the trial court did not err in closing the hearing on the defendant's motion for release from youthful trainee status and dismissal of her case because the motion was filed after the defendant was assigned to youthful trainee status, and explaining "[c]losure of the hearing was consistent with the remedial nature" of HYTA). See also *People v GR*, 331 Mich App 58, 63-64 (2020) (citing *Bobek*, the Court rejected the prosecution's argument that MCL 762.14(4) should be "interpreted to only close proceedings from public view *after* the individual has successfully completed the terms of their sentence and been discharged from youthful trainee status," and held the probation review hearings were properly closed to the public under the plain language of MCL 762.14(4)) (quotation marks omitted).

HYTA's provision regarding closing proceedings to the public controls over MCL 803.223 and MCR 6.935 because it is more specific, and because "both MCL 803.223 and MCR 6.935 are silent regarding HYTA, and neither MCL 803.223 nor MCR 6.935 prohibit closing proceedings to the public." *GR*, 331 Mich App at 67. Similarly, assuming MCR 3.925(A)(1) applies under the circumstances, it does not affect HYTA's mandate to close the proceedings to the public because MCR 3.925(A)(1) is "silent as to the more specific class of individuals to which defendants belong: juveniles who have been assigned youthful-trainee status under HYTA." *GR*, 331 Mich App at 68.

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[79]Note that retroactive application of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* to a defendant who pleaded guilty under HYTA before the Legislature enacted SORA violated the defendant's right to due process under US Const, Am XIV and Const 1963, art 1, § 17, where he "pleaded guilty in reasonable reliance on the possibility of receiving a sentence under HYTA and benefitting from its express promise that upon successful completion of his youthful training, he would not have a conviction on his record or suffer any related civil disabilities." *People v Temelkoski (Temelkoski II)*, 501 Mich 960, 961-962 (2018), rev'g *People v Temelkoski (Temelkoski I)*, 307 Mich App 241 (2014). For additional discussion of SORA, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10.

MCL 762.14(4), as applied to require the closure of a probation review hearing concerning a defendant who was assigned youthful trainee status, does not violate the First Amendment right of access held by the public under the test from *Press-Enterprise Co v Superior Court*, 479 US 1, 13-14 (1986) (*Press-Enterprise II)*.[80] *GR*, 331 Mich App at 68-73. The Court specifically noted that HYTA is "designed to give juveniles a second chance by providing them an opportunity to avoid having a criminal record and keeping the proceedings closed to public inspection," and "keeping the proceedings at issue open to the public would defeat the rehabilitative aims of HYTA." *GR*, 331 Mich App at 72-73.

9.11 Conditional Sentences

A sentencing court has discretion to impose a conditional sentence when a person is convicted of an offense that is punishable by a fine or imprisonment, or both. MCL 769.3(1). Specifically, "the court may impose a conditional sentence and order the person to pay a fine, with or without the costs of prosecution, and restitution as provided under [MCL 769.1a(11) or the Crime Victim's Rights Act, MCL 780.751 *et seq.*], within a limited time stated in the sentence and, in default of payment, sentence the person as provided by law." MCL 769.3(1). See also MCL 769.1a(11); MCL 780.766(11); MCL 780.826(11).

"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(2).

The court may order imprisonment under the conditional sentence (even where the defendant is placed on probation) if the offender fails to comply with the restitution order and if he or she has failed to make a good faith effort at compliance with the order. MCL 769.1a(11). When determining whether to impose imprisonment, the court must "consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay." *Id*.[81] See also MCL 780.766(11); MCL 780.826(11).

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[80]This test was adopted in Michigan. See *Detroit News, Inc v Recorder's Court Judge*, 202 Mich App 595, 599 n 2 (1993). Under this test, where the First Amendment right of access applies, "proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 479 US at 13-14 (quotation marks and citations omitted).

9.12 Suspended Sentences

Certain statutes specifically authorize a court to suspend a defendant's sentence. See, e.g., MCL 750.165(4) (felony nonsupport statute specifically authorizes a court to suspend a defendant's sentence if he or she posts a bond and any sureties required by the court). "Absent statutory authority, a court may not suspend indefinitely the execution of a sentence. To do so would in effect grant the defendant a pardon for his crime." *People v Morgan*, 205 Mich App 432, 434 (1994).

"The suspension of a sentence temporarily or indefinitely postpones the imposition or the commencement of the sentence. Whatever power a trial judge has in that regard disappears once the sentence begins." *People v Garcia*, 118 Mich App 676, 679 (1982). Accordingly, a court may not suspend a defendant's sentence once the defendant has started to serve it. *Oakland Co Prosecutor v 52nd Dist Judge*, 172 Mich App 557, 560 (1988).

9.13 Special Alternative Incarceration (SAI) Units

The special alternative incarceration program is established and operated by the Department of Corrections as provided in the Special Alternative Incarceration Act, MCL 798.11 *et seq.* See also MCL 791.234a(1). The SAI units provide a program of physically strenuous work and exercise, modeled after military basic training and other programming as determined by the Department of Corrections. MCL 798.14(1).

A court may order a person to complete a program of incarceration in an SAI unit as a term or condition of probation. See MCL 769.31(b)(*iv*) (defining intermediate sanction to include probation with SAI); MCL 771.3b(1) (probation); MCL 791.234a (placement of prisoner in a special alternative incarceration unit).[82] Instead, MCL 791.234a requires the Department of Corrections to consider prisoners sentenced to indeterminate terms of imprisonment for placement in an SAI unit. MCL 791.234a(1). MCL 791.234a sets out eligibility criteria and conditions that must be met before placement in an SAI unit; it also provides time restraints for any SAI program, procedures for parole following completion of the program, and other procedures and requirements relevant to participation in an SAI program.

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[81]Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(D)(3). See Section 8.4 for discussion of MCR 6.425(D)(3) and a defendant's ability to pay court-ordered financial obligations.

[82]For a discussion of SAI units in the context of probation, see Section 9.4(N).

Relevant to a sentencing court, MCL 791.234a provides that the Department of Corrections "shall not" place a prisoner in an SAI unit "[i]f the sentencing judge prohibited a prisoner's participation in the special alternative incarceration program in the judgment of sentence[.]" MCL 791.234a(4). "If the sentencing judge permitted the prisoner's participation in the special alternative incarceration program in the judgment of sentence, that prisoner may be placed in a special alternative incarceration unit if the department determines that the prisoner also meets the requirements of [MCL 791.234a(2) and MCL 791.234a(3)]." MCL 791.234a(4). "If the sentencing judge neither prohibited nor permitted a prisoner's participation in the special alternative incarceration program in the judgment of sentence, and the department determines that the prisoner meets the eligibility requirements of [MCL 791.234a(2) and MCL 791.234a(3)], the department shall notify the judge or the judge's successor, the prosecuting attorney for the county in which the prisoner was sentenced, and any victim of the crime for which the prisoner was committed if the victim has submitted to the department a written request for any notification under [MCL 780.769(1)] of the proposed placement of the prisoner in the special alternative incarceration unit." MCL 791.234a(4). "The notices shall be sent not later than 30 days before placement is intended to occur." *Id.*

"The department shall not place the prisoner in a special alternative incarceration unit unless the sentencing judge, or the judge's successor, notifies the department, in writing, that he or she does not object to the proposed placement." MCL 791.234a(4).

"In making the decision on whether or not to object, the judge, or judge's successor, shall review any impact statement submitted under . . . MCL 780.764, by the victim or victims of the crime of which the prisoner was convicted." MCL 791.234a(4).

The prisoner must consent to placement in an SAI unit, including the suspension or restriction of certain privileges generally afforded to prisoners. MCL 791.234a(5).

The prosecution waives objection to a defendant's placement in an SAI program if it does not raise the issue at sentencing. *People v Krim*, 220 Mich App 314, 320-321 (1997).

9.14 State-Certified Treatment Courts

Deferred adjudication, delayed sentencing, and discharge and dismissal of proceedings may be obtained under certain circumstances in a state-certified treatment court. Cases may be transferred from one court to another in order to allow a defendant to participate in a state-certified treatment court. MCL 600.1088(1).

State-certified treatments courts include:

- Drug treatment courts (for adults and juveniles),[83] MCL 600.1062;
- DWI/sobriety courts,[84] MCL 600.1084;
- Mental health courts, MCL 600.1091;
- Juvenile mental health courts, MCL 600.1099c; and
- Veterans treatment courts, MCL 600.1201.

For more information on implementing a problem-solving court and other administrative matters, see https://www.courts.michigan.gov/administration/court-programs/problem-solving-courts/. Another resource published by the State Court Administrative Office is the *Policy and Procedure Manual for Certification of Problem-Solving Courts*.

MCL 600.1084 governs the specialty court interlock program. See MCL 600.1084(1). Drug treatment courts, DWI/sobriety courts, courts that are a hybrid of drug treatment and DWI/sobriety courts, mental health courts, and veterans treatment courts may all participate in the specialty court interlock program that permits issuance of a restricted license to a participant after the installation of an ignition interlock device on their motor vehicle. MCL 600.1084(6); MCL 600.1084(9)(d). For a detailed discussion of DWI/sobriety courts and the specialty court interlock program, see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

A. Drug Treatment Courts[85]

The statutory authority for drug treatment courts is codified in Chapter 10A of the Revised Judicature Act, MCL 600.1060 *et seq*.

The State Court Administrative Office (SCAO) has published standards and best practices manuals for problem-solving courts, including Adult Drug Court.

The DWI/sobriety court is a specialized type of drug treatment court. See MCL 600.1084.

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[83]See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 9, for a thorough discussion of drug treatment courts.

[84]See the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9, for a thorough discussion of DWI/sobriety courts.

[85]See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 9, for a thorough discussion of drug treatment courts.

Similarly, the drug treatment court legislation provides that circuit courts may adopt or institute a swift and sure sanctions probation program as codified in Chapter XIA of the Code of Criminal Procedure, MCL 771A.1 *et seq*. MCL 600.1086.[86]

All of SCAO's drug court resources are located here.

Caselaw. Under MCL 600.1062(1) and MCL 600.1068(2), "courts may not admit a defendant into a drug treatment court program when doing so departs from the sentencing guidelines and the prosecutor has not approved." *People v Baldes*, 309 Mich App 651, 657 (2015).[87] A "prosecuting attorney's decision to sign [a] referral form" for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) "[does] not constitute a waiver or approval" if the form "[does] not state that it constitute[s] approval of the individual's admission into the drug treatment court program." *Baldes*, 309 Mich App at 656.

B. Veterans Treatment Courts

The statutory authority for Veterans treatment courts is codified in Chapter 12 of the Revised Judicature Act, MCL 600.1200 *et seq*.

The State Court Administrative Office (SCAO) has published standards and best practices manuals for problem-solving courts, including Veterans Treatment Court.

All of SCAO's veterans treatment court resources are located here.

C. Mental Health Courts

The statutory authority for adult mental health courts is codified in Chapter 10B of the Revised Judicature Act, MCL 600.1090 *et seq*.

The State Court Administrative Office (SCAO) has published standards and best practices manuals for problem-solving courts, including Adult Mental Health Court.

The statutory authority for Juvenile mental health courts is codified in Chapter 10C of the Revised Judicature Act, MCL 600.1099b *et seq*.[88] See also *7 Common Characteristics of Juvenile Mental Health Courts*.

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[86]For a detailed discussion of the Probation Swift and Sure Sanctions Act, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2.

[87]Note that *Baldes* was decided before the previously-mandatory sentencing guidelines were rendered "advisory only." *People v Lockridge*, 498 Mich 358, 365, 399 (2015). See Section 1.4 for discussion of *Lockridge*.

All of SCAO's mental health court resources are located here.

Caselaw. "[I]t was within the trial court's discretion to sentence defendant to participation in mental health court, despite the prosecution's objection and lack of consent," where the county's policy and procedure manual governing the mental health court did not provide "rigid" rules, but was instead a best practices manual and there was no indication "that the trial court failed to follow the statutory requirements concerning defendant's admission to mental health court." *People v Rydzewski*, 331 Mich App 126, 135 (2020). Further, the Court noted there was no legal authority "support[ing] an extension of the consent requirement of MCL 600.1068(2) [(concerning drug courts)] to other treatment courts," and it declined to extend that requirement to mental health courts where no statutory provision requires the prosecutor's consent before a defendant is admitted to a mental health court. *Rydzewski*, 331 Mich App at 136.

[88]For a detailed discussion of juvenile mental health courts, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1.

Glossary

A

Absconding

- For purposes of MCL 771.4b, *absconding* "means the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCL 771.4b(9)(a).

Abuse of authority status

- For purposes of MCL 777.40 (OV 10), *abuse of authority status* "means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d).

Accused

- For purposes of the Code of Criminal Procedure, *person*, *accused*, or a similar word means "an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association." MCL 761.1(p).

Act of terrorism

- For purposes of MCL 777.49a (OV 20), *act of terrorism* means that term as defined in MCL 750.543b. MCL 777.49a(2)(a). MCL 750.543b(a) defines *act of terrorism* as "a willful and deliberate act that is all of the following:

  (*i*) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(*ii*) An act that the person knows or has reason to know is dangerous to human life.

(*iii*) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion."

Adult

- For purposes of the Michigan Indigent Defense Commission Act, *adult* "means either of the following:

  (*i*) An individual 18 years of age or older.

  (*ii*) An individual less than 18 years of age at the time of the commission of a felony if any of the following conditions apply:

    (A) During consideration of a petition filed under . . . MCL 712A.4, to waive jurisdiction to try the individual as an adult and upon granting a waiver of jurisdiction.

    (B) The prosecuting attorney designates the case under . . . MCL 712A.2d[(1)], as a case in which the juvenile is to be tried in the same manner as an adult.

    (C) During consideration of a request by the prosecuting attorney under . . . MCL 712A.2d[(2)], that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult.

    (D) The prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under . . . MCL 764.1f." MCL 780.983(a).

Aircraft

- For purposes of Chapter XVII of the Code of Criminal Procedure (Sentencing Guidelines), *aircraft* "means that term as defined in . . . MCL 259.2." MCL 777.1(a). MCL 259.2(e) defines *aircraft* as "any contrivance used or designed for navigation of or flight in the air."

Alcoholic liquor

- For purposes of MCL 8.9(10)(c) and MCL 768.37 *alcoholic liquor* means "that term as defined in . . . MCL 436.1105." MCL 8.9(10)(c)(*i*); MCL 768.37(3)(a). MCL 436.1105(3) defines *alcoholic liquor* as "any spirituous, vinous, malt, or fermented liquor, powder, liquids, and compounds, whether or not medicated, proprietary, patented, and by whatever name

called, containing 1/2 of 1% or more alcohol by volume that are fit for use for food purposes or beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in [Chapter 1 of the Michigan Liquor Control Code of 1998]."

- For purposes of the Michigan Vehicle Code, *alcoholic liquor* means "any liquid or compound, whether or not medicated, proprietary, patented, and by whatever name called, containing any amount of alcohol including any liquid or compound described in . . . MCL 436.1105[(2)]." MCL 257.1d.

- For purposes of the Natural Resources and Environmental Protection Act, Part 801, Marine Safety, *alcoholic liquor* means "that term as defined in . . . MCL 257.1d." MCL 324.80101(b). MCL 257.1d defines *alcoholic liquor* as "any liquid or compound, whether or not medicated, proprietary, patented, and by whatever name called, containing any amount of alcohol including any liquid or compound described in . . . MCL 436.1105[(2)]."

Any bodily alcohol content

- For purposes of MCL 436.1703, *any bodily alcohol content* "means either of the following:

  (*i*) An alcohol content of 0.02 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

  (*ii*) Any presence of alcohol within a person's body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony." MCL 436.1703(17)(a).

- For purposes of MCL 777.48 (OV 18), *any bodily alcohol content* "means either of the following:

  (a) An alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning 5 years after the state treasurer publishes a certification under [MCL 257.625(28) stating that the state no longer receives annual federal highway construction funding conditioned on compliance with a national blood alcohol limit], 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

(b) Any presence of alcohol within an individual's body resulting from the consumption of alcoholic or intoxicating liquor other than the consumption of alcoholic or intoxicating liquor as part of a generally recognized religious service or ceremony." MCL 777.48(2).

Appointing authority

- For purposes of the Deaf Persons' Interpreters Act, *appointing authority* means "a court or a department, board, commission, agency, or licensing authority of this state or a political subdivision of this state or an entity that is required to provide a qualified interpreter in circumstances described under [MCL 393.503a]." MCL 393.502(a). MCL 393.503a provides that "[i]f an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter."

Arrest card

- For purposes of MCL 28.241 *et seq.*, *arrest card* means "a paper form or an electronic format prescribed by the [Michigan State Police] that facilitates the collection and compilation of criminal and juvenile arrest history record information and biometric data." MCL 28.241a(a).

Article 7 of the PHC

- *Article 7 of the PHC* means Article 7 of the Public Health Code, MCL 333.7101 *et seq.* Article 7 is the controlled substances article.

Assaultive crime

- For purposes of MCL 765.6b(6), *assaultive crime* means "that term as defined in [MCL 770.9a.]" MCL 765.6b(6)(a). MCL 770.9a(3) defines *assaultive crime* as "an offense against a person described in [MCL 750.81c(3), MCL 750.82, MCL 750.83, MCL 750.84, MCL 750.86, MCL 750.87, MCL 750.88, MCL 750.89, MCL 750.90a, MCL 750.90b(a), MCL 750.90b(b), MCL 750.91, MCL 750.200–MCL 750.212a, MCL 750.316, MCL 750.317, MCL 750.321, MCL 750.349, MCL 750.349a, MCL 750.350, MCL 750.397, MCL 750.411h(2)(b), MCL 750.411h(3), MCL 750.411i, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, MCL 750.520g, MCL 750.529, MCL 750.529a, MCL 750.530, or MCL 750.543a–MCL 750.543z.]"

- For purposes of MCL 769.4a (deferred sentencing), *assaultive crime* means "[one] or more of the following:

(*i*) That term as defined in [MCL 770.9a, see bullet entry below for definition].

(*ii*) A violation of chapter XI [Assaults] of the Michigan penal code, 1931 PA 328, MCL 750.81 to [MCL] 750.90h.

(*iii*) A violation of a law of another state or of a local ordinance of a political subdivision of this state or of another state substantially corresponding to a violation described in subparagraph (*i*) or (*ii*)." MCL 769.4a(8)(a).

- For purposes of MCL 770.9a, *assaultive crime* means "an offense against a person described in [MCL 750.81c(3), MCL 750.82, MCL 750.83, MCL 750.84, MCL 750.86, MCL 750.87, MCL 750.88, MCL 750.89, MCL 750.90a, MCL 750.90b(a), MCL 750.90b(b), MCL 750.91, MCL 750.200–MCL 750.212a, MCL 750.316, MCL 750.317, MCL 750.321, MCL 750.349, MCL 750.349a, MCL 750.350, MCL 750.397, MCL 750.411h(2)(b), MCL 750.411h(3), MCL 750.411i, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, MCL 750.520g, MCL 750.529, MCL 750.529a, MCL 750.530, or MCL 750.543a–MCL 750.543z." MCL 770.9a(3).

B

Before

- For purposes of the Code of Criminal Procedure, *taken*, *brought*, or *before* "a magistrate or judge for purposes of criminal arraignment or the setting of bail means either" physical presence before a judge or district court magistrate or presence before a judge or district court magistrate by use of 2-way interactive video technology. MCL 761.1(t).

Biometric data

- For purposes of MCL 28.241 *et seq.*, *biometric data* means "all of the following:

(*i*) Fingerprint images recorded in a manner prescribed by the [Michigan State Police].

(*ii*) Palm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the [Michigan State Police].

(*iii*) Digital images recorded during the arrest or booking process, including a full-face capture, left and right profile,

and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by the [Michigan State Police].

(*iv*) All descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

Brought

- For purposes of the Code of Criminal Procedure, *taken*, *brought*, or *before* "a magistrate or judge for purposes of criminal arraignment or the setting of bail means either" physical presence before a judge or district court magistrate or presence before a judge or district court magistrate by use of 2-way interactive video technology. MCL 761.1(t).

C

Case or court proceeding

- For purposes of MCR 1.111, *case or court proceeding* means "any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

Certified foreign language interpreter

- For purposes of MCR 1.111, *certified foreign language interpreter* means "a person who has:

  (a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

  (b) met all the requirements established by the state court administrator for this interpreter classification, and

  (c) registered with the State Court Administrative Office." MCR 1.111(A)(4).

Chemical irritant

- For purposes of MCL 777.31 (OV 1), *chemical irritant* means that term as defined in MCL 750.200h. MCL 777.31(3)(a). MCL 750.200h(a) defines *chemical irritant* as "solid, liquid, or gas that through its chemical or physical properties, alone or in

combination with 1 or more other substances, can be used to produce an irritant effect in humans, animals, or plants."

Chemical irritant device

- For purposes of MCL 777.31 (OV 1), *chemical irritant device* means that term as defined in MCL 750.200h. MCL 777.31(3)(a). MCL 750.200h(b) defines *chemical irritant device* as "a device designed or intended to release a chemical irritant."

Circuit court

- For purposes of the Probation Swift and Sure Sanctions Act, *circuit court* "includes a unified trial court having jurisdiction over probationers." MCL 771A.2(a).

Citation

- For purposes of the Michigan Vehicle Code, *citation* means "a complaint or notice upon which a police officer shall record an occurrence involving 1 or more vehicle law violations by the person cited." MCL 257.727c(1).

Civil infraction

- For purposes of the Michigan Vehicle Code, *civil infraction* means "an act or omission prohibited by law which is not a crime as defined in [MCL 750.5], and for which civil sanctions may be ordered." MCL 257.6a.

Civil violation

- For purposes of Chapter 48 of the Revised Judicature Act, *civil violation* "means a violation of a law of this state or a local ordinance, other than a criminal offense or a violation that is defined or designated as a civil infraction, that is punishable by a civil fine or forfeiture under the applicable law or ordinance." MCL 600.4801(d).

Commercial motor vehicle

- For purposes of the Michigan Vehicle Code, *commercial motor vehicle* means "a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property," other than "a vehicle used exclusively to transport personal possessions or family members for nonbusiness purposes," "if 1 or more of the following apply:

  (a) It is designed to transport 16 or more passengers, including the driver.

(b) It has a gross vehicle weight rating or gross vehicle weight, whichever is greater, of 26,001 pounds or more.

(c) It has a gross combination weight rating or gross combination weight, whichever is greater, of 26,001 pounds or more, inclusive of towed units with a gross vehicle weight rating or gross vehicle weight, whichever is greater, of more than 10,000 pounds.

(d) A motor vehicle carrying hazardous material and on which is required to be posted a placard as defined and required under 49 CFR parts 100 to 199." MCL 257.7a.

Commercial vehicle

- For purposes of the Michigan Vehicle Code, *commercial vehicle* "includes all motor vehicles used for the transportation of passengers for hire, or constructed or used for transportation of goods, wares, or merchandise, and all motor vehicles designed and used for drawing other vehicles that are not constructed to carry a load independently or any part of the weight of a vehicle or load being drawn[, but] . . . does not include a limousine operated by a limousine driver, a taxicab operated by a taxicab driver, or a personal vehicle operated by a transportation network company driver." MCL 257.7.

Complaint

- For purposes of the Code of Criminal Procedure, *complaint* means "a written accusation, under oath or upon affirmation, that a felony, misdemeanor, or ordinance violation has been committed and that the person named or described in the accusation is guilty of the offense." MCL 761.1(c).

Consumed

- For purposes of the Code of Criminal Procedure, *consumed* means "to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." MCL 768.37(3)(b).

Contemporaneous

- For purposes of MCL 777.42 (OV 12), a felonious criminal act is *contemporaneous* "if both of the following circumstances exist:

  (*i*) The act occurred within 24 hours of the sentencing offense.

(*ii*) The act has not and will not result in a separate conviction." MCL 777.42(2)(a).

Controlled substance

- For purposes of MCL 8.9(10)(c), the Natural Resources and Environmental Protection Act, Part 801, Marine Safety, and MCL 768.37, *controlled substance* means "that term as defined in . . . MCL 333.7104." MCL 8.9(10)(c)(*ii*); MCL 324.80101(i); MCL 333.7104(3) defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]"

- For purposes of the Michigan Vehicle Code, *controlled substance* means "a controlled substance or controlled substance analogue as defined in . . . MCL 333.7104[.]" MCL 257.8b. MCL 333.7104(3) defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]" MCL 333.7104(4) defines *controlled substance analogue* as "a substance the chemical structure of which is substantially similar to that of a controlled substance in schedule 1 or 2 and that has a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2 or, with respect to a particular individual, that the individual represents or intends to have a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2. Controlled substance analogue does not include 1 or more of the following:

  (a) A controlled substance.

  (b) A substance for which there is an approved new drug application.

  (c) A substance with respect to which an exemption is in effect for investigational use by a particular person under 21 USC 355, to the extent conduct with respect to the substance is pursuant to the exemption.

  (d) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance."

- For purposes of Article 7 of the Public Health Code, *controlled substance* means "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]" MCL 333.7104(3).

Conviction

- For purposes of Part 5 (Prior Record Variables) of Chapter XVII of the Code of Criminal Procedure, *conviction* "includes any of the following:

  (*i*) Assignment to youthful trainee status under [MCL 762.11 to MCL 762.15].

  (*ii*) A conviction set aside under . . . MCL 780.621 to [MCL] 780.624." MCL 777.50(4)(a).

Costs

- For purposes of Chapter 48 of the Revised Judicature Act, *costs* "means any monetary amount that the court is authorized to assess and collect for prosecution, adjudication, or processing of criminal offenses, civil infractions, civil violations, and parking violations, including court costs, the cost of prosecution, and the cost of providing court-ordered legal assistance to the defendant." MCL 600.4801(a).

County sheriff

- For purposes of MCL 771.3g and MCL 771.3h, *county sheriff* "includes the sheriff of a county in this state or the sheriff's designee." MCL 771.3g(7)(a).

Court

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *court* "includes a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate." MCR 6.003(4).

Court records

- For purposes of the Michigan Court Rules, *court records* "are defined by MCR 8.119 and [MCR 1.109(A)]. Under MCR 1.109(A), *court records* are "recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those

records comply with other provisions of law and these court rules.

(a) Court records include, but are not limited to:

(*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,

(*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records.

(b) For purposes of [MCR 1.109(A)]:

(*i*) Documents include, but are not limited to, pleadings, orders, and judgments.

(*ii*) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records.

(*iii*) Data refers to any information entered in the case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system.

(*iv*) Other recorded information includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image.

(2) Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding are not court records." MCR 1.109(A).

Under MCR 8.119 (applicable to all records in every trial court), *records* are defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G). MCR 8.119(A). See those rules for additional definitions of *records* and *court records*.

Criminal history record information

- For purposes of MCL 28.241 *et seq.*, *criminal history record information* means "name; date of birth; personal descriptions including identifying marks, scars, amputations, and tattoos;

aliases and prior names; social security number, driver's license number, and other identifying numbers; and information on misdemeanor arrests and convictions and felony arrests and convictions." MCL 28.241a(d).

Culpable/culpability

- For purposes of MCL 8.9, *culpable* means "sufficiently responsible for criminal acts or negligence to be at fault and liable to punishment for commission of a crime." MCL 8.9(10)(a).

D

Dangerous weapon

- For purposes of MCL 764.1f(2)(b), *dangerous weapon* means "1 or more of the following:

  (*i*) A loaded or unloaded firearm, whether operable or inoperable.

  (*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

  (*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

  (iv) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*)."

Data

- For purposes of MCR 1.109(A)(1), in which the term court records is defined, data "refers to any information entered in the case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system." MCR 1.109(A)(1)(b)(iii).

Dating relationship

- For purposes of MCL 764.15a(b), *dating relationship* means "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not

include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 764.15a(b).

- For purposes of MCL 780.582a(1)(b), *dating relationship* means "that term as defined in . . . MCL 600.2950." MCL 600.2950(30)(a) defines *dating relationship* as "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

Deaf person

- For purposes of the Deaf Persons' Interpreters Act, *deaf person* means "a person whose hearing is totally impaired or whose hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is through other sensory input; including, but not limited to, lip reading, sign language, finger spelling, or reading." MCL 393.502(b).

Deaf-blind person

- For purposes of the Deaf Persons' Intepreters Act, *deaf-blind person* means "a person who has a combination of hearing loss and vision loss, such that the combination necessitates specialized interpretation of spoken and written information in a manner appropriate to that person's dual sensory loss." MCL 393.502(c).

Deaf interpreter

- For purposes of the Deaf Persons' Interpreters Act, *deaf interpreter* or *intermediary interpreter* means "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Defendant

- For purposes of the Crime Victim's Rights Act, Article 1,"[e]xcept as otherwise defined in this article, as used in this article," *defendant* "means a person charged with, convicted of, or found not guilty by reason of insanity of committing a crime against a victim." MCL 780.752(1)(d).

- For purposes of the Crime Victim's Rights Act, Article 3,"[e]xcept as otherwise defined in this article, as used in this article," *defendant* "means a person charged with or convicted of having committed a serious misdemeanor against a victim." MCL 780.811(1)(c).

Defendant's lawyer

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *defendant's lawyer* "includes a self-represented defendant proceeding without a lawyer." MCR 6.003(2).

Deliver

- For purposes of MCL 777.45 (OV 15), *deliver* "means the actual or constructive transfer of a controlled substance from 1 individual to another regardless of remuneration." MCL 777.45(2)(a).

- For purposes of Article 7 of the Public Health Code, *deliver* or *delivery* "means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1). See also M Crim JI 12.2(2), defining *delivery* for use in controlled substances violations under MCL 333.7401, *delivery* "means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was a controlled substance and intending to transfer it to that person."

Departure

- For purposes of Chapter XVII of the Code of Criminal Procedure (Sentencing Guidelines), *departure* "means that term as defined in . . . [MCL 769.31]." MCL 777.1(b). MCL 769.31(a) defines *departure* as "a sentence imposed that is not within the appropriate minimum sentence range established under the sentencing guidelines set forth in chapter XVII [of the Code of Criminal Procedure, MCL 777.1 *et seq.*]"

Discharge date

- For purposes of Part 5 (Prior Record Variables) of Chapter XVII of the Code of Criminal Procedure, *discharge date* "means the date an individual is discharged from the jurisdiction of the court or the department of corrections after being convicted of or adjudicated responsible for a crime or an act that would be a crime if committed by an adult." MCL 777.50(4)(b).

Distribute

- For purposes of MCL 333.7341, *distribute* "means the actual, constructive, or attempted transfer, sale, delivery, or dispensing from one person to another of an imitation controlled substance." MCL 333.7341(1)(a).

Division

- For purposes of the Deaf Persons' Interpreters Act, *division* means "the division on deaf and hard of hearing of the department of labor and economic growth." MCL 393.502(d).

Document

- For purposes of the Michigan Court Rules, *document* means "a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8½ X 11 paper without manipulation." MCR 1.109(B).

- For purposes of MCR 1.109(A)(1), in which the term *court records* is defined, *documents* "include, but are not limited to, pleadings, orders, and judgments." MCR 1.109(A)(1)(b)(*i*).

Domestic violence

- For purposes of MCL 765.6b(6) and MCL 771.4b, *domestic violence* means "that term as defined in . . . MCL 400.1501." MCL 765.6b(6)(b); MCL 771.4b(6). MCL 400.1501(d) defines *domestic violence* as "the occurrence of any of the following acts by an individual that is not an act of self-defense: (*i*) [c]ausing or attempting to cause physical or mental harm to a family or household member[;] (*ii*) [p]lacing a family or household member in fear of physical or mental harm[;] (*iii*) [c]ausing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress[;] [and/or] (*iv*) [e]ngaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

Drug

- For purposes of Article 7 of the PHC, *drug* "means a substance recognized as a drug in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any

supplement to any of them; a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals; a substance other than food intended to affect the structure or any function of the body of human beings or animals; or, a substance intended for use as a component of any article specified in this subsection. It does not include a device or its components, parts, or accessories." MCL 333.7105(7).

Drug treatment court

- For purposes of MCL 600.1060 *et seq.*, *drug treatment court* means "a court supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol. A drug treatment court shall comply with the 10 key components promulgated by the national association of drug court professionals, which include all of the following essential characteristics:

  (*i*) Integration of alcohol and other drug treatment services with justice system case processing.

  (*ii*) Use of a nonadversarial approach by prosecution and defense that promotes public safety while protecting any participant's due process rights.

  (*iii*) Identification of eligible participants early with prompt placement in the program.

  (*iv*) Access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

  (*v*) Monitoring of participants effectively by frequent alcohol and other drug testing to ensure abstinence from drugs or alcohol.

  (*vi*) Use of a coordinated strategy with a regimen of graduated sanctions and rewards to govern the court's responses to participants' compliance.

  (*vii*) Ongoing close judicial interaction with each participant and supervision of progress for each participant.

  (*viii*) Monitoring and evaluation of the achievement of program goals and the program's effectiveness.

  (*ix*) Continued interdisciplinary education in order to promote effective drug court planning, implementation, and operation.

(*x*) The forging of partnerships among other drug courts, public agencies, and community-based organizations to generate local support." MCL 600.1060(c).

DWI/sobriety court

- For purposes of MCL 600.1084, *DWI/sobriety court* means "the specialized court docket and programs established within judicial circuits and districts throughout this state that are designed to reduce recidivism among alcohol offenders and that comply with the 10 guiding principles of DWI courts as promulgated by the National Center for DWI Courts." MCL 600.1084(9)(a).

E

Electronic monitoring

- For purposes of Chapter LXXVI of the Michigan Penal Code, *electronic monitoring* "means that term as defined in . . . MCL 791.285." MCL 750.520a(c). MCL 791.285(3) defines *electronic monitoring* as "a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded."

Electronic monitoring device

- For purposes of MCL 762.13, MCL 771.1, and MCL 771.3c, *electronic monitoring device* "includes any electronic device or instrument that is used to track the location of an individual, enforce a curfew, or detect the presence of alcohol in an individual's body." MCL 762.13(8); MCL 771.1(6); MCL 771.3c(5).

Exploit

- For purposes of MCL 777.40 (OV 10), *exploit* "means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "Exploit also means to violate [MCL 750.50b (killing or torturing animals)] for the purpose of manipulating a victim for selfish or unethical purposes."[1] MCL 777.40(3)(b).

[1] This part of the definition was added to MCL 777.40(3)(b) by 2018 PA 652, effective March 28, 2019.

F

Fee

- For purposes of Chapter 48 of the Revised Judicature Act, *fee* "means any monetary amount, other than costs or a penalty, that the court is authorized to impose and collect pursuant to a conviction, finding of responsibility, or other adjudication of a criminal offense, a civil infraction, a civil violation, or a parking violation, including a driver license reinstatement fee." MCL 600.4801(b).

Felony

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), and MCL 769.1j (minimum state costs), *felony* means "a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 28.241a(f); MCL 769.1j(7)(a).

- For purposes of MCL 780.905, *felony* "means a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 780.901(d).

- For purposes of the Code of Criminal Procedure and MCL 801.251a, *felony* means "that term as defined in . . . MCL 761.1" MCL 801.251a(2)(a). MCL 761.1(f) defines *felony* as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony."

- For purposes of the Michigan Penal Code, *felony* means "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." MCL 750.7.

- Note that two-year misdemeanors in the Michigan Penal Code are considered felonies "for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes." *People v Smith*, 423 Mich 427, 434 (1985).

Financially able to pay for interpretation costs

- For purposes of MCR 1.111, a person is *financially able to pay for interpretation costs* if "the court determines that requiring

reimbursement of interpretation costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court." MCR 1.111(A)(3). For purposes of MCR 1.111, a person is *financially able to pay for interpretation costs* when:

> "(a) The person's family or household income is greater than 125% of the federal poverty level; and
>
> (b) An assessment of interpretation costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter." MCR 1.111(A)(3).

Firearm offense

- For purposes of MCL 762.12(2)(e), *firearm offense* "means a crime involving a firearm as that term is defined in . . . MCL 28.421, whether or not the possession, use, transportation, or concealment of a firearm is an element of the crime." MCL 762.12(2)(e). MCL 28.421(1)(c) defines *firearm* as "any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive."

Fully automatic weapon

- For purposes of MCL 777.32 (OV 2), *fully automatic weapon* "means a firearm employing gas pressure or force of recoil or other means to eject an empty cartridge from the firearm after a shot, and to load and fire the next cartridge from the magazine, without renewed pressure on the trigger for each successive shot." MCL 777.32(3)(b).

H

Harmful biological device

- For purposes of MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.49a (OV 20), *harmful biological device* means that term as defined in MCL 750.200h. MCL 777.31(3)(a); MCL 777.32(3)(a); MCL 777.49a(2)(b). MCL 750.200h(f) defines *harmful biological device* as "a device designed or intended to release a harmful biological substance."

Harmful biological substance

- For purposes of MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.49a (OV 20), *harmful biological substance* means that term as defined in MCL 750.200h. MCL 777.31(3)(a); MCL 777.32(3)(a); MCL 777.49a(2)(b). MCL 750.200h(g) defines *harmful biological substance* as "a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants."

Harmful chemical device

- For purposes of MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.49a (OV 20), *harmful chemical device* means that term as defined in MCL 750.200h. MCL 777.31(3)(a); MCL 777.32(3)(a); MCL 777.49a(2)(b). MCL 750.200h(h) defines *harmful chemical device* as "a device that is designed or intended to release a harmful chemical substance."

Harmful chemical substance

- For purposes of MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.49a (OV 20), *harmful chemical substance* means that term as defined in MCL 750.200h. MCL 777.31(3)(a); MCL 777.32(3)(a); MCL 777.49a(2)(b). MCL 750.200h(i) defines *harmful chemical substance* as "a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants."

Harmful electronic or electromagnetic device

- For purposes of Chapter XXXIII of the Michigan Penal Code, *harmful electronic or electromagnetic device* means "a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system." MCL 750.200h(k).

Harmful radioactive device

- For purposes of MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.49a (OV 20), *harmful radioactive device* means that term as defined in MCL 750.200h. MCL 777.31(3)(a); MCL 777.32(3)(a); MCL 777.49a(2)(b). MCL 750.200h(*l*) defines

harmful radioactive device as "a device that is designed or intended to release a harmful radioactive material."

Harmful radioactive material

- For purposes of MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.49a (OV 20), *harmful radioactive material* means that term as defined in MCL 750.200h. MCL 777.31(3)(a); MCL 777.32(3)(a); MCL 777.49a(2)(b). MCL 750.200h(j) defines *harmful radioactive material* as "material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity."

Homicide

- For purposes of Chapter XVII of the Code of Criminal Procedure (Sentencing Guidelines), *homicide* "means any crime in which the death of a human being is an element of that crime." MCL 777.1(c).

I

Ignition interlock device

- For purposes of MCL 600.1084, *ignition interlock device* "means that term as defined in [MCL 257.20d]. MCL 600.1084(9)(b). MCL 257.20d defines *ignition interlock device* as "an alcohol concentration measuring device that prevents a motor vehicle from being started at any time without first determining through a deep lung sample the operator's alcohol level, calibrated so that the motor vehicle cannot be started if the breath alcohol level of the operator, as measured by the test, reaches a level of 0.025 grams per 210 liters of breath, and to which all of the following apply:

  (a) The device meets or exceeds the model specifications for breath alcohol ignition interlock devices (BAIID), 78 FR 26849 – 26867 (May 8, 2013) or any subsequent model specifications.

  (b) The device utilizes alcohol-specific electrochemical fuel sensor technology.

  (c) As its anticircumvention method, the device installation uses a positive-negative-positive air pressure test requirement, a midtest hum tone requirement, or any other anticircumvention method or

technology that first becomes commercially available after July 31, 2007 and that is approved by the department as equally or more effective."

Imitation controlled substance

- For purposes of MCL 333.7341, *imitation controlled substance*, "means a substance that is not a controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. However, this subsection does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles. An imitation controlled substance does not include a placebo or registered investigational drug that was manufactured, distributed, possessed, or delivered in the ordinary course of professional practice or research. All of the following factors shall be considered in determining whether a substance is an imitation controlled substance:

  (*i*) Whether the substance was approved by the federal food and drug administration for over-the-counter sales and was sold in the federal food and drug administration approved packaging along with the federal food and drug administration approved labeling information.

  (*ii*) Any statements made by an owner or another person in control of the substance concerning the nature, use, or effect of the substance.

  (*iii*) Whether the substance is packaged in a manner normally used for illicit controlled substances.

  (*iv*) Whether the owner or another person in control of the substance has any prior convictions under state or federal law related to controlled substances or fraud.

  (*v*) The proximity of the substance to controlled substances.

  (*vi*) Whether the consideration tendered in exchange for the substance substantially exceeds the reasonable value of the substance considering the actual chemical composition of the substance and, if applicable, the price at which the over-the-counter substances of like chemical composition sell." MCL 333.7341(1)(b).

Imitation harmful substance or device

- For purposes of MCL 777.31 (OV 1), *imitation harmful substance or device* means that term as defined in MCL 750.200h. MCL 777.31(3)(a). MCL 750.200h(m) defines *imitation harmful substance or device* as "a substance or device that is designed or intended to represent 1 or more of the following or that is alleged to be 1 of the following but that is not any of the following:

  (*i*) A harmful biological device.

  (*ii*) A harmful biological substance.

  (*iii*) A harmful chemical device.

  (*iv*) A harmful chemical substance.

  (*v*) A harmful radioactive material.

  (*vi*) A radioactive device.

  (*vii*) A harmful electronic or electromagnetic device."

Incendiary device

- For purposes of MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.49a (OV 20) *incendiary device* "includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device." MCL 777.31(3)(b); MCL 777.32(3)(d); MCL 777.49a(2)(c).

Indigent criminal defense services

- For purposes of the Michigan Indigent Defense Commission Act, *indigent criminal defense services* means "local legal defense services provided to a defendant and to which both of the following conditions apply: (*i*) [t]he defendant is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge[, and] (*ii*) [t]he defendant is determined to be indigent under [MCL 780.991(3)]." MCL 780.983(e). *Indigent criminal defense services* do not include services authorized to be provided under the appellate defender act, MCL 780.711—MCL 780.719. MCL 780.983(f).

Indigent criminal defense system

- For purposes of the Michigan Indigent Defense Commission Act, *indigent criminal defense system* means either "[t]he local

unit of government that funds a trial court[,]" or "[i]f a trial court is funded by more than 1 local unit of government, those local units of government, collectively." MCL 780.983(g).

Industrial hemp

- For purposes of Article 7 of the PHC, *industrial hemp* "means that term as defined in . . . MCL 333.27953." MCL 333.7106(2). MCL 333.27953 defines *industrial hemp* as "any of the following:

  (*i*) A plant of the genus *Cannabis*, whether growing or not, with a THC concentration of 0.3% or less on a dry-weight basis.

  (*ii*) A part of a plant of the genus *Cannabis*, whether growing or not, with a THC concentration of 0.3% or less on a dry-weight basis.

  (*iii*) The seeds of a plant of the genus *Cannabis* with a THC concentration of 0.3% or less on a dry-weight basis.

  (*iv*) If it has a THC concentration of 0.3% or less on a dry-weight basis, a compound, manufacture, derivative, mixture, preparation, extract, cannabinoid, acid, salt, isomer, or salt of an isomer of any of the following:

    (A) A plant of the genus *Cannabis*.

    (B) A part of a plant of the genus *Cannabis*.

  (*v*) A product to which 1 of the following applies:

    (A) If the product is intended for human or animal consumption, the product, in the form in which it is intended for sale to a consumer, meets both of the following requirements:

      (I) Has a THC concentration of 0.3% or less on a dry-weight or per volume basis.

      (II) Contains a total amount of THC that is less than or equal to the limit established by the cannabis regulatory agency under [MCL 333.27958(1)(n)].

    (B) If the product is not intended for human or animal consumption, the product meets both of the following requirements:

(I) Contains a substance listed in subparagraph (*i*), (*ii*), (*iii*), or (*iv*).

(II) Has a THC concentration of 0.3% or less on a dry-weight basis." MCL 333.27953(f).

Ingestion

- For purposes of MCL 8.9(10)(c), *ingestion* means "to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." MCL 8.9(10)(c)(*iii*).

Insane/insanity

- For purposes of the Code of Criminal Procedure, "[a]n individual is legally insane if, as a result of mental illness as defined in . . . MCL 330.1400, or as a result of having an intellectual disability as defined in . . . MCL 330.1100b, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity." MCL 768.21a(1).

Intellectual disability

- For purposes of the Mental Health Code and the Code of Criminal Procedure, *intellectual disability* "means a condition manifesting before the age of 18 years that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

  (a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.

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

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

  (d) With appropriate supports over a sustained period, the life functioning of the individual with an intellectual

disability will generally improve." MCL 330.1100b(13); see also MCL 768.21a(1).

Intent

- For purposes of MCL 8.9, *intent* means "a desire or will to act with respect to a material element of an offense if both of the following circumstances exist: a desire or will to act with respect to a material element of an offense if both of the following circumstances exist:

  (*i*) The element involves the nature of a person's conduct or a result of that conduct, and it is the person's conscious object to engage in conduct of that nature or to cause that result.

  (*ii*) The element involves the attendant circumstances, and the person is aware of the existence of those circumstances or believes or hopes that they exist." MCL 8.9(10)(b).

Intermediary interpreter

- For purposes of the Deaf Persons' Interpreters Act, *intermediary interpreter* or *deaf interpreter* means "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Intermediate sanction

- For purposes of Chapter XVII of the Code of Criminal Procedure, *intermediate sanction* "means that term as defined in [MCL 769.31]." MCL 769.31(b) defines *intermediate sanction* as "probation or any sanction, other than imprisonment in a county jail, state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:

  (*i*) Inpatient or outpatient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to [MCL] 600.1082.

  (*ii*) Probation with any probation conditions required or authorized by law.

  (*iii*) Residential probation.

  (*iv*) Probation with special alternative incarceration.

(*v*) Mental health treatment.

(*vi*) Mental health or substance abuse counseling.

(*vii*) Participation in a community corrections program.

(*viii*) Community service.

(*ix*) Payment of a fine.

(*x)* House arrest.

(*xi*) Electronic monitoring."

Interpret/interpretation

- For purposes of MCR 1.111, concerning foreign language interpreters, *interpret* and *interpretation* mean "the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(5).

Intoxicated or impaired

- For purposes of MCL 8.9, *intoxicated or impaired* "includes, but is not limited to, a condition of intoxication resulting from the ingestion of alcoholic liquor, a controlled substance, or alcoholic liquor and a controlled substance." MCL 8.9(10)(c).

Intoxicating substance

- For purposes of the MCL 257.625, *intoxicating substance* means "any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following:

  (*i*) Recognized as a drug in any of the following publications or their supplements:

  (A) The official United States pharmacopoeia.

  (B) The official homeopathic pharmacopoeia of the United States.

  (C) The official national formulary.

  (*ii*) A substance, other than food, taken into a person's body, including, but not limited to, vapors or fumes, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication." MCL 257.625(25)(a).

J

Jail

- For purposes of MCL 750.195 or MCL 750.197, *jail* "means a facility that is operated by a local unit of government for the detention of persons charged with, or convicted of, criminal offenses or ordinance violations, or persons found guilty of civil or criminal contempt." MCL 750.195(4); MCL 750.197(4).

- For purposes of the Day Parole of Prisoners Act, *jail* "means a facility that is operated by a county for the detention of persons charged with, or convicted of, criminal offenses or ordinance violations, or persons found guilty of civil or criminal contempt, for not more than 1 year." MCL 801.251(4).

Judicial district

- For purposes of the Code of Criminal Procedure, *judicial district* means "(*i*) [w]ith regard to the circuit court, the county[;] (*ii*) [w]ith regard to municipal courts, the city in which the municipal court functions or the village served by a municipal court under . . . MCL 600.9928[;] (*iii*) [w]ith regard to the district court, the county, district, or political subdivision in which venue is proper for criminal actions." MCL 761.1(i).

Judicial officer

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *judicial officer* "includes a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate." MCR 6.003(4).

Juvenile

- For purposes of Subchapter 6.900 of the Michigan Court Rules, *juvenile* means "a person 14 years of age or older, who is subject to the jurisdiction of the court for having allegedly committed a specified juvenile violation on or after the person's 14th birthday and before the person's 18th birthday." MCR 6.903(E).

- For purposes of the Crime Victim's Rights Act, Article 2, *juvenile* means "an individual alleged or found to be within the court's jurisdiction under . . . [MCL 712A.2(a)(1)], for an offense, including, but not limited to, an individual in a designated case." MCL 780.781(1)(e).

Juvenile adjudication

- For purposes of Part 5 (Prior Record Variables) of Chapter XVII of the Code of Criminal Procedure, *juvenile adjudication* "includes an adjudication set aside under . . . MCL 712A.18e, or expunged." MCL 777.50(4)(c).

Juvenile history record information

- For purposes of MCL 28.241 *et seq*., *juvenile history record information* means "name; date of birth; personal descriptions including identifying marks, scars, amputations, and tattoos; aliases and prior names; social security number, driver's license number, and other identifying numbers; and information on juvenile offense arrests and adjudications or convictions." MCL 28.241a(g).

Juvenile mental health court

- For purposes of Chapter 10C of the Revised Judicature Act, MCL 600.1099b *et seq*., *juvenile mental health court* "means all of the following:

  (*i*) A court-supervised treatment program for juveniles who are diagnosed by a mental health professional with having a serious emotional disturbance, co-occurring disorder, or developmental disability.

  (*ii*) Programs designed to adhere to the 7 common characteristics of a juvenile mental health court as described under [MCL 600.1099c(3)].

  (*iii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the Bureau of Justice Assistance, or amended, that include all of the following characteristics:

    (A) A broad-based group of stakeholders representing the criminal justice system, the juvenile justice system, the mental health system, the substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

    (B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for juveniles with mental illnesses, and that take into account the relationship between mental illness and a juvenile's offenses, while

allowing the individual circumstances of each case to be considered.

(C) Participants are identified, referred, and accepted into mental health courts, and then linked to community-based service providers as quickly as possible.

(D) Terms of participation are clear, promote public safety, facilitate the juvenile's engagement in treatment, are individualized to correspond to the level of risk that each juvenile presents to the community, and provide for positive legal outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, 2013 PA 93, MCL 780.981 to [MCL] 780.1003, provide legal counsel to juvenile respondents to explain program requirements, including voluntary participation, and guide juveniles in decisions about program involvement. Procedures exist in the juvenile mental health court to address, in a timely fashion, concerns about a juvenile's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights. Information gathered as part of the participants' court-ordered treatment program or services is safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice, if applicable, juvenile justice, and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants to achieve treatment and criminal and juvenile justice goals by regularly reviewing and revising the court process.

(I) Criminal and juvenile justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the juvenile mental health court, its performance is assessed periodically, procedures are modified accordingly, court processes are institutionalized, and support for the court in the community is cultivated and expanded." MCL 600.1099b(e).

Juvenile offense

- For purposes of MCL 28.241 *et seq.*, *juvenile offense* means "an offense committed by a juvenile that, if committed by an adult, would be a felony, a criminal contempt conviction under . . . MCL 600.2950 [or MCL] 600.2950a, a criminal contempt conviction for a violation of a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i, or a misdemeanor." MCL 28.241a(h).

K

Knowledge

- For purposes of MCL 8.9, *knowledge* means "awareness or understanding with respect to a material element of an offense if both of the following circumstances exist:

  (*i*) The element involves the nature or the attendant circumstances of the person's conduct, and the person is aware that his or her conduct is of that nature or that those circumstances exist.

  (*ii*) The element involves a result of the person's conduct, and the person is aware that it is practically certain that his or her conduct will cause that result." MCL 8.9(10)(d).

L

Law enforcement agency

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *law enforcement agency* means "the police department of a city, township, or village, the sheriff's department of a county, the department, or any other governmental law enforcement agency of this state." MCL 28.241a(i).

Library

- For purposes of MCL 333.7410, *library* "means a library that is established by the state; a county, city, township, village, school district, or other local unit of government or authority or combination of local units of government and authorities; a community college district; a college or university; or any private library open to the public."MCL 333.7410(8)(a).

Listed offense

- For purposes of the Sex Offenders Registration Act (SORA), MCL 762.11, MCL 771.2, and MCL 771.2a, *listed offense* "means a tier I, tier II, or tier III offense." MCL 28.722(i); MCL 762.11(7)(a); MCL 771.2(15); MCL 771.2a(14)(a).

Listed prior felony

- For purposes of MCL 769.12, *listed prior felony* "means a violation or attempted violation of any of the following:

  (*i*) Section 602a(4) or (5) or 625(4) of the Michigan vehicle code, 1949 PA 300, MCL 257.602a and [MCL] 257.625.

  (*ii*) Article 7 of the public health code, 1978 PA 368, MCL 333.7101 to [MCL] 333.7545, that is punishable by imprisonment for more than 4 years.

  (*iii*) [various sections] of the Michigan penal code, [MCL 750.72, MCL 750.82, MCL 750.83, MCL 750.84, MCL 750.85, MCL 750.86, MCL 750.87, MCL 750.88, MCL 750.89, MCL 750.91, MCL 750.110a(2), MCL 750.110a(3), MCL 750.136b(2), MCL 750.136b(2), MCL 750.145n(1), MCL 750.145n(2) MCL 750.157b, MCL 750.197c, MCL 750.226, MCL 750.227, MCL 750.234a, MCL 750.234b, MCL 750.234c, MCL 750.317, MCL 750.321, MCL 750.329, MCL 750.349, MCL 750.349a, MCL 750.350, MCL 750.397, MCL 750.411h(2)(b), MCL 750.411i, MCL 750.479a(4), MCL 750.479a(5), MCL 750.520b, MCL

750.520c, MCL 750.520d, MCL 750.520g, MCL 750.529, MCL 750.529a, or MCL]750.530.]

(*iv*) A second or subsequent violation or attempted violation of section 227b of the Michigan penal code, 1931 PA 328, MCL 750.227b.

(*v*) Section 2a of 1968 PA 302, MCL 752.542a." MCL 769.12(6)(a).

Local unit of government

- For purposes of MCL 769.1f, *local unit of government* "means any of the following:

  (*i*) A city, village, township, or county.

  (*ii*) A local or intermediate school district.

  (*iii*) A public school academy.

  (*iv*) A community college." MCL 769.1f(10)(b).

Loiter

- For purposes of MCL 771.2a, *loiter* "means to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purposes of observing or contacting minors." MCL 771.2a(14)(b).

M

Magistrate

- For purposes of the Code of Criminal Procedure, *magistrate* means "a judge of the district court or a judge of a municipal court. Magistrate does not include a district court magistrate, except that a district court magistrate may exercise the powers, jurisdiction, and duties of a magistrate if specifically provided in this act, the revised judicature act, . . . MCL 600.101 to [MCL] 600.9947, or any other statute. This definition does not limit the power of a justice of the supreme court, a circuit judge, or a judge of a court of record having jurisdiction of criminal cases under this act, or deprive him or her of the power to exercise the authority of a magistrate." MCL 761.1(*l*).

Major controlled substance offense

- *Major controlled substance offense* means either or both of the following offenses: a violation of MCL 333.7401(2)(a), a violation of MCL 333.7403(2)(a)(*i*)-(*iv*), or conspiracy to commit a violation of either MCL 333.7401(2)(a) or MCL 333.7403(2)(a)(*i*)-(*iv*). MCL 761.2.

Manufacture

- For purposes of MCL 333.7341 (imitation controlled substances), *manufacture* "means the production, preparation, compounding, conversion, encapsulating, packaging, repackaging, labeling, relabeling, or processing of an imitation controlled substance, directly or indirectly. MCL 333.7341(1)(c).

Marijuana/Marihuana

- For purposes of Article 7 of the PHC and the Michigan Medical Marihuana Act (MMMA), *marijuana* or *marihuana* "means that term as defined in . . . MCL 333.27953." MCL 333.7106(4); MCL 333.26423(e). MCL 333.27953 defines *marijuana* or *marihuana* as "any of the following:

  (*i*) A plant of the genus *Cannabis*, whether growing or not.

  (*ii*) A part of a plant of the genus *Cannabis*, whether growing or not.

  (*iii*) The seeds of a plant of the genus *Cannabis*.

  (*iv*) Marihuana concentrate.

  (*v*) A compound, manufacture, salt, derivative, mixture, extract, acid, isomer, salt of an isomer, or preparation of any of the following:

    (A) A plant of the genus *Cannabis*.

    (B) A part of a plant of the genus *Cannabis*.

    (C) The seeds of a plant of the genus *Cannabis*.

    (D) Marihuana concentrate.

  (*vi*) A marihuana-infused product.

  (*vii*) A product with a THC concentration of more than 0.3% on a dry-weight or per volume basis in the form in which it is intended for sale to a consumer.

(*viii*) A product that is intended for human or animal consumption and that contains, in the form in which it is intended for sale to a consumer, a total amount of THC that is greater than the limit established by the cannabis regulatory agency under [MCL 333.27958(1)(n)]. MCL 333.27953(h) (MRTMA); MCL 333.7106(4) (Article 7 of the PHC); MCL 333.26423(e) (MMMA); MCL 333.27102(k) (MMFLA); MCL 333.27902(d) (MTA).

- "Except for marihuana concentrate extracted from the following, 'marihuana' does not include any of the following:

  (*i*) The mature stalks of a plant of the genus Cannabis.

  (*ii*) Fiber produced from the mature stalks of a plant of the genus Cannabis.

  (*iii*) Oil or cake made from the seeds of a plant of the genus Cannabis.

  (*iv*) A compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks of a plant of the genus Cannabis.

  (*v*) Industrial hemp.

  (*vi*) An ingredient combined with marihuana to prepare topical or oral administrations, food, drink, or other products.

  (*vii*) A dug for which an application filed in accordance with 21 USC 355 is approved by the Food and Drug Administration." MCL 333.27953(i).

Marihuana concentrate

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marijuana concentrate* "means the resin extracted from any part of a plant of the genus *Cannabis*." MCL 333.27953(k).

Marihuana-infused product

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marihuana-infused product* "means a topical formulation, tincture, beverage, edible substance, or similar product containing marihuana and other ingredients and that is intended for human consumption." MCL 333.27953(n).

Medically frail

- For purposes of MCL 791.235, *medically frail* "describes an individual who is a minimal threat to society as a result of his or her medical condition, who has received a risk score of low on a validated risk assessment, whose recent conduct in prison indicates he or she is unlikely to engage in assaultive conduct, and who has 1 or both of the following:

  (*i*) A permanent or terminal physical disability or serious and complex medical condition resulting in the inability to do 1 or more of the following without personal assistance:

  (A) Walk.

  (B) Stand.

  (C) Sit.

  (*ii*) A permanent or terminal disabling mental disorder, including dementia, Alzheimer's, or a similar degenerative brain disorder that results in the need for nursing home level of care, and a significantly impaired ability to perform 2 or more activities of daily living." MCL 791.235(22)(c).

Medical use of marihuana

- For purposes of the Michigan Medical Marihuana Act, *medical use of marihuana* "means the acquisition, possession, cultivation, manufacture, extraction, use, internal possession, delivery, transfer, or transportation of marihuana, marihuana-infused products, or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(i).

Mental health court

- For purposes of MCL 600.1090 *et seq.*, *mental health court* means "any of the following:

  (*i*) A court-supervised treatment program for individuals who are diagnosed by a mental health professional with having a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.

(*ii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the bureau of justice assistance that include all of the following characteristics:

(A) A broad-based group of stakeholders representing the criminal justice system, mental health system, substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

(B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for defendants with mental illnesses, and that take into account the relationship between mental illness and a defendant's offenses, while allowing the individual circumstances of each case to be considered.

(C) Participants are identified, referred, and accepted into mental health courts, and then linked to community-based service providers as quickly as possible.

(D) Terms of participation are clear, promote public safety, facilitate the defendant's engagement in treatment, are individualized to correspond to the level of risk that each defendant presents to the community, and provide for positive legal outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, . . . MCL 780.981 to [MCL] 780.1003, provide legal counsel to indigent defendants to explain program requirements, including voluntary participation, and guides defendants in decisions about program involvement. Procedures exist in the mental health court to address, in a timely fashion, concerns about a defendant's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights as defendants. Information gathered as part of the participants' court-ordered

treatment program or services are safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants achieve treatment and criminal justice goals by regularly reviewing and revising the court process.

(I) Criminal justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the mental health court, its performance is assessed periodically, and procedures are modified accordingly, court processes are institutionalized, and support for the court in the community is cultivated and expanded." MCL 600.1090(e).

Mental illness/mentally ill

- For purposes of the Mental Health Code and the Code of Criminal Procedure, *mental illness* "means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g); see also MCL 768.21a(1).

Minor

- For purposes of MCL 777.45 (OV 15), *minor* "means an individual 17 years of age or less." MCL 777.45(2)(b).

- For purposes of MCL 771.2a, *minor* "means an individual less than 18 years of age." MCL 771.2a(14)(c).

Minor offense

- For purposes of the Code of Criminal Procedure, *minor offense* means "a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00." MCL 761.1(m).

Misdemeanor

- For purposes of MCL 28.241 *et seq*. (governing criminal history records of the Michigan State Police), *misdemeanor* means "either of the following:

  (*i*) A violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine.

  (*ii*) A violation of a local ordinance that substantially corresponds to state law and that is not a civil infraction." MCL 28.241a(j).

- For purposes of the Code of Criminal Procedure, *misdemeanor* means "a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(n).

- For purposes of the Michigan Penal Code, "[w]hen any act or omission, not a felony, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor." MCL 750.8.

- Note that "the Legislature intended two-year misdemeanors [(in the Michigan Penal Code)] to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes." *People v Smith*, 423 Mich 427, 434 (1985).

Motorboat

- For purposes of the Natural Resources and Environmental Protection Act, Part 801, Marine Safety, *motorboat* means "a vessel propelled wholly or in part by machinery." MCL 324.80103(f).

Motor vehicle

- For purposes of the Michigan Vehicle Code, *motor vehicle* means "every vehicle that is self-propelled, but for purposes of chapter 4 of this act motor vehicle does not include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under

this act. Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act . . . MCL 257.1571 to [MCL] 257.1577. Motor vehicle does not include an electric personal assistive mobility device. Motor vehicle does not include an electric carriage. Motor vehicle does not include a commercial quadricycle." MCL 257.33.

Moving violation

- For purposes of MCL 257.601b, *moving violation* means "an act or omission prohibited under this act or a local ordinance substantially corresponding to this act that occurs while a person is operating a motor vehicle, and for which the person is subject to a fine." MCL 257.601b(5)(b).

N

Narcotic drug

- For purposes of Article 7 of the Public Health Code, *narcotic drug* "means 1 or more of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

  (a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

  (b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in [MCL 333.7107(a)], but not including the isoquinoline alkaloids of opium." MCL 333.7107.

Negligence

- For purposes of MCL 8.9, *negligence* means "the failure to use reasonable care with respect to a material element of an offense to avoid consequences that are the foreseeable outcome of the person's conduct with respect to a material element of an offense and that threaten or harm the safety of another." MCL 8.9(10)(e).

O

Offense

- For purposes of the Crime Victim's Rights Act, Article 2, *offense* means "1 or more of the following:

  (*i*) A violation of a penal law of this state for which a juvenile offender, if convicted as an adult, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony.

  (*ii*) A violation of [MCL 750.81] (assault and battery, including domestic violence), [MCL 750.81a] (assault; infliction of serious injury, including aggravated domestic violence), [MCL 750.115] (breaking and entering or illegal entry), [MCL 750.136b(7)] (child abuse in the fourth degree), [MCL 750.145] (contributing to the neglect or delinquency of a minor), [MCL 750.145d] (using the internet or a computer to make a prohibited communication), [MCL 750.233] (intentionally aiming a firearm without malice), [MCL 750.234] (discharge of a firearm intentionally aimed at a person), [MCL 750.235] (discharge of an intentionally aimed firearm resulting in injury), [MCL 750.335a] (indecent exposure), or [MCL 750.411h] (stalking)[.]

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

  (*iv*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of section 33 of the former 1933 (Ex Sess) PA 8, or [MCL 436.1701], if the violation results in physical injury or death to any individual.

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

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

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

Operate

- For purposes of MCL 324.80176, *operate* means "to be in control of a vessel propelled wholly or in part by machinery while the vessel is underway and is not docked, at anchor, idle, or otherwise secured." MCL 324.80176(8).

Operating while intoxicated

- For purposes of the Michigan Vehicle Code, *operating while intoxicated* means "any of the following:

  (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

  (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning 5 years after the state treasurer publishes a certification under [MCL 257.625(28) stating that the state no longer receives annual federal highway construction funding conditioned on compliance with a national blood alcohol limit], the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

  (c) The person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine." MCL 257.625(1).

Ordinance violation

- For purposes of the Code of Criminal Procedure, *ordinance violation* means "either of the following: (*i*) [a] violation of an ordinance or charter of a city, village, township, or county that is punishable by imprisonment or a fine that is not a civil fine[;] (*ii*) [a] violation of an ordinance, rule, or regulation of any other governmental entity authorized by law to enact ordinances, rules, or regulations that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(o).

ORV

- For purposes of Chapter XVII of the Code of Criminal Procedure (Sentencing Guidelines), *ORV* "means that term as defined in . . . MCL 324.81101." MCL 777.1(e). MCL 324.81101(u) defines *ORV* as "a motor-driven off-road recreation vehicle capable of cross-country travel without benefit of a road or trail, on or immediately over land, snow, ice, marsh, swampland, or other natural terrain. A multitrack or multiwheel drive vehicle, a motorcycle or related 2-wheel vehicle, a vehicle with 3 or more wheels, an amphibious machine, a ground effect air cushion vehicle, or other means of transportation may be an ORV. An ATV is an ORV. ORV or vehicle does not include a registered snowmobile, a farm vehicle being used for farming, a vehicle used for military, fire, emergency, or law enforcement purposes, a vehicle owned and operated by a utility company or an oil or gas company when performing maintenance on its facilities or on property over which it has an easement, a construction or logging vehicle used in performance of its common function, or a registered aircraft."

Other recorded information

- For purposes of MCR 1.109(A)(1), in which the term court records is defined, *other recorded information* "includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image." MCR 1.109(A)(1)(b)(*iv*).

P

Participant

- For purposes of MCL 600.1200 *et seq.*, *participant* means "individual who is admitted into a veterans treatment court." MCL 600.1200(e).

Party

- For purposes of MCR 1.111, *party* means "a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *party* "includes the lawyer representing the party." MCR 6.003(1).

Penalty

- For purposes of Chapter 48 of the Revised Judicature Act, *penalty* "includes fines, forfeitures, and forfeited recognizances." MCL 600.4801(b).

Person

- For purposes of the Code of Criminal Procedure, *person*, *accused*, or a similar word means "an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association." MCL 761.1(p).

- For purposes of the Michigan Vehicle Code, *person* means "every natural person, firm, copartnership, association, or corporation and their legal successors." MCL 257.40.

- For purposes of the Crime Victim's Rights Act, Articles 1, Article 2, and Article 3, *person* "means an individual, organization, partnership, corporation, or governmental entity." MCL 780.752(1)(j); MCL 780.781(1)(h); MCL 780.811(1)(e).

Physician

- For purposes of MCL 771.3g and MCL 771.3h, *physician* "means that term as defined in . . . MCL 333.17001." MCL 771.3g(7)(b). MCL 333.17001(1)(f) defines *physician* as "an individual who is licensed or authorized under [Article 15 of the Public Health Code] to engage in the practice of medicine."

Pistol

- For purposes of MCL 777.32 (OV 2), *pistol* "includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle." MCL 777.32(3)(c).

Plant

- For purposes of MCL 333.7401, *plant* "means a marihuana plant that has produced cotyledons or a cutting of a marihuana plant that has produced cotyledons." MCL 333.7401(5).

Predatory conduct

- For purposes of MCL 777.40 (OV 10), *predatory conduct* "means preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization." MCL 777.40(3)(a). The phrase "or a law enforcement officer posing as a potential victim" was added to MCL 777.40(3)(a) by 2014 PA 350, effective October 17, 2014.

Prior conviction

- For purposes of MCL 257.625, *prior conviction* means "a conviction for any of the following, whether under a law of this state, a local ordinance substantially corresponding to a law of this state, a law of the United States substantially corresponding to a law of [Michigan], or a law of another state substantially corresponding to a law of this state, subject to [MCL 257.625(27)[2]]:

  (*i*) Except as provided in [MCL 257.625(26)[3]], a violation or attempted violation of any of the following:

  (A) [MCL 257.625], except a violation of [MCL 257.625(2)], or a violation of any prior enactment of [MCL 257.625] in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.

  (B) [MCL 257.625m].

  (C) Former [MCL 257.625b].

  (*ii*) Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

  (*iii*) [MCL 257.601d] or [MCL 257.626(3) or MCL 257.626(4)]." MCL 257.625(25)(b).

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[2]MCL 257.625(27) states that "[i]f 2 or more convictions described in [MCL 257.625(25)] are convictions for violations arising out of the same transaction, only 1 conviction shall be used to determine if the person has a prior conviction."

[3]MCL 257.625(26) states that "[e]xcept for purposes of the enhancement described in [MCL 257.625(12)(b)], only 1 violation or attempted violation of [MCL 257.625(6)], a local ordinance substantially corresponding to [MCL 257.625(6)], or a law of another state substantially corresponding to [MCL 257.625(6)] may be used as a prior conviction."

Prior high severity felony conviction

- For purposes of MCL 777.51 (PRV 1), *prior high severity felony conviction* "means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:

  (a) A crime listed in offense class M2, A, B, C, or D.

  (b) A felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D.

  (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.

  (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more." MCL 777.51(2).

Prior high severity juvenile adjudication

- For purposes of MCL 777.53 (PRV 3), *prior high severity juvenile adjudication* "means a juvenile adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the sentencing offense was committed:

  (a) A crime listed in offense class M2, A, B, C, or D.

  (b) A felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D.

  (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.

  (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more." MCL 777.53(2).

Prior judgment

- For purposes of MCL 436.1703, a *prior judgment* "means a conviction, juvenile adjudication, finding of responsibility, or admission of responsibility for any of the following, whether under a law of this state, a local ordinance substantially

corresponding to a law of this state, a law of the United States that substantially corresponds to a law of this state, or a law of another state that substantially corresponds to a law of this state:

(*i*) [MCL 436.1703] or [MCL 436.1701 or MCL 436.1707].

(*ii*) . . . MCL 257.624a, [MCL] 257.624b, and [MCL] 257.625.

(*iii*) . . . MCL 324.80176, [MCL] 324.81134, and [MCL] 324.82127.

(*iv*) . . . MCL 750.167a and [MCL] 750.237." MCL 436.1703(17)(d).

Prior low severity felony conviction

- For purposes of MCL 777.52 (PRV 2), *prior low severity felony conviction* "means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:

  (a) A crime listed in offense class E, F, G, or H.

  (b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.

  (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

  (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years." MCL 777.52(2).

Prior low severity juvenile adjudication

- For purposes of MCL 777.54 (PRV 4), *prior low severity juvenile adjudication* "means a juvenile adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the sentencing offense was committed:

  (a) A crime listed in offense class E, F, G, or H.

  (b) A felony under a law of the United States or another state corresponding to a crime listed in offense class E, F, G, or H.

(c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

(d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years." MCL 777.54(2).

Prior misdemeanor conviction

- For purposes of MCL 777.55 (PRV 5), *prior misdemeanor conviction* "means a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed." MCL 777.55(3)(a).

Prior misdemeanor juvenile adjudication

- For purposes of MCL 777.55 (PRV 5), *prior misdemeanor juvenile adjudication* "means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the order of disposition was entered before the sentencing offense was committed." MCL 777.55(3)(b).

Prison

- For purposes of MCL 750.193, *prison* "means a facility that houses prisoners committed to the jurisdiction of the department of corrections and includes the grounds, farm, shop, road camp, or place of employment operated by the facility or under control of the officers of the facility, the department of corrections, a police officer of this state, or any other person authorized by the department of corrections to have a prisoner under care, custody, or supervision, either in a facility or outside a facility, whether for the purpose of work, medical care, or any other reason." MCL 750.193(2).

Prisoner

- For purposes of MCL 771.3g and MCL 771.3h, *prisoner* "means an individual committed or sentenced to imprisonment under [MCL 769.28]." MCL 771.3g(7)(c).

Probationer

- For purposes of the Probation Swift and Sure Sanctions Act, *probationer* "means an individual placed on probation for committing a felony." MCL 771A.2(b).

Production

- For purposes of Article 7 of the PHC, *production* means "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." MCL 333.7109(6).

Program

- For purposes of MCL 600.1084, *program* "means the specialty court interlock program created under [MCL 600.1084]." MCL 600.1084(9)(c).

Prosecuting attorney

- For purposes of the Code of Criminal Procedure, *prosecuting attorney* means "the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, or, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based." MCL 761.1(r).

- For purposes of Article 1 of the Crime Victim's Rights Act, *prosecuting attorney* "means the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or a special prosecuting attorney." MCL 780.752(1)(*l*).

- For purposes of the Crime Victim's Rights Act, Articles 2 and 3, *prosecuting attorney* "means the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, or, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision that enacted the ordinance upon which the violation is based." MCL 780.781(1)(i); MCL 780.811(1)(g).

Prosecutor

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *prosecutor* "includes any lawyer prosecuting a case." MCR 6.003(3).

Q

Qualified interpreter

- For purposes of the Deaf Persons' Interpreters Act, *qualified interpreter* means "a person who is certified through the national registry of interpreters for the deaf or certified through the state by the division." MCL 393.502(f).

R

Record

- For purposes of MCL 600.1428, *record* means "information of any kind that is recorded in any manner and that has been created by a court or filed with a court in accordance with supreme court rules." MCL 600.1428(4).

Recklessness

- For purposes of MCL 8.9, *recklessness* means "an act or failure to act that demonstrates a deliberate, willful, or wanton disregard of a substantial and unjustifiable risk without reasonable caution for the rights, safety, and property of others." MCL 8.9(10)(f).

Recordings

- For purposes of MCR 1.109(A)(1), in which the term court records is defined, *recordings* "refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records." MCR 1.109(A)(1)(b)(*ii*).

Representations made

- In addition to other logically relevant factors, the following factors must be considered in regard to "representations made" when determining whether a substance is an imitation controlled substance:

"(a) Any express or implied representation made that the nature of the substance or its use or effect is similar to that of a controlled substance.

(b) Any express or implied representation made that the substance may be resold for an amount considerably in excess of the reasonable value of the composite ingredients and the cost of processing.

(c) Any express or implied representation made that the substance is a controlled substance.

(d) Any express or implied representation that the substance is of a nature or appearance that the recipient of the substance will be able to distribute the substance as a controlled substance.

(e) That the substance's package, label, or name is substantially similar to that of a controlled substance.

(f) The proximity of the substance to a controlled substance.

(g) That the physical appearance of the substance is substantially identical to a specific controlled substance, including any numbers or codes thereon, and the shape, size, markings, or color." MCL 333.7341(2).

Requiring medical treatment

- For purposes of MCL 777.33 (OV 3), *requiring medical treatment* "refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3).

Rifle

- For purposes of MCL 777.32 (OV 2), *rifle* "includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle." MCL 777.32(3)(c).

S

Sadism

- For purposes of MCL 777.37 (OV 7), *sadism* "means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).

School

- For purposes of MCL 771.3d and MCL 801.251a, *school* "means any of the following:

  (*i*) A school of secondary education.

  (*ii*) A community college, college, or university.

  (*iii*) A state-licensed technical or vocational school or program.

  (*iv*) A program that prepares the person for the general education development (GED) test." MCL 801.251a(2)(b).

- For purposes of MCL 750.237a, *school* "means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12." MCL 771.3d(2); MCL 750.237a(6)(b).

- For purposes of MCL 750.520o, *school* "means a public school as that term is defined in . . . MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12." MCL 750.520o(2)(a). MCL 380.5(6) defines *public school* to mean "a public elementary or secondary educational entity or agency that is established under [the Revised School Code] or under other law of this state, has as its primary mission the teaching and learning of academic and vocational-technical skills and knowledge, and is operated by a school district, intermediate school district, school of excellence corporation, public school academy corporation, strict discipline academy corporation, urban high school academy corporation, or by the department, the state board, or another public body. Public school also includes a laboratory school or other elementary or secondary school that is controlled and operated by a state public university described in section 4, 5, or 6 of article VIII of the state constitution of 1963."

- For purposes of MCL 771.2a, *school* "means a public, private, denominational, or parochial school offering developmental

kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school." MCL 771.2a(14)(d).

School bus

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

School bus zone

- For purposes of MCL 257.601b, *school bus zone* means "the area lying within 20 feet of a school bus that has stopped and is displaying 2 alternately flashing red lights at the same level, except as described in [MCL 257.682(2)]." MCL 257.601b(5)(c).

School property

- For purposes of MCL 764.15(1)(n) and Article 7 of the Public Health Code, *school property* means "a building, playing field, or property used for school purposes to impart instruction to children in grades kindergarten through 12, when provided by a public, private, denominational, or parochial school, except those building used primarily for adult education or college extension courses." MCL 764.15(1)(n); MCL 333.7410(8)(b).

- For purposes of MCL 750.237a, *school property* "means a building, playing field, or property used for school purposes to impart instruction to children or used for functions and events sponsored by a school, except a building used primarily for adult education or college extension courses." MCL 750.237a(6)(c).

- For purposes of MCL 771.2a, *school property* "means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:

  (*i*) It is used to impart educational instruction.

  (*ii*) It is for use by students not more than 19 years of age for sports or other recreational activities." MCL 771.2a(14)(e).

Second or subsequent offense

- For purposes of MCL 333.7413(1), "an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under [Article 7 of the Public Health Code] or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug." MCL 333.7413(4).

- For purposes of MCL 750.520f, "an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under [MCL 750.520b, MCL 750.520c, or MCL 750.520d] or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense." MCL 750.520f(2).

Sentencing offense

- "The sentencing offense is the crime of which the defendant has been convicted and for which he or she is being sentenced." *People v McGraw*, 484 Mich 120, 122 n 3 (2009).

Serious crime

- For purposes of MCL 769.12, *serious crime* "means an offense against a person in violation of [MCL 750.83, MCL 750.84, MCL 750.86, MCL 750.88, MCL 750.89, MCL 750.317, MCL 750.321, MCL 750.349, MCL 750.349a, MCL 750.350, MCL 750.397, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520g(1), MCL 750.529, or MCL 750.529a.]" MCL 769.12(6)(c).

Serious impairment of a body function

- For purposes of the Michigan Vehicle Code, *serious impairment of a body function* "includes, but is not limited to, 1 or more of the following:

  (a) Loss of a limb or loss of use of a limb.

  (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.

  (c) Loss of an eye or ear or loss of use of an eye or ear.

  (d) Loss or substantial impairment of a bodily function.

  (e) Serious visible disfigurement.

(f) A comatose state that lasts for more than 3 days.

(g) Measurable brain or mental impairment.

(h) A skull fracture or other serious bone fracture.

(i) Subdural hemorrhage or subdural hematoma.

(j) Loss of an organ." MCL 257.58c.

Serious misdemeanor

- For purposes of MCL 769.5 and the Crime Victim's Rights Act, Article 3, "[e]xcept as otherwise defined in this article, as used in this article, [*serious misdemeanor*] means 1 or more of the following:

  (*i*) A violation of [MCL 750.81], assault and battery, including domestic violence.

  (*ii*) A violation of [MCL 750.81a], assault; infliction of serious injury, including aggravated domestic violence.

  (*iii*) Beginning January 1, 2024, a violation of [MCL 750.81c(1)], threatening a department of health and human services' employee with physical harm.

  (*iv*) A violation of [MCL 750.115], breaking and entering or illegal entry.

  (*v*) A violation of [MCL 750.136b(7)], child abuse in the fourth degree.

  (*vi*) A violation of [MCL 750.145], contributing to the neglect or delinquency of a minor.

  (*vii*) A misdemeanor violation of [MCL 750.145d], using the internet or a computer to make a prohibited communication.

  (*viii*) Beginning January 1, 2024, a violation of [MCL 750.147a(2) or MCL 750.174a(3)(b)], embezzlement from a vulnerable adult of an amount of less than $200.00.

  (*ix*) Beginning January 1, 2024, a violation of [MCL 750.174a(3)(a)], embezzlement from a vulnerable adult of an amount of $200.00 to $1,000.00.

  (*x*) A violation of [MCL 750.233], intentionally aiming a firearm without malice.

  (*xi*) A violation of [MCL 750.234], discharge of a firearm intentionally aimed at a person.

(*xii*) A violation of [MCL 750.235], discharge of an intentionally aimed firearm resulting in injury.

(*xiii*) A violation of [MCL 750.335a], indecent exposure.

(*xiv*) A violation of [MCL 750.411h], stalking.

(*xv*) A violation of [MCL 257.601b(2)], injuring a worker in a work zone.

(*xvi*) Beginning January 1, 2024, a violation of [MCL 257.601d(1)], moving violation causing death.

(*xvii*) Beginning January 1, 2024, a violation of [MCL 257.601d(2)], moving violation causing serious impairment of a body function.

(*xviii*) A violation of [MCL 257.617a], leaving the scene of a personal injury accident.

(*xix*) A violation of [MCL 257.625], operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

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

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

(*xxii*) A violation of a local ordinance substantially corresponding to a violation enumerated in subparagraphs (*i*) to (*xxi*).

(*xxiii*) A violation charged as a crime or serious misdemeanor enumerated in subparagraphs (*i*) to (*xxii*) but subsequently reduced to or pleaded to as a misdemeanor. As used in this subparagraph, 'crime' means that term as defined in [MCL 780.752(1)(b)]." MCL 780.811(1)(a).; MCL 769.5(7) (defining *serious misdemeanor* as that term as defined by MCL 780.811).

Sexually delinquent person

- For purposes of the Michigan Penal Code, *sexually delinquent person* means "any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16." MCL 750.10a.

Sexually transmitted infection

- For purposes of MCL 333.5129(3), *sexually transmitted infection* "means syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted infections that the [Department of Health and Human Services] may designate and require to be reported under [MCL 333.5111]." MCL 333.5101(1)(h).

Shotgun

- For purposes of MCL 777.32 (OV 2), *shotgun* "includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle." MCL 777.32(3)(c).

Snowmobile

- For purposes of Chapter XVII of the Code of Criminal Procedure (Sentencing Guidelines), *snowmobile* "means that term as defined in . . . MCL 324.82101." MCL 777.1(f). MCL 324.82101(x) defines *snowmobile* as "any motor-driven vehicle that is designed for travel primarily on snow or ice and that utilizes sled-type runners or skis, an endless belt tread, or any combination of these or other similar means of contact with the surface upon which it is operated, but is not a vehicle that must be registered under the Michigan vehicle code, [MCL 257.1 *et seq.*]"

Specialty court

- For purposes of MCL 600.1084, *specialty court* "means any of the following:

  (*i*) A drug treatment court.

  (*ii*) A DWI/sobriety court.

(*iii*) A hybrid of the programs under subparagraphs (*i*) and (*ii*).

(*iv*) A mental health court, as that term is defined in [MCL 600.1090)].

(*v*) A veterans treatment court, as that term is defined in [MCL 600.1200)]. MCL 600.1084(9)(d).

Specified juvenile violation

- For purposes of MCL 764.1f, *specified juvenile violation* means "any of the following:

(a) A violation of [MCL 750.72, MCL 750.83, MCL 750.86, MCL 750.89, MCL 750.91, MCL 750.316, MCL 750.317, MCL 750.349, MCL 750.520b, MCL 750.529, MCL 750.529a, or MCL 750.531].

(b) A violation of [MCL 750.84 or MCL 750.110a(2)], if the juvenile is armed with a dangerous weapon.

(c) A violation of [MCL 750.186a], regarding escape or attempted escape from a juvenile facility, but only if the juvenile facility from which the individual escaped or attempted to escape was 1 of the following:

(*i*) A high-security or medium-security facility operated by the family independence agency or a county juvenile agency.

(*ii*) A high-security facility operated by a private agency under contract with the family independence agency or a county juvenile agency.

(d) A violation of [MCL 333.7401(2)(a)(*i*) or MCL 333.7403(2)(a)(*i*)].

(e) An attempt to commit a violation described in subdivisions (a) to (d).

(f) Conspiracy to commit a violation described in subdivisions (a) to (d).

(g) Solicitation to commit a violation described in subdivisions (a) to (d).

(h) Any lesser included offense of a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

(i) Any other violation arising out of the same transactions as a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g)." MCL 764.1f(2). See also MCR 6.903(H).

Stalking

- For purposes of MCL 750.411h and MCL 750.411i, *stalking* "means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(e); MCL 750.411i(1)(e).

State

- For purposes of MCL 769.1f, *state* "includes a state institution of higher education." MCL 769.1f(10)(f).

State-certified treatment court

- For purposes of MCL 600.1088, *state-certified treatment court* "includes the treatment courts certified by the state court administrative office as provided in" MCL 600.1062 (drug treatment court), MCL 600.1084 (DWI/sobriety court), MCL 600.1091 (mental health court), MCL 600.1099c (juvenile mental health court), or MCL 600.1201 (veterans treatment court). MCL 600.1088(2).

Student safety zone

- For purposes of MCL 771.2a, *student safety zone* "means the area that lies 1,000 feet or less from school property." MCL 771.2a(14)(f).

T

Taken

- For purposes of the Code of Criminal Procedure, *taken*, *brought*, or *before* "a magistrate or judge for purposes of criminal arraignment or the setting of bail means either" physical presence before a judge or district court magistrate or presence

before a judge or district court magistrate by use of 2-way interactive video technology. MCL 761.1(t).

Technical probation violation

- For purposes of MCL 771.4b, *technical probation violation* "means a violation of the terms of a probationer's probation order that is not listed below, including missing or failing a drug test, [MCL 771.4b(9)(b)(*ii*)] notwithstanding. Technical probation violations do not include the following:

  (*i*) A violation of an order of the court requiring that the probationer have no contact with a named individual.

  (*ii*) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

  (*iii*) The consumption of alcohol by a probationer who is on probation for a felony violation of . . . MCL 257.625.

  (*iv*) Absconding." MCL 771.4b(9)(b).

- For purposes of subchapters 6.000-6.800 of the Michigan Court Rules, *technical probation violation* "means any violation of the terms of a probation order, including missing or failing a drug test, excluding the following:

  (a) A violation of an order of the court requiring that the probationer have no contact with a named individual.

  (b) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

  (c) The consumption of alcohol by a probationer who is on probation for a felony violation of MCL 257.625.

  (d) Absconding, defined as the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCR 6.003(7).

Terrorist

- For purposes of MCL 777.49a (OV 20), *terrorist* "means that term as defined in . . . MCL 750.543b." MCL 777.49a(2)(a). MCL 750.543b(g) defines *terrorist* as "any person who engages or is about to engage in an act of terrorism."

Terrorist organization

- For purposes of MCL 777.49a (OV 20), *terrorist organization* "means that term as defined in . . . MCL 750.543c." MCL 777.49a(2)(d). MCL 750.543c defines *terrorist organization* as "an organization that, on [April 22, 2002], is designated by the United States state department as engaging in or sponsoring an act of terrorism." MCL 777.49a(2)(d); MCL 750.543c.

THC

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *THC* "means any of the following:

  (*i*) Tetrahydrocannabinolic acid.

  (*ii*) Unless excluded by the cannabis regulatory agency under [MCL 333.27958(2)(c)], a tetrahydrocannabinol, regardless of whether it is artificially or naturally derived.

  (*iii*) A tetrahydrocannabinol that is a structural, optical, or geometric isomer of a tetrahydrocannabinol described in subparagraph (*ii*)." MCL 333.27953(aa).

Tier I offense

- For purposes of the Sex Offenders Registration Act (SORA), *tier I offense* "means 1 or more of the following:

  (*i*) A violation of [MCL 750.145c(4)].

  (*ii*) A violation of [MCL 750.335a(2)(b)], if a victim is a minor.

  (*iii*) A violation of . . . MCL 750.349b, if the victim is a minor.

  (*iv*) A violation of [MCL 750.449a(2)].

  (*v*) A violation of [MCL 750.520e or MCL 750.520g(2)], if the victim is 18 years or older.

  (*vi*) A violation of . . . MCL 750.539j, if a victim is a minor.

  (*vii*) Any other violation of a law of this state or a local ordinance of a municipality, other than a tier II or tier III offense, that by its nature constitutes a sexual offense against an individual who is a minor.

  (*viii*) An offense committed by a person who was, at the time of the offense, a sexually delinquent person[.]

(*ix*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*viii*).

(*x*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*ix*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law." MCL 28.722(r).

Tier II offense

- For purposes of the Sex Offenders Registration Act (SORA), *tier II offense* "means 1 or more of the following:

(*i*) A violation of . . . MCL 750.145a.

(*ii*) A violation of . . . MCL 750.145b.

(*iii*) A violation of [MCL 750.145c(2) or MCL 750.145c(3)].

(*iv*) A violation of [MCL 750.145d(1)(a)], except for a violation arising out of a violation of . . . MCL 750.157c.

(*v*) A violation of . . . MCL 750.158, committed against a minor unless either of the following applies:

(A) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

(III) The individual is not more than 4 years older than the victim.

(B) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was 16 or 17 years of age at the time of the violation.

(III) The victim was not under the custodial authority of the individual at the time of the violation.

(*vi*) A violation of . . . MCL 750.338, [MCL] 750.338a, and [MCL] 750.338b, committed against an individual 13 years of age or older but less than 18 years of age. This subparagraph

does not apply if the court determines that either of the following applies:

(A) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

(III) The individual is not more than 4 years older than the victim.

(B) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was 16 or 17 years of age at the time of the violation.

(III) The victim was not under the custodial authority of the individual at the time of the violation.

(*vii*) A violation of [MCL 750.462e(a)].

(*viii*) A violation of . . . MCL 750.448, if the victim is a minor.

(*ix*) A violation of . . . MCL 750.455.

(*x*) A violation of [MCL 750.520c, MCL 750.520e, or MCL 750.520g(2)], committed against an individual 13 years of age or older but less than 18 years of age.

(*xi*) A violation of [MCL 750.520c] committed against an individual 18 years of age or older.

(*xii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*xi*).

(*xiii*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*xii*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law." MCL 28.722(t).

Tier III offense

- For purposes of the Sex Offenders Registration Act (SORA), *tier III offense* "means 1 or more of the following:

(*i*) A violation of . . . MCL 750.338, [MCL] 750.338a, and [MCL] 750.338b, committed against an individual less than 13 years of age.

(*ii*) A violation of . . . MCL 750.349, committed against a minor.

(*iii*) A violation of . . . MCL 750.350.

(*iv*) A violation of [MCL 750.520b, MCL 750.520d, or MCL 750.520g(1)]. This subparagraph does not apply if the court determines that the victim consented to the conduct constituting the violation, that the victim was at least 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim.

(*v*) A violation of [MCL 750.520c or MCL 750.520g(2)], committed against an individual less than 13 years of age.

(*vi*) A violation of . . . MCL 750.520e, committed by an individual 17 years of age or older against an individual less than 13 years of age.

(*vii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*vi*).

(*viii*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*vii*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law." MCL 28.722(v).

Trafficking

- For purposes of MCL 777.45 (OV 15), *trafficking* "means the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution." MCL 777.45(2)(c).

Traffic offense

- For purposes of MCL 762.11, *traffic offense* "means a violation of the Michigan vehicle code, 1949 PA 300, MCL 257.1 to [MCL] 257.923, or a violation of a local ordinance substantially corresponding to that act, that involves the operation of a vehicle and, at the time of the violation, is a felony or a misdemeanor." MCL 762.11(7)(b).

V

Vehicle

- For purposes of Chapter XVII of the Code of Criminal Procedure (Sentencing Guidelines), *vehicle* "means that term as defined in . . . the Michigan vehicle code, . . . MCL 257.79." MCL 777.1(g). MCL 257.79 defines *vehicle* as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks and except, only for the purpose of titling and registration under this act, a mobile home as defined in . . . [MCL 125.2302]."

Vessel

- For purposes of Chapter XVII of the Code of Criminal Procedure (Sentencing Guidelines), *vessel* "means that term as defined in . . . the natural resources and environmental protection act, . . . MCL 324.80104." MCL 777.1(h). MCL 324.80104(t) defines *vessel* as "every description of watercraft used or capable of being used as a means of transportation on water."

Veterans treatment court/veterans court

- For purposes of MCL 600.1200 *et seq.*, *veterans treatment court* or *veterans court* means "a court adopted or instituted under [MCL 600.1201] that provides a supervised treatment program for individuals who are veterans and who abuse or are dependent upon any controlled substance or alcohol or suffer from a mental illness." MCL 600.1200(j).

Victim

- For purposes of MCL 333.5129, *victim* "includes, but is not limited to, a victim as that term is defined in . . . MCL 750.520a." MCL 750.520a(s) defines *victim* as "the person alleging to have been subjected to criminal sexual conduct."

- For purposes of Chapter LXXVI of the Michigan Penal Code, *victim* "means the person alleging to have been subjected to criminal sexual conduct." MCL 750.520a(s).

- For purposes of MCL 777.31 (OV 1), MCL 777.37 (OV 7), and MCL 777.38 (OV 8) "each person who was placed in danger of

injury or loss of life" must be counted as a *victim*. MCL 777.31(2)(a); MCL 777.37(2); MCL 777.38(2)(a).

- For purposes of MCL 777.39 (OV 9), "each person who was placed in danger of physical injury or loss of life or property" must be counted as a *victim*. MCL 777.39(2)(a). The Court of Appeals further interpreted this definition of *victim* in *People v Ambrose*, 317 Mich App 556, 563 (2016). See Section 3.21(B)(1) for a discussion.

- For purposes of the Crime Victim's Rights Act (CVRA)[4], and except as otherwise defined in the CVRA, *victim* means "any of the following:

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

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

    (A) The spouse of the deceased victim.

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

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

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

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

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

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

[4] The definition of "victim" contained in all three articles of the CVRA is substantially similar. MCL 780.752(1)(m) (felony convictions), MCL 780.781(1)(j) (juvenile offenses), and MCL 780.811(1)(h) (serious misdemeanor convictions).

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

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

(A) The spouse of the victim.

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

(C) A parent of the victim.

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

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m).

- For purposes of MCL 750.411h and MCL 750.411i, *victim* "means an individual who is the target of a willful course of conduct involving repeated or continuing harassment." MCL 750.411h(1)(g); MCL 750.411i(1)(g).

Videoconferencing

- For purposes of Subchapter 2.400 of the Michigan Court Rules and MCR 6.006, *videoconferencing* means "the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers. It includes use of a remote video platform through an audio-only portion." MCR 2.407(A)(2); MCR 6.006(A)(1) (stating except as otherwise provided, MCR 2.407 governs the use of videoconferencing technology for purposes of MCR 6.006).

Violent felony

- For purposes of MCR 6.106(B)(1), *violent felony* means "a felony, an element of which involves a violent act or threat of a violent act against any other person." MCR 6.106(B)(2).

- For purposes of MCL 771.2a, *violent felony* "means that term as defined in . . . MCL 791.236." MCL 771.2a(14)(g). MCL 791.236(20) defines *violent felony* as "an offense against a person in violation of . . . MCL 750.82, [MCL] 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.87, [MCL] 750.88, [MCL] 750.89, [MCL] 750.316, [MCL] 750.317, [MCL] 750.321, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, [or MCL] 750.530."

Vulnerability

- For purposes of MCL 777.40 (OV 10), *vulnerability* "means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

W

Weapon

- For purposes of MCL 750.237a, *weapon* "includes, but is not limited to, a pneumatic gun." MCL 750.237a(6)(d).

Weapon free school zone

- For purposes of MCL 750.237a, *weapon free school zone* "means school property and a vehicle used by a school to transport students to or from school property." MCL 750.237a(6)(e).

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