Criminal Proceedings
Benchbook, Volume 2

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

• Sentencing
Michigan Supreme Court

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Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. This benchbook was created in 2013 by consolidating materials that were initially published in 2009, 2010, 2012, and 2013. The text has been revised, reordered, and updated through June 19, 2019.
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 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 or overruled is no longer binding precedent, it is less clear when an opinion is not reversed 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). But see Dunn v Detroit Inter-Ins Exch, 254 Mich App 256, 262 (2002), citing MCR 7.215(J)(1) and stating that “a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” See also People v James (Joel), 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.

The Criminal Proceedings Benchbooks, Volumes 1-3, 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 3: Misdemeanor Arraignments & Pleas—Third Edition
- Monograph 5: Preliminary Examinations—Third Edition
- Monograph 7: Probation Revocation—Fourth Edition
- Monograph 8: Felony Sentencing—Revised Edition
• Monograph 9: *Postconviction Proceedings*

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Chapter 1: Introduction to Sentencing & Select Post-Sentencing Issues

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1.1 **Scope of This Benchbook**

The primary objective of this benchbook is to present a comprehensive picture of the dynamic landscape of sentencing in Michigan since the legislative sentencing guidelines were adopted in 1998. This chapter provides an introduction to sentencing issues and addresses select post-sentencing issues. Chapter 2 addresses the sentencing guidelines, and Chapter 3 addresses the scoring of the prior record variables (PRVs) and offense variables (OVs). Chapter 4 addresses sentence ranges for non-habitual offenders, and Chapter 5 addresses sentencing habitual offenders. Chapter 6 discusses departures from the sentencing guidelines; Chapter 7 addresses the requirements at the sentencing hearing; Chapter 8 addresses special sentencing considerations; Chapter 9 addresses fines, costs, assessments, and restitution; Chapter 10 addresses special types of sentences, and Chapter 11 addresses district court sentencing.

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. Whenever the author intends reference to the judicial sentencing guidelines, the reference will be clearly specified.

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

1.2 **Overview of Felony Sentencing**

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

- 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.


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

Fashioning an appropriate sentence under the statutory guidelines requires the court’s attention to the offender’s prior record variable (PRV) and offense variable (OV) scores and the specific cell in which those scores place the offender in the appropriate sentencing grid.1 “Proposed scoring of the [sentencing] guidelines shall accompany the presentence report.” MCR 6.425(D). See Chapter 3 for a detailed discussion of scoring.

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1 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, 399 (2015), rev’g in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)[,]” further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399, citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis added).
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.\(^2\) *People v Pierce*, 158 Mich App 113, 115 (1987). However, resentencing is not required if the defendant does not object. *People v Robinson*, 203 Mich App 196, 197-198 (1993).


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*, ___ Mich App ___, ___ (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).

### 1.3 Court-Appointed Foreign Language Interpreter\(^3\)

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)*.\(^4\) A person financially able to pay for the interpretation costs may be ordered to reimburse the court for those costs. *MCR 1.111(F)(5)*. See also *MCR 1.111(A)(4)*.

### 1.4 Indeterminate Sentences\(^5\)

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)*. The maximum term of imprisonment is the

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\(^2\) 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.

\(^3\) See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

\(^4\) 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)*.
maximum penalty authorized by law for conviction of the sentencing offense, unless otherwise provided by Chapter 9 of the Code of Criminal Procedure (MCL 769.1–MCL 769.36). MCL 769.8(1).

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

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

A. The Tanner Rule

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

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

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

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

6 The Tanner rule was ultimately codified in MCL 769.34(2)(b). People v Garza, 469 Mich 431, 435 (2003).
The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and Tanner, 387 Mich at 690, is a reduction in the minimum sentence. People v Thomas (Gerry), 447 Mich 390, 392-394 (1994).

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

B. The Tanner Rule Extended to Habitual Offenders

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

“In People v Tanner, [387 Mich 683, 688 (1972),] the defendant, who had pleaded guilty to manslaughter, was sentenced to serve fourteen years, eleven months to fifteen years in prison. The Court addressed itself to the purely legal question whether the defendant’s sentence was in fact ‘indeterminate,’ as contemplated by the provisions of the indeterminate sentence act. The [Tanner] Court stated:

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“‘Convinced as we are, that a sentence with too short an interval between minimum and maximum is not indeterminate, we hold that any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act.’” Wright (Kenneth), 432 Mich at 89-90, quoting Tanner, 387 Mich at 689-690.
C. The Tanner Rule Codified

MCL 769.34(2)(b) codified the common-law Tanner rule. MCL 769.34(2)(b) provides that “[t]he court shall not impose a minimum sentence, including a departure,[7] that exceeds 2/3 of the statutory maximum sentence.”

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

1.5 Presentence Investigation Report

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

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

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

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

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[7] In People v Lockridge, 498 Mich 358, 391 (2015), the Michigan Supreme Court “[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3).” The Lockridge Court additionally stated that “[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1, emphasis supplied. In light of the emphasized limiting language, it is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in Lockridge. See  for discussion of Lockridge.

[8] For a full discussion on PSIR requirements, see Section 7.2.
A challenge to the validity of information contained in the PSIR may be raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand.” People v Lloyd, 284 Mich App 703, 706 (2009); MCL 769.34(10); MCR 6.429(C). Regarding the resolution of challenges to the PSIR, see MCR 6.425(E)(2). The trial court is required to respond to a challenge. People v Spanke, 254 Mich App 642, 648 (2003), overruled in part on other grounds by People v Barrera, 500 Mich 14, 17 (2017).

1.6 Sentencing Guidelines

The legislative sentencing guidelines apply to felony offenses listed in MCL 777.11 to 777.19 that were committed on or after January 1, 1999. MCL 769.34(2). The legislative sentencing guidelines do not apply if a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment. MCL 769.34(5). The legislative sentencing guidelines that were in effect on the date the crime was committed govern the calculation of an offender’s minimum sentence. MCL 769.34(2). The minimum sentence range for an offense to which the sentencing guidelines apply is determined by scoring the appropriate offense variables (OVs) and prior record variables (PRVs) for a specific conviction. MCL 777.21. Although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” People v Lockridge, 498 Mich 358, 365, 399 (2015), citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis supplied).

For a detailed discussion of the sentencing guidelines, see Chapter 2. For a detailed discussion of scoring the OVs and PRVs, see Chapter 3.

1.7 Allocution

At sentencing, the court is required to give the defendant, defense counsel, the prosecutor, and the crime victim(s) an opportunity to advise the court of any circumstances they believe the court should take into account.

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

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

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

12 For more information on allocution, see Section 7.3
consideration in imposing sentence. MCR 6.425(E)(1)(c). The victim also has a constitutional and statutory right to make a statement to the court at sentencing, Const 1963, art 1, § 24(1); MCL 780.765(1); People v Williams (Anterio), 244 Mich App 249, 253-254 (2001). 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. Finally, the court has discretion to allow a nonparty to address the court at sentencing, People v Albert, 207 Mich App 73, 75 (1994) (trial court did not abuse its discretion in allowing a victim’s attorney in a civil case against the defendant to address the court, over the defendant’s objection).

### 1.8 Imposition of Sentence

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

#### 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 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).¹⁴

The minimum sentence cannot be more than two-thirds of the maximum sentence. People v Tanner, 387 Mich 683, 690 (1972). The

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¹³ See SCAO Form CC 219b, Judgment of Sentence Commitment to Department of Corrections. For more information on the sentencing hearing, including requirements and rights of the defendant, see Chapter 7.

¹⁴ See Section 2.2 for discussion of Lockridge.
Tanner rule is now statutory. MCL 769.34(2)(b). The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and Tanner, 387 Mich at 690, is a reduction in the minimum sentence. People v Thomas (Gerry), 447 Mich 390, 392-394 (1994). However, “MCL 769.34(2)(b) does not apply when a defendant is convicted of a crime punishable with imprisonment for life or any term of years because the minimum will never exceed two-thirds of the statutory maximum of life.” People v Lewis (Curtis), 489 Mich 939, 939-940 (2011), citing People v Washington (Sylvester), 489 Mich 871 (2011); People v Powe, 469 Mich 1032 (2004); People v Drohan, 475 Mich 140, 162 n 14 (2006), abrogated in part on other grounds as recognized by Lockridge, 498 Mich at 378-379; People v Harper, 479 Mich 599, 617 n 31 (2007), abrogated in part on other grounds by Lockridge, 498 Mich at 364-365.

B. Consecutive and Concurrent Sentences

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

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

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.16

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15 See Section 8.1 for more information.
16 Additionally, MCL 769.12, governing fourth habitual offender status, provides for a mandatory minimum sentence of 25 years’ imprisonment for an offender who has been convicted of three or more prior felonies or felony attempts, including at least one “[l]isted prior felony” as defined in MCL 769.12(6)(a), and who commits or conspires to commit a subsequent “[s]erious crime” as defined in MCL 769.12(6)(c). MCL 769.12(1)(a).
Before accepting a guilty plea, the trial court is required, under MCR 6.302(B)(2), to apprise the defendant “of the maximum possible prison sentence with habitual-offender enhancement[.]” People v Brown (Shawn), 492 Mich 684, 693-694 (2012) (holding that MCR 6.310(C)(4) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea).17

D. Special Alternative Incarceration (SAI)—“Boot Camp”

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

E. Jail Sentence18

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

MCL 801.251(1)(a)-(e) provides that, subject to MCL 801.251a,19 a person sentenced to a county jail (except for a person serving all or any part of a sentence of imprisonment for any of the following crimes or attempted crimes: MCL 750.145c, 750.520b, 750.520c, 750.520d, 750.520g, and murder in connection with sexual misconduct) may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:

- Job seeking
- Working at his or her job

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17 Brown refers to MCR 6.310(C); however, MCR 6.310 was amended after Brown was decided, see ADM File No. 2016-07, and the text of MCR 6.310(C) pertinent to the holding in Brown was re-numbered as MCR 6.310(C)(4).


19 MCL 801.251a(1) provides that “an individual convicted of a felony” may not be released from jail under MCL 801.251 to attend work or school “unless the county sheriff or the [Department of Corrections] has determined that the individual is currently employed or currently enrolled in school,” and establishes requirements for ordering and providing this verification. MCL 801.251a(2)(b) defines “school[,]” for purposes of MCL 801.251a, as “[a] school of secondary education[,] . . . [a] community college, college, or university[,] . . . [a] state-licensed technical or vocational school or program[,] . . . [or a] program that prepares the person for the general education development (GED) test.”
• Conducting his or her own self-employed business or occupation (including housekeeping and caring for the needs of his or her family)

• Attending school

• Obtaining medical treatment, substance abuse treatment, mental health counseling, or psychological counseling

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

F. Probation\textsuperscript{20}

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).

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

G. Fines and Costs\textsuperscript{21}

MCL 769.1\textsuperscript{22} provides a general statutory basis for a court’s authority to impose fines and costs. If a defendant pleads guilty or nolo contendere, or the defendant is found guilty following a trial, the court must impose the minimum state costs as set out in MCL 769.1j, MCL 769.1k(1)(a). Under MCL 769.1k(1)(b) and MCL 769.1k(2), the court may also impose:

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

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

\textsuperscript{20} See Section 10.1 for a full discussion of probation.

\textsuperscript{21} See Chapter 9 for a full discussion.
• any cost “reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case”\(^{23}\)

• the expenses of providing legal assistance to the defendant\(^{24}\)

• any assessment authorized by law

• reimbursement under MCL 769.1f

• any additional costs incurred in compelling the defendant’s appearance

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

See Chapter 9 for a full discussion on fines and costs. See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Table of Felony Costs and the Table of Misdemeanor Costs.

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\(^{22}\) Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k in response to the Michigan Supreme Court’s holding in *People v Cunningham (Cunningham II)*, 496 Mich 145 (2014), rev’d 301 Mich App 218 (2013) and overruling *People v Sanders (Robert) (After Remand)*, 298 Mich App 105 (2012), and *People v Sanders (Robert)*, 296 Mich App 710 (2012). In *Cunningham II*, the Court held that MCL 769.1k(1)(b)(ii)—which, at the time, provided for the imposition of “[a]ny cost in addition to the minimum state cost”—did “not provide courts with the independent authority to impose ‘any cost[;]’” rather, it “provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute.” *Cunningham II*, 496 Mich at 147, 158 (concluding that “[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(ii) as independent authority to impose $1,000 in court costs[.]”). 2014 PA 352 added MCL 769.1k(1)(b)(iii) to provide for the imposition of “any cost reasonably related to the actual costs incurred by the trial court[.]”

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

\(^{23}\) Court costs may be awarded under MCL 769.1k(1)(b)(iii), as amended by 2014 PA 352, effective October 17, 2014. *People v Konopka*, 309 Mich App 345, 357 (2015). This provision is applicable “[u]ntil October 17, 2020[,]” MCL 769.1k(1)(b)(iii). See also 2014 PA 352, enacting section 1 (“[t]his amendatory act applies to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[ ] before June 18, 2014, and after [October 17, 2014].”)
H. Restitution

Victims have a constitutional right to restitution. Const 1963, art 1, § 24. Additionally, restitution is mandatory under the Crime Victim’s Rights Act (CVRA), MCL 780.751 et seq., and Michigan’s general restitution statute, MCL 769.1a. See People v Garrison, 495 Mich 362, 365, 373 (2014). “At sentencing, the court must, on the record[,] order that the defendant make full restitution as required by law to any victim of the defendant’s course of conduct that gives rise to the conviction, or to that victim’s estate.” MCR 6.425(E)(1)(f); see also MCL 769.1a(2); MCL 780.766(2) (felony article); MCL 780.794(2) (juvenile article); MCL 780.826(2) (misdemeanor article).26 “Both [the CVRA27 and MCL 769.1a(2)] impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete.” Garrison, 495 Mich at 368 (noting that “the plain meaning of the word ‘full’ is ‘complete; entire; maximum[’” (citation omitted).

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

1.9 Judgment/Reissuance of Judgment

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

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

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25 For detailed information on restitution, see the Michigan Judicial Institute’s Crime Victim Rights Benchbook, Chapter 8. For more information on restitution as it relates to felony sentencing, see Section 9.7

26 The felony, juvenile, and misdemeanor articles of the CVRA contain substantially similar language.

27 Although the Garrison Court specifically applied MCL 780.766(2) (the restitution provision that is contained in the felony article of the CVRA), the Court’s holding defining the term full restitution as “restitution that is maximal and complete[]” would presumably extend to the restitution provisions contained in the CVRA’s juvenile article (MCL 780.794(2)) and misdemeanor article (MCL 780.826(2)) as well. See Garrison, 495 Mich at 367 n 11 (noting that “MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)[[‘”].
• The defendant’s plea;
• The name of the defendant’s attorney if one appeared;
• The jury’s verdict or the finding of guilt by the court;
• The term of the sentence;
• The place of detention;
• The conditions incident to the sentence; and
• Whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant’s Michigan driver’s license number.

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

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

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

1.10 Two-Way Interactive Video Technology

A defendant may not be sentenced for a felony by videoconference. People v Heller, 316 Mich App 314, 317-321 (2016). “Sentencing [for a felony] by videoconference plainly contravenes MCR 6.006, which identifies the criminal proceedings in which two-way interactive video technology may be used[]” and does not include felony sentencing. Heller, 316 Mich App at 315-316. Furthermore, “sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present, and virtual appearance is not a suitable substitute for physical presence.” Id. at 315, 318, 321 (holding that where “[t]he trial court sentenced [the defendant] by videoconference, with [the defendant] located in the county jail[,]” the defendant’s “[physical] absence from the sentencing nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair[]”) (citation omitted).
1.11 Overview of District Court Sentencing

This book is undergoing revision; a new section will be created that discusses district court sentencing. In the meantime, for information on this topic, see http://mjieducation.mi.gov/documents/benchbooks/7-distcsent.

1.12 Appellate Review of Felony Sentences

A. Record on Appeal

In addition to other relevant and applicable preservation requirements, a copy of the defendant’s presentence investigation report (PSIR) must accompany any appellate brief if an issue on appeal concerns the defendant’s sentence. MCL 769.34(8)(b); MCR 7.212(C)(7); People v Callon, 256 Mich App 312, 332 (2003). When appealing any sentence imposed under the statutory guidelines, MCL 769.34(8) also requires that the record filed for appeal includes “[a]n entire record of the sentencing proceedings . . . [and] any other reports or documents the sentencing court used in imposing sentence.” MCL 769.34(8)(a) and MCL 769.34(8)(c).

B. Review of Guidelines Scoring

“Under the [legislative] sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.” People v Hardy (Donald), 494 Mich 430, 438, 438 n 18 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016 (citing People v Osantowski, 481 Mich 103, 111 (2008), and noting that, contrary to several Court of Appeals decisions, “[t]he ‘any evidence’ standard does not govern review of a circuit court’s factual findings for the purposes of assessing points under the sentencing guidelines”) (additional citations omitted); see also People v Steanhouse (Steanhouse I), 313 Mich App 1, 38 (2015), aff’d in part and rev’d in part on other grounds by People v Steanhouse (Steanhouse II), 500 Mich 453, 459-461 (2017). ^30^ 31

“Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to

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28 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.

29 See Chapter 7 for information on presentence investigation reports.

30 For more information on the precedential value of an opinion with negative subsequent history, see our note.
the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Hardy (Donald)*, 494 Mich at 438, citing *People v Babcock*, 469 Mich 247, 253 (2003). See also *Steanhouse I*, 313 Mich App at 38; *People v Rhodes (Anthony)*, 495 Mich 938, 938-939 (2014) (“[d]etermining whether a trial court properly scored sentencing variables is a two-step process; first, the trial court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence; . . . second, the appellate court considers de novo ‘whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute[,]’”) (citations omitted); *People v Gullett*, 277 Mich App 214, 217 (2007).32

“[T]he ‘right result—wrong reason’ doctrine . . . [cannot] be employed to allow impermissible appellate fact-finding[.]” in reviewing the propriety of an OV score; “[a] trial court determines the sentencing variables by reference to the record[,]’ not [the Court of Appeals].” *People v Thompson (Jackie)*, 314 Mich App 703, 712 n 5 (2016) (citing *Anspaugh v Imlay Twp*, 480 Mich 964 (2007), and holding that where “the trial court assessed 50 points for OV 7 solely on the basis of sadistic behavior, . . . [i]t would not be appropriate for [the Court of Appeals] to consider whether” the score would nevertheless have been appropriate on the alternative basis that “[the] defendant’s conduct was designed to substantially increase the victim’s fear and anxiety”) (additional citations omitted). See also *People v Gloster*, 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 [the] defendant’s own conduct[; b]ecause the trial court did not itself find that [the] defendant’s own conduct was predatory in nature, the Court of Appeals failed to review the trial court’s findings for clear error as required by [*Hardy (Donald)*, 494 Mich at 438]”) (emphasis added).

Note: “An error in scoring the judicial [sentencing] guidelines does not provide a basis for appellate relief.”

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31 See also *People v Jones (Byron)*, 494 Mich 880, 880-881 (2013) (explaining that “an appellate court reviews for clear error a trial court’s finding of facts, and ‘[a] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence[,]’” and vacating the portion of *People v Jones (Byron)*, 299 Mich App 284, 286 (2013), stating that “‘[a] scoring decision is not clearly erroneous if the record contains any evidence in support of the decision[,]’”) (citations omitted).

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

In cases involving a sentence departure under the previously-mandatory sentencing guidelines, “whether a [particular] factor exist[ed] was reviewed for clear error, whether a factor [was] objective and verifiable [was] reviewed de novo, and whether a reason [was] substantial and compelling [was] reviewed for an abuse of discretion[.]” Babcock, 469 Mich at 265; see also Hardy (Donald), 494 Mich at 438 n 17 (citing Babcock, 469 Mich at 265, and noting that “under the sentencing guidelines, the abuse of discretion standard only applie[d] when an appellate court review[ed] a circuit court’s conclusion that there was a ‘substantial and compelling reason’ to depart from the guidelines[.”].

Under People v Lockridge, 498 Mich 358, 392 (2015), however, “the sentencing court may exercise its discretion to depart from [the applicable] guidelines range without articulating substantial and compelling reasons for doing so.” In order to facilitate appellate review, the court must justify any sentence imposed outside the advisory minimum guidelines range. Id., citing People v Coles, 417 Mich 523, 549 (1983), overruled in part on other grounds by People v Milbourn, 435 Mich 630, 644 (1990). “A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable.” Lockridge, 498 Mich at 392 (emphasis supplied), citing Booker, 543 US at 261.

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.” People v Dixon-Bey, 321 Mich App 490, 531 (2017), citing Steanhouse II, 500 Mich at 474-475. “[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[.]’” Dixon-Bey, 321 Mich App at 530, quoting Milbourn, 435 Mich at 647.

If an appellate court determines that a departure sentence is reasonable, resentencing is not required, even if the lower court erred in scoring the guidelines. People v Ambrose, 317 Mich App 556, 565 (2016) (quoting Lockridge, 498 Mich at 394, and holding that resentencing was not required under People v Biddles, 316 Mich App 148, 156-158 (2016),33 for an error under People v Francisco, 474 Mich 82, 92 (2006), in the scoring of the guidelines where the trial court imposed a reasonable departure sentence and “the sentence ‘did not rely on the minimum sentence range from . . . improperly scored guidelines’”) (ellipses in original). In Ambrose, 317 Mich App at 565, the Court of Appeals concluded that, “[i]n light of the facts of [the] case, the trial court’s lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[;]” accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables.

D. Unpreserved Sentencing Issues

Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. Callon, 256 Mich App at 332; see also Lockridge, 498 Mich at 392-393. For claims of constitutional error in the scoring of the guidelines under Lockridge, see Section 1.12(E).

E. Review of Claims of Constitutional Guidelines-Scoring Error Under Lockridge34

In 2015, the Michigan Supreme Court, applying Alleyne v United States, 570 US 99 (2013), and Apprendi v New Jersey, 530 US 466 (2000),

33 In Biddles, 316 Mich App at 156-162, the Court of Appeals clarified the difference between a successful guidelines-scoring evidentiary challenge (for which resentencing under People v Francisco, 474 Mich 82 (2006), is required) and a successful Lockridge challenge (for which remand for possible resentencing is required). See Section 3.54(E)(5) for discussion of Biddles, 316 Mich App 148.

34 See the Michigan Judicial Institute’s Quick Reference Guide for handling “Crosby remands” under Lockridge.
held that “Michigan’s sentencing guidelines . . . are constitutionally deficient[36] to the extent that they . . . require judicial fact-finding beyond facts admitted by the defendant[35] or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range[,]” People v Lockridge, 498 Mich 358, 364, 399 2015), rev’g in part 304 Mich App 278 (2013) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3[,]” further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399, citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis supplied).

Noting that “Apprendi errors are not structural errors,” and that unpreserved Apprendi/Alleyne/Lockridge errors are therefore reviewed “for plain error affecting substantial rights,” the Lockridge Court held that defendant Lockridge “[could not] show prejudice from any error in scoring the OVs in violation of Alleyne[, 570 US 99[,]” and was therefore not entitled to resentencing, “[b]ecause he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines[.]” Lockridge, 498 Mich at 392, 392-393 n 29, 393-394 (citations omitted).

The Lockridge Court then addressed “how [the plain-error standard applicable to claims of error under Lockridge] is to be applied in the many cases that [were] held in abeyance for [Lockridge].”36 The Court addressed three broad categories of cases, each discussed in the following subsections:

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35 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 Garmes, 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 “[t]he defendant did not make any . . . formal admission” with respect to several contested offense variable scores).

36 The Lockridge Court did not address its retroactive application to cases that became final for purposes of direct appellate review before Lockridge was decided. The Court also did not address review of preserved Apprendi/Alleyne errors (i.e., cases in which the defendant objected to the scoring of the OVs at sentencing on Apprendi/Alleyne grounds); the Court noted that “virtually all of [the cases held in abeyance for Lockridge] involve[d] challenges that were not preserved in the trial court.” Lockridge, 498 Mich at 394. However, the Court of Appeals subsequently held that the identical process applies to preserved errors. People v Stokes (Stokes I), 312 Mich App 181, 192-203 (2015), vacated in part on other grounds by People v Stokes (Stokes II), 501 Mich 918 (2017). For more information on the precedential value of an opinion with negative subsequent history, see our note. See Section 1.12(E)(4).
• cases in which plain error categorically cannot be established (no resentencing);

• cases in which sentence was imposed on or before July 29, 2015 (subject to Crosby remand and possible resentencing); and

• cases in which sentence was imposed after July 29, 2015 (subject to traditional plain-error review).

1. Cases in Which Plain Error Categorically Cannot Be Established

   a. Established Sentencing Facts

   In cases in which “facts admitted by the defendant and facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant’s score to fall in the cell of the sentencing grid under which he or she was sentenced[,] . . . because the defendant suffered no prejudice from any error, there is no plain error and no further inquiry is required.” 


   Where a “defendant does not argue [on appeal] that the [trial] court’s factual findings in scoring [any OV] were clearly erroneous or not supported by a preponderance of the evidence[,]” but argues only “that the facts supporting the scoring . . . were not found by the jury or admitted by [the] defendant,” a threshold showing of plain error has not been made, and “remand is not required under Lockridge[, 498 Mich 358,]” if “[r]educing [the] defendant’s OV score by [the number of points scored for an OV on the basis of judicially-found facts] . . . would not alter [the] defendant’s guidelines minimum sentence range.” People v Jackson (Kevin) (On Reconsideration), 313 Mich App 409, 433-436 (2015).

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37 See the Michigan Judicial Institute’s Quick Reference Guide for handling Crosby remands.

38 See Section3.46(F)(3).

39 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 “[t]he defendant did not make any . . . formal admission” with respect to several contested offense variable scores).
Where the “defendant had pleaded guilty . . . to two charges of home invasion related to offenses committed [before the sentencing offense] . . . [and defense 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 [the] defendant, and the points scored for OV 13 [did not need to] be subtracted in considering [the] defendant’s total OV score under [People v Lockridge, 498 Mich 358].” Jackson (Kevin) (On Reconsideration), 313 Mich App at 436. “[I]n pleading guilty to those crimes against a person, [the] defendant admitted his commission of those crimes, and admitted the factual basis for his guilty pleas to those crimes, in ‘proceedings with substantial procedural safeguards of their own[,]’” Id. at 436, quoting Apprendi v New Jersey, 530 US 466, 488 (2000).

b. Sentence Departures

As a matter of law, “[i]n cases . . . that involve a minimum sentence that is an upward departure, a defendant necessarily cannot show plain error because the sentencing court has already clearly exercised its discretion to impose a harsher sentence than allowed by the guidelines and expressed its reasons for doing so on the record.” Lockridge, 498 Mich at 393-394, 395 n 31 (determining that because defendant Lockridge “received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines[,] . . . [he could not] show prejudice from any error in scoring the OVs in violation of Alleyne[,] 570 US 99]).” See also People v Steanhouse (Steanhouse II), 500 Mich 453, 475-476 (2017) (disavowing the portion of People v Steanhouse (Steanhouse I), 313 Mich App 1, 48 (2015), in which the panel held that “the [‘Crosby remand’] procedure articulated in Lockridge, and modeled on that adopted in Crosby, 397 F3d at 117-118] . . . applies . . . [and] is the proper remedy when[. . . the trial court was unaware of and not expressly bound by a reasonableness standard rooted in the Milbourn principle of proportionality at the time of sentencing[)].” “[T]he purpose for the Crosby remand is not present in cases involving departure sentences[];” “the Crosby remand procedure [is] for [the] very specific purpose of determining whether trial courts that had sentenced defendants under the mandatory sentencing guidelines had their discretion impermissibly constrained by those
guidelines[,]” and “departure sentences [are exempted] from that remand procedure, at least for cases in which the error was unpreserved, because a defendant who [has] received an upward departure [cannot] show prejudice resulting from the constraint on the trial court’s sentencing discretion.” Steanhouse II, 500 Mich at 475-476, citing Lockridge, 498 Mich at 395 n 31; aff’g in part and rev’g in part 313 Mich App 1; and aff’g in part and rev’g in part Masroor, 313 Mich App 358.

Resentencing was not required under People v Biddles, 316 Mich App 148, 156-158 (2016), for a guidelines-scoring error under People v Francisco, 474 Mich 82, 92 (2006), where the trial court imposed a departure sentence that the Court of Appeals determined was reasonable and “the sentence ‘did not rely on the minimum sentence range from . . . improperly scored guidelines[,]’” People v Ambrose, 317 Mich App 556, 565 (2016), quoting Lockridge, 498 Mich at 394. “In light of the facts of [the] case, the trial court’s lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, . . . the departure was reasonable[,]” accordingly, the defendant was not entitled to resentencing, even if the trial court erred in scoring one of the offense variables. Ambrose, 317 Mich App at 565 (ellipses in original).

The trial court must actually score the guidelines before imposing a departure sentence. See 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[,]’”) (additional citation omitted). Where the trial court failed to score points for any offense variables but departed from the guidelines range in part on the basis of conduct that should have been scored under OV 13, resentencing was required under Francisco, 474 Mich 82; “even though the guidelines ranges are now advisory[ under Lockridge, 498 Mich 358],” resentencing was required “[b]ecause

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40 In Biddles, 316 Mich App at 156-162, the Court of Appeals clarified the difference between a successful guidelines-scoring evidentiary challenge (for which resentencing under People v Francisco, 474 Mich 82 (2006), is required) and a successful Lockridge challenge (for which remand for possible resentencing is required). See Section 3.54(E)(5) for discussion of Biddles, 316 Mich App 148.
correcting the OV score would change the applicable guidelines range[,]” *Geddert*, 500 Mich at 859.

c. **No Change in Applicable Minimum Sentence Range**

A defendant cannot make a threshold showing of plain error that could require resentencing if a “reduction in [his or her] OV score to account for [an alleged *Apprendi/Alleyne/Lockridge*] error would [not] change the applicable guidelines minimum sentence range.” *Lockridge*, 498 Mich at 399.

2. **Sentence Imposed On or Before July 29, 2015, and *Crosby* Remand for Possible Resentencing**\(^{41}\)

In cases that involve sentences imposed on or before July 29, 2015 (the date *Lockridge* was decided), if “a defendant’s minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error; if the trial court determines that the answer to that question is yes, the court shall order resentencing.” *Lockridge*, 498 Mich at 397, citing *United States v Crosby*, 397 F3d 103, 118 (CA 2, 2005). This process applies only to “defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure[,]” *Lockridge*, 498 Mich at 395.

“A *Crosby* remand returns the case to the trial court in a presentence posture, allowing the trial court to consider every aspect of the defendant’s sentence de novo.” *People v Odom*, ___ Mich App ___, ___ (2019) (quotation marks and citation omitted). Accordingly, on remand, “the trial court may receive new sentencing information, may rescore the guidelines (even utilizing judicial fact finding), and may exercise its discretion to depart from the sentencing-guidelines range.” *Id.* at ___. Further, “on de novo resentencing there can be no presumption of vindictiveness for the trial court’s exercise of [its] discretion” to impose an out-of-guidelines sentence. *Id.* at ___.

“[T]he retroactive application of the advisory sentencing guidelines [does not] violate[] the prohibition against *ex post facto*

\(^{41}\) See the Michigan Judicial Institute’s Quick Reference Guide for handling *Crosby* remands.
laws when the application results in an increase in the defendant’s sentence compared to the sentence originally imposed.” Odom, ___ Mich App at ___.

Defendants are “entitled to representation at the time of the Crosby remand.” People v Howard, 323 Mich App 239, 247 (2018).

a. Plain Error and Threshold Showing Requiring Remand

In cases in which “[t]he defendant did not object to the scoring of the OVs at sentencing on Apprendi/Alleyne grounds, . . . [appellate] review is for plain error affecting substantial rights[ under People v Carines, 460 Mich 750, 763, 774 (1999)].” Lockridge, 498 Mich at 392.42 “To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant’s OV score to account for the error would change the applicable guidelines minimum sentence range.” Id. at 399. “If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand [to] the trial court[.]” Id.

See Jackson (Kevin) (On Reconsideration), 313 Mich App at 435-436 (holding that the scoring of five points for OV 16 (value of stolen property) over the defendant’s objection was erroneous under Lockridge, 498 Mich 358, “because the jury was only required to find that [the] defendant intended or did commit a larceny, not a larceny of a specific value, . . . [and the facts] were not admitted by [the] defendant[,]” however, because “[r]educing [the] defendant’s OV score by 5 points . . . would not alter [his] guidelines minimum sentence range[,] . . . remand [was] not required under Lockridge[.]”). See also People v Norfleet, 317 Mich App 649, 667-668 (2016) (holding that because OV 12 “specifically states that it cannot be scored for criminal acts for which there was a conviction, . . . any criminal act scored under OV 12 would not be a criminal act found by the jury[,]” accordingly, where there was no indication in the record that the defendant admitted

42 Although Lockridge addressed only unpreserved Alleyne errors, the Court of Appeals subsequently held that the identical process applies to preserved errors. People v Stokes (Stokes I), 312 Mich App 181, 192-203 (2015), vacated in part on other grounds by People v Stokes (Stokes II), 501 Mich 918 (2017). For more information on the precedential value of an opinion with negative subsequent history, see our note. See Section 1.12(E)(4).
committing the contemporaneous felonious criminal acts supporting the score of 10 points for OV 12, and where removing the 10 points resulted in a change in the applicable guidelines range, he was entitled to a remand for possible resentencing under Lockridge, 498 Mich 358, and Crosby, 397 F3d 103, even though the “evidence was [otherwise] sufficient to support” the score).

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

b. **Sentencing Court Procedure on Remand: Determination Whether Resentencing is Required**

If a case is remanded to the sentencing court upon a threshold showing of plain error that may require resentencing, the trial court must first “determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion.” Lockridge, 498 Mich at 399. “If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant.” Id.

“[A] trial court considering a case on a Crosby remand should first and foremost ‘include an opportunity for a defendant to avoid resentencing by promptly notifying the [trial] judge that resentencing will not be sought.’”
Lockridge, 498 Mich at 398, quoting Crosby, 397 F3d at 118. The defendant must inform the trial court that he or she is not seeking resentencing “before the trial court expresses its intent to resentence the defendant.” People v Odom, ___ Mich App ___, ___ (2019). “If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, [at least in writing,] (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant.” Lockridge, 498 Mich at 398, citing Crosby, 397 F3d at 118, 120. “Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the ‘circumstances existing at the time of the original sentence.’” Lockridge, 498 Mich at 398, quoting Crosby, 397 F3d at 117 (additional citation omitted).

The Crosby remand procedure was “designed to address whether defendant’s sentence was affected by unconstitutional sentencing constraints,” and “soliciting input from defense counsel is specifically required of the trial court.” People v Howard, 323 Mich App 239, 246, 247 (2018). Accordingly, the defendant is “entitled to representation at the time of the Crosby remand.” Id. at 247 (holding that the “defendant’s Crosby remand was improperly handled” where “the trial court failed to appoint counsel and obtain the views of that counsel”).

c. Decision Whether to Resentence

“Upon making [its] decision[ whether to resentence the defendant], the trial court shall ‘either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and[,] . . . resentence [the defendant].’” Lockridge, 498 Mich at 398, quoting Crosby, 397 F3d at 120.

d. Resentencing Procedure

The sentencing court “must have the defendant present, as required by law, if it decides to resentence the defendant.” Lockridge, 498 Mich at 398, citing MCR 6.425. The resentencing must be conducted “‘in conformity with’ [Lockridge, 498 Mich 358].” Lockridge, 498 Mich at 398, quoting Crosby, 397 F3d at 120.
e. Procedure When Original Sentencing Judge is Not Available

“When a newly assigned judge handles a Crosby remand without ever encountering the defendant, both the personal nature of sentencing and perceptions of the fairness, integrity, and public reputation of the judicial proceeding are called into question.” Howard, 323 Mich App at 252-253 (finding the rationale in United States v Garcia, 413 F3d 201 (CA 2, 2005) “persuasive” and “its solution reasonable”) (citation omitted). Accordingly, “when the original sentencing judge is unavailable, in addition to following the other Crosby remand requirements, the assigned judge must allow the defendant an opportunity to appear before the court and be heard before the judge can decide whether he or she would resentence the defendant.” Howard, 323 Mich App at 253 (vacating the trial court’s order and remanding for further proceedings where a newly assigned judge determined that he would not impose a materially different sentence without affording the defendant an opportunity to appear and be heard and without appointing counsel) (citation omitted).

3. Sentence Imposed After July 29, 2015, and Traditional Carines Review

“Crosby remands are warranted only in cases involving sentences imposed on or before July 29, 2015, the date [that Lockridge, 498 Mich 358, was decided; a]ccordingly, for defendants sentenced after [July 29, 2015], the [traditional plain-error] review from [Carines, 460 Mich 750,] will apply.” Lockridge, 498 Mich at 397, citing Crosby, 397 F3d at 116.

4. Preserved Alleyne Errors

Where a defendant presents on appeal a preserved claim “under Alleyne v United States, [570 US 99 (2013)], [that] his [or her] Sixth Amendment right to a jury trial was violated when the trial court made factual findings to determine [his or her] minimum sentence[,]” the claim is subject to the same remand procedure, “modeled on that adopted in [Crosby, 397 F3d 103,]” that was adopted by the Michigan Supreme Court in Lockridge, 498 Mich 358, for addressing unpreserved claims of sentencing error under Alleyne. People v Stokes (Stokes I), 312 Mich App 181, 192, 198-199, 203 (2015), vacated in part on other grounds by People v Stokes (Stokes II), 501 Mich 918 (2017) (citations omitted). The Stokes I Court explained that, although “the Second Circuit [Court of
Appeals later] repudiated Crosby to the extent it held that its remand procedure applied to preserved claims[,]” the Michigan Supreme Court apparently “intended the Crosby procedure to apply to both preserved and unpreserved errors[,]” given that the Court “specifically expressed its ‘agreement with’” the portion of Crosby indicating that its reasoning applied equally to the plain error and harmless error doctrines. Stokes I, 312 Mich App at 200-203 (“remand[ing] the matter to the trial court to follow the Crosby procedure in the same manner as outlined in Lockridge for unpreserved errors”) (some citations omitted).

Additionally, where the defendant raises an Alleyne issue in a motion for resentencing, the claim is “considered preserved” under Lockridge, 498 Mich 358, and is therefore reviewed “for harmless error beyond a reasonable doubt.” People v Terrell (James), 312 Mich App 450, 464, 464 n 40, 464-465 n 42 (2015), rev’d in part on other grounds 501 Mich 903 (2017) (citing People v Kimble, 470 Mich 305, 310-311 (2004), and Stokes I, 312 Mich App at 198, and additionally noting that the defendant’s “agreement to the scoring [of OV]s was not an admission for Lockridge purposes[; r]ather, it could reasonably be interpreted as only an admission that the OVs were supported by a preponderance of the evidence”).

5. Cases in Which Defendant Presents Both Evidentiary and Lockridge Claims

A remand under Lockridge, 498 Mich 358, and Crosby, 397 F3d 103, “results in the possibility of resentencing, whereas, in the context of a successful evidentiary challenge[ to the scoring of the guidelines], resentencing is actually ordered by the appellate court[;]” therefore, when an appellant raises both “an evidentiary and a constitutional challenge regarding the scoring of the guidelines, the evidentiary challenge must initially be entertained, because if it has merit and requires resentencing, the constitutional or Lockridge challenge becomes moot—a defendant will receive the protections of Lockridge when he or she is resentenced.” People v Biddles, 316 Mich App 148, 157-158 (2016). “[I]f an evidentiary challenge does not succeed, then and only then should [the appellate court] entertain the constitutional challenge.” Id. at 158.

43For more information on the precedential value of an opinion with negative subsequent history, see our note.
44For more information on the precedential value of an opinion with negative subsequent history, see our note.
6. Collateral Review


1.13 Trial Court’s Responsibility in Providing Documents to Defendant Pursuing Postconviction Proceedings

A. Appeals of Right

- An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. MCR 6.433(A).

- The court must order the 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).\(^\text{45}\)

B. Appeals by Leave

- An indigent defendant who may file an application for leave to appeal may obtain copies of transcripts and other documents as provided in MCR 6.433(B). 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).\(^\text{46}\)

- An indigent defendant must make a written request to the sentencing court for specified documents or transcripts indicating that they are required to prepare an application for leave to appeal. MCR 6.433(B)(1).

- If the requested materials have been filed with the court and not previously provided to the defendant, the court clerk must provide a copy to the defendant. MCR 6.433(B)(2).

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\(^\text{45}\)See Section 1.14 for a complete discussion of the appointment of an appellate lawyer.

\(^\text{46}\)See Section 1.14 for a complete discussion of the appointment of an appellate lawyer.
• If the requested materials have been previously provided to the defendant, on the defendant’s showing of good cause to the court, the clerk must provide the defendant with another copy. MCR 6.433(B)(2).

• If the defendant requests the transcript of a proceeding that has not been transcribed, the court must order the materials transcribed and filed with the court. MCR 6.433(B)(3).

• After the transcript has been prepared, the court clerk must provide a copy to the defendant. MCR 6.433(B)(3).

C. Other Postconviction Proceedings

• An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in MCR 6.433(C).

• An indigent defendant must make a written request to the sentencing court for specific court documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to him or her. MCR 6.433(C)(1).

• If the documents or transcripts have been filed with the court and not previously provided to the defendant, the clerk must provide the defendant with copies of those materials without cost to the defendant. MCR 6.433(C)(2). If the requested materials have been previously provided to the defendant, the clerk is required to provide the defendant with another copy if the defendant demonstrates good cause to obtain an additional set of court documents. MCR 6.433(C)(2).

• The court may order the transcription of additional proceedings if it finds that there is good cause for doing so. MCR 6.433(C)(3); People v Caston, 228 Mich App 291, 302 (1998) (“MCR 6.433(C)(3), by requiring an indigent defendant to demonstrate ‘good cause’ to obtain a transcript in a postconviction proceeding, does not violate [a] defendant’s right to equal protection, even though a defendant with funds might decide to purchase the transcript”).

• After a transcript of additional proceedings has been prepared, the clerk must provide a copy to the defendant. MCR 6.433(C)(3).

• Nothing in MCR 6.433(C) precludes the court from ordering materials to be supplied to the defendant in a proceeding under MCR 6.501 et seq. MCR 6.433(C)(4).
1.14 Appointment of Appellate Lawyer

A. Required Advice

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 and that a lawyer will be appointed if the defendant cannot afford one. MCR 6.425(F)(1)(a)-(b). Similarly, in a case involving a conviction following a plea of guilty or nolo contendere the trial court must inform the defendant immediately after sentencing that he or she is entitled to file an application for leave to appeal and that a lawyer will be appointed if the defendant cannot afford one. MCR 6.425(F)(2)(a)-(b). The defendant must request an attorney within 42 days after sentencing. MCR 6.425(F)(1)(c); MCR 6.425(F)(2)(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 returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer.” MCR 6.425(F)(3).

B. Appointment of Appellate Lawyer

MCR 6.425(G)(1) governs the appointment of an appellate lawyer and the preparation of transcripts:

“(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 through 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.

(c) Within 7 days after receiving a request and related information from the trial court, MAACS must provide

47See the Michigan Judicial Institute’s Criminal Proceedings Benchbook Vol. 1, Section 6.28 for a discussion of guilty plea appeals.
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. A denial of counsel must
include a statement of reasons.

(e) In a case involving a conviction following a trial, if
the defendant’s request for a lawyer was made 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.’ (48) 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
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."

48See SCAO Form CC 403.
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).

1.15 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.
Chapter 2: Overview of the Sentencing Guidelines

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2.1 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. MCL 769.34(2). The brief descriptions accompanying the statutory sections listing the felony offenses in MCL 777.11 to MCL 777.19 “are for assistance only.” MCL 777.6. The language contained in the statute defining the felony offense itself governs application of the sentencing guidelines. MCL 777.6. The statutory sentencing guidelines are not applicable to offenses for which the applicable statute establishes a mandatory determinate penalty or a mandatory penalty of life imprisonment for conviction of the offense. MCL 769.34(5).

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

MCL 769.34(2) states, in part:

“Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3),[1] the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 [may2] be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.”

MCL 769.34(2) clearly anticipates the dynamic quality of the statutory sentencing guidelines by requiring that a court sentence an offender to

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1 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).”

2 MCL 769.34(2) uses the word shall rather than may. However, in 2015, the Michigan Supreme Court, applying Alleyne v United States, 570 US 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, 399 (2015), rev’g in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3),” further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence,” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399, citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis added). See Section 2.2 for discussion of Lockridge.
the minimum sentence range recommended “under the version of th[e] sentencing guidelines in effect on the date the crime was committed.”


### 2.2 Judicial Factfinding and the *Apprendi/Alleyne* Rule

In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines “advisory only.” *People v Lockridge*, 498 Mich 358, 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*.

#### A. How Michigan’s Sentencing Scheme was Justified Under *Apprendi* and *Alleyne* Prior to 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 (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, and the guidelines were rendered *advisory* rather than mandatory.

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3 See Section 2.2 for discussion of *Lockridge*. 
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 *Lockridge*, 498 Mich at 378-379.\(^5\) 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, 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, in which the United States Supreme Court extended the *Apprendi/Blakely* rule to “mandatory minimum” sentences and held that “[f]acts that increase [a] mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt.” The *Herron* Court concluded that “[w]hile judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sentence, the maximum of which is set by law, *Drohan*, [475 Mich at 164], it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment right to a jury trial.” *Herron*, 303 Mich App at 403-404, citing *Alleyne*, 570 US at 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

\(^4\) 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.

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), the Court of Appeals applied *Herron*, 303 Mich App 392, and rejected the defendant’s *Alleyne* challenge to the scoring of the guidelines. However, two judges on the *Lockridge* panel filed concurring opinions indicating that they disagreed with the analysis in *Herron*, 303 Mich App 392. Judge Beckering opined that *Alleyne*, 570 US 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 [Booker, 543 US 220].” *Lockridge*, 304 Mich App at 285-286 (BECKERING, P.J., concurring). Judge Shapiro agreed with Judge Beckering that *Herron*, 303 Mich App 392, “[did] not comport with the constitutional mandate of *Alleyne*, [570 US 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 “Michigan’s sentencing guidelines scheme[, which] allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives, . . . violates the Sixth Amendment to the United States Constitution under *Alleyne*, 570 US 99.” *Lockridge*, 498 Mich at 383, 399 (additionally noting that “[b]ecause Michigan’s sentencing scheme is not ‘indeterminate’ as that term has been used by the United States Supreme Court, [it] cannot be exempt from the [rule of *Apprendi*, 530 US 466, and *Alleyne*, 570 US 99,] on that basis”).

“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. 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, 399.9

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 1.10

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

“[S]entencing courts [are no longer] bound by the applicable sentencing guidelines range[.]” *Lockridge*, 498 Mich at 392. “Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify the sentence imposed in order to facilitate appellate review.” *Id.*, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). The *Lockridge* Court specifically noted that its holding “[did] nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OV$s, whether using judge-found facts or not.” *Lockridge*, 498 Mich at 392 n 28, citing MCL 777.21(1)(a); MCL 777.31(1); MCL 777.32(1). See also *People v Biddles*, 316 Mich App 148, 159, 161 (2016) (noting that, under *Lockridge*, 498 Mich at 392 n 28, “judicial fact-finding is proper, as long as the guidelines are advisory only[,]” and disagreeing “with any contention that a trial court can only use facts

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

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

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

7 MCL 769.34(2) provides, in part:

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

Under Lockridge, 498 Mich 358, “the Legislative sentencing guidelines are advisory in every case, regardless of whether the case actually 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 (Anthony), 318 Mich App 688, 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, 468 (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[12] 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.”13 Lockridge, 498 Mich at 391-392. “A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for

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8 MCL 769.34(3) provides, in part:

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

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

10 It is unclear whether or to what extent other statutory references to departures (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in Lockridge. See, e.g., MCL 769.34(4), governing intermediate sanctions, which refers to departures. See Section 2.6 for discussion of intermediate sanctions.
reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable.” Id. at 392, citing Booker, 543 US at 261. “[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 (Gary), 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 460, 473, aff’g in part and rev’g in part 313 Mich App 1 (2015). Further, “the standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion.” Steanhouse II, 500 Mich at 471.

The trial court must score the now-advisory guidelines before imposing a sentence. 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’””) (additional citation omitted).

“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 (Donald), 494 Mich 430, 438 (2013).14

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11 The Steanhouse II Court rejected the prosecution’s contention that Lockridge, 498 Mich 358, “rendered the legislative sentencing guidelines advisory only in cases that involved judicial fact-finding that [unconstitutionally] increased the applicable guidelines range and that[,] by virtue of MCL 8.5,] the guidelines remain mandatory in all other cases.” Steanhouse II, 500 Mich at 465. “[T]rial courts [cannot be] statutorily directed to score the ‘highest number of points’ possible but [be] constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are found by a judge rather than by a jury or admitted by a defendant.” Steanhouse II, 500 Mich at 467-468.

12 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 Gares, 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 “[t]he defendant did not make any . . . formal admission” with respect to several contested offense variable scores).

13 MCR 6.425(E)(1)(e), which provides that “if the sentence imposed is not within the guidelines range, the sentencing court must articulate the substantial and compelling reasons justifying that specific departure,” has not yet been amended to conform to Lockridge, 498 Mich 358.
“The fact that a trial court engaged in judicial fact-finding is not relevant to the inquiry with respect to an evidentiary challenge” to the scoring of the OVs. People v Biddles, 316 Mich App 148, 158, 161 (2016) (citing Lockridge, 498 Mich at 389, and disagreeing “with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant’s OV score under the guidelines,” which “is in direct contradiction of the Lockridge Court’s rejection of the defendant’s argument that juries should be required to find the facts used to score the OVs”). Under Lockridge, 498 Mich at 392 n 28, “judicial fact-finding is proper, as long as the guidelines are advisory only.” Biddles, 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 Chapter 1 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.

### 2.3 Calculating a Minimum Sentence Range Under the Guidelines

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.


Offense categories and crime classes are discussed in detail in Section Section 2.4, and sentencing grids are discussed in Section 2.5. See Chapter

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15 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, 364-365, 399 (2015), rev’d in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). See Section 2.2 for discussion of Lockridge and the procedure for imposing a sentence post-Lockridge.
3 for detailed discussion about scoring PRVs and OVVs. For additional information about scoring the sentencing guidelines, see the Sentencing Guidelines Manual.

2.4 Offense Categories and Crime Classes

A. Offense Category (Crime Group)

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

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

The offense category of a crime determines which offense variables must be scored for that offense. MCL 777.22.

B. Crime Class

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

An offense’s crime class roughly corresponds to the maximum term of imprisonment for offenses in the same class.17

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16 Sentence grids are available by clicking here.

17 House Legislative Analysis, HB 5419, HB 5398, and SB 826 (Revised Second Analysis), September 23, 1998, 3.
• 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

Generally, the actual statutory maximum term of imprisonment for a specific offense is consistent with the sentences specified in the bulleted list. However, there are 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.¹⁸ MCL 777.14b; MCL 777.16g. According to the crime class — maximum sentence bulleted list, which corresponds to language found in legislative documents discussing the statutory guidelines,¹⁹ class D felonies are crimes for which a maximum sentence of ten years of imprisonment may be appropriate. However, the maximum term of imprisonment authorized by MCL 750.145c(3)(a) is only seven years (falling in between the maximum terms indicated for class D and class E felonies), while the maximum term authorized by MCL 409.122(3) is 20 years. In neither of the two statutes is the statutory maximum ten years as the class D designation suggests. While the crime class designation in most cases will correspond to the maximum sentences listed in the chart above, the two offenses discussed here exemplify the directive of MCL 777.6: the express language of the statute defining the offense itself governs application of the sentencing guidelines.

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.

¹⁸ In general, MCL 409.122(3) prohibits employing children in a child sexually abusive activity, and MCL 750.145c(3)(a) prohibits distributing, promoting, or financing child sexually abusive activity or materials.

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

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

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

Specific cells in some sentencing grids are differentiated from other cells by their classification as prison cells, straddle cells, and intermediate sanction cells.20
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*\(^\text{21}\) 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 below.

<table>
<thead>
<tr>
<th>OV Level</th>
<th>PRV Level</th>
<th>Offender Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 Points</td>
<td>A 0 Points</td>
<td>B 1-9 Points</td>
</tr>
<tr>
<td>10-24 Points</td>
<td>C 10-24 Points</td>
<td>D 25-49 Points</td>
</tr>
<tr>
<td>50-74 Points</td>
<td>E 50-74 Points</td>
<td>F 75+ Points</td>
</tr>
</tbody>
</table>

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\(^{20}\) 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).

\(^{21}\) See Section 2.6(D) for a comprehensive discussion.
### C. Intermediate Sanction Cells

Intermediate sanction cells[^22] 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 this chapter, as shown in the example above.

### D. Habitual Offenders

The upper limit of the recommended minimum sentence range (the “maximum-minimum” sentence) under the statutory sentencing

[^22]: See Section 2.6 for a comprehensive discussion.
guidelines may be incrementally increased based on the number of the defendant’s previous felony convictions, as depicted by the rows for HO2, HO3, and HO4. MCL 777.21.

Chapter 4 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, and Chapter 5 discusses the guidelines and grids as they apply to habitual offenders.

2.6 Intermediate Sanctions

A. Introduction

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

MCL 769.34(4) provides:

“Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines . . . is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

(b) If an attempt to commit a felony designated in offense class H . . . is punishable by imprisonment for more than 1 year, the court shall impose an intermediate sanction upon conviction of that offense absent a departure.

23 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).
(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 that may include a term of imprisonment of not more than 12 months.”

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

- inpatient or outpatient drug treatment or participation in a drug treatment court (MCL 600.1060 et seq.);
- probation with conditions required or authorized by law;
- residential probation;
- probation with jail;

24The 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, 364-365, 399 (2015), rev’d in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). See Section 2.2 for discussion of Lockridge and the procedure for imposing a sentence post-Lockridge. The Lockridge Court did not specifically address intermediate sanctions. However, MCL 769.34(4), governing intermediate sanctions, refers to departures, and the Lockridge Court stated that “[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1 (emphasis added).

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

The Court of Appeals has held that, “[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.” People v Schrauben, 314 Mich App 181, 194-195 (2016) (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,’” and “strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction”) (emphasis added). Moreover, “because, 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. Presumably, the same reasoning would apply to MCL 769.34(4)(b) (providing for the imposition of intermediate sanctions for certain attempted Class H offenses) and MCL 769.34(4)(c) (governing straddle cells). See Section 2.2 for discussion of Lockridge and Alleyne.
• probation with special alternative incarceration (SAI);
• mental health treatment;
• mental health or substance abuse counseling;
• jail, with or without work or school release;
• jail, with or without day parole authorized under MCL 801.251 to MCL 801.258;
• participation in a community corrections program;
• community service;
• payment of a fine;
• house arrest; and
• electronic monitoring. MCL 769.31(b)(i)-(xv).

B. Intermediate Sanction Cells

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

<table>
<thead>
<tr>
<th>OV Level</th>
<th>PRV Level</th>
<th>Offender Status</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A 0 Points</td>
<td>B 1-9 Points</td>
</tr>
</tbody>
</table>

25 The intermediate sanction provisions of MCL 769.34(4)(a)-(c) provide that, absent a departure, the court is required to impose sentence as set out in those provisions. However, “[i]n accordance with the broad language of [People v Lockridge, 498 Mich 358, 365 n 1, 391 (2015)], under [MCL 769.34(4)(a)], a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less.” People v Schrauben, 314 Mich App 181, 194-195 (2016) (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,’” and “stri[k]ing down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction”) (emphasis added). 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.
Under MCL 769.34(4)(a), if the offender’s PRV and OV scores place him or her in an intermediate sanction cell, the trial court must either impose an intermediate sanction or articulate for the record a substantial and compelling reason for a departure. However, “[i]n accordance with the broad language of [People v Lockridge, 498 Mich 358, 365 n 1, 391 (2015)] under [MCL 769.34(4)(a)], a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less.” People v Schrauben, 314 Mich App 181, 194-195 (2016) (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,’” and “strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction”) (emphasis added). Moreover, “because, 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.

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

27 In Lockridge, 498 Mich at 391, the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” The Lockridge Court additionally stated that “[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1 (emphasis added). See Section 2.2 for discussion of Lockridge.

28 See Section 2.2 for additional discussion of Lockridge, 498 Mich 358.

29 The Schrauben Court additionally held that if the trial court declines to impose an intermediate sanction under MCL 769.34(4)(a) and instead imposes a prison sentence that is within the recommended minimum sentencing range, the prison sentence “is within the range authorized by law.” Schrauben, 314 Mich App at 195-196, citing Alleyne, 570 US 99. Under such circumstances, MCL 769.34(10) requires that “the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information.” Schrauben, 314 Mich App at 196.
NOTE: Although imposition of an intermediate sanction under MCL 769.34(4)(a) is no longer mandatory under Schrauben, 314 Mich App at 194-195, the following discussion of caselaw predating Schrauben and Lockridge, 498 Mich 358, may be of continued relevance in determining whether to impose an intermediate sanction under the guidelines.

An offender may be incarcerated in a county jail as part of an intermediate sanction as long as the term does not exceed the upper limit indicated in the intermediate sanction cell\(^{30}\) or 12 months, whichever is less. MCL 769.34(4)(a). In Stauffer, 465 Mich at 634, the defendant’s PRV and OV levels placed him in a cell with a maximum minimum term of 17 months, and the trial court sentenced the defendant to a prison term of 17 to 24 months.\(^{31}\) Ordinarily, the defendant’s sentence would have been unremarkable because on its face, the sentence was within the guidelines. Id. at 634-635. However, under the plain language of MCL 769.34(4)(a), the trial court was required to impose an intermediate sanction because the upper limit of the range in the defendant’s cell was less than 18 months. Stauffer, 465 Mich at 635. Because a prison term cannot be an intermediate sanction, the trial court’s sentence represented a departure from the directive contained in MCL 769.34(4)(a), even though the actual length of the term imposed fell within the face values indicated by the cell. Stauffer, 465 Mich at 636.

See also People v Muttscheler, 481 Mich 372, 373 (2008), in which the Michigan Supreme Court held that absent a substantial and compelling reason to depart from the guidelines, a defendant whose recommended minimum sentence range required the imposition of an intermediate sanction could not be sentenced to serve time in prison because an intermediate sanction did not include a prison sentence. The Court noted that Stauffer, 465 Mich at 636, “implies that when the guidelines require an intermediate sanction, even if the length of the sentence does not exceed the statute’s 12-month maximum, the sentence is an upward departure if the defendant is required to serve it in prison, rather than in jail.” Muttscheler, 481 Mich at 375. See, e.g., People v Lucey, 287 Mich App 267, 269-270 (2010), in which the guidelines recommended a minimum term of five to 17 months, and the trial court was required to impose an intermediate sanction unless it provided a substantial and compelling reason to sentence the defendant to prison. Without a substantial and compelling reason, the defendant’s sentence of 17 to

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\(^{30}\) Unless otherwise specified in the applicable statutory provisions. See MCL 769.34(2)(a).

\(^{31}\) The minimum term was reduced to 16 months to comply with the two-thirds rule. Stauffer, 465 Mich at 634 n 3.
30 months in prison—a “location departure”—to run consecutively to the sentence for which he was on parole at the time he committed the offenses in the case at issue, constituted an unsubstantiated guidelines departure. *Id.* at 269, 274. According to the Court, “[t]he fact that a defendant might have to serve county jail time following additional prison incarceration for a parole violation cannot be a substantial and compelling reason to depart from the sentencing guidelines.” *Id.* at 273.

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

For a defendant sentenced for violating a section of the Michigan Vehicle Code, a trial court’s sentence of one year of probation to be served in the county jail was not a departure under MCL 769.34(2)(a) where the maximum minimum term recommended by the guidelines was 11 months. *People v. Hendrix*, 263 Mich App 18, 22 (2004), modified in part 471 Mich 926 (2004). *Hendrix*, 263 Mich App at 20, involved MCL 257.625(9)(c),32 a statute expressly noted in MCL 769.34(2)(a). Violations of MCL 257.625(9)(c) are subject to alternate mandatory minimum sentences under MCL 769.34(2), and the trial court may sentence a defendant to either alternative. *Hendrix*, 263 Mich App at 21-22. In *Hendrix*, 263 Mich App at 21, one sentencing alternative under MCL 257.625(9)(c) authorized the court to sentence a defendant to prison for not less than one year, and this one-year mandatory minimum applied only if the defendant was sentenced to prison.

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

“If the Michigan vehicle code . . . mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections [(if a defendant is sentenced under the option in MCL 257.625(9)(c)(i), a mandatory minimum of one year applies)] and the Michigan vehicle code . . . authorizes the sentencing judge to impose a sentence that is less than that minimum sentence [(MCL 257.625(9)(c)(ii) authorizes a court to

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32 MCL 257.625(8)(c) at the time *Hendrix* was decided.
sentence a defendant to probation and community service with a maximum of one year in a county jail, a lesser sentence than the one-year minimum in prison), imposing a sentence that exceeds the recommended sentence range [(in Hendrix, the range was 0 to 11 months)] but is less than the mandatory minimum sentence [(one year in prison if the defendant is sentenced to prison)] is not a departure under this section." Hendrix, 263 Mich App at 19.

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

Under MCL 769.34(4)(b), when an offender is convicted of attempting to commit a class H felony for which a term of more than one year of imprisonment is authorized, the trial court must impose an intermediate sanction, unless the court expresses a substantial and compelling reason for a departure.33

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

D. Straddle Cells

Generally, straddle cells are those cells that “straddle” the division between prison and jail. Straddle cells are those cells in which the

33 However, in People v Lockridge, 498 Mich 358 (2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3),” and additionally stated that “[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1, 391 (emphasis added). “In 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.” People v Schrauben, 314 Mich App 181, 194-195 (2016) (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,’” and “stri[k]ing down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction”) (emphasis added). 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. Presumably, the same reasoning would apply to MCL 769.34(4)(b) (providing for the imposition of intermediate sanctions for certain attempted Class H offenses) and MCL 769.34(4)(c) (governing straddle cells). See the Alleyne/Lockridge footnote in Section 2.6(A) for more information. See Section 2.2 for discussion of Lockridge and Alleyne.
lower limit of the recommended range is one year or less and the upper limit of the recommended range is more than 18 months. MCL 769.34(4)(c); Stauffer, 465 Mich at 636 n 8. Straddle cells appear shaded in the sentencing grids published in the State of Michigan’s Sentencing Guidelines Manual and in the grids used in this chapter, as shown in the example in Section 2.6(B).

When an offender’s prior record variable (PRV) and offense variable (OV) levels result in his or her placement in a straddle cell, the sentencing court—absent a departure—must sentence the offender in one of two ways described in MCL 769.34(4)(c)34:

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

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

People v Martin (George H), 257 Mich App 457 (2003), provides an example of a case involving a straddle cell, i.e., a cell in which the upper limit of the recommended sentence is more than 18 months and the lower limit is 12 months or less. MCL 769.34(4)(c). According to the guidelines, the defendant’s recommended minimum sentence was 5 to 28 months in prison for the offense of larceny from a person, MCL 750.357. Martin (George H), 257 Mich App at 459-460. Pursuant to a Cobbs35 agreement, the defendant

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34 However, in People v Lockridge, 498 Mich 358 (2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)(a),” and additionally stated that “[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1, 391, emphasis supplied. “In 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.” People v Schrauben, 314 Mich App 181, 194-195 (2016) (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[,]’” and “strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction[.]”) (emphasis added). Moreover, “because, 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. Presumably, the same reasoning would apply to MCL 769.34(4)(b) (providing for the imposition of intermediate sanctions for certain attempted Class H offenses) and MCL 769.34(4)(c) (governing straddle cells). See the Alleyne/Lockridge footnote in Section 2.6(A) for more information. See Section 2.2 for discussion of Lockridge and Alleyne.
pleaded guilty based on the trial court’s preliminary sentence evaluation that the court would sentence him to a term in county jail rather than a term of imprisonment in state prison. *Martin (George H)*, 257 Mich App at 458. The defendant was sentenced as a second offense habitual offender, MCL 769.10, to ten months in the county jail, and the prosecution appealed on the grounds that the trial court erred as a matter of law by imposing a determinate sentence on defendant. *Martin (George H)*, 257 Mich App at 458.

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

35 *People v Cobbs*, 443 Mich 276 (1993); see Chapter XX for more information.

36 Determinate and indeterminate sentencing are discussed in Chapter XX.
Chapter 3: Scoring Prior Record and Offense Variables

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Part A: Scoring the Prior Record Variables (PRVs)

3.1 Scoring an Offender’s PRVs

Generally

Note: Published appellate opinions discussing issues under the legislative sentencing guidelines remain limited with regard to specific prior record variables. In an effort to provide guidance to users of this chapter, unpublished opinions addressing issues not addressed by published opinions have been included in the discussion of a particular area. Unpublished opinions appear only to provide a court with information regarding how an appellate court has dealt with an issue not clearly addressed in published case law. Unpublished opinions are not precedentially binding under

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1 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, 369, 399 (2015), rev’d in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)[[,]” further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399, citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis supplied).

The rule of Apprendi, 530 US at 490 (“[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[“],) does not apply to prior convictions and therefore presumably does not implicate the scoring of prior record variables under Michigan’s sentencing guidelines. See Alleyne, 570 US at 111 n 1 (noting that “[i]n Almendarez–Torres v United States, [523 US 224 (1998)], [the United States Supreme Court] recognized a narrow exception to [the] general rule [of Apprendi] for the fact of a prior conviction[,]” the Alleyne Court declined to revisit Almendarez-Torres “[b]ecause the parties [did] not contest that decision’s vitality”); see also, generally, Lockridge, 498 Mich at 370 n 12.
the rule of stare decisis, MCR 7.215(C)(1), and the first unpublished opinion appearing in a series of unpublished opinions will be footnoted with a reminder of this fact. In addition, published opinions discussing the prior judicial guidelines are included where relevant.

MCL 777.21 provides in detail the method by which an offender’s recommended minimum sentence range is determined using the offender’s prior record variable (PRV) and offense variable (OV) scores. Each offense variable to be scored is determined by the crime group to which the sentencing offense belongs. MCL 777.21(1)(a). But all prior record variables are scored for felony offenses to which the guidelines apply, without regard to the sentencing offense’s crime group. MCL 777.21(1)(b); People v Peltola, 489 Mich 174, 187, 190-191 (2011). The total number of points assessed for the PRVs constitutes the offender’s “PRV level,” which is represented by the horizontal axis on each sentencing grid.2

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

“[A] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.” People v Jones (Byron), 494 Mich 880, 880-881 (2013), quoting People v Osantowski, 481 Mich 103, 111 (2008) (emphasis omitted); see also People v Hardy (Donald), 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016; People v Steanhouse (Steanhouse I), 313 Mich App 1, 38 (2015), aff’d in part and rev’d in part on other grounds by People v Steanhouse (Steanhouse II), 500 Mich 453, 459-461 (2017).3 “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” Hardy (Donald), 494 Mich at 438; see also Steanhouse I, 313 Mich App at 38; People v Gullett, 277 Mich App 214, 217 (2007).4

For purposes of scoring an offender’s PRVs, a “conviction” includes an assignment to youthful trainee status under MCL 762.11 et seq. and a conviction set aside under MCL 780.621 to MCL 780.624. MCL

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

3 For more information on the precedential value of an opinion with negative subsequent history, see our note.
Similarly, a “juvenile adjudication” for purposes of an offender’s PRV score includes an adjudication set aside under MCL 712A.18e or expunged. MCL 777.50(4)(a). See People v Smith (Ricky), 437 Mich 293, 302-304 (1991), where the Court explained the propriety of considering an adult defendant’s expunged juvenile record at the adult defendant’s sentencing hearing. The Court noted that the purpose of automatic expungement was not to protect the adult offender from any criminal consequences of his or her juvenile record, but to eliminate the social or civil stigma of delinquency and the economic disabilities that could accompany a record of juvenile delinquency. Id. at 302-303. “The law contemplates a differentiation in sentencing between first-time offenders and recidivists, juvenile or adult.” Id. at 303.

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

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

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

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

To apply MCL 777.50(1), determine the length of time between the discharge date of the conviction or juvenile adjudication immediately

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

5 Specific offender statuses are discussed in Section 3.7(B).

6 Discharge from the jurisdiction of the court or the Department of Corrections. MCL 777.50(4)(b).
preceding the *commission date* of the sentencing offense. If the time span is ten years or more, that conviction or juvenile adjudication—and any convictions or adjudications that occurred earlier—must not be counted when scoring the offender’s PRVs. MCL 777.50(2). If the time span between the commission date of the offender’s sentencing offense and the discharge date of the offender’s most recent conviction or juvenile adjudication is less than ten years, that prior conviction or adjudication must be counted in scoring the offender’s PRVs.

If the offender’s most recent conviction or adjudication must be counted in scoring his or her PRVs, and if the offender has additional prior convictions or juvenile adjudications, determine the length of time between the *commission date* of the prior conviction or adjudication first scored and the *discharge date* of the next earlier conviction or adjudication. If the time span equals or exceeds ten years, that conviction or adjudication may not be counted. If the time span is less than ten years, that conviction or adjudication may be counted in scoring the offender’s PRVs. Use the process described above until a time span equal to or greater than ten years separates the discharge date of an earlier conviction or adjudication from the commission date of the next conviction or adjudication or until no previous convictions or adjudications remain. MCL 777.50(2).

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

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

**Note:** Frequent challenges to the constitutionality of an offender’s prior convictions or adjudications arise at sentencing when a defendant claims that one or more of the prior convictions or adjudications counted in scoring the PRVs was obtained without the defendant having had the benefit of counsel.
“[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 (Rodney), 315 Mich App 546, 546-547 (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 the respective limitation is obviously different as well.” Butler (Rodney), 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 the points to be assessed based upon the number and severity of those offenses[,]” while “MCL 777.50, on the other hand, addresses the question whether a defendant’s prior criminal history should be considered at all because of a period of time spent as a law-abiding citizen.” Butler (Rodney), 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. at 552.

PRVs 1 through 5 indicate that the convictions and adjudications contemplated for use in scoring these variables must be convictions and adjudications entered before the commission date of the sentencing offense. MCL 777.51 to MCL 777.55. Where the commission date of the sentencing offense fell after the commission date of a previous offense but before the date on which the defendant entered a guilty plea to the previous offense, the conviction (plea) entered after the commission date of the sentencing offense is not a “prior conviction” for purposes of scoring PRV 5. People v Hammond, unpublished per curiam opinion of the Court of Appeals, issued September 18, 2003 (Docket No. 231540).7

Despite the range of possible offense dates (March 7, 2001 to June 7, 2001) listed in the complaint against the defendant, the evidence at trial established that the earliest date on which the defendant committed the sentencing offense was March 31, 2001, which was more than ten years after the defendant’s discharge from probation for an earlier offense (March 18, 1991). Thus, the earlier offense could not be counted as a prior conviction for purposes of scoring the defendant’s PRVs. People v Ray (John), unpublished per curiam

7 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
opinion of the Court of Appeals, issued September 9, 2003 (Docket No. 240843).

B. Assignment to Youthful Trainee Status Under the PRVs

Under the express language of the statutory sentencing guidelines, a defendant’s previous assignment to youthful trainee status\(^8\) is a prior conviction for purposes of scoring a defendant’s PRVs. MCL 777.50(4)(a)(i); People v Williams (Zachary), 298 Mich App 121, 125, 127 (2012).\(^9\) However, the statutory sentencing guidelines do not diminish the civil protection provided by MCL 762.14(2) or the conditional protection provided in MCL 762.14(4), regarding public disclosure of records involving the prior criminal charge.

3.2 PRV 1—Prior High Severity Felony Convictions

A. Definitions/Scoring

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

- a conviction entered before the commission date of the sentencing offense,\(^10\)

- for a crime listed in class M2, A, B, C, or D, or

- for a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D, or

- for a felony that is not listed in any crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more, or

- for a felony under federal law or the law of another state that does not correspond to a crime listed in any class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more. MCL 777.51(2).

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\(^8\) Youthful trainee status is discussed further in Section 10.4.

\(^9\) A defendant’s assignment to youthful trainee status could not be counted as a prior conviction under the judicial sentencing guidelines, see People v Garner (Demetrick), 215 Mich App 218, 220 (1996); “[h]owever, Garner was decided two years before the Legislature enacted MCL 777.50, . . . which defines ‘conviction’ to include assignment to youthful trainee status for purposes of scoring PRV 1[,]” Williams (Zachary), 298 Mich App at 125-126.

\(^10\) A qualifying prior high severity felony conviction must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.1(A).
If the defendant has previous convictions that qualify under PRV 1, next determine which one or more of the statements addressed by the variable apply to the offender’s previous high severity felony convictions and assign the point value indicated by the applicable statement with the highest number of points. MCL 777.51(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>PRV 1—Number of prior high severity convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>75</td>
<td>The offender has 3 or more prior high severity convictions. MCL 777.51(1)(a).</td>
</tr>
<tr>
<td>50</td>
<td>The offender has 2 prior high severity convictions. MCL 777.51(1)(b).</td>
</tr>
<tr>
<td>25</td>
<td>The offender has 1 prior high severity conviction. MCL 777.51(1)(c).</td>
</tr>
<tr>
<td>0</td>
<td>The offender has no prior high severity convictions. MCL 777.51(1)(d).</td>
</tr>
</tbody>
</table>

**B. Case Law Under the Statutory Guidelines**

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

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

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

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

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

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

“[O]ur review of the California and Michigan definitions of robbery suggest, without more facts, that [the] defendant’s California second-degree robbery conviction is akin to an unarmed robbery[12] conviction in Michigan. Accordingly, in the absence of evidence to the contrary, it appears that the trial court correctly scored PRV 1.” People v Stewart (Cedric), unpublished per curiam opinion of the Court of Appeals, issued September 18, 2003 (Docket No. 240376).[13]

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

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

A prior conviction entered against an individual who was tried as an adult in a designated proceeding under MCL 712A.2d\textsuperscript{14} constitutes a conviction, rather than a juvenile adjudication, for purposes of scoring the PRVs, irrespective of whether the individual was sentenced as an adult or received a juvenile disposition in the designated proceeding. \textit{People v Armstrong (Parys)}, 305 Mich App 230, 243-244 (2014) (noting that, under MCL 712A.2d(7), “a juvenile tried as an adult who is found guilty or who pleads guilty or no contest receives a judgment of conviction, which has ‘the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction[]’”). Accordingly, if the prior conviction constitutes a high-severity felony, “the trial court must score the previous conviction under PRV 1, regardless of how the previous trial court sentenced the juvenile.” \textit{Armstrong (Parys)}, 305 Mich App at 244.

C. Relevant Caselaw Under the Judicial Guidelines

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

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

### 3.3 PRV 2—Prior Low Severity Felony Convictions

A. Definitions/Scoring

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

\textsuperscript{14} See the Michigan Judicial Institute’s \textit{Juvenile Justice Benchbook} for information about designated proceedings.
• a conviction entered before the commission date of the sentencing offense,\textsuperscript{15}

• for a crime listed in class E, F, G, or H, or

• for a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H, or

• for a felony that is not listed in any crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of less than ten years, or

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

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

<table>
<thead>
<tr>
<th>Points</th>
<th>PRV 2—Number of prior low severity convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>The offender has 4 or more prior low severity convictions. MCL 777.52(1)(a).</td>
</tr>
<tr>
<td>20</td>
<td>The offender has 3 prior low severity convictions. MCL 777.52(1)(b).</td>
</tr>
<tr>
<td>10</td>
<td>The offender has 2 prior low severity convictions. MCL 777.52(1)(c).</td>
</tr>
<tr>
<td>5</td>
<td>The offender has 1 prior low severity conviction. MCL 777.52(1)(d).</td>
</tr>
<tr>
<td>0</td>
<td>The offender has no prior low severity convictions. MCL 777.52(1)(e).</td>
</tr>
</tbody>
</table>

\textbf{B. Case Law Under the Statutory Guidelines}

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

\textsuperscript{15} A qualifying prior low severity felony conviction must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.1(A).
For purposes of scoring an offender’s prior record variables, “another state” does not include foreign states. Price (Tore), 477 Mich at 5 (the defendant’s previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 2 is the same as the language used in PRV 1—the variable at issue in Price (Tore). MCL 777.52(2) defines a prior low severity felony conviction as a conviction for “[a] crime listed in offense class E, F, G, or H [or for a] felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.” (Emphasis added.) According to the Price (Tore) Court:

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

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

A felony-firearm conviction constitutes a prior low severity felony conviction that may be assessed points for purposes of PRV 2. People v Dent, unpublished per curiam opinion of the Court of Appeals, issued September 21, 2010 (Docket No. 290832) (MCL 777.52(2)(c) “specifically incorporates felonies that are not listed in the offense classes” with maximum terms of imprisonment that are less than ten years; felony-firearm is not listed in the offense classes, and first and second felony-firearm convictions have sentences of two and five years, respectively). See also People v Williams (Timothy),

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16 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
unpublished per curiam opinion of the Court of Appeals, issued November 18, 2010 (Docket No. 288704) (trial court properly assessed five points for PRV 2 for the defendant’s felony-firearm conviction, because “felony-firearm fits the plain wording of [MCL 777.52(2)(c)]”—a felony not listed in any offense class that is punishable by a maximum term of imprisonment of less than ten years).

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

C. Relevant Caselaw Under the Judicial Guidelines

It is permissible to use the same previous conviction for purposes of scoring PRV 2 and PRV 6.17 People v Vonins (After Remand), 203 Mich App 173, 176 (1993), overruled in part on other grounds by People v Horton, 500 Mich 1034 (2017).18 In Vonins, the defendant argued that the trial court’s assessment of points under PRV 2 for the defendant’s previous controlled substance offense conviction precluded the court from using that same conviction to assess him points under PRV 6. Id. at 176. The Court of Appeals explained that PRV 6 was a separate category that addressed a situation different from the situation addressed in PRV 2:

17 PRV 6 deals with an offender’s relationship to the criminal justice system at the time the sentencing offense was committed. See Section 3.7(b).

18 For more information on the precedential value of an opinion with negative subsequent history, see our note.
“PRV 2 provides for the assessment of points for every prior low[]severity felony conviction, with an increase in the number of points in correlation to the number of such convictions. PRV 6 provides for the assessment of points if, at the time of the instant offense, the defendant had a relationship with the criminal justice system . . . . Additional points are to be assessed under PRV 6 when there is a ‘post-conviction relationship,’ such as being on probation or parole when the instant offense was committed . . . .” Vonins, 203 Mich App at 176-177.

3.4 PRV 3—Prior High Severity Juvenile Adjudications

A. Definitions/Scoring

A “prior high severity juvenile adjudication” is a juvenile adjudication:

• for conduct that would be a crime listed in class M2, A, B, C, or D if committed by an adult, or

• for conduct that would be a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D if committed by an adult, or

• for conduct that, if committed by an adult, would be a felony that is not listed in any crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more, or

• for conduct that, if committed by an adult, would be a felony under federal law or the law of another state that does not correspond to a crime listed in any class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of ten years or more, and

• for which the order of disposition was entered before the commission date of the sentencing offense. 19 MCL 777.53(2).

If the offender has previous adjudications to which PRV 3 applies, determine which one or more of the statements addressed by PRV 3 apply to the offender and assign the point value indicated for the

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19 A qualifying prior high severity juvenile adjudication must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.1(A).
applicable statement with the highest number of points. MCL 777.53(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>PRV 3—Number of prior high severity juvenile adjudications</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>The offender has 3 or more prior high severity juvenile adjudications. MCL 777.53(1)(a).</td>
</tr>
<tr>
<td>25</td>
<td>The offender has 2 prior high severity juvenile adjudications. MCL 777.53(1)(b).</td>
</tr>
<tr>
<td>10</td>
<td>The offender has 1 prior high severity juvenile adjudication. MCL 777.53(1)(c).</td>
</tr>
<tr>
<td>0</td>
<td>The offender has no prior high severity juvenile adjudications. MCL 777.53(1)(d).</td>
</tr>
</tbody>
</table>

B. Case Law Under the Statutory Guidelines

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

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

3.5 PRV 4—Prior Low Severity Juvenile Adjudications

A. Definitions/Scoring

A “prior low severity juvenile adjudication” is an adjudication:

• for conduct that would be a crime listed in class E, F, G, or H if committed by an adult, or
• for conduct that would be a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H if committed by an adult, or

• for conduct that, if committed by an adult, would be a felony that is not listed in any crime class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of less than ten years, or

• for conduct that, if committed by an adult, would be a felony under federal law or the law of another state that does not correspond to a crime listed in any class (M2, A, B, C, D, E, F, G, or H) that is punishable by a maximum term of imprisonment of less than ten years, and

• for which the order of disposition was entered before the commission date of the sentencing offense. MCL 777.54(2).

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

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

B. Case Law Under the Statutory Guidelines

For purposes of scoring an offender’s prior record variables, “another state” does not include foreign states. Price (Tore), 477 Mich at 5 (the defendant’s previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 4 is

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<sup>20</sup> A qualifying prior low severity juvenile adjudication must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.1(A).
the same as the language used in PRV 1—the variable at issue in *Price (Tore)*. MCL 777.54(2) defines a prior low severity juvenile adjudication as “a juvenile adjudication for conduct that would be . . . if committed by an adult . . . * felony under a law of the United States or another state* corresponding to a crime listed in offense class E, F, G, or H.” (Emphasis added.) According to the *Price (Tore)* Court:

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

### 3.6 PRV 5—Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications

#### A. Definitions/Scoring

A “prior misdemeanor conviction” is a conviction:

- for a misdemeanor offense under Michigan law or the law of a political subdivision of Michigan, or under the law of another state or a political subdivision of another state, or under federal law,

- if the conviction was entered before the commission date of the sentencing offense.\(^{21}\) MCL 777.55(3)(a).

A “prior misdemeanor juvenile adjudication” is a juvenile adjudication:

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

- if the order of disposition for the juvenile adjudication was entered before the commission date of the sentencing offense.\(^{22}\) MCL 777.55(3)(b).

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\(^{21}\) A qualifying prior misdemeanor conviction must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.1(A).

\(^{22}\) A qualifying prior misdemeanor conviction must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.1(A).
Score PRV 5 by determining which one or more of the statements addressed by the variable apply to the offender and assigning the point value indicated for the applicable statement with the highest number of points. MCL 777.55(1).

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

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:
  - prior misdemeanor convictions or prior misdemeanor juvenile adjudications that are offenses against a person or property, weapons offenses, or controlled substances offenses, and
  - prior misdemeanor convictions and prior misdemeanor juvenile adjudications for the operation or attempted operation of a vehicle, vessel, ORV,

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22 A qualifying prior misdemeanor juvenile adjudication must satisfy the ten-year gap requirements of MCL 777.50, as discussed in Section 3.1(A).
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. Case Law Under the Statutory Guidelines

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

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

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

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


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

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

Misdemeanor offenses are not categorized as are felony offenses under the sentencing guidelines. *People v Maben*, 313 Mich App 545, 550 (2015), citing MCL 777.5; *People v Bonilla-Machado*, 489 Mich 412, 422 (2011). Consequently, a trial court must often determine the nature of a misdemeanor crime for purposes of scoring PRV 5. *People v Cadwell*, unpublished memorandum opinion of the Court of Appeals, issued December 20, 2002 (Docket No. 236381), slip op p 2.24 In Cadwell, slip op at 2, the appellate panel concluded:

“Unlike felonies, the Legislature did not place misdemeanors into categories. In the absence of more

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

24 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
specific legislative guidance, it was for the trial court to determine whether [the] defendant’s misdemeanor conviction for disorderly jostling, MCL 750.167(1)(k), was a crime against a person. The court noted that the jostling offense involved unconsented touching of other persons. The trial court did not err in finding that this was an offense against a person that should be scored under MCL 777.55.” Cadwell, slip op at 2.

In Maben, 313 Mich App at 550, the Court of Appeals held that because the statute governing the misdemeanor offense of malicious use of a telecommunications device, MCL 750.540e(1), “specifically addresses communications directed at ‘another person[,]’” it “constitute[s] [an] offense[] against a person as required by MCL 777.55(2)(a)[,]” and therefore may be used to score PRV 5. The Court further noted that even if “analogous felony offenses have been categorized as offenses against public order or public safety, . . . those offenses . . . do not proscribe activity directed at a particular individual[,]” in contrast to the misdemeanor offense of malicious use of a telecommunications device. Maben, 313 Mich App at 550 (citations omitted).

An out-of-state conviction for an attempted crime may qualify for scoring under PRV 5 if the attempted offense is tied to the crime attempted, the attempted offense is a misdemeanor, and the crime attempted “‘is an offense against a person or property, a controlled substance offense, or a weapon offense.’” People v Crews, 299 Mich App 381, 397-399 (2013) (quoting MCL 777.55(2)(a) and holding that the defendant’s prior Ohio conviction of “‘attempt to commit an offense’ . . . stemm[ing] from a charge of possession or use of drugs[]” was properly considered in scoring ten points under PRV 5, because “Ohio’s attempt statute specifically tie[d] an attempt conviction to the crime attempted[]” and “[the d]efendant’s PSIR clearly indicate[d] that the original charge leading to his attempt plea was a controlled substance offense[’].”

3.7 PRV 6—Relationship to the Criminal Justice System

A. Definitions/Scoring

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

<table>
<thead>
<tr>
<th>Points</th>
<th>PRV 6—Offender’s relationship to the criminal justice system</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>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).</td>
</tr>
<tr>
<td>15</td>
<td>The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation. MCL 777.56(1)(b).</td>
</tr>
<tr>
<td>10</td>
<td>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).</td>
</tr>
<tr>
<td>5</td>
<td>The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor. MCL 777.56(1)(d).</td>
</tr>
<tr>
<td>0</td>
<td>The offender has no relationship to the criminal justice system. MCL 777.56(1)(e).</td>
</tr>
</tbody>
</table>

“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).25

B. Case Law Under the Statutory Guidelines

A defendant has a prior “relationship with the criminal justice system” for purposes of scoring PRV 6 when disposition of a misdemeanor crime committed by the defendant is pending at the time the defendant committed the sentencing offense. People v

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25 Specific statutes under which an offender’s sentence may be delayed are discussed in detail in Section 10.2.

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

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

Thus, a five-point score for PRV 6 was not improper where the defendant committed a misdemeanor for which bond was granted and subsequently revoked because “the ramifications for that charge remain.” Johnson (Angelo), 293 Mich App at 89-90. Because the defendant’s misdemeanor charge was still pending, the Court could not “classify [him] as having ‘no relationship’ with the criminal justice system.” Id. at 90.

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

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26 For more information on the precedential value of an opinion with negative subsequent history, see our note.
27 For more information on the precedential value of an opinion with negative subsequent history, see our note.
A score of ten points is appropriate for PRV 6 where the defendant absconded from probation 20 years before committing the sentencing offense, because “a defendant’s period of probation is tolled when he [or she] absconds from probationary supervision” and “[a]n absconding defendant should not be allowed to benefit from his [or her] wrongful noncompliance with the terms of his [or her] probation order.” People v Dendel (On Remand), unpublished per curiam opinion of the Court of Appeals, issued September 11, 2008 (Docket No. 247391), vacated in part on other grounds by People v Dendel, 485 Mich 903 (2009), quoting People v Ritter, 186 Mich App 701, 711 (1991).28

Ten points were properly scored for PRV 6 where the defendant committed the sentencing offense while on probation for a juvenile offense. People v Anderson (Michael), 298 Mich App 178, 180-183 (2012) (“juveniles on probation are involved with the corrections aspect of the criminal justice system[,]” therefore, “[t]he defendant’s prior juvenile adjudications supported the trial court’s scoring of [PRV 6][]”). See also People v Gibbs (Phillip), 299 Mich App 473, 486-487 (2013) (where the defendant had entered a plea on a juvenile offense and was “awaiting adjudication or sentencing at the time he committed the sentencing offense,” five points were properly assessed under PRV 6, “even if [the defendant] was not on bond at the time he committed the sentencing offense[]”); People v Kelly (DeJuan), unpublished per curiam opinion of the Court of Appeals, issued April 13, 2010 (Docket No. 289689) (because “[n]othing in PRV 6 indicates that it was not meant to apply to an escapee from juvenile confinement[,]” the trial court properly assessed 20 points for PRV 6 where the defendant committed the sentencing offense after he escaped from his court-ordered community placement following a juvenile adjudication).

C. Relevant Case Law Under the Judicial Guidelines

Under the judicial sentencing guidelines, the Court of Appeals determined that the trial court properly assessed a defendant five points under PRV 6 where the defendant’s bail was revoked when he failed to appear for a hearing following his arrest for an offense committed before the sentencing offense. People v Lyons (Kenyatta) (After Remand), 222 Mich App 319, 322-323 (1997). Applying the

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28 People v Dendel has a lengthy history. The Michigan Supreme Court reversed the first Court of Appeals unpublished opinion, issued July 18, 2006, and remanded the case to the Court of Appeals for consideration of remaining appellate issues. People v Dendel, 481 Mich 114 (2008). On both parties’ motions for rehearing, the Michigan Supreme Court reiterated its reversal of the Court of Appeals opinion and its remand of the case to the Court of Appeals for consideration of appellate issues raised but not yet considered. The case discussed above is the resulting Court of Appeals decision from the remand. Both parties appealed the decision in that case and the outcome of those subsequent appeals and opinions involve issues not related to the Court of Appeals decision regarding the scoring of PRV 6.
rules of statutory interpretation to the judicial sentencing guidelines then in effect, the Court noted that “the guidelines do not state that five points can be assessed only in the enumerated circumstances.” *Id.* at 322. The Court explained that “[i]t would be absurd to suggest that the drafters of the guidelines intended that a defendant would receive more lenient treatment by being, in the words of the trial court, a ‘runaway’ from the criminal justice system.” *Id.*

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

3.8 PRV 7—Subsequent or Concurrent Felony Convictions

A. Definitions/Scoring

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

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

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

- A concurrent felony conviction that will result in a consecutive sentence under MCL 333.7401(3) may not be counted under PRV 7.29 MCL 777.57(2)(c).30

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29 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.

30 The prohibition against counting an offense under MCL 333.7401(2)(a) for which a consecutive sentence may be imposed under MCL 333.7401(3) was added by 2002 PA 666, effective March 1, 2003.
Score PRV 7 by determining which of the statements apply to the offender and assigning the point value corresponding to the applicable statement with the highest number of points. MCL 777.57(1).

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

<table>
<thead>
<tr>
<th>Points</th>
<th>PRV 7—Number of subsequent or concurrent felony convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>The offender has 2 or more subsequent or concurrent felony convictions. MCL 777.57(1)(a).</td>
</tr>
<tr>
<td>10</td>
<td>The offender has 1 subsequent or concurrent felony conviction. MCL 777.57(1)(b).</td>
</tr>
<tr>
<td>0</td>
<td>The offender has no subsequent or concurrent felony convictions. MCL 777.57(1)(c).</td>
</tr>
</tbody>
</table>

### B. Case Law Under the Statutory Guidelines

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

See also *People v Rapley*, unpublished per curiam opinion of the Court of Appeals, issued March 18, 2003 (Docket No. 238704) (any “inherent inconsistency” in counting an offender’s concurrent conviction for purposes of a prior record variable does not trump the clear language of MCL 777.57, which states that an offender is to be assessed points under PRV 7 for felony convictions obtained at the same time as the conviction for the sentencing offense and felony convictions obtained after the commission date of the sentencing offense).31

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

PRV 7’s instruction not to count a concurrent conviction if the conviction will result in the imposition of a mandatory consecutive

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31 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
sentence does not apply to consecutive sentences resulting from an offender’s parole violation. *People v Clark (Dale)*, unpublished per curiam opinion of the Court of Appeals, issued October 2, 2003 (Docket No. 240139), slip op pp 3-4. The convictions prohibited from inclusion under PRV 7 are those where an offender will be sentenced for at least one concurrent or subsequent conviction at the time of the sentencing offense, and the concurrent or subsequent conviction will result in a mandatory consecutive sentence. *Id.* at slip op p 4. PRV 7 does not apply to consecutive sentences that may result from a separate parole violation hearing, because a separate parole violation hearing is not a concurrent felony conviction for purposes of MCL 777.57(2)(c). *Clark (Dale)*, slip op at 4.

**Part B: Scoring the Offense Variables (OVs)**

### 3.9 Background on OVs

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

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

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

Previously, sentencing courts were generally required to either impose a minimum sentence within the appropriate minimum range as calculated under the sentencing guidelines, MCL 769.34(2), or to articulate “a substantial and compelling reason” to depart from that range, MCL 769.34(3). However, in 2015, the Michigan Supreme Court, applying Alleyne v United States, 570 US 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, 399 (2015), rev’g in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)],”32 further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399, citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis supplied).33 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[“]).34

However, the Lockridge Court specifically noted that its holding “[did] nothing to undercut the requirement that the highest number of points

32 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.

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

34 The Steanhouse II Court rejected the prosecution’s contention that Lockridge, 498 Mich 358, “rendered the legislative sentencing guidelines advisory only in cases that involved judicial fact-finding that [unconstitutionally] increased the applicable guidelines range and that[, by virtue of MCL 8.5,] the guidelines remain mandatory in all other cases.” Steanhouse II, 500 Mich at 465. “[T]rial courts [cannot be] statutorily directed to score the ‘highest number of points’ possible but [be] constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are found by a judge rather than by a jury or admitted by a defendant.” Steanhouse II, 500 Mich at 467-468.
possible must be assessed for all OVs, whether using judge-found facts or not.” Lockridge, 498 Mich at 392 n 28, citing MCL 777.21(1)(a); MCL 777.31(1); MCL 777.32(1). “The fact that a trial court engaged in judicial fact-finding is not relevant to the inquiry with respect to an evidentiary challenge[ ]” to the scoring of the OVs. People v Biddles, 316 Mich App 148, 158, 161 (2016) (citing Lockridge, 498 Mich at 389, and disagreeing, “with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant’s OV score under the guidelines[ ]” which “is in direct contradiction of the Lockridge Court’s rejection of the defendant’s argument that juries should be required to find the facts used to score the OVs[ ]”). Under Lockridge, 498 Mich at 392 n 28, “judicial fact-finding is proper, as long as the guidelines are advisory only.” Biddles, 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[ ]’”.

3.10 OVs According to Crime Group

MCL 777.21 details the method by which an offender’s recommended minimum sentence range is determined using the offender’s prior record variable (PRV) and OV scores. The offense category or “crime group” to which the sentencing offense belongs “[is] used to determine which of the OVs to score for [the] crime and how those OVs should be scored.” People v Bonilla-Machado, 489 Mich 412, 422 (2011); see also MCL 777.21(1)(a). The total number of points assessed for all OVs scored for an offense constitutes the offender’s “OV level,” which is represented by the vertical axis on each sentencing grid.35 MCL 777.21(1)(a).

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

35 Sentencing grids are found in MCL 777.61 to MCL 777.69. Each grid is also available by clicking here.
in the offense variable statutes.” Accordingly, “a felony statutorily designated as a ‘crime against public safety’ may not be used to establish a ‘pattern of felonious criminal activity involving three or more crimes against a person’ for purposes of scoring OV 13.” Bonilla-Machado, 489 Mich at 430-431. See also People v Pearson (Jermaine), 490 Mich 984 (2012) (because “conspiracy is classified as a ‘crime against public safety’” under MCL 777.18, conspiracy to commit armed robbery may not be considered when scoring OV 13, even though armed robbery is classified under MCL 777.16y as a “‘crime’ against a person”; MCL 777.21(4) “does not allow the offense category underlying the conspiracy to dictate the offense category of the conspiracy itself for purposes of scoring OV 13”); People v Reynolds (Regan), 495 Mich 921, 921 (2014) (citing Pearson (Jermaine), 490 Mich 984, and Bonilla-Machado, 489 Mich 412, and holding that because “[a] conspiracy conviction cannot be scored as a crime against a person[,]” the trial court erred in “consider[ing] the defendant’s conspiracy conviction to be a crime against a person[,]” for purposes of scoring OV 12 and OV 13).

A. Crimes Against a Person (Person)

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

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

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

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

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

B. Crimes Against Property (Property)

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

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

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

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

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

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

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

E. Crimes Against Public Safety (Pub Saf)

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

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

Score OV 18 if the offense or attempted offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(5).
Section 3.11 Criminal Proceeding Benchbook, Vol. 2

3.11 OV Scoring In General

A. Evidentiary Standard

“‘[A] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.’” People v Jones (Byron), 494 Mich 880, 880-881 (2013), quoting People v Osantowski, 481 Mich 103, 111 (2008) (emphasis omitted); see also People v Hardy (Donald), 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016; People v Steanhouse (Steanhouse I), 313 Mich App 1, 38 (2015), aff’d in part and rev’d in part on other grounds by People v Steanhouse (Steanhouse II), 500 Mich 453, 459-461 (2017).37 “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” Hardy (Donald), 494 Mich at 438; see also Steanhouse I, 313 Mich App at 38; People v Gullett, 277 Mich App 214, 217 (2007).38

B. Conduct Beyond the Sentencing Offense

“Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable.” People v McGraw, 484 Mich 120, 133 (2009). “McGraw[, 484 Mich at 122, 130-134,] . . . requires a court to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was charged and later dismissed or dropped, regardless of the sequence in which the conduct transpired.” People v Gray (Orlando), 297 Mich App 22, 33-34


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

38 In People v Lockridge, 498 Mich 358, 365, 399 (2015), the Court held that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the guidelines “are advisory only.” Because nothing in Lockridge specifically calls into question the standards currently governing appellate review of judicial fact-finding in scoring the (now advisory) guidelines, it is unclear to what extent these standards remain good law. The Court of Appeals has since concluded that, “given the continued relevance to the Michigan sentencing scheme of scoring the variables, the standards of review traditionally applied to the trial court’s scoring of the variables remain viable after Lockridge.” Steanhouse I, 313 Mich App at 38, citing Lockridge, 498 Mich at 392 n 28; Hardy, 494 Mich at 438; Gullett, 277 Mich App at 217.
(2012). “However, . . . a trial court may properly consider all of [the] ‘defendant’s conduct during’ that offense.” *People v Chelmicki*, 305 Mich App 58, 72 (2014) (quoting *McGraw*, 484 Mich at 134, and holding that the trial court properly scored OV 1 based on “[the] defendant’s act of holding a BB gun to the victim’s head . . . ‘during’ the ongoing offense of unlawful imprisonment[]”). See also *People v Nawwas*, 499 Mich 874, 874 (2016) (citing *McGraw*, 484 Mich at 135, and holding that where the defendant was convicted of discharge of a firearm in an occupied facility, MCL 750.234b(2), possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a pistol in a motor vehicle, MCL 750.227, 39 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[]”).

C. Conduct Inherent in a Crime

“[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables.” *Hardy (Donald)*, 494 Mich at 441-442 (holding that “[t]he Court of Appeals . . . erred in [People v Glenn (Devon), 295 Mich App 529, 535 (2012),] to the extent it concluded that ‘circumstances inherently present in the crime must be discounted for purposes of scoring an OV[]’”). “The sentencing guidelines explicitly direct courts to disregard certain conduct inherent in a crime when scoring OVs 1, 3, 8, 11, and 13[40]; however, in all other cases, ‘the Sentencing Guidelines allow a factor that is an element of the crime charged to also be considered when computing an offense variable score.’” *Hardy (Donald)*, 494 Mich at 442, quoting *People v Gibson (Terrance)*, 219 Mich App 530, 534 (1996) (holding that the defendant was properly assessed points for OV 2 under the judicial sentencing guidelines—the equivalent of OV 3 under the statutory guidelines—for causing personal injury to the victim even though personal injury was an element of the CSC-I charge against the defendant).

See also *People v Nantelle*, 215 Mich App 77, 84-85 (1996) (the age of the victim and the defendant’s position of authority were elements of CSC-II and were factors properly considered in scoring OV 7 under the judicial guidelines—OV 10 under the statutory guidelines); *People v Cotton*, 209 Mich App 82, 84 (1995) (it was

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

40 See e.g., OV 3, where the guidelines preclude scoring five points for injury if bodily injury is an element of the sentencing offense, and OV 8, where the guidelines preclude scoring points for asportation when the sentencing offense is kidnapping. MCL 777.33(2)(d); MCL 777.38(2)(b).
proper to prosecute the defendant for CSC-I because the victim was younger than 13 years of age and to assess points for OV 7—OV 10 under the statutory guidelines—against the defendant for exploiting a victim’s vulnerability because the victim was younger than 13 years of age).

D. Co-offenders’ Conduct

“[T]he court may not assess a defendant points solely on the basis of his or her co-offender’s conduct unless the OV at issue explicitly directs the court to do so.” People v Gloster, 499 Mich 199, 205, 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 [or her] co-offenders in multiple-offender situations[ ]”). “[T]he Legislature has explicitly provided that all offenders in a multiple-offender situation should receive the same score for OVs 1, 2, and 3, but excluded that language from other OVs[.]” Gloster, 499 Mich at 206.

3.12 OV 1—Aggravated Use of a Weapon

A. Definitions/Scoring

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

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 1—Aggravated use of a weapon</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>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).</td>
</tr>
<tr>
<td>20</td>
<td>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.</td>
</tr>
<tr>
<td>15</td>
<td>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).</td>
</tr>
<tr>
<td>10</td>
<td>The victim was touched by any other type of weapon. MCL 777.31(1)(d).</td>
</tr>
</tbody>
</table>
• Each person in danger of injury or loss of life is counted as a victim for purposes of scoring OV 1. MCL 777.31(2)(a).

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

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

• Score five points if an offender used a chemical irritant, a chemical irritant or smoke device, or an imitation harmful substance or device. MCL 777.31(2)(d).41

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

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

• “‘Incendiary device’ includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device.” MCL 777.31(3)(b).

### B. Case Law Under the Statutory Guidelines

#### 1. Offense-Specific Nature of OV 1

“OV 1 is an ‘offense-specific’ variable; therefore, in scoring OV 1, the trial court [is] limited to ‘considering the sentencing offense alone.’” People v Chelmicki, 305 Mich App 58, 72 (2014), quoting People v McGraw, 484 Mich 120, 127 (2009). “However, in doing so, a trial court may properly consider all of [the] ‘defendant’s conduct during’ that offense.” Chelmicki, 305 Mich App at 71-72 (quoting McGraw, 484 Mich at 134, and rejecting the defendant’s contention that because “the [sentencing] offense of unlawful imprisonment was ‘complete’ the moment

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he [asported the victim], . . . evidence of his putting [a] BB gun to the victim’s head occurred after that crime and, therefore, [could not] be used in scoring OV 1[;]” rather, ten points were properly scored for OV 1 because “[the] defendant’s act of holding a BB gun to the victim’s head was conduct that occurred ‘during’ the ongoing offense of unlawful imprisonment[’].” Where “there was no evidence that [the] defendant’s possession of [a] gun, which was used to support [his] felon-in-possession conviction, entailed [the] defendant’s discharge of the weapon, let alone discharging it at or toward a human being[, t]he trial court . . . clearly erred by assessing 25 points for OV 1[.]” People v Biddles, 316 Mich App 148, 166 (2016), citing Chelmicki, 305 Mich App at 72; McGraw, 484 Mich at 127.

2. Multiple Offender Provision

The instructions for scoring OV 1 include specific directions in cases involving multiple offenders.42 For OV 1, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same number of points. MCL 777.31(2)(b). However, the multiple offender provision applies only when the offenders are being scored for the same offense. People v Johnston, 478 Mich 903, 904 (2007).43 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 904.44 In other words, when more than one offender is involved in the same criminal conduct but only one offender is convicted of a specific crime arising from the conduct, that particular crime does not involve multiple offenders for purposes of scoring OV 1.

“[I]n the absence of any clear argument that the scores assessed [against the first offender] were incorrect,” the multiple

42 OVs 2 and 3 also have multiple offender provisions.

43 However, see People v Jackson (Antjuan), 320 Mich App 514, 523-527 (2017), 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 (Antjuan) Court did not, however, specifically address the fact that the defendant and codefendant were not convicted of the same offense.

44 Johnston, 478 Mich at 904, overruled People v Villegas, unpublished per curiam opinion of the Court of Appeals, issued October 27, 2005 (Docket Nos. 253447, 253512, and 254284). In those consolidated cases involving the multiple offenders at issue in the scoring of OV 1, defendant Johnston’s codefendants were convicted of felonious assault (assault with a dangerous weapon), but defendant Johnston’s convictions did not involve the use of a weapon.
offender provision in OV 1 and OV 3 requires that other offenders convicted of the same offense must be assessed the same number of points. *People v Morson*, 471 Mich 248, 261-262 (2004) (the defendant and the codefendant robbed a woman at gunpoint and a third party was injured when the codefendant shot him). At issue in *Morson*, 471 Mich at 258-259, was the fact that the defendant, who was sentenced after the codefendant was sentenced, received higher scores for OV 1 and OV 3 than did the codefendant. The prosecution argued that the statute clearly required that the highest number of points be assessed for each variable, but it did not dispute the codefendant’s scores at her sentencing and did not contend on the defendant’s appeal that the codefendant’s scores were inaccurate or erroneous. *Id.* at 259. Under these circumstances, the *Morson* Court explained:

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

The multiple-offender provisions in OV 1 and OV 3 were “not implicated” where “[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm,” and was convicted only of felon-in-possession “based on evidence apart from the shooting[ of the victim], and . . . [his] codefendant . . . was convicted by plea of the crimes for which [the] defendant was acquitted.” *Biddles*, 316 Mich App at 164, 166 (citing *Johnston*, 478 Mich at 904, and *Morson*, 471 Mich at 260 n 13, and concluding that, because the defendant and his codefendant were not convicted of the same specific offense, the case “was not a multiple-offender case[]”).

The multiple-offender provisions of OV 1 and OV 2 required that the defendant be assessed 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 (Antjuan)*, 320 Mich App 514, 525-526 (2017). “[T]rial courts have no scoring discretion in multiple offender cases” under MCL 777.31(2)(b) and MCL 777.32(2). *Jackson (Antjuan)*, 320 Mich App at 525. 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 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 [the] defendant’s acquittal of . . . felony-firearm charges.” Jackson (Antjuan), 320 Mich App at 525-526 (additionally noting that even if the multiple-offender provisions did not apply, there was sufficient evidence to support the scores of 15 points for OV 1 and five points for OV 2 where testimony at trial indicated that guns were pointed at the robbery victims and that the defendant was “the lead gunman”).

3. Inoperable Weapons

The definition of a firearm “does not prescribe a requirement that the weapon be ‘operable’ or ‘reasonably or readily repairable.’ . . . [T]he design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a ‘firearm.’” People v Peals, 476 Mich 636, 638 (2006) (construing the definition of “firearm” for purposes of determining whether the defendant was a felon in possession of a firearm, MCL 750.224f[1]). See also People v Humphrey, 312 Mich App 309, 318, 319 n 4 (2015) (holding that “under Peals, [476 Mich at 638, 642,] the operability of a firearm is not relevant to firearms offenses under Chapter XXXVII of the Michigan Penal Code, and the inoperability of a pistol is [not] a valid affirmative defense to a [carrying a concealed weapon (CCW)] charge[,]” and further noting that “the reasoning employed in Peals is . . . viable” under the definition of firearm in both former MCL 750.222(d) and MCL 750.222(e) as amended by 2015 PA 28, effective August 10, 2015)45; People v Rueda (On Reconsideration), unpublished per curiam opinion of the Court of Appeals, issued March 24, 2011 (Docket No. 291914), slip op p 3 (citing Peals, 476 Mich at 652 n 7, 655-656, and holding that the trial court properly assessed 15 points for OV 1 where the gun used in the scoring offense had missing internal parts, rendering it temporarily inoperable).46

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

46 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
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 (Randall)*, 304 Mich App 318, 321 (2014). When determining whether a knife or other cutting or stabbing weapon was used to threaten the victim or was merely displayed or implied,

“the fact that some kind of weapon is apparently present, by sight or by implication, in the abstract warrants [an] assessment of 5 points under MCL 777.31(1)(e). To warrant [an] assessment of 15 points under MCL 777.31(1)(c), there must be some reason, however slight, for the victim to reasonably perceive that the weapon will actually be used, and moreover, will actually be used against the victim. A threat exists when a knife is used for the purpose of suggesting to the victim a ‘menace or source of danger[,]’” *Brooks (Randall)*, 304 Mich App at 322, quoting *Random House Webster’s College Dictionary* (1997).

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

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

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

5. Harmful Substances
   • “Exposure”

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

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

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

• “Harmful chemical substance”

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

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

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

“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, ___ Mich App ___, ___ (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. at ___. 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. at ___. 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 ___.

6. Unconventional Weapons

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

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

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

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

Where the defendant admitted throwing a stick that struck the victim’s leg and knocked the victim down, the evidence

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47 The defendant’s scoring error claims were unpreserved and unreviewable; however, the Court, in the context of the defendant’s claim that he was denied the effective assistance of counsel, reviewed the defendant’s claim that OV 1 was improperly scored. Because of this, the Court characterized its analysis of the scoring issues as dicta with regard to a properly preserved challenge to the same scoring issues that may occur in subsequent cases. *Wilson (John)*, 252 Mich App at 392-393, 395 n 1.
established that the “victim was touched [with] any other type of weapon” for the purposes of scoring OV 1. People v Jones (Kenneth), unpublished per curiam opinion of the Court of Appeals, issued July 22, 2003 (Docket No. 238557), vacated on other grounds by People v Jones (Kenneth), 469 Mich 984 (2003).48

7. Use of Bare Hands as a Weapon

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

8. Implied Use or Possession of Weapon

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

Where the complainant testified that he was under the impression that the defendant was carrying a gun because the defendant kept his hand inside his shirt during the robbery, OV 1 was correctly scored for the defendant’s implied use of a weapon. People v Gholston, unpublished per curiam opinion of the Court of Appeals, issued September 11, 2003 (Docket No. 240810).

9. Sufficient Evidence to Support OV 1 Score

Although the evidence did not suggest that the defendant intended to hit the victim when shooting his gun over the victim’s bed and head, it also did not suggest that he intentionally shot away from the victim; thus, OV 1 was properly scored at 25 points because the trial court had “a sound evidentiary basis” for determining that the shooter discharged his gun “in the victim’s general direction,” i.e. toward the victim. People v Greyerbiehl, unpublished per curiam opinion of the Court of Appeals, issued June 10, 2004 (Docket No. 238557).

48 The Michigan Supreme Court remanded the case for the Court of Appeals to reconsider the trial court’s sentence in light of People v Babcock, 469 Mich 247 (2003). In its opinion on remand, the Court of Appeals “adopt[ed] and reaffirm[ed] its prior opinion regarding all non-departure issues.” People v Jones (Kenneth), unpublished per curiam opinion of the Court of Appeals, issued June 10, 2004 (Docket No. 238557).
opinion of the Court of Appeals, issued December 20, 2002 (Docket No. 233472).

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

10. OV Score Inconsistent with Jury Verdict

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

11. Statutory Interpretation and Intent of OV 1

“[T]he central focus of OV 1 is not the type of weapon involved, but rather the manner in which the weapon was used.” People v Rutley, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2010 (Docket No. 291682), slip op p 4. Even though “firearm” is not specifically listed in MCL 777.31(1)(d), as it is in MCL 777.31(1)(a) (firearm was discharged at or toward a human being) and MCL 777.31(1)(c) (firearm was pointed at or toward a victim), the phrase used in MCL 777.31(1)(d) (victim was touched by any other type of weapon) must be read to include a firearm. Rutley, slip op p 4. In Rutley, slip op at 4, points were properly assessed under MCL 777.31(1)(d) because the victim was clearly “touched by any other type of weapon” when the defendant struck the victim several times with a pistol.
C. Relevant Case Law Under the Judicial Guidelines

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

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

A. Definitions/Scoring

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

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 2—Lethal potential of the weapon possessed or used</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>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.</td>
</tr>
<tr>
<td>15</td>
<td>The offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon. MCL 777.32(1)(b).</td>
</tr>
<tr>
<td>10</td>
<td>The offender possessed or used a short-barreled rifle or a short-barreled shotgun. MCL 777.32(1)(c).</td>
</tr>
<tr>
<td>5</td>
<td>The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon. MCL 777.32(1)(d).</td>
</tr>
<tr>
<td>1</td>
<td>The offender possessed or used any other potentially lethal weapon. MCL 777.32(1)(e).</td>
</tr>
<tr>
<td>0</td>
<td>The offender possessed or used no weapon. MCL 777.32(1)(f).</td>
</tr>
</tbody>
</table>

- In cases involving multiple offenders, if one offender is assessed points for possessing a weapon, all offenders must be assessed the same number of points. MCL 777.32(2).
• “Harmful biological substance,” “harmful biological device,” “harmful chemical substance,” “harmful chemical device,” “harmful radioactive material,” and “harmful radioactive device” are defined in MCL 750.200h. MCL 777.32(3)(a).

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

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

• An “‘[i]ncendiary device’ includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device.” MCL 777.32(3)(d).

B. Case Law Under the Statutory Guidelines

1. Multiple Offender Provision

   The instructions for scoring OV 2 include specific directions in cases involving multiple offenders.49 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). However, the multiple offender provision applies only when the offenders are being scored for the same offense. Johnston, 478 Mich at 904.50 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 904.51 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

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49 OVs 1 and 3 also have multiple offender provisions.

50 However, see People v Jackson (Antjuan), 320 Mich App 514, 525-526 (2017), 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 (Antjuan) Court did not, however, specifically address the fact that the defendant and codefendant were not convicted of the same offense.
The multiple-offender provisions of OV 1 and OV 2 required that the defendant be assessed 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 (Antjuan)*, 320 Mich App 514, 525-526 (2017). “[T]rial courts have no scoring discretion in multiple offender cases” under MCL 777.31(2)(b) and MCL 777.32(2). *Jackson (Antjuan)*, 320 Mich App at 525. 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 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 [the] defendant’s acquittal of . . . felony-firearm charges.” *Jackson (Antjuan)*, 320 Mich App at 525-526 (additionally noting that even if the multiple-offender provisions did not apply, there was sufficient evidence to support the scores of 15 points for OV 1 and five points for OV 2 where testimony at trial indicated that guns were pointed at the robbery victims and that the defendant was “the lead gunman”).

2. **Inoperable Weapons**

The definition of a firearm “does not prescribe a requirement that the weapon be ‘operable’ or ‘reasonably or readily repairable.’ . . . [T]he design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a ‘firearm.’” *Peals*, 476 Mich at 638. See also *People v Rueda (On Reconsideration)*, unpublished per curiam opinion of the Court of Appeals, issued March 24, 2011 (Docket No. 291914), slip op pp 3-4, citing *Peals*, 476 Mich 650 (trial court properly assessed five points for OV 2 where the gun used in the scoring offense had missing internal parts rendering it temporarily inoperable).\(^\text{52}\)

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\(^{51}\) *Johnston*, 478 Mich at 904, overruled *People v Villegas*, unpublished per curiam opinion of the Court of Appeals, issued October 27, 2005 (Docket Nos. 253447, 253512, and 254284). In those consolidated cases involving the multiple offenders at issue in the scoring of OV 1, defendant Johnston’s codefendants were convicted of felonious assault (assault with a dangerous weapon), but defendant Johnston’s convictions did not involve the use of a weapon.

\(^{52}\) Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
3. **Harmful Substances**

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

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*, ___ Mich App ___, ___ (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 ___. (noting that OV 1 and OV 2 both refer to a “harmful chemical substance” and use the same definition for the term).

4. **Controlled Substances**

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

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

5. Unconventional Weapons

“A metal pipe or bat used to strike a person in the head is unquestionably a potentially lethal weapon.” People v McCuller, unpublished per curiam opinion of the Court of Appeals, issued January 11, 2005 (Docket No. 250000).54

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 lethal weapon[.]” People v Rodriguez, ___ Mich App ___, ___ (2019).

6. Use of Bare Hands as a Weapon

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

7. Sufficient Evidence to Support OV 2 Score

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

54 This conclusion was reviewed by the Michigan Supreme Court in People v McCuller, 479 Mich 672, 696 (2007). The Court (after remand from the United States Supreme Court on other grounds) stated that “the uncontroversed and overwhelming evidence showed beyond a reasonable doubt that the victim was touched by a weapon[, and i]n regard to OV2, the uncontested and overwhelming evidence regarding the magnitude of the victim’s injuries demonstrated that the weapon used to injure him was potentially lethal.”
A witness’s testimony that the weapon used by the defendant “was shorter than a normal size shotgun” is sufficient to support a score of ten points under OV 2. *People v Brewer (Michael)*, unpublished per curiam opinion of the Court of Appeals, issued February 19, 2004 (Docket No. 242764).

Where “the only weapon found at the scene was an ‘Airsoft’ pellet gun[,]” and where the trial court found that “there was ‘no credible evidence to indicate that the defendant had in his possession or was assisting someone else in the possession of a firearm[,]’” five points should not have been assessed under OV 2. *People v Hood (Lavise)*, unpublished per curiam opinion of the Court of Appeals, issued November 7, 2013 (Docket Nos. 307575, 308316, 311136, 315294)\(^{55}\) (holding that “[b]ecause there was no testimony or other evidence presented about the lethality of the Airsoft gun, [OV 2 should be scored at zero]”).

### 3.14 OV 3—Physical Injury to a Victim

#### A. Definitions/Scoring

OV 3 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22(1)-(5). To score OV 3, determine which statements addressed by the variable apply to the offense and assign the point value indicated by the applicable statement with the highest number of points. MCL 777.33(1).

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

\(^{55}\) Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
• In cases involving multiple offenders, if one offender is assessed points for death or physical injury, all offenders must be assessed the same number of points. MCL 777.33(2)(a).

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

• Score 50 points if death results from an offense or attempted offense that involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive\textsuperscript{56} 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\textsuperscript{57} 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).

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

• “Requiring medical treatment” refers to an injury’s need for treatment, not whether a victim was successful in obtaining treatment. MCL 777.33(3).

B. Case Law Under the Statutory Guidelines

1. Sufficient Evidence

If “a preponderance of the evidence [independently] supports the trial court’s . . . score,” the trial court is not required to “independently verify” disputed information contained in the presentence investigation report (PSIR) or conduct an evidentiary hearing. People v Maben, 313 Mich App 545, 550-552

\textsuperscript{56} See MCL 777.1 for definitions of “aircraft,” “ORV,” “snowmobile,” “vehicle,” and “vessel.”

\textsuperscript{57} Effective October 1, 2021, the alcohol content level increases to 0.10 grams or more.
(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), overruled in part on other grounds by People v Hardy (Donald), 494 Mich 430, 438 n 18 (2013), 58 effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016.

Where the jury convicted the defendant of first-degree child abuse and second-degree murder for the death of her newborn infant, 25 points should have been scored for OV 3, irrespective of the existence of “conflicting evidence surrounding the baby’s manner of death[.]” People v Portellos, 298 Mich App 431, 434, 446-448 (2012), overruled in part on other grounds by People v Calloway, 500 Mich 180 (2017) 59 (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 effects from the fracture or retinal hemorrhage. People v McFarlane, 325 Mich App 507, 532-533 (2018). However, 25 points were appropriately assessed under OV 3 because there

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58For more information on the precedential value of an opinion with negative subsequent history, see our note.

59For more information on the precedential value of an opinion with negative subsequent history, see our note.
was sufficient evidence that the victim’s injuries were life threatening 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.” *Id.* at 533.

“[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*, ___ Mich App ___, ___ (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 ___.

2. Victim

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

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

“[A] coperpetrator is properly considered a ‘victim’ for purposes of OV 3 when he or she is harmed by the criminal actions of the charged party[;]” accordingly, where the defendant’s coperpetrator was fatally shot by the homeowner during the home invasion for which the defendant was convicted, “[t]he trial court properly assessed 100 points for OV 3 because the coperpetrator was harmed by the criminal actions of [the] defendant.” *People v Laidler*, 491 Mich 339, 341-342 (2012). Noting that “[b]ecause OV 3 is defined as ‘physical injury to a victim,’ it is manifest that a ‘victim’ is required in all cases in which OV 3 is scored[,]” but that “MCL 777.33 does not define ‘victim,’” the *Laidler* Court concluded that “a ‘victim’ is any person who is harmed by the defendant’s criminal actions[,]” including a coperpetrator whose injury is factually caused by the defendant’s criminal actions. *Laidler*, 491 Mich at 343, 345-349. “But for [the] defendant’s commission of the [home invasion], [his coperpetrator] would not have been killed[;] . . . [b]ecause [the coperpetrator] was killed as a result of the home invasion perpetrated jointly with [the] defendant, he was clearly ‘harmed by the criminal actions’ of [the] defendant . . . [and, t]herefore, he was a ‘victim’ for purposes of OV 3.” *Id.* at 350. See also *People v Howe (Bryan)*, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2014 (Docket No. 313143), slip op pp 1-2, 10-11 (concluding that, under *Laidler*, 491 Mich at 352-353, “[a] defendant can be considered a ‘victim’ for purposes of scoring OV 3[,]” and holding that OV 3 was properly scored based on injuries the defendant sustained when a methamphetamine laboratory exploded).60


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60 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
3. Injury Must Result From Sentencing Offense

Under McGraw, 484 Mich at 133,61 “the ‘offense variables must be scored giving consideration to the sentencing offense alone.’” People v Mushatt, 486 Mich 934 (2010). In Mushatt, 486 Mich at 934, the trial court improperly assessed five points for OV 3, MCL 777.33(1)(e), where although an individual was bruised after being hit by the defendant’s car, the defendant was acquitted of the related felonious assault charge. Accordingly, the individual did not constitute a victim for purposes of scoring OV 3 because “the injured woman was not injured by the criminal actions that were the subject of [the defendant’s] convictions (fleeing and eluding and larceny).” Mushatt, 486 Mich at 934. See also People v Dolittle, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2011 (Docket No. 298235)62 (trial court erred in scoring 100 points under OV 3 where there was no evidence that a victim was killed during the course of the defendants’ arson offense; although the defendants set fire to a dumpster containing a dead body, no factual causation existed to support the score because the decedent had been killed by someone other than the defendants prior to the arson).

Where “[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm,” and was convicted only of felon-in-possession “based on evidence apart from the shooting[ of the victim], and . . . [his] codefendant . . . was convicted by plea of the crimes for which [the] defendant was acquitted[,]” the trial court erred in scoring 100 points for OV 3; “looking solely at [the] defendant’s conduct,” it could not be concluded that the victim’s death “resulted from or was factually caused by [the] defendant’s commission of the offense of felon-in-possession[.]” Biddles, 316 Mich App at 164-165, citing Mushatt II, 486 Mich 934; McGraw, 484 Mich at 129.

4. Multiple Offender Provision

The instructions for scoring OV 3 include specific directions in cases involving multiple offenders.63 For OV 3, where multiple offenders are involved and one offender is assessed points under the variable, all offenders must be assessed the same

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

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

63 OVs 1 and 2 also have multiple offender provisions.
number of points. MCL 777.33(2)(b). However, the multiple offender provision applies only when the offenders are being scored for the same offense. Johnston, 478 Mich at 904.\textsuperscript{64} 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. \textit{Id.} at 904.\textsuperscript{65} 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 3.

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

\textsuperscript{64} However, see \textit{People v Jackson (Antjuan)}, 320 Mich App 514, 525-526 (2017), which applied the multiple-offender provisions of OV 1 and OV 2 to the defendant—who was convicted of \textit{unarmed} robbery—based on the scores for those variables previously assessed against his codefendant, who was convicted of \textit{armed} robbery. (The \textit{Jackson (Antjuan)} Court did not, however, specifically address the fact that the defendant and codefendant were not convicted of the same offense.)

\textsuperscript{65} \textit{Johnston}, 478 Mich at 904, overruled \textit{People v Villegas}, unpublished per curiam opinion of the Court of Appeals, issued October 27, 2005 (Docket Nos. 253447, 253512, and 254284). In those consolidated cases involving the multiple offenders at issue in the scoring of OV 1, defendant Johnston’s codefendants were convicted of felonious assault (assault with a dangerous weapon), but defendant Johnston’s convictions did not involve the use of a weapon.
The multiple-offender provisions in OV 1 and OV 3 were “not implicated” where “[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm,” and was convicted only of felon-in-possession “based on evidence apart from the shooting[ of the victim], and . . . [his] codefendant . . . was convicted by plea of the crimes for which [the] defendant was acquitted.” Biddles, 316 Mich App at 164, 166 (citing Johnston, 478 Mich at 904, and Morson, 471 Mich at 260 n 13, and concluding that, because the defendant and his codefendant were not convicted of the same specific offense, the case “was not a multiple-offender case[]”).

5. Bodily Injury

“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, ___ Mich App ___, ___ (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 ___.

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

“The defendant’s conduct need not be the sole cause of the victim’s death” for a score under OV 3; rather, in determining
the number of points to assess when the sentencing offense is a homicide, a court must consider “whether, but for the defendant’s conduct, the victim’s death would have occurred.”  

Portellos, 298 Mich App at 448. Therefore, where the jury convicted the defendant of first-degree child abuse and second-degree murder for the death of her newborn infant, 25 points should have been scored for OV 3, irrespective of the existence of “conflicting evidence surrounding the baby’s manner of death[.]” Id. at 434, 447-448.

The fact that an assault with intent to commit murder “could have ended in the KR’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). “However, OV 3 does not assess whether a defendant’s actions were life-threatening; rather, OV 3 assesses whether a victim’s injuries are life-threatening.” Id. at 746. Therefore, where a defendant is convicted of assault with intent to commit murder, 25 points should be scored 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 life in danger, OV 3 should not be scored.” Id. at 746.

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 KR’s neck, and broken blood vessels around her eyes.” Id. at 731. The Court of Appeals held that 25 points were properly scored for OV 3, noting that although “the act of strangulation [may not] always [be] enough to score OV 3, . . . 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.

Pregnancy resulting from sexual assault is “bodily injury” for purposes of scoring OV 3. People v Cathey, 261 Mich App 506, 513-514 (2004). The Cathey Court approved the resolution of this issue in a case decided under the judicial guidelines—People v Woods (Joseph), 204 Mich App 472, 474-475 (1994) (under the judicial guidelines then in effect, bodily injury was addressed by OV 2). Cathey, 261 Mich App at 511-512. The Woods (Joseph) Court quoted with approval a California appellate court’s decision involving a similar issue:
“‘A pregnancy resulting from a rape (and, in this case, a resulting abortion) are not injuries necessarily incidental to an act of rape. The bodily injury involved in a pregnancy (and, in this case, a resulting abortion) are significant and substantial. Pregnancy cannot be termed a trivial, insignificant matter. It amounts to significant and substantial bodily injury or damage. . . . Major physical changes begin to take place at the time of pregnancy. It involves a significant bodily impairment primarily affecting a woman’s health and well being. It is all the more devastating when imposed on a woman by forcible rape.’” Woods (Joseph), 204 Mich App at 474-475, quoting People v Sargent, 86 Cal App 3d 148, 151-152; 150 Cal Rptr 113 (1978).

Ten points were properly assessed where a rape victim “suffered an infection as a consequence of the rape[, because . . . t]his is sufficient to constitute ‘bodily injury requiring medical treatment’ within the meaning of OV 3.” People v McDonald (Deandre), 293 Mich App 292, 298 (2011). The McDonald (Deandre) Court defined “bodily injury” in the context of OV 3 as “encompass[ing] anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence.” Id. at 298. See also People v Lampe, ___ Mich App ___ (2019) (ten points properly assessed for OV 3 where the evidence supported 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).

Five points may be assessed against a defendant for bodily injury not requiring medical treatment where “the victim received a homemade tattoo and sustained a small bruise to her right buttock and irritation and redness to her vaginal opening.” People v Apgar, 264 Mich App 321, 329 (2004), overruled in part on other grounds by People v White (Anthony), 501 Mich 160 (2017).66

“Whether an injury required medical treatment [for purposes of scoring 10 points under MCL 777.33(1)(d)] depends on whether the treatment was necessary, not on whether the victim successfully obtained treatment[;]” however, OV 3 must

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66For more information on the precedential value of an opinion with negative subsequent history, see our note.
not be construed “in a way that would allow courts to assume that all bodily injuries require medical treatment, when there is no evidence that treatment was necessary, [as this construction] would render [MCL 777.33(1)(e)]—which concerns injuries that do not require medical treatment—surplusage.” People v Armstrong (Parys), 305 Mich App 230, 246 (2014) (holding that even if the criminal sexual conduct victim “suffered from a reddened and tender hymen, the evidence did not support assessing 10 points under OV 3 because there [was] no evidence that medical treatment was necessary for [this] injury”) (citations omitted).

Where the defendant disputed that the victim “actually went to the hospital,” contrary to the victim’s impact statement in the 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.” Maben, 313 Mich App at 550-552 (additionally noting that, under MCL 777.33(3), the phrase requiring medical treatment for purposes of OV 3 “‘refers to the necessity for treatment and not the victim’s success in obtaining treatment’”).

Absent any evidence that the victim was actually infected with HIV, life-threatening injury does not occur when a defendant with HIV has unprotected sex with an uninformed person. People v Clayton, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2002 (Docket No. 230328), slip op p 4. According to the Court, “Although it is clear that [the] defendant engaged in life threatening behavior, . . . there is no evidence that the victim was actually infected with HIV as a result[, and] . . . we decline to speculate regarding whether such an injury will occur in the future.” Id. 67

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

Where nothing in the record indicated that the victim’s breathing troubles and repeated loss of consciousness following a sexual assault were related to a physical, rather

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67 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
than a psychological, injury resulting from the assault, and where ten points were also scored for OV 4 (psychological injury to a victim), the trial court erred in scoring ten points for OV 3. *People v Taylor (Keondo)*, unpublished per curiam opinion of the Court of Appeals, issued June 28, 2011 (Docket No. 296915).

Twenty-five points were properly scored 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).

### 6. Sentencing Departure\(^{68}\)

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

### 7. Claim of Lockridge Error

The trial court’s assessment of 50 points for OV 3 and 100 points for OV 9 did not violate the defendant’s Sixth Amendment right to a jury trial where the “jury . . . found [the] defendant guilty of OUIL causing death, which required the jury to find that [the] defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof[,]” and “two counts each of second-degree murder[,] . . . reflect[ing] that the jury found beyond a reasonable doubt that multiple deaths occurred[,]” under these circumstances, “each of the facts necessary to support [the OV scores] was necessarily found by the jury beyond a reasonable doubt.” *People v Bergman*, 312 Mich App 471, 498, 499 (2015) (noting that where “facts found by the jury [are] sufficient to assess the

\(^{68}\) In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court “[s]truck down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1.
minimum number of OV points necessary for [the] defendant’s placement in the . . . cell of the sentencing grid under which [he or] she [is] sentenced, there [is] no plain error and [the] defendant is not entitled to resentencing or other relief [on an unpreserved claim] under [People v Lockridge, 498 Mich 358 (2015)]

### 3.15 OV 4—Psychological Injury to a Victim

#### A. Definitions/Scoring

OV 4 is scored for all offenses to which the guidelines apply except crimes involving a controlled substance. MCL 777.22(1), (2), (4), and (5). Score OV 4 by determining which statement applies to the offense and assigning the point value indicated by the applicable statement. MCL 777.34(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 4—Degree of psychological injury sustained by a victim</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>Serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a).</td>
</tr>
<tr>
<td>5</td>
<td>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. MCL 777.34(1)(b).</td>
</tr>
<tr>
<td>0</td>
<td>No serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(c).</td>
</tr>
</tbody>
</table>

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

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

#### B. Case Law Under the Statutory Guidelines

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

1. **Evidence of Psychological Harm**

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

OV 4 does not require proof that a victim has already sought or received, or intends to seek or receive, professional treatment; rather, 10 points may be scored 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 (2017), which held that OV 5 did not require that a family member “be, at present, seeking or receiving professional treatment [or] carrying the intent to do so”69). 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 ‘everyday life was harder for her now[,]’” was fidgety and nervous while testifying; testified about her memory loss; and “was suffering digestive issues since the incident and was experiencing them that day in trying to get to the courthouse to give her testimony[.]” 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 contrastingly”).

However, “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 against the victim[.]” White (Anthony), 501 Mich at 163 (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 the instant crime[, 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, 182-183 (2012) (because “[t]here was no testimony indicating that [the victim] suffered a psychological injury, the presentence report contain[ed] no

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69 See Section 3.9(G)(2) for discussion of OV 5 and Calloway, 500 Mich 180.
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’”).

Additionally, “evidence of fear while a crime is being committed, by itself, is insufficient to assess points for OV 4.” White (Anthony), 501 Mich at 162, overruling Apgar, 264 Mich App at 329, “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.” 70 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[j]” therefore, “the trial court erred by assessing 10 points for [OV 4] . . . when the only evidence to support this scoring was the victim’s fear while the crime was being committed.” White (Anthony), 501 Mich at 162, 165 n 3 (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”) (first alteration in original). “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 165. See also People v McChester, 310 Mich App 354, 358-359 (2015) (holding that the trial court erred by assessing 10 points for OV 4 where “the only information or evidence in the record regarding the victim’s psychological state was the [presentence investigation report’s] reference to her being ‘visibly shaken]’” and there was no “indication from the victim herself regarding her psychological state[j]” while the victim “may very well have suffered a serious psychological injury requiring professional

70 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 (Anthony), 501 Mich at 164, 164 n 2, citing People v Williams (Zachary), 298 Mich App 121, 124 (2012); People v Earl (Ronald), 297 Mich App 104, 109 (2012), aff’d on other grounds 495 Mich 33 (2014); People v Davenport (After Remand), 286 Mich App 191, 200 (2009).
treatment or that may have required professional treatment, . . . there simply was not a preponderance of evidence establishing that the victim suffered a serious psychology injury”).

Where “the evidence showed that KR experienced a terrifying ordeal[] and actually sought professional counseling after” her ex-husband strangled her with a belt in the presence of her child, the trial court properly scored 10 points for OV 4. *Rosa*, 322 Mich App at 745 (noting that “the victim testified in detail to 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”).

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

“‘life has been terrible since the incidents. She states that she has a lot of nightmares, problems in her marriage, problems at work, and in just about every other facet of her life. She states that this whole situation has been a nightmare . . . She indicates that she has not sought treatment as of this writing date, however, she plans to do so in the future.’” *People v Drohan*, 264 Mich App 77, 90 (2004), aff’d on other grounds 475 Mich 140 (2006).71

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

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71 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).
continuing the sex acts. This, in light of the fact that the male victim’s demeanor on the stand was rather casual, indicates that the male victim suffered serious psychological injury as a result of this incident such that he was rendered unable to comprehend the gravity of his actions. This supports the trial court’s scoring of OV 4.

With regard to the female victim, the trial court relied on statements that she made ‘on the videotape and everything else.’ Though the female victim did not testify, the videotape shows that the female victim repeatedly indicated that she did not want to continue the sex acts and that the ‘motion lotion’ was hurting her, yet [the] defendant asserted that the videotape was not worth the money he spent on the female victim’s clothes and urged the female victim to continue. Ultimately, the female victim sat up in bed and remained silent while [the] defendant attempted to coax her into continuing. This evidence indicates that [the] defendant’s actions caused the female victim anxiety, altered her demeanor, and caused her to withdraw; it supports a finding of serious psychological injury occurring to the female victim.” *Wilkens*, 267 Mich App at 740-741.

Where one victim of an armed robbery “testified that the experience was traumatic and he had bad dreams about it,” another victim “stated[ at sentencing], ‘Not to mention what you took from us psychologically,’” and a third victim “indicated [in his impact statement] that he did not feel safe in his store,” ten points were properly scored for OV 4. *People v Gibbs (Phillip)*, 299 Mich App 473, 493 (2013). See also *People v Armstrong (Parys)*, 305 Mich App 230, 247-248 (2014) (citing *Gibbs (Phillip)*, 299 Mich App at 493, and noting that a “trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated[,]” therefore, even though the victim “testified that she did not want counseling because she did not want to continue to talk about her experience,” points were properly assessed under OV 4 because the victim’s “statements about the way the sexual assault affected her life showed that she suffered a psychological injury[ that] . . . may require treatment in the future”); *People v Schrauben*, 314 Mich App 181, 196-198 (2016) (holding that OV 4 was properly scored at 10 points for the defendant’s uttering and publishing convictions where the
victim “indicated in a letter 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 noted how . . . when [the] defendant committed the crimes, everything changed for [the victim]”).

The trial court properly scored 10 points for OV 4 “based on [the victim]’s fear that she was going to die” when she was confined and assaulted by her boyfriend; “on the fact (elicited at trial) that she wanted to look at pictures of her children as she died[;] . . . on all of the things that happened that [the court] heard firsthand from her and observed firsthand in the courtroom[;]” on “[t]he 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 on the victim’s indication that she experienced “nightmares, . . . 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) (fourth alteration in original).

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*, ___ Mich App ___, __ (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 __.

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

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

3.16 **OV 5—Psychological Injury to a Member of a Victim’s Family**

**A. Definitions/Scoring**

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

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 5—Psychological injury sustained by a member of a victim’s family</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Serious psychological injury requiring professional treatment occurred to a victim’s family member. MCL 777.35(1)(a).</td>
</tr>
<tr>
<td>0</td>
<td>No serious psychological injury requiring professional treatment occurred to a victim’s family member. MCL 777.35(1)(b).</td>
</tr>
</tbody>
</table>

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

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

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72 In *People v Lockridge*, 498 Mich 358, 391(2015), the Michigan Supreme Court “[s]truck down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1.
B. Case Law Under the Statutory Guidelines

“[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; in particular, 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.” People v Calloway, 500 Mich 180, 182 (2017), overruling People v Portellos, 298 Mich App 431 (2012), “to the extent it stated or implied otherwise.” The Calloway Court further explained:

“Although this threshold may seem low, trial courts must bear in mind that OV 5 requires a ‘serious psychological injury.’ . . . 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. However, even 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.” Calloway, 500 Mich at 186.

In Calloway, 500 Mich at 183, 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 ‘[w]as 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. 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; there 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.” Calloway, 500 Mich at 189.73

“[T]he trial court properly assessed 15 points for OV 5[1]” where “[t]he trial testimony[] . . . indicated that [the victim’s] parents were

73 See also Wellman, 320 Mich App at 609 (extending to OV 4 the reasoning of Calloway, 500 Mich 180). See Section 3.9(F)(2)(a) for discussion of OV 4 and Wellman, 320 Mich App 603.
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), aff’d in part and rev’d in part on other grounds by People v Steanhouse (Steanhouse II), 500 Mich 453, 459-461 (2017)74 (citations omitted). “[T]he facts as found by the trial court were not clearly erroneous and were supported by a preponderance of record evidence, and . . . the evidence sufficiently demonstrate[d] that [the victim’s] parents sustained serious psychological injury that may require professional treatment[,]” Id. at 39 (additionally noting that “[t]he trial court’s opportunity to observe the demeanor of [the victim’s] parents during their testimony also supported the trial court’s finding that [they] sustained psychological injury[,]” and that the victim “testified at the sentencing hearing that his parents were ‘deeply affected’ by the incident and [were] in the process of seeking psychological help[‘]”) (citations omitted).

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

Where the victim’s mother reported “that both her and her husband are receiving counseling and continue to feel depressed about the death of their daughter, stating that ‘there are no words that can describe it[,]’” the trial court properly scored OV 5 at 15 points. People v Rice (Ronald), unpublished per curiam opinion of the Court of Appeals, issued September 7, 2010 (Docket No. 291711).75

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

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

75 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
Points may be appropriate under OV 5 even when family members have a typical reaction to the death of a family member (trouble sleeping, anxiety affecting physical health, fear, and devastation), and the effect on the family members’ lives is not debilitating. *People v Chancy*, unpublished per curiam opinion of the Court of Appeals, issued December 14, 2004 (Docket No. 249893).

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

OV 5 was properly scored where the victim was survived by a young child who would grow up without a mother and where the child’s “caregivers would have to ‘explain to the . . . child why he does not have a mother like all the other children,’ and that the child’s loss ‘imposes . . . incomprehensible . . . additional concerns for the family[,]’” as indicated by statements made by the victim’s grandmother, grandfather, and uncle. *People v Laury*, unpublished per curiam opinion of the Court of Appeals, issued September 23, 2003 (Docket No. 238490).

### 3.17 OV 6—Intent to Kill or Injure Another Individual

#### A. Definitions/Scoring

OV 6 is scored only under very specific circumstances involving a crime against a person: when the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1). Score OV 6 by determining which statements apply to the sentencing offense and assigning the point value indicated by the
applicable statement having the highest number of points. MCL 777.36(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 6—Intent to kill or injure another individual</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>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).</td>
</tr>
<tr>
<td>25</td>
<td>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).</td>
</tr>
<tr>
<td>10</td>
<td>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).</td>
</tr>
<tr>
<td>0</td>
<td>The offender had no intent to kill or injure. MCL 777.36(1)(d).</td>
</tr>
</tbody>
</table>

• Unless the sentencing court has information that was not presented to the jury, an offender’s OV 6 score must be consistent with the jury’s verdict. MCL 777.36(2)(a).

• Ten points must be scored if a killing is intentional within the definition of second-degree murder or voluntary manslaughter, but the death took place in a combative situation or in response to the decedent’s victimization of the offender. MCL 777.36(2)(b).

• Any crime in which a person’s death is an element of the crime is a “homicide.” MCL 777.1(c).

B. Case Law Under the Statutory Guidelines

1. Premeditation

In People v Steanhouse (Steanhouse I), 313 Mich App 1, 40, 41 (2015), aff’d in part and rev’d in part on other grounds by People v Steanhouse (Steanhouse II), 500 Mich 453, 459-461 (2017),76 the Court of Appeals rejected the defendant’s contention that there was insufficient evidence of

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76 For more information on the precedential value of an opinion with negative subsequent history, see our note.
premeditation to support a 50-point score for OV 6. The Court explained:

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

The trial court’s finding that [the] defendant had a premeditated intent to kill was not clearly erroneous and was supported by a preponderance of evidence in the record. [The victim] testified that he went upstairs to retrieve his marijuana and, when he returned to the basement, he was struck in the head, apparently without warning, and slit in the throat. When [he] woke up and realized that his throat had been slit, he saw [the] defendant staring at him, ‘[j]ust wait[ing] for [him] to die.’ [The d]efendant made no effort to assist [him]. There was no evidence of an altercation or argument between [the] defendant and [the victim] immediately before the assault which could indicate that the attack was provoked or instigated by hot blood. From these circumstances, one could reasonably infer that [the] defendant planned the attack before it occurred and was lying in wait to attack [the victim] when he returned to the basement, which justifies an assessment of 50 points under OV 6[.]” Steanhouse I, 313 Mich App at 40, 41, citing People v Hardy (Donald), 494 Mich 430, 438 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5,
2. **Killing Committed in the Course of Enumerated Offense or Murder of Officer**

Fifty points are properly scored under OV 6 when “a killing was committed in the course of an enumerated felony[ or ] . . . when ‘the killing was the murder of a peace officer[,]” irrespective of whether the offender had the premeditated intent to kill. *People v Bowling*, 299 Mich App 552, 561-562 (2013) (noting that “[a]ccording to the plain language of [MCL 777.36(1)(a)], the scoring of 50 points is appropriate when the offender has the premeditated intent to kill or the killing was committed in the course of the commission of one of the enumerated offenses[ . . . [or] when ‘the killing was the murder of a peace officer[,]” and holding that because the record supported the conclusion that a police officer was killed during a home invasion in which the defendant participated, 50 points were appropriately scored).

3. **Directive to Score Consistent With Jury Verdict**

Where the defendant was charged with first-degree murder but jury-convicted of second-degree murder, a departure sentence could not properly be premised on the trial court’s “belief that the killing was premeditated[,]” *People v Dixon-Bey*, 321 Mich App 490, 527 (2017). Because OV 6 must be scored “‘consistent with a jury verdict unless the judge has information that was not presented to the jury[,]’ . . . a sentencing court may be constrained under the guidelines from scoring OV 6 as high as it otherwise would have[;]” presumably, however, a trial court may not “sentence a defendant convicted of second-degree murder as though the murder were premeditated.” *Id.* at 527-528 (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 [the] defendant acted with premeditation”). Furthermore, because scoring OV 6 at 50 points to reflect premeditated intent would have resulted in an unchanged minimum sentence range, “it [did] not support 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
In *Anderson (Henry)*, 322 Mich App 622, 635-636 (2018), 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. The Court of Appeals 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.

A defendant’s uncorroborated self-serving hearsay is not an effective challenge to the defendant’s OV 6 score when the record evidence more than adequately supported the trial court’s scoring decision, and the score was consistent with the jury’s verdict. *People v Jones (Kenneth)*, unpublished per curiam opinion of the Court of Appeals, issued July 22, 2003 (Docket No. 238557), slip op pp 3-4, vacated on other grounds by *People v Jones (Kenneth)*, 469 Mich 984 (2003). \(^77\) In *Jones (Kenneth)*, slip op at 3, the defendant claimed OV 6 should have been scored at ten points rather than 25 because the victim’s death occurred “in a combative situation”—according to the defendant, the victim and the defendant fought after the victim attempted to rob the defendant. However, the evidence showed that the victim was fleeing from the defendant when he was first struck and then beaten to death. *Id.* at 4.

Where a defendant is convicted by jury of OUIL causing death (“a crime in which gross negligence is presumed”), a maximum of ten points may be scored against the defendant under the statutory requirements governing OV 6. \(^78\) *People v Stanko*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2004 (Docket No. 242876), slip op pp 2-3. A maximum of ten points was proper in *Stanko* because OV 6 must be scored consistently with the jury’s verdict unless

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\(^77\) The Michigan Supreme Court remanded the case for the Court of Appeals to reconsider the trial court’s sentence in light of *People v Babcock*, 469 Mich 247 (2003). In its opinion on remand, the Court of Appeals “adopt[ed] and reaffirm[ed] its prior opinion regarding all non-departure issues.” *People v Jones (Kenneth)*, unpublished per curiam opinion of the Court of Appeals, issued June 10, 2004 (Docket No. 238557). \(^\text{Note: Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).}\)

\(^78\) Conduct scored under OV 6 precludes scoring ten points against an offender under OV 17 (degree of negligence exhibited). MCL 777.47(2).
the sentencing court has information that was not available to the jury. MCL 777.36(2)(a). Based on the record before the Court on appeal, and without evidence of malice rising to the level of intent required to prove second-degree murder, no more than ten points could be assessed against the defendant for OV 6. *Stanko*, slip op at 3.

Where the defendant initiated the confrontation that resulted in the shooting death of the decedent, the assessment of 25 points for OV 6 “was consistent with the jury’s verdict of second-degree murder, which required proof that the defendant acted with the intent to kill, or the intent to inflict great bodily harm, or with the willful and wanton disregard for whether death would result[;]” to score ten points under MCL 777.36(2)(b) for a death occurring “in a combative situation or in response to victimization of the offender by the decedent” would not have been appropriate because “[t]he confrontation was [the defendant’s] own creation.” *People v Al-Jamailawi*, unpublished per curiam opinion of the Court of Appeals, issued May 24, 2011 (Docket No. 292774).

4. **Applicability of OV 6 to Sentencing Offense**

The trial court properly scored 50 points under OV 6 for the defendant’s conviction of conspiracy to commit assault with intent to murder (AWIM), notwithstanding that conspiracy is a “public safety” offense under MCL 777.18 and that OV 6 is not included under MCL 777.22(5) as an offense variable that must be scored for crimes against public safety. *People v Tarver*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2012 (Docket No. 300775) (because “MCL 777.22(1) directs a trial court to score OV 6 for . . . ‘conspiracy . . . to commit a homicide,’” and “because[] when [the] defendant conspired to commit AWIM, he necessarily conspired to commit a homicide[,]” the trial court was required to score OV 6).

Where a defendant is convicted by jury of OUIL causing death (“a crime in which gross negligence is presumed”), a maximum of ten points may be scored against the defendant under the statutory requirements governing OV 6.79 *Stanko*, unpub op at 2-3.

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79 Conduct scored under OV 6 precludes scoring ten points against an offender under OV 17 (degree of negligence exhibited). MCL 777.47(2).
3.18 OV 7—Aggravated Physical Abuse

A. Definitions/Scoring

OV 7 is scored for crimes against a person only. MCL 777.22(1). Determine which statement applies to the offense and assign the number of points indicated by the applicable statement. MCL 777.37(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 7—Aggravated Physical Abuse</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>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).</td>
</tr>
<tr>
<td>0</td>
<td>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).</td>
</tr>
</tbody>
</table>

• Each person placed in danger of injury or loss of life is a victim for purposes of scoring OV 7. MCL 777.37(2).

• “Sadism” is “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3).80

B. Case Law Under the Statutory Guidelines

1. Categories of Conduct

The former version of MCL 777.37(1)(a), which was in effect from April 200281 until January 2016, required a 50-point score if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” (Emphasis added.) Effective January 5, 2016, 2015 PA 137 amended MCL 777.37(1)(a) to require a 50-point score if “[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear

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80 Effective April 22, 2002, 2002 PA 137 deleted “terrorism” from OV 7’s list of behaviors meriting points. Although terrorism was eliminated from consideration under OV 7, the conduct previously defined as terrorism remains in OV 7’s statutory language as “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)[a]. “Terrorism” is now addressed by OV 20, MCL 777.49a. See Section 3.30[B].

81 See 2002 PA 137, effective April 22, 2002.
and anxiety a victim suffered during the offense[)]” (emphasis added).

The 2016 amendment was apparently prompted by People v Hardy (Donald), 494 Mich 430, 439-444 (2013), in which the Michigan Supreme Court construed the former version of MCL 777.37(1)(a) as establishing four separate categories of scorable conduct—“sadism, torture, or excessive brutality[,] . . . [or] ‘conduct designed to substantially increase the fear and anxiety a victim suffered during the offense’”—and further concluded that conduct under the “fourth category” did “not have to be ‘similarly egregious’ to ‘sadism, torture, or excessive brutality[,]’” The Hardy (Donald) Court explained:

“In [People v Glenn, 295 Mich App 529, 533-537 (2012),] the Court of Appeals erred by ignoring the Legislature’s second use of the word ‘or’ in the provision at issue. MCL 777.37(1)(a)[] reads: ‘[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered[,]’ ‘Or’ is a word ‘used to indicate a disunion, a separation, an alternative.’ While the first ‘or’ may be interpreted as linking the first three categories in a common series, the second ‘or’ separates the last OV 7 category from the series that precedes it. Thus, the use of ‘or’ before the phrase ‘conduct designed’ shows that this phrase is an independent clause that has an independent meaning. The Court of Appeals in Glenn therefore erred by interpreting the statute in a manner inconsistent with its plain meaning.” Hardy (Donald), 494 Mich at 441 (emphasis added by the Court; citation omitted).

The Hardy (Donald) Court further held that, although the fourth category of conduct need not be “‘similarly egregious’ to ‘sadism, torture, or excessive brutality,’” the conduct must go “beyond the minimum required to commit the offense” and be “intended to make a victim’s fear or anxiety greater by a considerable amount.” Hardy (Donald), 494 Mich at 443-444.

Justice Cavanagh dissented on this point and would have held that “the amendatory history of OV 7 evidence[d] a legislative intent that the ‘conduct designed’ category include only conduct that is of the same class as the other three categories of conduct listed in OV 7.” Hardy (Donald), 494 Mich at 458 (Cavanagh, J., concurring in part and dissenting in part). Justice Cavanagh noted that the original version of MCL
777.37(1)(a), as enacted in 1998, required a 50-point score if “[a] victim was treated with terrorism, sadism, torture, or excessive brutality[,]” and that terrorism was defined in former MCL 777.37(2)(a) as “‘conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.’” Hardy (Donald), 494 Mich at 450-451 (Cavanagh, J., concurring in part and dissenting in part) (emphasis added by Justice Cavanagh).

In 2002, MCL 777.37 was amended, in light of the simultaneous addition of OV 20 (terrorism), to remove the reference to terrorism; yet the definition of terrorism from former MCL 777.37(2)(a) was retained as an addition to the list of categories of conduct warranting a score of 50 points, indicating that “the ‘conduct designed’ category should be given related meaning to the other three categories.” Hardy (Donald), 494 Mich at 450-456 (Cavanagh, J., concurring in part and dissenting in part).

Justice McCormack concurred in the majority opinion, but “[wrote] separately to encourage the Legislature to amend [OV 7]] to define, or more clearly articulate its intent in including, the language ‘conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.’” Hardy (Donald), 494 Mich at 448 (McCormack, J., concurring), quoting former MCL 777.37(1).

As noted, MCL 777.37(1)(a), as amended by 2015 PA 137, effective January 5, 2016, now requires a 50-point score if “[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense” (emphasis supplied), effectively superseding—at least in part—the majority’s construction of OV 7 in Hardy (Donald), 494 Mich 430.82

“[T]he ‘right result—wrong reason’ doctrine . . . [cannot] be employed to allow impermissible appellate fact-finding” in reviewing the propriety of an OV score; accordingly, where “the trial court assessed 50 points for OV 7 solely on the basis of sadistic behavior, . . . [i]t would not be appropriate for [the Court of Appeals] to consider whether” the score would nevertheless have been appropriate on the alternative basis that “[the] defendant’s conduct was designed to substantially increase the victim’s fear and anxiety.” People v Thompson (Jackie), 314 Mich App 703, 712 n 5 (2016) (citing Anspaugh v Imlay Twp, 480 Mich 964 (2007), and noting that “‘[a] trial court

82In People v Rodriguez, ___ Mich App ___, ___ 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.”
determines the sentencing variables by reference to the record[,] not [the Court of Appeals]” (emphasis added by the Court of Appeals; additional citation omitted).

2. **Conduct Outside the Sentencing Offense May Not Be Considered**

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.” Thompson (Jackie), 314 Mich App at 711, citing People v McGraw, 484 Mich 120 (2009)83; People v Sargent, 481 Mich 346 (2008). Accordingly, the trial court improperly assessed 50 points for OV 7 “in light of conduct engaged in by [the] defendant throughout the two-year course of the sexual abuse against the victim, instead of confining its examination to conduct occurring during the sexual assault [forming the basis of the defendant’s no-contest plea], which was the only criminal offense” of which the defendant was convicted under his plea bargain. Thompson (Jackie), 314 Mich App at 711.

3. **Scoring Limited to Actual Participants**

“For OV 7, only the defendant’s actual participation should be scored.” People v Hunt (Christopher), 290 Mich App 317, 326 (2010). In Hunt (Christopher), 290 Mich App at 325-326, the trial court erred in assessing 50 points for OV 7 where, although “[the] defendant was present and armed during the commission of the crimes . . . , he did not himself commit, take part in, or encourage others to commit acts constituting ‘sadism, torture, or excessive brutality[,]’”

4. **Actual Physical Abuse Not Necessary**

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

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

5. Consciousness of Victim Not Required

The assessment of points under OV 7 does not depend on whether the victim is alive or conscious of the treatment scored by this variable. People v Kegler, 268 Mich App 187, 191-192 (2005). Points are properly scored under OV 7 when a victim is treated with excessive brutality no matter how (or if) the victim subjectively experiences that treatment. Id. at 191. Although OV 7 does account for a victim’s treatment when the victim is conscious, its application is not limited to those criminal episodes where a victim’s consciousness is implicitly required (when points are assessed for conduct intended to increase a victim’s fear and anxiety, for example). Id. at 192 n 14.

6. Sadism

“‘[S]adism’ denotes conduct that exceeds that which is inherent in the commission of the offense.” People v McReynolds, unpublished per curiam opinion of the Court of Appeals, issued June 30, 2009 (Docket No. 282582).
OV 7 was properly scored at 50 points 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). The defendant “confined [the victim] for three-and-a-half to four hours[,] threatened her with guns[,] . . . assaulted her with his hands and feet, a liquor bottle, and a handgun[,] . . . choked and kicked her[,] . . . told her that 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[,] . . . did not allow [the victim] to stand and would point 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 gun in her 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 [he] 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”).

Fifty points should be scored for “sadism” when a defendant’s conduct subjects the victim to extreme or prolonged pain or humiliation and the conduct is inflicted for the defendant’s gratification. People v Taylor (Michael), unpublished per curiam opinion of the Court of Appeals, issued February 24, 2004 (Docket No. 240344), slip op p 3. The statutory language does not require that the defendant be gratified by the victim’s pain or humiliation, only that the defendant’s conduct itself be intended to gratify the defendant. Id.; see also MCL 777.37(1)(a) and MCL 777.37(3). “Because [the] defendant performed the sexual acts for his gratification, and the acts caused the victim severe and prolonged humiliation,” OV 7 was properly scored at 50 points. Taylor (Michael), slip op at 3.

“[T]he trial court erroneously concluded that [the] defendant’s conduct was sadistic[]” where, before the defendant sexually assaulted a minor on several occasions, “[the] defendant and the minor would play a [video game] in which [the] defendant’s character would kiss and want to have sex with the minor’s character.” People v O’Dell, unpublished per curiam
opinion of the Court of Appeals, issued June 10, 2014 (Docket No. 315609), slip op pp 1-2 (noting that “there [was] no evidence to support the trial court’s finding that the victim was subjected to extreme or prolonged pain or humiliation as a result of playing the [video game; a]t most, the evidence showed that [the] defendant’s actions made the victim nervous, which does not rise to the level of sadism[”]).

7. Excessive Brutality

Because brutality must be excessive, 50 points may only be scored if the trial court 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. at 534. 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. at 534.

Fifty points were properly scored against a defendant for the excessive brutality exhibited by the defendant during the assault of his wife. People v Wilson (Willie), 265 Mich App 386, 398 (2005). “The victim’s testimony detailed a brutal attack, which took place over several hours, involving being attacked by weapons and being kicked, punched, slapped, and choked numerous times, ending in injuries requiring treatment in a hospital.” Id. at 398.

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 her mother and that her grandmother would take good care of her”; and “it appear[ed] that defendant intended to rape [the

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84 An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).
victim] while he was strangling her.” *Rosa*, 322 Mich App at 744. “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.* at 744. 85

For purposes of OV 7, the defendant’s use of “excessive brutality” was established by evidence that he had hidden a baseball bat in his coat, confronted and struck the victim without warning so that the victim had no opportunity to protect himself, and once the victim was down, the defendant continued to kick and strike the victim with the baseball bat four or five more times. *People v Brown (Tony)*, unpublished per curiam opinion of the Court of Appeals, issued February 24, 2004 (Docket No. 243961).

Fifty points were properly scored for OV 7 where, “during the two to five minutes that the pregnant [victim] was being strangled, she suffered a fractured pharynx and hemorrhaging in her deep neck muscles . . . Such evidence demonstrated excessive brutality in commission of the assault and murder of a six-and-a-half month pregnant woman, which also caused the death of her unborn child.” *People v Lario-Munoz*, unpublished per curiam opinion of the Court of Appeals, issued June 30, 2011 (Docket No. 295811).

8. **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 86 until January 2016, required a 50-point score if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense” (emphasis added). Effective January 5, 2016, 2015 PA 137 amended MCL 777.37(1)(a) to require a 50-point score if “[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” (Emphasis added.)

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85 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. See *Rosa*, 322 Mich App at 743. See Section 3.18(B)(1) for discussion of 2015 PA 137.

86 See 2002 PA 137, effective April 22, 2002.
The 2016 amendment was apparently prompted by *Hardy (Donald)*, 494 Mich at 439-444. Construing the version of OV 7 that was in effect prior to the January 2016 amendments, the Michigan Supreme Court held that the last phrase of former MCL 777.37(1)(a) “[was] an independent clause that [had] an independent meaning[,]” therefore, “a defendant’s conduct [did] not have to be ‘similarly egregious’ to ‘sadism, torture, or excessive brutality’ for OV 7 to be scored at 50 points[.]” *Hardy (Donald)*, 494 Mich at 441, 443. This portion of *Hardy (Donald)*, 494 Mich 430, has been superseded, at least in part, by 2015 PA 137, which explicitly requires that conduct be *similarly egregious* to sadism, torture, or excessive brutality in order to warrant a 50-point score.87

It is unclear, however, whether the remainder of the OV 7 analysis in *Hardy (Donald)* remains good law following the enactment of 2015 PA 137. The *Hardy (Donald)* Court, in construing the “‘fourth category’” of scorable conduct under former MCL 777.37(1)(a), held that “it is proper to assess points under OV 7 for conduct that was intended to make a victim’s fear or anxiety greater by a considerable amount.” *Hardy (Donald)*, 494 Mich at 440-441. “[T]he focus is on the intended effect of the conduct[,]” not its actual effect on the victim.” *Id.* at 441 n 29, citing *Kegler*, 268 Mich App at 191. “The relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim’s fear or anxiety greater by a considerable amount.” *Id.* at 443-444. In determining whether the defendant treated the victim “with conduct ‘similarly egregious’ to sadism, torture, or excessive brutality that is ‘designed to substantially increase the fear and anxiety a victim suffered during the offense’” the Court still began its analysis by considering “whether the defendant engaged in conduct beyond the minimal required to commit the offense” as well as ‘whether the conduct was intended to make a victim’s fear or anxiety greater by a considerable amount.’” *People v Rodriguez*, ___ Mich App ___, ___ (2019), quoting MCL 777.37(1)(a) and *Hardy (Donald)*, 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 (Donald), 494 Mich at 442-443 (citation omitted). The Hardy (Donald) 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.” Id. at 443.

Where the defendant “took the extra step of racking [a] shotgun,” which “went beyond the minimum conduct necessary to commit a carjacking,” and because a preponderance of the evidence showed that “he did so to make his victim fear that a violent death was imminent, not just possible, the circuit court properly assessed 50 points for OV 7.” Hardy (Donald), 494 Mich at 444-445, 447 (concluding that defendant Hardy’s 89 “conduct of racking a shotgun while pointing it at the victim constituted ‘conduct designed to substantially increase the fear and anxiety a victim suffered during the offense’”) (citation omitted).

Similarly, 50 points were properly scored for OV 7 where “a preponderance of the evidence established that [defendant] Glenn struck two victims [of an armed robbery] with the butt of what appeared to be a sawed-off shotgun, knocked one victim to the ground, and forced both victims behind a store counter to make them fear imminent, serious injury or death[].” Hardy (Donald), 494 Mich at 446-448 (reversing Glenn, 295 Mich App 529, and concluding that “[defendant] Glenn’s

89 In Hardy (Donald), the Court decided two consolidated cases. Hardy (Donald), 494 Mich at 434.
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”).\(^\text{90}\)

The defendant was properly assessed 50 points under former OV 7 where the evidence established that, in robbing a drugstore, he “did more than simply produce a weapon and demand money.” *People v Hornsby*, 251 Mich App 462, 469 (2002).\(^\text{91}\) In *Hornsby*, 251 Mich App at 468, the shift supervisor testified that the defendant held her at gunpoint behind the closed door of the manager’s office as she transferred money from the store’s safe to an envelope. Further testimony established that the defendant threatened to kill her and everybody else in the store, and that at one point, the shift supervisor heard the defendant’s gun click as if it was being cocked when someone began turning the doorknob to the room she and the defendant occupied. *Id.* at 469. The defendant’s repeated threats against the shift supervisor and store customers and his actions in cocking the gun provided sufficient support\(^\text{92}\) for the trial court’s conclusion that “[the defendant] deliberately engaged in ‘conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.’” *Id.; MCL 777.37(1)(a).*

Under the current version of the statute, the Court distinguished *Hornsby* and concluded that 50 points should not have been assessed for OV 7 despite similar factual circumstances because of the statutory amendment. *People v Rodriguez*, ___ Mich App ___, ___ (2019). In *Rodriguez*, the defendant unquestionably “engaged in conduct that goes beyond the minimum required to commit [unarmed robbery\(^\text{93}\)] by using a tire iron during the course of the robbery[.]” *Id.* at ___. The Court acknowledged that in *Hornsby*, the assessment

\(^{90}\) As noted above, it is unclear whether, and to what extent, this portion of the analysis of former MCL 777.37(1)(a) in *Hardy (Donald)*, 494 Mich at 441-448, remains good law following the amendments to OV 7 under 2015 PA 137, effective January 5, 2016. See Section 3.18(B)(1) for additional discussion of the former versions of MCL 777.37(1)(a). In *People v Rodriguez*, ___ Mich App ___, ___ n 3 (2019), the Court stated that the “amendment essentially put into place the Glenn Court’s interpretation of OV 7.”

\(^{91}\) *Hornsby*, 251 Mich App 462, was decided before OV 7 was amended under both 2015 PA 137, effective January 5, 2016, and 2002 PA 137, effective April 22, 2002; accordingly, it is unclear whether, and to what extent, *Hornsby* remains good law.

Additionally, *Hornsby* was decided before OV 20 was enacted, under 2002 PA 137, effective April 22, 2002, to address terrorism (a violent act that is dangerous to human life and is intended to intimidate or influence a civilian population or government operation). See Section 3.30(B). Before the enactment of OV 20, the language in OV 7 included terrorism in its list of behaviors meriting points under that variable. Notwithstanding the elimination of the term terrorism from the language of OV 7, the variable accounts for the conduct to which the term terrorism then referred—“conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a) (emphasis added).

See Section 3.18(B)(1) for additional discussion of the former versions of MCL 777.37(1)(a).
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, ___ Mich App at ___ (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 ___.

Under former MCL 777.37(1)(a), OV 7 was properly scored at 50 points where the defendant “ordered the [rape] victim to keep her eyes closed[,] . . . [i]ndicated that he and what he implied were accomplices knew who she was and had been watching her[,] . . . and] made threats that he could find her again in the future, thereby suggesting not only that she was suffering a horrific assault but that there might never be any escape, either.” McDonald (Deandre), 293 Mich App at 298-299.44 “[E]ven though the victim eventually concluded that [the] defendant really did not know her identity there was ample evidence that [the] defendant engaged in ‘conduct designed to substantially increase [her] fear and anxiety[.]’” Id. at 299.

Under former MCL 777.37(1)(a), OV 7 was properly scored at 50 points 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

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92 The Hornsby Court stated that “‘[s]coring decisions for which there is any evidence in support will be upheld.’” Hornsby, 251 Mich App at 468, quoting People v Elliott, 215 Mich App 259, 260 (1996). However, in Hardy (Donald), 494 Mich at 437-438, 438 n 18, the Michigan Supreme Court clarified that, contrary to several Court of Appeals decisions, “[t]he ‘any evidence’ standard does not govern review of a circuit court’s factual findings for the purposes of assessing points under the sentencing guidelines[.]” rather, “the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence[,]” (citations omitted). “[T]he standards of review traditionally applied to the trial court’s scoring of the variables remain viable after [People v Lockridge, 498 Mich 358 (2015)].” People v Steanhouse (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). Note: with regard to Steanhouse I, 313 Mich App 1, for more information on the precedential value of an opinion with negative subsequent history, see our note.

93 The elements of unarmed robbery are “1) a felonious taking of property from another, 2) by force or violence, assault, or putting in fear, while 3) being unarmed.” Rodriguez, ___ Mich App at ___.

94 McDonald (Deandre), 293 Mich App 292, was decided before OV 7 was amended under 2015 PA 137, effective January 5, 2016; accordingly, it is unclear whether, and to what extent, McDonald (Deandre) remains good law.
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). The defendant “confined [the victim] for three-and-a-half to four hours[,] threatened her with guns[,] . . . assaulted her with his hands and feet, a liquor bottle, and a handgun[,] . . . choked and kicked her[,] . . . told her that 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[,] . . . did not allow [the victim] to stand and would point 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 gun in her 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 [he] 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”).

“[T]he trial court . . . erroneously concluded that [the defendant’s conduct] was ‘designed to substantially increase the fear and anxiety [the] victim suffered during the offense’” under former MCL 777.37(1)(a) where, before the defendant sexually assaulted a minor on several occasions, “[the] defendant and the minor would play a [video game] in which [the] defendant’s character would kiss and want to have sex with the minor’s character.” *People v O’Dell*, unpublished per curiam opinion of the Court of Appeals, issued June 10, 2014 (Docket No. 315609), slip op pp 1-2.95 “[T]here [was] nothing in the record to support a finding that [the] defendant used the [video game] as a means of increasing the victim’s fear or anxiety[; t]o the contrary, it [was] equally, if not more[,] probable that [the] defendant used the [video game] to groom the victim for future sexual acts and reduce the victim’s fear and anxiety suffered during the sexual assault.” *Id.* at 2 (“that the victim may have felt nervous while playing the [video game] was] irrelevant to the . . . inquiry[ under former MCL 777.37(1)(a)], which only considers [the] defendant’s intent”).

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95 An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1). Additionally, *O’Dell* was decided before OV 7 was amended under 2015 PA 137, effective January 5, 2016.
9. **Pre-Offense or Post-Offense Sexual Conduct Against the Victim**

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.” *Thompson (Jackie)*, 314 Mich App at 711, citing *People v McGraw*, 484 Mich 120 (2009) \(^{96}\); *People v Sargent*, 481 Mich 346 (2008). Accordingly, the trial court improperly assessed 50 points for OV 7 “in light of conduct engaged in by [the] defendant throughout the two-year course of the sexual abuse[ against the victim], instead of confining its examination to conduct occurring during the sexual assault [forming the basis of the defendant’s no-contest plea], which was the only criminal offense” of which the defendant was convicted under his plea bargain. *Thompson (Jackie)*, 314 Mich App at 711.

### 3.19 OV 8—Victim Asportation or Captivity

#### A. Definitions/Scoring

OV 8 is scored for crimes against a person only. MCL 777.22(1). Score OV 8 by determining which statement applies to the sentencing offense and assigning the point value indicated by the applicable statement. MCL 777.38(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 8—Victim asportation or captivity</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>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).</td>
</tr>
<tr>
<td>0</td>
<td>No victim was asported or held captive. MCL 777.38(1)(b).</td>
</tr>
</tbody>
</table>

- Each person in danger of injury or loss of life is a victim for purposes of scoring OV 8. MCL 777.38(2)(a).
- Zero points must be scored if the sentencing offense is kidnapping. MCL 777.38(2)(b). \(^{97}\)

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\(^{96}\) “[T]he retroactive effect of *McGraw*, 484 Mich 120[,] is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved.” *People v Mushatt (Mushatt II)*, 486 Mich 934 (2010).

\(^{97}\)
B. Case Law Under the Statutory Guidelines

1. 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 (2017). In *Spanke*, the Court of Appeals held that the trial court did not abuse its discretion in scoring 15 points for OV 8, even if the victims voluntarily accompanied the defendant to his home, where the criminal acts occurred. *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 [the] defendant and the victims to a location where they were secreted from observation by others.” *Id.* at 648.

Points were appropriately assessed for OV 8 when, although no force was used, “the victim was transported . . . to an unfamiliar house . . . where she was involved in sexual encounters with three men she barely knew.” *Apgar*, 264 Mich App at 330. See also *People v Cox (Jeffery)*, 268 Mich App 440, 454-455 (2005) (although the victim had been to the defendant’s house on other occasions, the defendant was the individual who transported the victim to the defendant’s house at the time the sexual offenses occurred).

2. 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.” *Barrera*, 500 Mich at 17 (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 (James)*, 488 Mich 888 (2010), and *Spanke*, 254 Mich App 642, to the extent

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

99 See, however, *Barrera*, 500 Mich at 17 (overruling *Spanke*, 254 Mich 642, to the extent it held that movement that is incidental to the commission of a crime does not qualify as asportation under OV 8). See Section 3.9(J)(2)(b) for additional discussion of *Barrera*, 500 Mich 14.
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 [15] points for OV 8[.]” Id. at 22.

3. Asportation to Places or Situations of Greater Danger

“(P)laces where others [are] less likely to see [a] defendant commit[ ] crimes,” e.g., a trailer on the defendant’s property, a tree stand on the defendant’s property, and a dirt bike ridden “far away from the house,” constitute places or situations of greater danger under MCL 777.38(1)(a) for which OV 8 is properly scored. People v Steele (Larry), 283 Mich App 472, 490-491 (2009). See also People v Chelmicki, 305 Mich App 58, 70-71 (2014) (citing Steele (Larry), 283 Mich App at 491, and holding that “OV 8 could have properly been scored . . . on the basis of ‘asportation[]’” where “[t]he victim was . . . [dragged by the defendant] away from the balcony[ of their apartment], where she was in the presence or observation of others, to the interior of the apartment, where others were less likely to see [the] defendant committing a crime[[]]”; People v Dillard, 303 Mich App 372, 380 (2013), overruled in part on other grounds by People v Barrera, 500 Mich 14 (2017) (“the strong implication [was] that the victim was not free to go anywhere other than into the [defendant’s] apartment with [the] defendant, a place that would have been more isolated from the possibility of further assaults being detected; [t]hat no such additional assaults apparently occurred [was] not relevant[]”); People v Phillips (Keith), 251 Mich App 100, 108 (2002) (the defendant drove the victim to “an isolated area near a river” and parked the car so it faced away from the road); People v Gholston, unpublished per curiam opinion of the Court of Appeals, issued September 11, 2003 (Docket No. 240810) (“confined and private environment inside the back room [of a store] was

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

101 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
a place of greater danger than the main shopping area of the store”).

4. **Victim Held Captive Beyond the Time Necessary to Commit the Offense**

“[Fifteen] points may be assessed [under OV 8] . . . if the defendant held the victim ‘captive beyond the time necessary to commit the offense.” Chelmicki, 305 Mich App at 70, quoting MCL 777.38(1)(a) and citing Apgar, 264 Mich App at 329-330.

“[W]hen [the] defendant continued to hold the victim against her will after dragging her [from the balcony of their apartment] into the apartment, he effectively held her longer than the time necessary to commit the [sentencing] offense of unlawful imprisonment.” Chelmicki, 305 Mich App at 70 (noting that because “[t]he unlawful-imprisonment statute’s definition of ‘restrain’ provides that “[t]he restraint does not have to exist for any particular length of time[,]’ MCL 750.349b(3)(a)[,] . . . the crime can occur when the victim is held for even a moment[,]” and holding that 15 points were therefore properly scored for OV 8 notwithstanding that “all of [the] defendant’s conduct during the time he restrained the victim was conduct that occurred ‘during’ the offense[’]”).

5. **Multiple Offender Cases**

A defendant must be “directly responsible for the movement of the victim” in order for 15 points to be assessed under OV 8. People v Logan, unpublished per curiam opinion of the Court of Appeals, issued February 22, 2018 (Docket No. 335863), p 2,102 citing People v Gloster, 499 Mich 199, 206 (2016) (“the trial court cannot assess 15 points for OV 8 based on the actions of a co-offender”). Gloster addressed OV 10, and held that 15 points for predatory conduct under OV 10 could not be scored “solely on the basis of the predatory conduct of a defendant’s co-offenders” because “[i]n direct contrast to [OVs 1, 2, and 3], MCL 777.40 contains no language directing a court to assess a defendant the same number of points as his co-offenders in multiple-offender situations.” Gloster, 499 Mich at 201.

C. **Relevant Case Law Under the Judicial Guidelines**

In People v Hack, 219 Mich App 299, 313 (1996), the trial court properly assessed points against a defendant under OV 5 (the

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102 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
equivalent of OV 8 under the statutory guidelines) where the evidence established that the defendant moved the child-victims to a different area of the house and away from the mother of one victim. \textit{Id.} at 313. The child’s mother testified that she could not see into the bedroom where the defendant had taken the victims and did not know what was happening during the time she was separated from the children. \textit{Id.} The Court agreed with the trial court that the children were in greater danger when they were removed from the room occupied by one victim’s mother; therefore, points were properly assessed against the defendant for OV 5. \textit{Id.} See also \textit{People v Dilling}, 222 Mich App 44, 54-55 (1997) (same result regarding OV 5 score for codefendant involved in the same offense for which the defendant in \textit{Hack} was convicted).

3.20 OV 9—Number of Victims

A. Definitions/Scoring

OV 9 is scored for all felony offenses except crimes involving a controlled substance. MCL 777.22(1), (2), (4), and (5). Determine which statements in OV 9 apply to the offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.39(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 9—Number of victims</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>Multiple deaths occurred. MCL 777.39(1)(a).</td>
</tr>
<tr>
<td>25</td>
<td>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.</td>
</tr>
<tr>
<td>10</td>
<td>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.</td>
</tr>
<tr>
<td>0</td>
<td>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.</td>
</tr>
</tbody>
</table>

• Count each person\textsuperscript{103} who was placed in danger of physical injury or loss of life or property\textsuperscript{104} as a victim for purposes of scoring OV 9. MCL 777.39(2)(a).\textsuperscript{105}
• Score 100 points only in homicide cases. MCL 777.39(2)(b). Any crime in which the death of a person is an element of the crime is a “homicide.” MCL 777.1(c).

B. Case Law Under the Statutory Guidelines

The term *victim* as used in MCL 777.39 is not limited to *persons* who suffered danger of physical injury or loss of life or property; rather, “MCL 777.39 allows a trial court when scoring OV 9 to count as a victim ‘one that is acted on’ by the defendant’s criminal conduct and placed in danger of loss of life, bodily injury, or loss of property.” *People v Ambrose*, 317 Mich App 556, 563 (2016), quoting *Merriam-Webster’s Collegiate Dictionary* (11th ed). 106 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.

* * *

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

103 In *People v Ambrose*, 317 Mich App 556, 562 n 4 (2016), the Court of Appeals 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[,]’ MCL 750.10[,]” and that “[a] similar definition, including ‘an individual’ in its definition of ‘person,’ appears in the Code of Criminal Procedure[,] former MCL 761.1(a)[(relettered as MCL 761.1(p))].” (second alteration in original).

104 Loss of property was added to the circumstances in OV 9 by 2006 PA 548, effective March 30, 2007.

105 In *People v Ambrose*, 317 Mich App 556, 562 (2016), the Court of Appeals held that MCL 777.39(2)(a) “only provid[es] guidance . . . about who must be counted as a ‘victim,’ and [does not provide] a complete and limiting definition of the term ‘victim[,]’”

106 The *Ambrose* Court 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[,]’ MCL 750.10[,]” and that “[a] similar definition, including ‘an individual’ in its definition of ‘person[,]’ appears in the Code of Criminal Procedure[,] former MCL 761.1(a)[(relettered as MCL 761.1(p))].” *Ambrose*, 317 Mich App at 562 n 4 (second alteration in original).
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).

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”).

When scoring OV 9, only people placed in danger of injury or loss of life or property during conduct “relating to the [sentencing] offense” should be considered. People v Sargent, 481 Mich 346, 350 (2008). See also McGraw, 484 Mich at 122, 133-135 (“[A] defendant’s conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise.”).107

In Sargent, 481 Mich at 347, the defendant was convicted of sexually abusing a teenager. At trial, evidence was introduced that the defendant also sexually abused the victim’s sister on a separate occasion. Id. The Supreme Court found that the sentencing court erred in assessing ten points for OV 9 on the basis that there were two victims: the victim and the victim’s sister. Id. at 347-348, 351. The Court noted that although “the Legislature has explicitly stated that conduct not related to the offense being scored can be considered when scoring some offense variables,” OV 9 is not among those variables. Id. at 350. Therefore, the Sargent Court held that zero points should have been assessed because the defendant was not convicted of sexually abusing the victim’s sister, and because the defendant’s sexual abuse of the sister did not arise out of the same transaction as the abuse of the victim. Sargent, 481 Mich at 351.

See also People v Nawwas, 499 Mich 874, 874 (2016) (citing McGraw, 484 Mich at 135, and holding that where the defendant was convicted of discharge of a firearm in an occupied facility, MCL 750.234b(2), possession of a firearm during the commission of a

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107 “[T]he retroactive effect of [People v McGraw], 484 Mich 120 (2009), is limited to cases pending on appeal when McGraw was decided and in which the scoring issue had been raised and preserved.” People v Mushatt, 486 Mich 934 (2010).
felony, MCL 750.227b, and carrying a pistol in a motor vehicle, MCL 750.227, 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[‘s]”); Biddles, 316 Mich App at 164, 167 (citing McGraw, 484 Mich at 133-134, and holding that where “[the] defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm,” and was convicted only of felon-in-possession “based on evidence apart from the shooting[ of the victim], and . . . [his codefendant] was convicted by plea of the crimes for which defendant was acquitted,” the trial court erred in scoring 10 points for OV 9; “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 Phelps, 288 Mich App 123, 139 (2010), overruled in part on other grounds by People v Hardy (Donald), 494 Mich 430 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016 (ten points were improperly scored against the defendant when although two of the complainant’s friends were in the room at the time of the sexual assault(s), “[the defendant] did not threaten anyone, and he did not make physical contact with either of the complainant’s friends”).

“A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim.” People v Gratsch, 299 Mich App 604, 623-624 (2013), vacated in part on other grounds 495 Mich 876 (2013) (evidence that the defendant told a fellow jail inmate that the defendant “‘should stab . . . [a corrections officer] in the neck’” with a needle he had constructed, and that he threatened to hurt the inmate if the inmate told anyone about the needle, supported the trial court’s score of ten points for OV 9; “at least two victims were placed in danger of physical injury because of defendant’s possession of the needle, . . . [and it was] irrelevant that neither the inmate nor the correction[s] officer was actually harmed”). See also People v Rodriguez, ___ Mich App ___, ___ (2019) (where 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

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

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

110 For more information on the precedential value of an opinion with negative subsequent history, see our note.
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”; “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”).

OV 9 was properly scored at ten points where the defendant was charged with several sex-related crimes against three separate victims on three separate occasions because more than one potential victim was in the room sleeping while the defendant assaulted another victim. People v Waclawski, 286 Mich App 634, 684 (2009). Although the charges against the defendant stemmed from behavior that occurred on three different dates and only one victim was harmed on each of those dates, the evidence presented “support[ed] the conclusion that [the] defendant would choose a victim while the other boys were present.” Id. at 684. Thus, a score of ten points was proper “because the record support[ed] the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed.” Id.

OV 9 was improperly scored at ten points because, even though the defendant was charged with gross indecency involving the victim, and on a different occasion, two other minors, the instance of CSC-I for which the defendant was being sentenced only involved one of the girls. People v Gullett, 277 Mich App 214, 217-218 (2007). According to the Gullett Court, where the record revealed that the defendant was convicted and sentenced on only one charge of CSC-I involving a single victim, the sentencing court erred in assessing points for OV 9 based on the number of victims involved in a separate incident. Id. at 218.

OV 9 was properly scored at ten points where the defendant committed an armed robbery in a store, then stopped a woman driving a car and forced her to drive him to another location. People v Mann (Brian), 287 Mich App 283, 284-285, 288 (2010). The defendant argued that OV 9 should be scored at zero points, because “his armed robbery was completed with there being only one victim . . . before he began the separate crime stemming from his commandeering a car and driver for his getaway.” Id. at 286. However, the Court found that the applicable statutes provide that “the course of an armed robbery includes the robber’s conduct in fleeing the scene of the crime.”111 Id. at 287. In this case, the “defendant’s commandeering of a car immediately after taking money from the first victim and forcing the driver of the car to drive him to another community, created a second victim of the armed robbery. In other words, the carjacking incident constituted not only
the commission of separate offenses, but was also a continuation of
the armed robbery.” *Id.*

OV 9 must not be construed so broadly that individuals are counted
by the mere possibility that they could appear within the scope of
the dangerous circumstances created by a defendant’s conduct;
“[t]he plain language of MCL 777.39(1) requires that a specific
number of persons be placed in danger to warrant the scoring of
points for OV 9.” *People v Rogers (Jimmie),* unpublished per curiam
opinion of the Court of Appeals, issued November 16, 2010 (Docket
No. 293926), slip op p 7. In *Rogers (Jimmie),* slip op at 6, the
defendant had a blood alcohol level of 0.27 percent and was driving
his truck “all over the roadway.” Although “any person in or near
[the] defendant’s path was likely placed in danger, considering his
level of intoxication, erratic swerving in the roadway, and speed[,]”
the trial court erred in assessing 25 points for OV 9 (“10 or more
victims . . . were placed in danger of physical injury or death”) because
“there [was] no record evidence indicating [that 10 or more
victims] were in or near [the] defendant’s path at the time of his
drunk driving.” *Rogers (Jimmie),* slip op at 7.

OV 9 was properly scored at ten points where the defendant shot a
bystander who attempted to aid the armed robbery victim because
the bystander was also “‘placed in danger of injury or loss of life[.]’”
MCL 777.39(1)(c). *Morson,* 471 Mich at 261-262. See also *People v
Fawaz,* 299 Mich App 55, 58, 63-64 (2012) (the defendant’s elderly
neighbor qualified as a “victim[.]” under OV 9 because she “had to
be escorted from her home by a police officer for her personal
safety[.]” when her home filled with smoke due to the defendant’s
arson of his nearby home); *People v Kimble (Richard),* 252 Mich App
(decedent, her fiance, and her child were with her in the car and
were all “in danger of injury or loss of life” when the defendant
fatally shot the decedent through the car’s windshield); *People v
Williams (Harold),* unpublished per curiam opinion of the Court of
Appeals, issued May 20, 2003 (Docket No. 230566) (the number of
victims properly included the victim’s wife and children who,
although they occupied a different room of the house than did the
defendant and the victim, were “placed in danger of injury or loss of
life” when the defendant fired multiple shots in the victim’s home);
*People v Arney,* unpublished per curiam opinion of the Court of

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

112 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
Appeals, issued March 20, 2003 (Docket No. 236875) (at least two individuals other than the cashier from whom the defendant took money saw the defendant and his gun at the cash register in front of the restaurant; thus they were placed in danger of injury because of their physical proximity to the robbery and the defendant’s weapon).

Ten points were appropriate under OV 9 where videotaped evidence showed a female victim and a male victim actually being harmed, or being placed in danger of injury, as a result of the defendant’s conduct. Wilkens, 267 Mich App at 741-742.

The trial court erred in scoring 25 points for OV 9 on the ground that the defendant’s vandalism of two schools “was a crime against a community[;]” because “[t]here [was] no evidence on the record to establish that 20 or more persons were affected by [the] defendant’s vandalism, either directly or indirectly[,] . . . OV 9 should have been scored at zero points.” People v Carrigan, 297 Mich App 513, 515-516 (2012), overruled in part on other grounds by Hardy (Donald), 494 Mich at 438 n 18.113

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

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

The trial court’s assessment of 50 points for OV 3 and 100 points for OV 9 did not violate the defendant’s Sixth Amendment right to a jury trial where the “jury . . . found [the] defendant guilty of OUIL causing death, which required the jury to find that [the] defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof[,]” and “two counts each of second-degree murder[,] . . . reflect[ing] that the jury found beyond a reasonable doubt that multiple deaths occurred[;]” under these circumstances, “each of the facts necessary to support [the OV scores] was necessarily found by the jury beyond a reasonable doubt.” People v

113For more information on the precedential value of an opinion with negative subsequent history, see our note.
Bergman, 312 Mich App 471, 498, 499 (2015) (noting that where “facts found by the jury were sufficient to assess the minimum number of OV points necessary for [the] defendant’s placement in the . . . cell of the sentencing grid under which [he or] she was sentenced, there [is] no plain error and [the] defendant is not entitled to resentencing or other relief [on an unpreserved claim] under [People v Lockridge, 498 Mich 358 (2015)]”).

3.21 OV 10—Exploitation of a Vulnerable Victim

A. Definitions/Scoring

OV 10 is scored for all felony offenses except crimes involving a controlled substance. MCL 777.22(1), MCL 777.22(2), MCL 777.22(4), and MCL 777.22(5). Score OV 10 by determining which statements apply to the circumstances of the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.40(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 10—Exploitation of a victim’s vulnerability</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Predatory conduct was involved. MCL 777.40(1)(a).</td>
</tr>
<tr>
<td>10</td>
<td>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).</td>
</tr>
<tr>
<td>5</td>
<td>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).</td>
</tr>
<tr>
<td>0</td>
<td>The offender did not exploit a victim’s vulnerability. MCL 777.40(1)(d).</td>
</tr>
</tbody>
</table>

- Do not automatically score points for victim vulnerability just because one or more of the factors addressed by OV 10 are present in the circumstances surrounding the sentencing offense. MCL 777.40(2) expressly states that “[t]he mere existence of 1 or more factors described in [MCL 777.40](1) does not automatically equate with victim vulnerability.”

- “Predatory conduct” is “preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim,”[114] for the primary purpose of victimization.” MCL 777.40(3)(a).

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[114] The phrase “[o]r a law enforcement officer posing as a potential victim[]” was added to MCL 777.40(3)(a) by 2014 PA 350, effective October 17, 2014.
• To “exploit” a victim is 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.”115 MCL 777.40(3)(b).

• A victim’s “vulnerability” is the victim’s “readily apparent susceptibility to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c).

• “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).

B. Case Law Under the Statutory Guidelines

1. Overview of OV 10’s Purpose

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

“The hierarchical range of points that may be assessed under OV 10 extends from zero to 15 points. Zero points are to be assessed when ‘[t]he offender did not exploit a victim’s vulnerability.’ MCL 777.40(1)(d). Five points are to be assessed when ‘[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious’—things that are largely within the victim’s own control. MCL 777.40(1)(c). Ten points are to be assessed when ‘[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status’—things that are largely

115 This part of the definition was added to MCL 777.40(3)(b) by 2018 PA 652, effective March 28, 2019.
outside of the victim’s control. MCL 777.40(1)(b).

Finally, 15 points are to be assessed when ‘predatory 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. . . . We 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).”

2. Victim Vulnerability in General

“[P]oints should be assessed under OV 10 only when it is readily apparent that a victim was ‘vulnerable,’ i.e., was susceptible to injury, physical restraint, persuasion, or temptation.” People v Cannon (Trumon), 481 Mich 152, 158 (2008), overruled in part on other grounds by Huston, 489 Mich at 458 n 4. 116 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,

116 Huston, 489 Mich at 458 n 4, noted that the Cannon (Trumon) Court’s statement that a defendant’s preoffense conduct must be directed at a specific victim was dictum. The Huston Court clarified that preoffense conduct need not be directed at a specific victim in order to merit points under OV 10. Huston, 489 Mich at 454.
• difference in the victim’s and the offender’s size, strength, or both,

• victim’s intoxication or drug use, or

• victim’s level of consciousness. \textit{Cannon (Trumon)}, 481 Mich at 158-159.

The Court noted that “[t]he mere existence of one of these factors does not automatically render [a] victim vulnerable.” \textit{Cannon (Trumon)}, 481 Mich at 159.

Exploitation of a vulnerable victim is a prerequisite to assessing points under OV 10. \textit{Cannon (Trumon)}, 481 Mich at 162. However, “nothing in \textit{Cannon [(Trumon), 481 Mich 152,]} requires the offender to have first-hand contact to exploit a victim[; r]ather, \textit{Cannon [(Trumon)]} provides that every subdivision of MCL 777.40(1) requires that the offender have somehow exploited a vulnerable victim[.]” \textit{People v Needham}, 299 Mich App 251, 252, 258 (2013) (“[w]hen a person possesses child sexually abusive material, he or she personally engages in the systematic exploitation of the vulnerable victim depicted in that material[, and e]vidence of possession therefore can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim’s vulnerability due to the victim’s youth”).

An undercover officer posing as a minor cannot be counted as a vulnerable victim under OV 10; despite the defendant’s intent, under those circumstances the defendant’s conduct does “not place any vulnerable victim in jeopardy because there [is], in fact, no vulnerable victim to be jeopardized.” \textit{People v Russell (On Remand)}, 281 Mich App 610, 615 (2008).

3. \textbf{Defendant’s Conduct Need Not Be Directed at a Specific Victim}

Fifteen points may be assessed against a defendant for predatory conduct without regard to whether the defendant directed his or her preoffense conduct at a specific victim—all that is required under OV 10 is that the defendant’s preoffense conduct was directed at ‘a victim.’ \textit{Huston}, 489 Mich at 454. Furthermore, “the victim does not have to be inherently vulnerable. Instead, a defendant’s ‘predatory conduct,’ by that conduct alone (\textit{eo ipso}), can create or enhance a victim’s ‘vulnerability.’” \textit{Id.}
4. **Abuse of Authority Status**

Where the defendant argued that OV 10 was improperly scored because no evidence was presented “to indicate any manipulation by [the] defendant or any exploitation of his status,” ten points were correctly assessed against the 67-year-old defendant, who was in the process of adopting the 14-year-old victim, and who lived at the defendant’s home, at the time he sexually assaulted her. *Phillips (Keith)*, 251 Mich App at 109.

OV 10 was properly scored against a defendant who used his status as an authority figure to sexually assault his niece; he constituted an authority figure because he was “playing the uncle role” to his sister’s children and was “invested with the authority to enforce [the children’s mother’s] directives regarding the disciplining of her children.” *People v Loney*, unpublished per curiam opinion of the Court of Appeals, issued March 16, 2004 (Docket No. 243416).\(^{117}\)

5. **Exploitation Must Occur to Victim of Crime Scored**

Ten points are proper only where the defendant has exploited a victim’s vulnerability; that is, when the defendant “exploit[s] a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status.” MCL 777.40(1)(b). “A ‘victim’ is ‘a person harmed by a crime, tort, or other wrong’ . . . or . . . a person who ‘is acted on and usually adversely affected by a force or agent[.]’” *Needham*, 299 Mich App at 255, quoting *People v Althoff*, 280 Mich App 524, 536-537 (2008) (additional citations omitted).

Ten points were properly scored under OV 10 based on the defendant’s possession of child sexually abusive material. *Needham*, 299 Mich App at 255, 260 (“[t]he victim of crimes involving child sexually abusive activity, including the possession of child sexually abusive material[,] is the child victim portrayed in the material[,] and[ ] . . . [the defendant] exploit[ed] and manipulate[d] the young, vulnerable victims depicted in the materials he possessed[.]”).

Ten points were not proper when the score was based on the fact that the defendant’s two children were passengers in the defendant’s car when she drove through a flashing red light and killed the driver of another vehicle. *People v Hindman*, 472 Mich 875, 876 (2005), reversing the unpublished per curiam

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117 Unpublished opinions are not precedentially binding under the rule of stare decisis. *MCR 7.215(C)(1)*.
opinion of the Court of Appeals, issued January 22, 2004 (Docket No. 244904). It was error for the trial court to assess points under OV 10, “not on the basis of having exploited the second-degree murder victim, but on the basis of having exploited her own children who were merely passengers in her car and not the victims of the criminal offense being scored.” *Hindman*, 472 Mich at 876.

6. Domestic Relationship

Ten points were properly scored for OV 10 where “[t]he victim was clearly ‘vulnerable’ in light of [the] defendant’s greater strength, [the victim’s] intoxication, and the domestic relationship between the two, including the fact that [the victim] and [the] defendant had a child together.” *People v Dillard*, 303 Mich App 372, 380-381 (2013), overruled in part on other grounds by *People v Barrera*, 500 Mich 14, 16 (2017) (holding that “[the 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”).

“[T]o qualify as a ‘domestic relationship’ [for purposes of scoring OV 10, MCL 777.40,] there must be a familial or cohabitating relationship.” *People v Jamison*, 292 Mich App 440, 447 (2011). In *Jamison*, 292 Mich App at 444, 448, the trial court erred in assessing ten points for OV 10 where the defendant and the victim dated in the past, but did not share a domicile and were not related. Specifically, the Court of Appeals stated that “[it did] not believe that simply any type of dating relationship, past or present, meets the requirements of OV 10” and held that the “relationship [in *Jamison*] did not display the characteristics needed to elevate [the] ordinary relationship [between the victim and the defendant] to ‘domestic relationship’ status.” *Id.* at 447-448.

“[T]he trial court erroneously assessed 10 points for OV 10[]” where, although the defendant and the victim “remained friends,” they “had stopped dating at least two months prior to the assault[,] . . . were dating other people, . . . did not continue to have sex, and . . . did not live together.” *People v Brantley*, 296 Mich App 546, 554-555 (2012). See also *People v Counts*, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2004 (Docket No. 246717), slip op pp 2-3, which held that for purposes of OV 10, a “domestic relationship” is

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118 For more information on the precedential value of an opinion with negative subsequent history, see our note.
not established by proof that the defendant and the victim shared “any type” of relationship. In the context of scoring OV 10, the defendant and the victim must have a “familial or cohabitating relationship.” If any relationship could qualify under OV 10, the Legislature need not have specified “domestic.” Counts, slip op at 3. Further, OV 10 requires not only the existence of the domestic relationship—points are appropriate only when the defendant exploits that relationship. Id. “If the relationship [between the defendant and the victim] is over, . . . that relationship can no longer be exploited.” Id.

7. **Vulnerability—Age of the Victim**

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

A five-year age difference between a defendant and a complainant may justify a score of 10 points for OV 10. People v Johnson (William), 474 Mich 96, 103 (2006). In Johnson (William), the Michigan Supreme Court stated: “We also agree that the trial court did not err in scoring OV 10 at ten points. . . . As the Court of Appeals explained, ‘[w]here [the] complainant was fifteen years old and [the] defendant was twenty, the court could determine that [the] defendant exploited the victim’s youth in committing the sexual assault.’” Id. at 103.
The trial court properly assessed 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), overruled in part on other grounds by People v Hardy (Donald), 494 Mich 430 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016. Although the victim’s age alone did not support scoring OV 10, “the record supported that [the victim’s] age and immaturity made her a vulnerable victim.” Phelps, 288 Mich App at 136. The Court of Appeals noted that “evidence on the record supported that [the defendant] exploited the [victim] for selfish purposes by manipulating her into engaging in sexual acts with him and allowing him to be in a position in which he could engage in nonconsensual sexual intercourse.” Id. at 136-137. Further, “the evidence showed that the [victim] was vulnerable because it was readily apparent that she was susceptible to physical restraint, persuasion, or temptation.” Id. at 137.

Where the defendant “picked up [the 12-year-old victim of dissemination of sexually explicit matter to a minor] in the middle of the night in his van, . . . drove to a liquor store to purchase alcohol, . . . [and] then drove the van to a city park and parked it,” the trial court’s assessment of 15 points for OV 10 was supported by the evidence; “[b]ecause of [the victim’s] young age, she was susceptible to injury, physical restraint, or temptation,” and “it [was] a reasonable inference that victimization was [the defendant’s] primary purpose for engaging in the preoffense conduct.” People v Lockett, 295 Mich App 165, 184 (2012).

Ten points were properly assessed under OV 10 based on the defendant’s possession of child sexually abusive material. Needham, 299 Mich App at 252, 260 (“evidence of possession [of child sexually abusive material] . . . can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim’s vulnerability due to the victim’s youth”).

“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

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

8. Vulnerability Arising Out of a Victim’s Relationships or Circumstances

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

9. Predatory Conduct

“MCL 777.40(3)(a) does not define ‘predatory conduct’ to mean preoffense conduct directed at the victim; instead, MCL 777.40(3)(a) defines ‘predatory conduct’ to mean ‘preoffense conduct directed at a victim . . . .’” Huston, 489 Mich at 458. 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

120 After Huston, 489 Mich 451, was decided, 2014 PA 350, effective October 17, 2014, amended MCL 777.40(3)(a) to include, in the definition of “[p]redatory conduct[,]” preoffense conduct that is directed at “a law enforcement officer posing as a potential victim[.]”
requiring only that the defendant’s preoffense predatory conduct have been directed at a victim.” Huston, 489 Mich at 459. Accordingly, 15 points were properly scored under OV 10 for “[a] defendant who directed his preoffense conduct at the community-at-large by lying in wait, armed, in a parking lot at night, waiting for the first random person to come along so that he or she could be criminally victimized.” Id. at 459-460.

“[P]redatory conduct’ . . . is behavior that is predatory in nature, ‘precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action . . . .’” Huston, 489 Mich at 463, quoting Cannon (Trumon), 481 Mich at 161, overruled in part on other grounds in Huston, 489 Mich at 458 n 4. Additionally, “[‘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, quoting Cannon (Trumon), 481 Mich at 162. In Huston, 489 Mich at 463-464, the defendant’s preoffense conduct of “[lying] in wait while armed and hidden from view for the primary purpose of eventually causing a person to suffer from an injurious action, i.e., an armed robbery . . . constituted ‘predatory conduct’ both under the statutory definition of this phrase and according to common understanding under which lying in wait constitutes quintessential ‘predatory conduct.’” See also People v Savage, ___ Mich App ___, ___ (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 scored 15 points against the defendant for predatory conduct under OV 10 where the evidence established that the defendant and his accomplices drove around looking for a car from which they could steal a set of expensive wheel rims, spotted the victim’s car and its valuable wheel rims, followed the victim’s car to the victim’s home, watched the victim pull her car into the driveway, shot the victim, and stole her car. Kimble (Richard), 252 Mich App at 274-275, aff’d on other grounds 470 Mich 305 (2004).

121 After Huston, 489 Mich 451, was decided, 2014 PA 350, effective October 17, 2014, amended MCL 777.40(3)(a) to include, in the definition of “[p]redatory conduct[,]” preoffense conduct that is directed at a law enforcement officer posing as a potential victim[.]”
Fifteen points were proper where the trial court found the victim’s vulnerability “readily apparent” from observing the victim’s demeanor and where the defendant engaged in predatory conduct. *People v Drohan*, 264 Mich App 77, 90-91 (2004), aff’d on other grounds 475 Mich 140 (2006). Evidence showed that the victim confided in the defendant, and the defendant took advantage of her vulnerability by approaching her on numerous occasions and waiting for her in a parking structure before sexually assaulting her. *Id.* at 90-91.

The timing and location of an offense is evidence that the defendant watched and waited for an opportunity to commit the criminal act, and watching and waiting for an opportunity to commit a crime is “predatory conduct” for which the defendant was appropriately assessed 15 points under OV 10. *People v Witherspoon*, 257 Mich App 329, 336 (2003). In *Witherspoon*, 257 Mich App at 336, the nine-year-old victim testified that the defendant assaulted her when she was alone in the basement folding clothes. Relying on *Kimble*, 252 Mich App at 274-275, the Court noted that the defendant’s timing (when the victim was alone) and his choice of location (an isolated room of the house, the basement) was sufficient to establish predatory conduct similar to the defendant’s conduct in *Kimble*. *Witherspoon*, 257 Mich App at 336. See also *People v Kosik*, 303 Mich App 146, 160 (2013) (citing *Witherspoon*, 257 Mich App at 336, and holding that 15 points were properly scored for OV 10 where “[the] defendant engaged in predatory conduct by investigating the store [in which the victim worked] and waiting until the victim was alone to strike[,] . . . [t]he timing of an offense, including watching the victim and waiting until the victim is alone before victimizing him or her, may be evidence of predatory conduct”); *People v Ackah-Essien*, 311 Mich App 13, 38 (2015) (holding that 15 points were properly scored for OV 10 where the “evidence supported the trial court’s finding that [the defendant and his accomplices engaged in] . . . ‘pre-offense conduct designed to lure the victim[, a pizza deliveryman,] to . . . [an] abandoned home where they then, on the pretext of paying him, lured him in to a dark and abandoned home where he was jumped and robbed’”).

See also *Cox (Jeffery)*, 268 Mich App at 455, where points were properly assessed for predatory or preoffense conduct when the defendant engaged in sexual conduct with “a seventeen-year-old mentally incapable victim.” In addition to the

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122 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).
questions concerning the victim’s mental status, evidence established that, before the charged sexual conduct, the defendant visited the victim at his foster home, the victim had been to the defendant’s home on several occasions and had viewed pornographic material there, and the “defendant admitted to harboring the victim as a runaway from a foster home.” *Id.* at 446-447, 455.

Fifteen points were properly assessed under OV 10 based on evidence that, prior to engaging in intercourse with the child victim, the defendant gave her gifts, including a cell phone so that she could communicate with him, and picked her up in his vehicle and took her to his home. *People v Johnson* (Todd), 298 Mich App 128, 133-134 (2012) (“the trial court did not err by finding that 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*, ___ Mich App ___, ___ (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 ___ (concluding the victim was vulnerable “because of his youth and naiveté”).

### 10. 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 [OVs 1, 2, and 3], MCL 777.40 contains no language directing a court to assess a defendant the same number of points as his [or her] co-offenders in multiple-offender situations.” *Gloster*, 499 Mich at 201. Accordingly, “the trial court erred by assessing [the] defendant 15 points for OV 10 because the record indicate[d] that the court based its assessment of points entirely on the conduct of [the] defendant’s co-offenders.” *Id.* at 209-210 (additionally holding that the Court of Appeals “erred by concluding that the trial court’s scoring of OV 10 was supported by [the] defendant’s own conduct [; b]ecause the trial court did not itself find that [the] defendant’s own conduct was
predatory in nature, the Court of Appeals failed to review the trial court’s findings for clear error as required by People v Hardy[ (Donald), 494 Mich 430, 438 (2013)]” (emphasis added).

C. **Relevant Case Law Under the Judicial Guidelines**

OV 7 (OV 10 under the statutory guidelines) differentiates between an offender’s exploitation of a victim due to a difference in size or strength and exploitation of a victim based on agedness. People v Piotrowski, 211 Mich App 527, 531 (1995). In Piotrowski, the defendant argued that her treatment of the victim was not the result of age-based exploitation; instead, according to the defendant, she would have subjected the victim to the same treatment regardless of the victim’s age. Id. at 531. The Court disagreed, emphasizing the different point values corresponding to an offender’s exploitation due to strength or size and an offender’s exploitation due to age.123

“We would first note that OV 7 distinguishes between exploitation through a difference in size or strength, which is scored at 5, and exploitation of agedness, which is scored at 15. We take this [point differential] to be an explicit recognition of the distinction between the decline in physical strength characteristic of advanced age, and the less easily articulated decline in aggressiveness in confrontational situations that also often accompanies advancing years. To fail to recognize this distinction would render nugatory OV 7 in the context of elderly victims, since virtually all exploitation of agedness would be ascribed to exploitation of physical infirmity, meaning that those who prey on the aged would receive more lenient sentences than recommended by the guidelines. The guidelines recognize and address exploitation of our senior citizens.

In the present case, [the] defendant did not shout, ‘I am exploiting you because you are a senior citizen.’ In our opinion, there was no need for [the] defendant to so state her motivation; her actions clearly manifested such a motivation. Had the victim been twenty-eight rather than seventy-eight, regardless of her physical strength, we find it unlikely that she would have been all but forgotten in a bathroom, fearing for her life the entire fifteen minutes, while her knife-wielding assailant leisurely inventoried her possessions. In other words,

123 The same point values are assigned to OV 10 under the statutory guidelines.
had [the] defendant not immediately dismissed the possibility that the elderly victim would offer any resistance, which dismissal can only be attributed to her age, we believe that the victim would have been terrorized for a far shorter period of time.” *Piotrowski*, 211 Mich App at 531-532.

### 3.22 OV 11—Criminal Sexual Penetration

#### A. Definitions/Scoring

OV 11 is scored only for crimes against a person. MCL 777.22(1). Determine which statements addressed by OV 11 apply to the offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.41(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 11—Criminal sexual penetration</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a).</td>
</tr>
<tr>
<td>0</td>
<td>No criminal sexual penetration occurred. MCL 777.41(1)(c).</td>
</tr>
</tbody>
</table>

- All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11. MCL 777.41(2)(a).

- Multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OV12 or 13.\(^{124}\) MCL 777.41(2)(b). However, if any conduct is scored under OV 11, that conduct must not be scored under OV 12 and may be scored under OV 13 only if the conduct is gang-related or related to the offender’s membership in an organized criminal group. MCL 777.42(2)(c); MCL 777.43(2)(c).

- The one penetration on which a first- or third-degree criminal sexual conduct offense is based must not be counted for purposes of scoring OV 11. MCL 777.41(2)(c).

\(^{124}\) OV 12 addresses criminal acts that occur within 24 hours of the sentencing offense and will not result in a separate conviction. OV 13 accounts for an offender’s pattern of criminal conduct over a period of five years regardless of outcome.
B. Case Law Under the Statutory Guidelines

When scoring 50 points under OV 11, there must be sufficient “record evidence to support a finding that any charged or uncharged criminal sexual penetration arose out of the sentencing offense.” People v Goodman, 480 Mich 1052 (2008); People v Thompson (Bernard), 474 Mich 861 (2005).

The sexual penetration that is the basis of the sentencing offense may not be scored under OV 11, but a sexual penetration arising from the sentencing offense and on which a conviction separate from the sentencing offense is based is not precluded from consideration under OV 11. People v McLaughlin, 258 Mich App 635, 676 (2003). In McLaughlin, the defendant argued he was improperly scored 50 points for two penetrations when those penetrations resulted in separate CSC-I convictions, because the instructions for OV 11 prohibited scoring points for any penetration that formed the basis of a CSC-I or CSC-III conviction. Id. at 671-672. Because the defendant was convicted of three counts of CSC-I, the defendant argued that each penetration was the basis of its own conviction and could not be used in scoring the other convictions. Id.

Notwithstanding the ambiguity of the language used in MCL 777.41(2)(c), the Court concluded:

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

See also People v Lampe, ___ Mich App ___, ___ (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”); Cox (Jeffery), 268 Mich App at 455-456 (trial court properly assessed 25 points where the defendant
was convicted of two counts of CSC-I for penetrations arising from the same incident—the trial court properly scored the one penetration that did not form the basis of the sentencing offense, even though the defendant was separately convicted for both penetrations); *People v Matuszak*, 263 Mich App 42 (2004) (fifty points were appropriate under OV 11 where there was evidence of five penetrations).

In *People v Johnson (William)*, 474 Mich 96, 99-103 (2006), the Michigan Supreme Court further defined OV 11 as applied to cases in which a defendant is convicted of more than one count of CSC-III. In *Johnson (William)*, 474 Mich at 99-100, the trial court scored OV 11 at 25 points because the defendant had twice penetrated the victim. Like the defendant in *Cox (Jeffery)*, 268 Mich App 440, the defendant in *Johnson (William)* was charged with and convicted of CSC for each penetration. *Johnson (William)*, 474 Mich at 98. In *Johnson (William)*, however, the penetrations occurred on different dates, and therefore, neither of the penetrations arose from the same sentencing offense. *Id.* at 101-102. In the absence of any evidence that the defendant’s conduct on one date arose from his conduct on the other date, the two penetrations did not arise from either of the two CSC-III offenses for which the defendant was sentenced. *Id.* Consequently, because the two penetrations in *Johnson (William)* did not arise from the sentencing offense, the trial court erred in scoring OV 11 at 25 points instead of zero points. *Id.*

OV 11 was properly scored at 25 points in Count 1 (penetration during the commission of a felony) “because defendant was charged with only one penetration, yet he penetrated the female victim more than once during the making of the videotape” (evidence showed that the defendant penetrated the victim with his mouth and with a sex toy). *Wilkens*, 267 Mich App at 742-743. OV 11 was also properly scored at 25 points in Count 2 (aiding and abetting in the production of child sexually abusive material) where the evidence established that the defendant aided and abetted the male victim’s penetration of the female victim and that the defendant also penetrated the female victim at least one other time. *Id.* at 743. See also *Lampe*, ___ Mich App at ___ (trial court properly assessed 50 points on the basis of an uncharged sexual penetration because the victim’s testimony supported the finding “that three penetrations occurred during the same course of conduct,” and “excluding the sentencing offense, two or more criminal sexual penetrations occurred”); *People v Johnson (Todd)*, 298 Mich App 128, 130-132 (2012) (the trial court properly scored 50 points for OV 11 based on evidence that the defendant and the victim engaged in sexual activity involving penetrations on several occasions over a three-year period beginning when the victim was 13 years old; although “[the victim] did not recall how many times she had sex
with defendant,” her testimony that they engaged in intercourse, fellatio, and cunnilingus “almost every time they were together” constituted “record evidence establish[ing] that two sexual penetrations arose out of the penetrations forming the basis of the sentencing offenses”).

Because “fellatio,” for purposes of first-degree criminal sexual conduct, “‘requires entry of a penis into another person’s mouth,’” the trial court erred in scoring 25 points for OV 11 where there was evidence that the five-year-old victim licked the defendant’s penis, but no evidence that the defendant’s penis entered her mouth. People v McCloud, unpublished per curiam opinion of the Court of Appeals, issued September 8, 2011 (Docket No. 298504),125 quoting People v Reid, 233 Mich App 457, 479-480 (1999).

3.23 OV 12—Contemporaneous Felonious Criminal Acts

A. Definitions/Scoring

OV 12 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22(1)-(5). Score OV 12 by determining which statements apply to the circumstances of the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.42(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 12—Number of contemporaneous felonious criminal acts</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>Three or more contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(a).</td>
</tr>
<tr>
<td>10</td>
<td>Two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b).</td>
</tr>
<tr>
<td>10</td>
<td>Three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(c).</td>
</tr>
<tr>
<td>5</td>
<td>One contemporaneous felonious criminal act involving a crime against a person was committed. MCL 777.42(1)(d).</td>
</tr>
<tr>
<td>5</td>
<td>Two contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(e).</td>
</tr>
</tbody>
</table>

125 Unpublished opinions are not procedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
### A. Case Law Under the Statutory Guidelines

The phrase “crime[] against a person” as used in MCL 777.42(1) applies only to offenses falling within that offense category under MCL 777.5 and MCL 777.11–MCL 777.19. See *Bonilla-Machado*, 489 Mich at 422 n 19.\(^{126}\)  

“[W]hen scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense.” *People v Light*, 290 Mich App 717, 723 (2010). In *Light*, 290 Mich App at 720, the defendant pleaded guilty to unarmed robbery, and the trial court assessed five points for OV 12 (two or more contemporaneous felonious criminal acts): (1) carrying a concealed weapon (which was not in dispute), and (2) either larceny from a person or larceny in a building (the lower court record was unclear as to which form of larceny its ultimate scoring decision was based). The Court of Appeals determined that “for OV 12 scoring purposes, [the defendant’s] physical act of wrongfully taking [the victim’s] money while inside a grocery store

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\(^{126}\) However, see *Bonilla-Machado*, 489 Mich at 428-429, where the Court noted that “[t]he plain language of MCL 777.42 indicates the Legislature’s express intent to allow sentencing courts to consider crimes within all the offense categories” whenever the statutory language does not expressly limit the sentencing court to considering only “crimes against a person.” Specifically, the statutory language in MCL 777.42(1)(c), MCL 777.42(1)(e), and MCL 777.42(1)(f) directs the sentencing court to score points under OV 12 for “contemporaneous felonious criminal acts involving other crimes” committed by the defendant.
is the same single act for all forms of larceny—robbery, larceny from a person, and larceny in a building. Therefore, even though the trial court sentenced [the defendant] for unarmed robbery, [the defendant’s] sentencing offense included all acts ‘occur[ring] in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.’” Id. at 725, quoting MCL 750.530(2). The Court held that “[b]ecause [the defendant’s] sentencing offense was unarmed robbery, neither form of larceny could be used as the contemporaneous felonious act needed to increase [the defendant’s] OV 12 score.” Light, 290 Mich App at 726. Stated another way, “the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense.” Id. “Because both forms of larceny served as the basis of [the defendant’s] sentencing offense, the trial court should not have scored five points for [the defendant’s] unarmed [] robbery conviction under OV 12.” Id. See also People v Carter, ___ Mich ___, ___ (2019) (“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”).

“What matters, [for purposes of scoring OV 12], is whether the ‘sentencing offense’ can be separated from other distinct ‘acts.’” Carter, ___ Mich at ___ (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). 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, ___ Mich at ___ (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, ___ Mich App ___, ___ (2019) (distinguishing the facts in
Light, 290 Mich App 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, ___ Mich App at ___.

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

In scoring OV 12, a trial court “[is not] free to look at the substance of the crime rather than the offense category designations under the guidelines themselves.” People v Wiggins (Dale), 289 Mich App 126, 130 (2010). In Wiggins (Dale), 289 Mich App at 127-128, the defendant was charged with two counts of attempting to arrange for child sexually abusive activity, MCL 750.145c(2) (designated as crimes against a person under MCL 777.16g), and two counts of disseminating sexually explicit matter to a minor, MCL 722.675 (designated as crimes against public order under MCL 777.15g). After the defendant pleaded no contest to one count of attempting to arrange for child sexually abusive activity, the trial court assessed 25 points for OV 12 (three or more contemporaneous felonious criminal acts involving crimes against a person were committed). Wiggins (Dale), 289 Mich App at 127-128; MCL 777.42(1)(a). The Court of Appeals held that OV 12 should have been scored at ten points (three or more contemporaneous felonious criminal acts involving other crimes were committed), because only one of the other three charges was designated as a crime against a person, and the other charges were designated as crimes against public order. Wiggins (Dale), 289 Mich App at 130-131; MCL 777.42(1)(c). The trial court erred in justifying a score of 25 points for OV 12 based on its conclusion that “all three of the additional charges were crimes involving other persons, namely the minor children involved.” Wiggins (Dale), 289 Mich App at 127-128, 130-131. The Court of Appeals clarified that “only crimes with the offense category designated as ‘person’ under MCL 777.11 to MCL 777.18 can be considered ‘crimes against a person’ for purposes of scoring OV 12.” Wiggins (Dale), 289 Mich App at 131.

Where the defendant was in possession of “numerous sexually explicit pictures” of the three child victims “at the time and place where he committed CSC–I against [one of the victims].”
where “he was never charged as a result of the possession[,]” the trial court properly scored 25 points for OV 12. People v Waclawski, 286 Mich App 634, 686-687 (2009). See also People v Mull, unpublished per curiam opinion of the Court of Appeals, issued April 25, 2013 (Docket No. 309452)\(^{127}\) (citing Waclawski, 286 Mich App at 686-687, and holding that where the defendant sent an e-mail containing ten sexually explicit images of minor boys, but “the trial court . . . relied on only one photo in finding a factual basis for the [defendant’s] plea” of no contest to one count of distributing or promoting child sexually abusive material and one count of using a computer to commit a crime, 25 points were properly scored for OV 12; “because each of the remaining nine images could support a separate charge . . . , the trial court’s determination that there were at least three contemporaneous yet uncharged offenses that justified scoring OV 12 was not error”.

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

Where the defendant possessed “at least 100 distinct images of child pornography contained in . . . four [computer] disks,” 25 points were properly scored for OV 12 even though “the majority of the child sexually abusive material was downloaded onto the four disks . . . over a year before the date of the offense[.]” Loper, 299 Mich App at 454, 461-463 (because “the facts presented to the trial court form[ed] the basis of a reasonable inference that [the] defendant possessed the disks . . . beginning in 2007 or before, and that he possessed all four disks . . . on October 23, 2008[ (which the trial

\(^{127}\) Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
court listed as the offense date), . . . [i]t was reasonable for the trial court to infer that [the] defendant possessed the images within 24 hours of the offense date[;] . . . [t]hus, there was evidence supporting the trial court’s finding that there were three or more contemporaneous acts of possession of child sexually abusive material under MCL 777.42(2)(a)”).

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

### 3.24 OV 13—Continuing Pattern of Criminal Behavior

#### A. Definitions/Scoring

OV 13 is scored for all felony offenses subject to the statutory sentencing guidelines. MCL 777.22(1)-(5). Determine which statements addressed by OV 13 apply to the circumstances of the offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.43(1).128

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 13—Continuing pattern of criminal behavior</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a).</td>
</tr>
<tr>
<td>25</td>
<td>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.</td>
</tr>
<tr>
<td>25</td>
<td>The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c).</td>
</tr>
<tr>
<td>Score</td>
<td>Description</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
</tr>
<tr>
<td>10</td>
<td>The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(i)-(iii) or MCL 333.7403(2)(a)(i)-(iii). MCL 777.43(1)(d). <strong>The underlined portion applies only to offenses occurring on or after March 1, 2003. See 2002 PA 666.</strong></td>
</tr>
<tr>
<td>10</td>
<td>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. <strong>This provision applies only to offenses occurring before April 1, 2009. See 2008 PA 562.</strong></td>
</tr>
<tr>
<td>10</td>
<td>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). <strong>This provision applies only to offenses occurring on or after March 1, 2003. See 2002 PA 666.</strong></td>
</tr>
<tr>
<td>5</td>
<td>The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. MCL 777.43(1)(f).</td>
</tr>
<tr>
<td>0</td>
<td>No pattern of felonious criminal activity existed. MCL 777.43(1)(g).</td>
</tr>
</tbody>
</table>

- To score this variable, all crimes within a period of five years, *including the sentencing offense*, must be counted without regard to whether the offense resulted in a conviction. MCL 777.43(2)(a).

- The existence of an organized criminal group may be reasonably inferred from the facts surrounding the sentencing offense, and the group’s existence is more important than the presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication demonstrated by the criminal group. MCL 777.43(2)(b).

- Do not consider conduct scored in OVs 11 or 12 unless the offense was related to membership in an organized criminal group, or unless the offense was gang-related. MCL 777.43(2)(c).\(^{129}\)

- Score 50 points only if the sentencing offense is first-degree criminal sexual conduct. MCL 777.43(2)(d).

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\(^{128}\) Effective March 1, 2003, 2002 PA 666 amended the instructions for OV 13 to include references to specific controlled substance offenses. Additionally, effective April 1, 2009, 2008 PA 562 amended the instructions for OV 13 to replace the provision allocating ten points for a pattern of activity related to “membership in an organized criminal group” with a provision allocating 25 points for a pattern of activity related to gang membership. Language appearing in the shaded areas of the chart represents the variable as it applies to offenses occurring before or after the effective date(s) of the amendment(s), as indicated within the chart.

\(^{129}\) “Gang-related” conduct was added by 2008 PA 562, effective April 1, 2009.
• Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring this variable.\textsuperscript{130} MCL 777.43(2)(e).

• Only one crime involving the same controlled substance may be counted under this variable.\textsuperscript{131} 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).

B. Case Law Under the Statutory Guidelines

1. 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.” \textit{Bemer}, 286 Mich App at 28. That is, “when scoring OV 13, the trial court cannot consider any conduct that was or should have been scored under [OV 12].” \textit{Bemer}, 286 Mich App at 35.

2. 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).” \textit{People v Nelson}, ___ Mich ___, ___ (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 \textit{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

\textsuperscript{130} Effective March 1, 2003. 2002 PA 666.

\textsuperscript{131} Effective March 1, 2003. 2002 PA 666.
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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’

3. Five-Year Period

The five-year period to which OV 13 refers must include the sentencing offense. People v Francisco, 474 Mich 82, 86-87 (2006). OV 13 assesses points when a sentencing offense is “part of a pattern of felonious activity.” MCL 777.43(1)(a)-(g). According to MCL 777.43(2)(a), a pattern consists of three or more crimes committed in a five-year period “including the sentencing offense without regard to whether a conviction resulted from the offense.” In Francisco, 474 Mich at 88, the trial court scored OV 13 at 25 points for the defendant’s three previous felonies that occurred in 1986, even though the offense for which the defendant was being sentenced occurred in 2003.

Based on the plain language of MCL 777.43, the Francisco Court explained:

“[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.

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“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.

4. Pending or Dismissed Charges and Acquittals

“[A] court may consider [a] charge[es] against a defendant [that was] dismissed as a result of a plea agreement in scoring OV 13.” People v Nix, 301 Mich App 195, 205 (2013). Moreover, a charge dismissed as a result of a plea agreement may be considered in assessing 25 points under MCL 777.43(1)(c), even if the plea agreement resulted in an “ultimate conviction . . . for a crime that is not a crime against a person.” Nix, 301 Mich App at 203-206 (where the evidence supported the trial court’s “determin[ation] that [the] defendant had committed an act of felonious assault [(a crime against a person)] three days before the sentencing offenses[,]” the charged felonious assault was
properly considered in assessing 25 points for OV 13, even though the defendant ultimately pleaded guilty of a different offense (a crime against public safety) in connection with the incident).\footnote{132}

“[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[\textsuperscript{132}]” in sentencing the defendant for a 2010 robbery at the same bank. \cite{People v Earl (Ronald), 297 Mich App 104, 106, 110-111 (2012), aff’d on other grounds 495 Mich 33 (2014)} (“[a]lthough the 2008 case was dismissed in the district court, there was no indication at sentencing that ‘the 2008 allegation was dismissed for want of probable cause[,]’ and “[i]n light of the unchallenged evidence presented at sentencing regarding the 2008 bank robbery offense, there was enough evidence for the trial court to score 10 points for OV 13[\textsuperscript{132}]”).

OV 13 was properly scored at 25 points where the defendant was convicted of two felony offenses against a person and had two CSC-I charges pending at the time he was sentenced. \cite{Wilkens, 267 Mich App at 743-744}

An offense for which a defendant is acquitted may still be considered for purposes of scoring OV 13 if it is established by a preponderance of the evidence that the defendant committed the offense. \cite{People v Jenkins (Terrell), unpublished per curiam opinion of the Court of Appeals, issued August 5, 2008 (Docket No. 276763)} See also \cite{People v Clark (Dale), unpublished per curiam opinion of the Court of Appeals, issued October 2, 2003 (Docket No. 240139)} (OV 13 was properly scored at 25 points where the evidence established that the defendant was in possession of items taken in three home invasions from which the defendant’s sentencing offenses stemmed, even though the defendant was not convicted of home invasion).

\footnote{\textsuperscript{132} The \textit{Nix} Court stated that a score under the sentencing guidelines “must [be upheld] . . . if there is any supporting evidence.” \textit{Nix}, 301 Mich App at 204, citing \textit{People v hornsby}, 251 Mich App 462, 468 (2002). However, in \textit{People v Hardy (Donald), 494 Mich 430, 437-438, 438 n 18 (2013)} effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016, the Michigan Supreme Court clarified that, contrary to several Court of Appeals decisions, “[t]he ‘any evidence’ standard does not govern review of a circuit court’s factual findings for the purposes of assessing points under the sentencing guidelines[,]” rather, “the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence[\textsuperscript{133}]” [citations omitted]. “[T]he standards of review traditionally applied to the trial court’s scoring of the variables remain viable after \textit{People v Lockridge}, 498 Mich 358 (2015).” \textit{People v Steanhouse (Steanhouse I), 313 Mich App 1, 38 (2015)}, aff’d in part and rev’d in part on other grounds by \textit{People v Steanhouse (Steanhouse II), 500 Mich 453, 459-461 (2017)}, citing \textit{Lockridge}, 498 Mich at 392 n 28; \textit{Hardy}, 494 Mich at 438 (additional citation omitted). Note: with regard to Steanhouse I, 313 Mich App 1, for more information on the precedential value of an opinion with negative subsequent history, see our note.}

\footnote{\textsuperscript{133} Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).}
5. **Applicable Crime Categories**

An offense that is statutorily designated as a “crime against public safety” under **MCL 777.5** and **MCL 777.11–MCL 777.19** may not also be considered a “crime against a person” to establish a continuing pattern of criminal behavior for purposes of scoring OV 13. \(\text{Bonilla-Machado, 489 Mich at 415-416, 422.}\) In Bonilla-Machado, 489 Mich at 424-425, the defendant was convicted of two counts of assaulting a prison employee, an offense that is designated under **MCL 777.16j** as a crime against public safety. The defendant had two prior convictions for offenses designated as crimes against a person and one prior conviction for an offense designated as a crime against public safety. **Bonilla-Machado, 489 Mich at 425 n 20.** The trial court assessed ten points for OV 13 under **MCL 777.43(1)(d)** ("[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . ."). Bonilla-Machado, 489 Mich at 425. The Court of Appeals increased the defendant’s OV 13 score to 25 points under **MCL 777.43(1)(c)** ("[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person"), explaining that "’[a]lthough MCL 777.16j indicates that assault of a prison guard is a crime against public safety, this offense is also a crime against a person because, obviously, a prison guard is a person.’” Bonilla-Machado, 489 Mich at 425, quoting People v Bonilla-Machado, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2009 (Docket No. 287605), slip op p 4.

The Michigan Supreme Court, noting that “**MCL 777.21(1)(a)** explicitly instructs a court to first ‘[f]ind the offense category for the offense from’ **MCL 777.11** through [**MCL 777.19**] and then ‘determine the offense variables to be scored for that offense category[,]’” concluded that “[t]he use of the named offense categories throughout the sentencing guidelines chapter indicates legislative intent to have the offense categories applied in a uniform manner, including when they are applied in the offense variable statutes.” Bonilla-Machado, 489 Mich at 426. Accordingly, “a felony designated as a ‘crime against public safety’ may not be used to establish a ‘pattern of felonious criminal activity involving 3 or more crimes against a person,’ **MCL 777.43(1)(c),** for purposes of scoring OV 13.” Bonilla-Machado, 489 Mich at 416. Because “the combination of designated crimes needed to assess 5 to 50 points for OV 13 [was] not present, . . . the only allowable score under the categories designated in the statute [was] zero points.” \(\text{Id. at 427.}\) See also People v Pearson (Jermaine), 490 Mich 984 (2012)
(because “conspiracy is classified as a ‘crime against public safety[,]’” under MCL 777.18, conspiracy to commit armed robbery may not be considered when scoring OV 13, even though armed robbery is classified under MCL 777.16y as a “‘crime[,] against a person’”; MCL 777.21(4) “does not allow the offense category underlying the conspiracy to dictate the offense category of the conspiracy itself for purposes of scoring OV 13”).

6. Misdemeanor Offenses, Juvenile Adjudications, and Out-of-State Offenses

“[T]he trial court correctly counted defendant’s [misdemeanor] attempted resisting or obstructing offenses as felonious criminal activity in its OV 13 score determination.” People v Jackson (Antjuan), 320 Mich App 514, 522 (2017). “Pursuant to MCL 777.19(2), the trial court was required to consider defendant’s attempted resisting or obstructing offenses in the same offense category as the offense of actually resisting or obstructing a police officer.” Jackson (Antjuan), 320 Mich App at 521. “Consequently, pursuant to MCL 777.19(3)(b), because resisting or obstructing a police officer is a Class G felony, the trial court was required to consider defendant’s attempted resisting or obstructing a police officer offenses as Class H felonies for purposes of scoring the sentencing guidelines.” Jackson (Antjuan), 320 Mich App at 522.

Juvenile adjudications may be included when scoring OV 13. People v Harverson, 291 Mich App 171, 180 (2010). “[T]he plain language of the statute does not require a criminal conviction to score [ten] points, but only requires ‘criminal activity.’ A juvenile adjudication clearly constitutes criminal activity because ‘it amounts to a violation of a criminal statute, even though that violation is not resolved in a ‘criminal proceeding,’”” Id. at 180, quoting People v Luckett, 485 Mich 1076, 1076-1077 (2010) (Young, J., concurring).

“Before . . . alleged [out-of-state] crimes may be used to score [25 points for] OV 13[ under MCL 777.43(1)(c)], the prosecution must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they are properly classified as felony ‘crimes against a person,’ MCL 777.43(1)(c), and that they occurred ‘within a 5-year period’ of the sentencing offense, MCL 777.43(2)(a).” People v Butler, 498 Mich 859, 859 (2015), citing People v Hardy (Donald), 494 Mich 430 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016.
7. **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 (Phillip)*, 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’”) (emphasis added). Accordingly, the trial court erred in assessing 25 points for OV 13 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 704, 705-706 (remanding for resentencing because the “[d]efendant’s reckless driving constitute[d] a single act, and 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”; accordingly, “the trial court improperly scored OV 13 at 25 points” when “[i]t should have been scored at zero”).

8. **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 [the] defendant, and the points scored for OV 13 [did not need to] be subtracted in considering [the] defendant’s total OV score under [People v Lockridge, 498 Mich 358 (2015)].” *People v Jackson (Kevin) (On Reconsideration)*, 313 Mich App 409, 436 (2015).
3.25 OV 14—Offender’s Role

A. Definitions/Scoring

OV 14 is scored for all felony offenses to which the guidelines apply. MCL 777.22(1)-(5). Determine which statement applies to the sentencing offense and assign the point value indicated by the applicable statement. MCL 777.44(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 14—Offender’s role</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>The offender was a leader in a multiple offender situation. MCL 777.44(1)(a).</td>
</tr>
<tr>
<td>0</td>
<td>The offender was not a leader in a multiple offender situation. MCL 777.44(1)(b).</td>
</tr>
</tbody>
</table>

• Consider the entire criminal transaction in which the sentencing offense occurred when determining the offender’s role. MCL 777.44(2)(a).

• In cases involving three or more offenders, more than one offender may be considered a leader. MCL 777.44(2)(b).

B. Case Law Under the Statutory Guidelines

“[T]he plain meaning of ‘multiple offender situation’ as used in OV 14 is a situation consisting of more than one person violating the law while part of a group[,]” there is no requirement that “[t]here must be more than one person actively participating in the charged offense(s)[,]” People v Jones (Byron), 299 Mich App 284, 286-288 (2013), vacated in part on other grounds 494 Mich 880 (2013) (evidence “that at least one other man[,] . . . accompanied [the] defendant in the mall to confront [another] group of young men[]” and that the defendant and the other man “escalated the confrontation . . . when they both drew guns and [the] defendant started firing[]” supported the trial court’s score of ten points for OV 14, even though “no other [participants in the confrontation] were placed on trial . . . [and the] defendant was the only person charged in connection with the shooting[.]”).

“[M]erely posing a greater threat to a joint victim is [not] sufficient to establish an individual as a leader within the meaning of OV 14, at least in the absence of any evidence showing that the individual played some role in guiding or initiating the [criminal] transaction.

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134For more information on the precedential value of an opinion with negative subsequent history, see our note.
itself.” People v Rhodes (Anthony) (On Remand), 305 Mich App 85, 90 (2014) (although “[the] defendant’s exclusive possession of a gun during the criminal transaction [was] some evidence of leadership, . . . it [did] not meet the [applicable] preponderance of the evidence standard” where “the evidence [did] not show that [the] defendant acted first, gave any directions or orders to [his accomplice], displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in [the accomplice’s] participation in the criminal transaction, or was otherwise a primary causal or coordinating agent[”].)

Ten points were appropriate under OV 14 where, although the defendant did not drive the automobile in which the offenders rode, the defendant was the oldest among the group of offenders involved in the sexual assault, he was the first to make sexual contact with the victim and had the most sexual contact with her, and his was the only DNA that matched the semen in the victim’s vaginal area. Apgar, 264 Mich App at 330-331.

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

“[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 [the] defendant’s [leadership] role in the criminal transaction[” where “[the] 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 [the] defendant acted as a leader[” because the prisoner “obviously could not leave the prison to procure the heroin himself[“] it was “reasonable to infer[. . . that [the] defendant exercised independent leadership to procure the heroin from someone else outside the prison, transport[] it independently to the prison, and smuggle[] it inside before transferring it to [the prisoner].” Id. at 23.

Where the defendant’s PSIR indicated that his sister was involved in his effort to take his former girlfriend and their children out of state, ten points were properly scored for OV 14; it appeared from the PSIR that the sister aided and abetted the defendant in committing unlawful imprisonment and, therefore, that she could be viewed as
an “offender” and the defendant as a “leader” within the meaning of MCL 777.44. *People v Hernandez-Perez*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2011 (Docket No. 297917), rev’d in part on other grounds by *People v Hernandez-Perez*, 490 Mich 916 (2011).\(^{135}\)

OV 14 was improperly scored where evidence showed that the defendant was the sole offender involved in the sentencing offense; the fact that the defendant’s wife and children lived at the same residence and frequent visits were made by numerous other people is not evidence that a defendant was the leader in a multiple offender situation. *People v Black (Tempy)*, unpublished per curiam opinion of the Court of Appeals, issued October 19, 2004 (Docket No. 248613).

A police informant acting in concert with law enforcement is not “committing a crime” when the informant’s conduct is authorized by the police. *People v Rosenberg*, unpublished per curiam opinion of the Court of Appeals, issued January 25, 2005 (Docket No. 251930), slip op p 7 (undercover police informant acting as a buyer in purchasing cocaine from the defendant was not an “offender” for purposes of OV 14). Where the defendant was the only other person involved in the controlled buy, the circumstances do not constitute a “multiple offender situation” as intended by OV 14. *Id*.

OV 14 is properly scored at ten points when the defendant is one of two offenders (in a group of three or more offenders) taking an active role in the commission of the crime and neither one of the two primary participants establishes himself or herself as the leader. *People v Brewer (Michael)*, unpublished per curiam opinion of the Court of Appeals, issued February 19, 2004 (Docket No. 242764), slip op p 4. In *Brewer (Michael)*, slip op at 4, ten points were appropriate where the defendant was one of two men with guns who demanded money from the hotel clerk and tied him up in the hotel manager’s office, and where testimony indicated that the third participant’s purpose in the criminal endeavor was unclear to the victim who suggested that the third person was “maybe a watch out.”

The defendant was the leader for purposes of OV 14 in a group’s attempt to rob the victim where the defendant “took initiative” in the robbery attempt and “was the first person to throw a punch.” *People v Scott (Paris)*, unpublished per curiam opinion of the Court of Appeals, issued March 4, 2004 (Docket No. 243418).

\(^{135}\) Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
Although “there [were] facts that may indicate that [an 18-year-old codefendant] was a leader[]” in disseminating sexually explicit matter to a minor, the trial court did not clearly err in assessing 10 points against the 35-year-old defendant under OV 14; the defendant was “significantly older than [the codefendant]; [the defendant] owned and drove the van in which he picked the girls up and in which the sexual acts occurred; and it [was] reasonable to assume that [the defendant] purchased the alcohol[]” that was procured during the criminal episode. People v Lockett, 295 Mich App 165, 184-185 (2012).

Although two of the three victims of an armed robbery did not “believe[] that either [the defendant or his accomplice] was ‘the leader,’ . . . the trial court did not err by assessing 10 points for OV 14[]” where “[t]here was evidence that [the defendant] was the only perpetrator with a gun, did most of the talking, gave orders to [the accomplice], and checked to make sure [the accomplice] took everything of value[,]” and where the testimony of the accomplice and the third victim supported the finding that the defendant was the leader. People v Gibbs (Phillip), 299 Mich App 473, 493-494 (2013).

### 3.26 OV 15—Aggravated Controlled Substance Offenses

#### A. Definitions/Scoring

OV 15 is only scored for felony offenses involving a controlled substance. MCL 777.22(3). Score OV 15 by determining which statements apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.45(1).137

<table>
<thead>
<tr>
<th>Pts</th>
<th>OV 15—Aggravated controlled substance offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>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).</td>
</tr>
<tr>
<td>75</td>
<td>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).</td>
</tr>
</tbody>
</table>

136 See the Michigan Judicial Institute’s Controlled Substances Benchbook for detailed information about controlled substance offenses.
<table>
<thead>
<tr>
<th>Point</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>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).</td>
</tr>
<tr>
<td>50</td>
<td>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.</td>
</tr>
<tr>
<td>25</td>
<td>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).</td>
</tr>
<tr>
<td>20</td>
<td>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.</td>
</tr>
<tr>
<td>15</td>
<td>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.</td>
</tr>
<tr>
<td>10</td>
<td>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).</td>
</tr>
<tr>
<td>10</td>
<td>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).</td>
</tr>
</tbody>
</table>

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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.
• “Deliver” is the actual or constructive transfer of a controlled substance from one person to another person without regard to remuneration. MCL 777.45(2)(a).

• A “minor” is an individual 17 years of age or less. MCL 777.45(2)(b).

• “Trafficking” is the sale or delivery of actual or counterfeit controlled substances on a continuing basis to another person or persons for further distribution. MCL 777.45(2)(c).

<table>
<thead>
<tr>
<th>5</th>
<th>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).</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>The offense was not an offense described in the categories above. MCL 777.45(1)(i).</td>
</tr>
</tbody>
</table>

B. Case Law Under the Statutory Guidelines

“OV 15 must be scored [based solely on] the amount of [controlled substance applicable to] . . . the sentencing offense, and cannot be scored on the basis of other drug offenses committed during a similar period but dismissed as part of [a] plea agreement[.].” Accordingly, 50 points were improperly scored under OV 15 based on “amounts of cocaine related to dismissed counts but wholly unrelated to the cocaine possession ‘sentencing offense’ to which [the] defendant pleaded guilty.” People v Gray (Orlando), 297 Mich App 22, 24, 28 (2012). In Gray (Orlando), 297 Mich App at 23-25, the defendant pleaded guilty to certain charges, including a charge of possession with intent to deliver less than 50 grams of cocaine that was based on a small amount of cocaine found in his car, in exchange for dismissal of other charges, including two major controlled substance charges that were based on a large amount of cocaine that was discovered in a motel room. The trial court, noting that the defendant possessed both the smaller and larger amounts of cocaine at the same time, assessed 50 points under OV 15, distinguishing People v McGraw, 484 Mich 120 (2009), “on the basis that McGraw rejected for scoring consideration events that transpired after the sentencing offense was completed[.].” Gray (Orlando), 297 Mich App at 27-28 (emphasis supplied). The Court of Appeals reversed, holding that because OV 15 does not specifically provide otherwise, it must be scored based solely on the sentencing offense. Id. at 28, 33-34. Noting that “[McGraw, 484 Mich at 122, 130-134,] . . . requires a court to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was charged and later dismissed or dropped, regardless
of the sequence in which the conduct transpired[,]” the Gray (Orlando) Court concluded that although the greater amount of cocaine could be considered as the basis for a departure from the sentencing guidelines, it could not be considered in scoring OV 15. Id. at 32-34.

Dicta appearing in a case remanded for articulation of a substantial and compelling reason for departure under the previously-mandatory guidelines indicates that, for purposes of scoring the guidelines, a person may “deliver” a controlled substance by injecting the substance into another person. People v Havens, 268 Mich App 15, 18 (2005). According to the Court:

“We assume that if injection constitutes delivery for purposes of conviction,[138] the same act constitutes delivery for purposes of scoring offense variable 15 (aggravated controlled substance offenses), MCL 777.45, at 25 points for delivery of a controlled substance other than marijuana to a minor.” Havens, 268 Mich App at 18.

“A proper reading of MCL 777.45(1)(h) reveals two alternative bases for scoring [OV 15] at five points: (1) when the offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or counterfeit controlled substance; and (2) when the offense involved possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking.” People v Jackson (Kelly), 497 Mich 857, 858 (2014) (holding that five points were properly scored for OV 15 “on the ground that there was evidence of delivery of . . . drugs”).

Five points were properly scored for OV 15 where “[the d]efendant admitted ownership of cocaine and marijuana, and admitted that he sold those substances to others. Packaging materials and a scale of the type used to weigh narcotics were found in [the] defendant’s home, and [the] defendant’s mother admitted that her son was selling something out of her home.” People v Kennedy (Terrell), unpublished per curiam opinion of the Court of Appeals, issued January 29, 2008 (Docket No. 275753).[139]

Five points were proper where the defendant was convicted of possession with intent to deliver less than 50 grams of cocaine. People v Scott (Willie), unpublished per curiam opinion of the Court

138 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.”

139 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1),
of Appeals, issued October 26, 2004 (Docket No. 248764), slip op p 3. The trial court scored OV 15 at five points because the amount of cocaine and its packaging (pieces of crack cocaine were individually wrapped) indicated that the defendant intended to sell or deliver a controlled substance having value or under circumstances that indicated he was involved in trafficking. *Scott (Willie)*, slip op at 1, 3; MCL 777.45(1)(g).

Fifty points were improperly assessed 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, ___ Mich ___, ___* (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”).

### 3.27 OV 16—Property Obtained, Damaged, Lost, or Destroyed

**A. Definitions/Scoring**

OV 16 is scored for all felony offenses under the sentencing guidelines except those involving a controlled substance. MCL 777.22(2), MCL 777.22(4), and MCL 777.22(5). When the offense is a crime against a person, OV 16 is scored only for a violation or attempted violation of MCL 750.110a (home invasion). MCL 777.22(1). Score OV 16 by determining which statements addressed by the variable apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.46(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 16—Degree of property damage</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>For a conviction under MCL 750.50, the property was 25 or more animals.¹ MCL 777.46(1)(a).</td>
</tr>
<tr>
<td>10</td>
<td>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).</td>
</tr>
<tr>
<td>10</td>
<td>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).</td>
</tr>
</tbody>
</table>
• In cases involving multiple offenders or multiple victims, the appropriate point total may be determined by aggregating the value of property involved in the offense, including property involved in uncharged offenses or property involved in charges dismissed under a plea agreement. MCL 777.46(2)(a).

• Use the value of the property to score this variable in cases where the property was unlawfully obtained, lost to the lawful owner, or destroyed. If the property was damaged, use the amount of money necessary to restore the property to its pre-offense condition. MCL 777.46(2)(b).

• Money or property involved in admitted but uncharged offenses or in charges dismissed under a plea agreement may be considered in scoring this variable. MCL 777.46(2)(c).

B. Case Law Under the Statutory Guidelines

“OV 16 [is] to be scored when tangible property that was already possessed by a particular owner was unlawfully obtained, damaged, lost or destroyed[,] . . . [t]herefore, . . . the definition of the term ‘loss’ or ‘lost’ [as used in MCL 777.46] does not encompass a person’s loss of a right or expectation.” People v Hershey, 303 Mich App 330, 340-341 (2013) (holding that the defendant’s failure “to fulfill [his children’s] legal expectation of receiving child support because he was unable to make the [court-ordered] payments[ ]” did not support a score of five points for OV 16).

Additionally, where “[t]he record [was] void of any evidence[,] . . . to refute that [the] defendant was unemployed and unable to pay[,]” his failure to make court-ordered child support payments did not support a score of five points for OV 16 on the basis that property was “obtained unlawfully” within the meaning of MCL 777.46(2)(b). Hershey, 303 Mich App at 338 (noting that “[i]f [the] defendant did

| 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). |

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.
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]."

Where the sentencing offense was armed robbery, MCL 750.529, OV 16 should not have been scored because armed robbery is a crime against a person, and for crimes against a person, OV 16 is scored only when the violation or attempted violation involves MCL 750.110a (home invasion). MCL 777.22(1); People v Miller (Keothes), unpublished per curiam opinion of the Court of Appeals, issued October 28, 2003 (Docket No. 240613).

A family’s attachment to the family pet is the sort of intangible value of property contemplated by OV 16’s point assignment for damage or destruction to property with “significant sentimental value.” People v Kruithoff, unpublished per curiam opinion of the Court of Appeals, issued December 16, 2003 (Docket No. 242739).

The monetary amounts reflected in the statutory language governing OV 16 do not require submission of exacting or itemized proof of the property’s value. See People v Rosario, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2003 (Docket No. 236965) (where testimony established that a door had been broken off its hinges, a mattress was ruined, and a phone line had been pulled off the wall, the Court of Appeals found that there was sufficient evidence showing that the property damage met the minimum amount of $200 for purposes of scoring OV 16).

The scoring of five points for OV 16 over the defendant’s objection was erroneous under People v Lockridge, 498 Mich 358 (2015), “because the jury was only required to find that [the] defendant intended or did commit a larceny, not a larceny of a specific value, . . . [and the facts] were not admitted by [the] defendant[,]” however, because “[r]educing [the] defendant’s OV score by 5 points . . . would not alter [his] guidelines minimum sentence range[,] . . . remand [was] not required under Lockridge.” People v Jackson (Kevin) (On Reconsideration), 313 Mich App 409, 435-436 (2015) (citations omitted).

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140 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.

141 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
3.28 OV 17—Degree of Negligence Exhibited

A. Definitions/Scoring

OV 17 is scored only under very specific circumstances: when the offense is a crime against a person and the crime involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1). Determine which statements apply to the offense and assign the point value indicated by the statement having the highest number of points. MCL 777.47(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 17—Degree of negligence exhibited</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>The offender showed a wanton or reckless disregard for the life or property of another person. MCL 777.47(1)(a).</td>
</tr>
<tr>
<td>5</td>
<td>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).</td>
</tr>
<tr>
<td>0</td>
<td>The offender was not negligent. MCL 777.47(1)(c).</td>
</tr>
</tbody>
</table>

- If points are assessed against the offender for OV 6 (intent to kill or injure another individual), ten points may not be scored under this variable. MCL 777.47(2).
- Definitions for “aircraft,” “ORV,” “snowmobile,” “vehicle,” and “vessel” are referenced in MCL 777.1.

B. Case Law Under the Statutory Guidelines

The trial court erred in scoring five points for OV 17, which, under MCL 777.22(1), “can only be scored for larceny from a person if the crime involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive,” where “the defendant’s operation of a vehicle occurred after he completed the crime of larceny from a person. See People v Smith-Anthony, 494 Mich 669, 689 n 61 (2013) (‘In a larceny case, the crime is completed when the taking occurs.’); see also People v McGraw, 484 Mich 120, 122 (2009) (‘A defendant’s conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise.’).” People v Siders, 497 Mich 985, 986 (2015).

Five points were properly scored for OV 17 where “[t]he evidence revealed that the two vehicles in front of [the] defendant

\[142\] The language used in the instructions for OV 17 does not appear to preclude assigning an offender five points under this variable when the offender received points under OV 6.
successfully swerved to avoid hitting the victim . . . , while [the] defendant did not.” *People v Bartel*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2011 (Docket No. 296795).143

OV 17 was properly scored at ten points where “[the] defendant did not give up possession of the vehicle until after he had led multiple officers on a chase. [The d]efendant was observed driving through an intersection on a red light, driving erratically in an attempt to avoid police officers, and driving on a sidewalk near a pedestrian and her children.” *People v Morrison (Brian)*, unpublished per curiam opinion of the Court of Appeals, issued March 25, 2010 (Docket No. 285662).

### 3.29 OV 18—Operator Ability Affected by Alcohol or Drugs

#### A. Definitions/Scoring

OV 18 is only scored under very specific circumstances: when the offense is a crime against a person and the crime involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1). Score OV 18 by determining which of the statements addressed by this variable apply to the offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.48(1).144

<table>
<thead>
<tr>
<th>Pts</th>
<th>OV 18—Degree to which alcohol or drugs affected the offender</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>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).</td>
</tr>
<tr>
<td>15</td>
<td>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).</td>
</tr>
</tbody>
</table>

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143 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
<table>
<thead>
<tr>
<th>10</th>
<th>The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender was under the influence of alcoholic or intoxicating liquor, a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance; or while the offender’s body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(iv); or while the offender had an alcohol content of 0.08 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2021, 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).</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>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.</td>
</tr>
<tr>
<td>5</td>
<td>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).</td>
</tr>
<tr>
<td>5</td>
<td>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.</td>
</tr>
<tr>
<td>0</td>
<td>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).</td>
</tr>
</tbody>
</table>

- For purposes of scoring OV 18, “any bodily alcohol content” is either of the following:
  - an alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or

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144 Effective September 30, 2003, 2003 PA 134 amended the statute governing point allocations for OV 18. Language appearing in the shaded areas of the chart represents the variable as it applies to offenses that occurred before September 30, 2003. Unshaded areas contain the instructions for scoring OV 18 for offenses occurring on or after September 30, 2003, the amendment’s effective date.
• any presence of alcohol within a person’s body from the consumption of alcohol except for alcohol consumption as part of a generally recognized religious service or ceremony, MCL 777.48(2)(b).

• Definitions for “aircraft,” “ORV,” “snowmobile,” “vehicle,” and “vessel” are referenced in MCL 777.1.

B. Case Law Under the Statutory Guidelines

At the time this chapter was published, there was no published case law concerning the application of OV 18.

“[Where the defendant’s own testimony at the plea hearing indicated that he ‘was on drugs’ at the time he took the victim’s vehicle[,]” and where “the sentencing report indicate[d] that [the] defendant’s description of the offense included an admission that he had smoked crack ten minutes before forcibly taking the victim’s car[,]” ten points were appropriately scored for OV 18. People v Morrison (Brian), unpublished per curiam opinion of the Court of Appeals, issued March 25, 2010 (Docket No. 285662).147

3.30 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

A. Definitions/Scoring

OV 19 is scored for all felony offenses to which the statutory sentencing guidelines apply. MCL 777.22(1)-(5). Determine which statements addressed by OV 19 apply to the sentencing offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.49.

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 19—Threat to security or interference with administration of justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>The offender by his or her conduct threatened the security of a penal institution or court. MCL 777.49(a).</td>
</tr>
</tbody>
</table>

145 Beginning October 1, 2021, an alcohol content of 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

146 Before September 30, 2003, MCL 777.48(2)(a) stated: “An alcohol content of not less than 0.02 grams or more than 0.07 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.”

147 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
### B. Case Law Under the Statutory Guidelines

“[T]he plain and ordinary meaning of ‘interfere with the administration of justice’ for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process.” People v Hershey, 303 Mich App 330, 343 (2013) (citations omitted). “It ‘encompasses more than just the actual judicial process’ and can include ‘[c]onduct that occurs before criminal charges are filed,’ acts that constitute obstruction of justice, and acts that do not ‘necessarily rise to the level of a chargeable offense[,]’” Id. (citation omitted).

In addition to the following discussion of issues, see the Michigan Judicial Institute’s table summarizing OV 19 scoring circumstances caselaw.

#### 1. Conduct That Threatened the Security of a Penal Institution or Court

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”).

<table>
<thead>
<tr>
<th>Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>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).</td>
</tr>
<tr>
<td>10</td>
<td>The offender otherwise interfered with or attempted to interfere with the administration of justice, or directly or indirectly violated a personal protection order. MCL 777.49(c).</td>
</tr>
<tr>
<td>0</td>
<td>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).</td>
</tr>
</tbody>
</table>

1. The phrase “or directly or indirectly violated a personal protection order” was added to MCL 777.49(c) by 2018 PA 652, effective March 28, 2019.
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 (Chad), 322 Mich App 523, 530, 531 (2018) (noting that “OV 19 explicitly contemplates post-offense conduct[”] and rejecting “[the] 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 [his] 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, [the] 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.

Where “the defendant was arrested with drugs on his person that were only discovered after he was transported to the county jail[,]” the trial court properly assessed 25 points for OV 19; “MCL 777.49(a)[, which] is not limited ‘to those instances in which the sentencing itself occurred within a court or penal institution[,]’” does not contain an intent requirement. People v Bragg, unpublished per curiam opinion of the Court of Appeals, issued September 12, 2013 (Docket No. 310200), rev’d in part on other grounds by People v Bragg, 498 Mich 900 (2015) (quoting People v Smith (David), 488 Mich 193, 200 (2010), and rejecting the defendant’s argument that 25 points should not have been scored for OV 19 because “he involuntarily brought drugs to the jail after he was placed under arrest and, therefore, had no intent to threaten the security of the penal institution[”]). 148

2. 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

148 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
officer a false name when asked for identification. *People v Barbee*, 470 Mich 283, 284, 288 (2004) (the defendant gave a false name to a police officer who had pulled over the defendant’s car for crossing the fog line). 149

According to the *Barbee* Court, the phrase ‘administration of justice’ “encompasses more than just the actual judicial process.” *Barbee*, 470 Mich at 287-288. The Court explained:

“While ‘interfered with or attempted to interfere with the administration of justice’ is a broad phrase that can include acts that constitute ‘obstruction of justice,’ it is not limited to only those acts that constitute ‘obstruction of justice.’

***

“The investigation of crime is critical to the administration of justice. Providing a false name to the police constitutes interference with the administration of justice, and OV 19 may be scored, when applicable, for this conduct.” *Barbee*, 470 Mich at 286, 288.

However, ten points may not be scored under OV 19 based solely on the fact that a defendant lied to medical services personnel. *People v Portellos*, 298 Mich App 431, 449-452 (2012), overruled in part on other grounds by *People v Calloway*, 500 Mich 180 (2017) 150 (holding that “[t]he trial court correctly determined that it should not assign [the defendant ten] points for OV 19 for lying to medical services personnel” about the circumstances surrounding the birth and death of her infant, because “MCL 777.49(c) does not contain any reference to ‘[’]otherwise interfering with emergency medical services[’]”).

“Fleeing from the police can easily become ‘interference with the administration of justice’ particularly where[,] . . . there was an effective command for the vehicle to stop, in the form of the police activating their lights and sirens.” *People v Ratcliff*, 299 Mich App 625, 632-633 (2013), vacated in part on other grounds 495 Mich 876 (2013) 151 (ten points were properly scored for OV

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149 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.

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

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

3. **Conduct After Completion of Offense**

“OV 19 may be scored for conduct that occurred after the sentencing offense was completed.” *Smith (David)*, 488 Mich at 202. “Because the circumstances described in OV 19 expressly include events occurring after a felony has been completed, the offense variable provides for the ‘consideration of conduct after completion of the sentencing offense.’” *Id.* at 202, quoting *McGraw*, 484 Mich at 133-134.

In *Smith (David)*, 488 Mich at 197, the defendant was convicted of manslaughter, reckless driving, and witness intimidation. A few days after the car accident in which the victim was killed, the defendant made threatening statements to one of the passengers in the defendant’s vehicle at the time of the accident. *Id.* at 196. At sentencing, defense counsel argued that the “defendant’s witness intimidation conviction precluded the scoring of OV 19 for the manslaughter conviction.” *Id.* at 197. The Court of Appeals agreed and held that the defendant should have been scored zero points for OV 19, based on the rule set out in *McGraw*, 484 Mich 120, that “offense variables may not be scored for conduct that occurred after the completion of the sentencing offense unless provided for in the particular variable . . . .” *Smith (David)*, 488 Mich at 197-198. The Supreme Court reversed, noting that “[t]he aggravating factors considered in OV 19 contemplate events that almost always occur after the charged offense has been completed[,]” and that “[t]he express consideration of these events explicitly indicates that postoffense conduct may be considered when scoring OV 19.” *Id.* at 200. The Court held that “[u]nder the exception to the general rule set [out] in *McGraw*, OV 19 may be scored for conduct that occurred after the sentencing offense was completed.” *Smith (David)*, 488 Mich at 202.

The mere fact that a defendant “was contemporaneously in violation of his [or her] parole[]” at the time of the commission of the sentencing offense does not justify a score of 10 points for OV 19. *People v Sours*, 315 Mich App 346, 348 (2016) (citing *McGraw*, 484 Mich at 135, and holding that “the trial court erred by scoring 10 points for OV 19 . . . [for the] defendant’s possession-of- methamphetamine conviction because [the] defendant’s failure to report to his parole agent before committing a new felony, the sentencing offense, did not
hinder the process of administering judgment for the sentencing offense[”]”) (emphasis added). Where “[the] defendant was arrested immediately after being discovered with methamphetamine[, t]he fact that he was also violating his parole had no effect on the process of investigating, trying, and convicting him for the methamphetamine offense; therefore, OV 19 should have been scored at zero points.” Sours, 315 Mich App at 350 (citation omitted).

The defendant’s misconduct while in jail awaiting sentencing on the sentencing offense is properly considered in scoring OV 19. Carpenter (Chad), 322 Mich App at 530 (noting that the defendant, who attempted to smuggle drugs into jail and assaulted another inmate who had informed the authorities of his conduct, was “in the ‘administration of justice’ phase of the sentencing offense when his conduct threatened the security of a penal institution[””).

4. Threatening Conduct/Words

Ten points were properly scored for OV 19 where the defendant told the rape victim that he knew who she was and that “his ‘boys’ had been watching her[,]” and where the “defendant required the victim to promise not to contact the police as a condition of releasing her.” McDonald (Deandre), 293 Mich App at 299-300. The Court explained:

“[T]he specific criminal sexual conduct offense for which [the] defendant was charged and convicted was sexual penetration involving the commission of another felony. MCL 750.520b(1)(c). The underlying felony is therefore part of the criminal sexual conduct offense itself. Armed robbery, MCL 750.529, proscribes conduct that includes an assault and a felonious taking of property from the victim’s presence or person while the defendant is armed with a weapon, . . . and as such includes flight or attempted flight after the commission of the larceny, or attempts to retain possession of the stolen items, see MCL 750.530(2). Kidnapping is defined as restraining another person, meaning restricting or confining their liberty, and thus necessarily is an ongoing offense until the victim is released. MCL 750.349(2) . . . . In this case, the victim’s liberty was not free from restraint until she was not only out of [the] defendant’s car, but out of shooting range—after all, the defendant had a gun trained on her even after she exited the car.
Therefore, even if [the] defendant had not made
the threat to the victim until she was already
walking away, none of [the] defendant’s charged
offenses were complete until it was clear that he
could no longer change his mind and order her
back into the car and OV 19 should be scored.”

*McDonald (Deandre)*, 293 Mich App at 300-301.

A defendant’s conduct is properly scored under OV 19 where
the defendant threatens to kill a victim of the crime committed.

*People v Endres*, 269 Mich App 414, 420-422 (2006), overruled in
part on other grounds by *People v Hardy (Donald)*, 494 Mich 430
(2013), 152 effectively superseded in part on other grounds by
2015 PA 137, effective January 5, 2016. Without regard to a
defendant’s intention when the threat was issued, fifteen
points are appropriate because the “threats resulted in the
interference with the administration of justice, either by
preventing the victim from coming forward sooner or affecting
his testimony against [the] defendant.” *Endres*, 269 Mich App
at 422. See also *Steele (Larry)*, 283 Mich App at 492-493 (ten
points were properly scored for OV 19 where the
“[d]efendant’s admonitions to his victims [that he would go to
jail if they disclosed his acts of sexual assault] were a clear and
obvious attempt by him to diminish his victims’ willingness
and ability to obtain justice”).

5. **Flight From Police**

“Fleeing from the police can easily become ‘interference with
the administration of justice’ particularly where[] . . . there was
an effective command for the vehicle to stop, in the form of the
police activating their lights and sirens.” *Ratcliff*, 299 Mich App
at 632-633 (ten points were properly scored for OV 19 where
police officers approached the stolen vehicle in which the
defendant was a passenger and ordered the occupants to
“[f]reeze,” but the defendant, after a vehicle chase, “instead
fled on foot after the vehicle came to a stop”). But see *People v
Brown (Charles)*, unpublished per curiam opinion of the Court
of Appeals, issued August 13, 2013 (Docket No. 313306)
(“[b]ecause flight by itself provides no basis for scoring points
under OV 19, and because the record . . . does not show that
[the] defendant’s flight was even related to the police or their
imminent arrival, the trial court erred in scoring ten points
under OV 19]” where the defendant left the scene merely for
the purpose of avoiding further confrontation with the victim

152For more information on the precedential value of an opinion with negative subsequent history, see
our note.
and did not “[take] affirmative steps, beyond mere flight, to obstruct justice[.]”

6. Resisting Apprehension

OV 19 is properly scored at 15 points where the defendant, in the course of robbing a retail store, “vigorously resisted and threatened” the store’s loss prevention officer and other store employees. *People v Passage*, 277 Mich App 175, 181 (2007). According to the Court, interference with store employees in their efforts to prevent the defendant from leaving the premises with unpaid merchandise constituted “interference with the administration of justice” because MCL 764.16(d) authorizes a private citizen to make an arrest if the citizen is an employee of a merchant and has reasonable cause to believe that the person arrested committed a larceny in that store. *Passage*, 277 Mich App at 180-181. Additionally, the language in MCL 777.49(b) refers only to using force or threatening force against another “person”; the statute does not require that the use or threat of force be directed against police officers. *Passage*, 277 Mich App at 181, citing *Endres*, 269 Mich App at 420-422.

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.

8. General Denial of Guilt

Ordinarily, “a general denial of accusation by a defendant cannot support the scoring of OV 19[.]” *People v Jackson (Victor)*, unpublished per curiam opinion of the Court of Appeals, issued October 1, 2009 (Docket No. 285285), slip op p 6. However, OV 19 is properly scored at ten points where the defendant “actively lie[s] to the police, providing a false version of events designed to avoid arrest and to impugn the

153 Unpublished opinions are not procedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

154 Unpublished opinions are not procedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
conduct and reputation of the victim.” *Id.* In *Jackson (Victor)*, slip op at 6, the Court found that the defendant’s “active lies, attempting to portray the victim as the aggressor and designed to thwart prosecution, interfered with the administration of justice.”

9. **Lying to Police**

OV 19 is properly scored at ten points where an offender “goes beyond merely lying to the police about being guilty, but affirmatively interfer[es] with the administration of justice by inventing a crime where none existed, and falsely reporting that non-existent crime to the police.” *People v Morgan (William)*, unpublished per curiam opinion of the Court of Appeals, issued October 21, 2003 (Docket No. 242731), slip op pp 3-4.

10. **Lying to Medical Personnel**

“MCL 777.49(c) does not contain any reference to ‘[‘]otherwise interfering with emergency medical services[;’]’” accordingly, “[t]he trial court correctly determined that it should not score [the defendant ten] points for OV 19 for lying to medical services personnel[” about the circumstances surrounding the birth and death of her infant. *Portellos*, 298 Mich App at 450-451 (noting that although “[i]nterference with emergency services is mentioned several other times throughout MCL 777.49,” it was “not included in MCL 777.49(c)[,]” which “is the only part of OV 19 that includes . . . conduct[] such as deceit[]”).

11. **Concealing or Destroying a Weapon**

Evidence of an offender’s “attempt to hide or dispose of the weapon [he used to stab the victim] in conjunction with his encouragement of others to lie about where he was at the time of the stabbing was a multifaceted attempt to create a false alibi and mislead the police” and supported the trial court’s assessment of ten points for OV 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”155).

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155Note 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.
12. Fleeing Jurisdiction

OV 19 was properly scored where the defendant absconded and fled the jurisdiction during his trial. *People v Vallance*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2003 (Docket No. 242163). According to the *Vallance* Court, the defendant’s conduct was “precisely the type of ‘evasive and noncooperative behavior’ that OV 19 was designed to address.” *Id.*, quoting *Deline*, 254 Mich App at 697-698.

The trial court properly assessed ten points for OV 19 where the defendant fled to a different state and changed his name following the commission of the sentencing offense. *People v Waller*, unpublished per curiam opinion of the Court of Appeals, issued June 14, 2011 (Docket No. 297639). The defendant’s conduct interfered with the administration of justice by interfering with his capture and arrest. *Id.* “The fact that the investigation could proceed without [the] defendant’s presence in Michigan does not mean that the administration of justice was not hampered.” *Id.*

13. Change in Offender’s Appearance

Absent evidence that the defendant deliberately attempted to prevent his identification by witnesses, a defendant’s drastic weight loss and change in head and facial hair styles is not conduct contemplated by OV 19. *People v Arney*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2003 (Docket No. 236875).

14. Failure to Pay Court-Ordered Child Support

“[The] defendant’s failure to comply with [his] court-ordered [child support] obligation” did not “constitute interference with the administration of justice under OV 19,” *People v Hershey*, 303 Mich App 330, 342, 345 (2013) (holding that because “[the] defendant’s failure to pay child support occurred after the circuit court ordered [him] responsible for child support[,]” the defendant “did not hinder the process or act of administering judgment by judicial process of the cause in . . . the divorce and child-support [case]” in which child support was ordered).

15. Probation Violations

“[The] defendant did not interfere with the administration of justice by violating the terms of his probation[,]” and ten
points could not be scored for OV 19 on this basis. *Hershey*, 303 Mich App at 345-346 (noting that “[w]hen [the] defendant violated the terms of his probation, the trial court had already entered the . . . judgment of sentence, and the court’s probation order was already effective; [t]hus, although [the] defendant violated the trial court’s probation order, he did not hinder the process or act of the trial court administering judgment in [that case]]”).

16. Failure to Register Under the Sex Offenders Registration Act (SORA)

“[A] defendant’s failure to register as a sex offender [does] not constitute interference with the administration of justice[]” under OV 19. *People v Welch (Jamaal)*, unpublished per curiam opinion of the Court of Appeals, issued August 14, 2014 (Docket Nos. 315782; 316029), slip op p 1. “[O]nce [the] defendant was convicted of a listed offense, . . . ‘the process or act of administering judgment by judicial process’ was complete upon [the] defendant as related to that offense because he was already found guilty of that offense[,] . . . therefore[,] . . . OV 19 could not be scored at ten points for interfering with the administration of justice as related to the underlying listed offense.” *Welch (Jamaal)*, slip op at 2, quoting *Hershey*, 303 Mich App at 344-345. “Moreover, . . . [the] defendant’s failure to register as a sex offender [did not] . . . constitute[] an interference with the administration of justice[ because] the duties of police under [the SORA] are monitoring functions that do not involve the administering of judgment to an individual by judicial process.” *Welch (Jamaal)*, slip op at 2, citing *Hershey*, 303 Mich App at 342-343.156

17. 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 entered a camper parked in a nearby yard for the purpose of hiding from the police. *People v Smith (Chaz)*, 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 [(i.e., resisting or obstructing a police officer)] when he entered the camper[,]” and when he “broke into the camper, he exerted

156 An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).
force against the property of another [for purposes of OV 19] by opening the door.” *Id.* at 288 (noting that “‘[u]nder Michigan law, any amount of force used to open a door or window to enter [a] building, no matter how slight, is sufficient to constitute a breaking[]’”) (citation omitted).

18. Claim of *Lockridge* Error

Where the defendant, “while pleading guilty, . . . admitted that he ran from the police after stealing property . . . and that he broke into [a] camper in order to hide from the police[,] . . . the facts necessary to support a score of fifteen points [for OV 19] were admitted by [the defendant], and his sentence was not constrained by improper judicial fact-finding in violation of the Sixth Amendment” under *People v Lockridge*, 498 Mich 358, 373 (2015). *Smith (Chaz)*, 318 Mich App at 289, citing *People v Garnes*, 316 Mich App 339, 344 (2016).157

3.31 OV 20—Terrorism

A. Definitions/Scoring

OV 20 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22(1)-(5). Score OV 20 by determining which statements addressed by the variable apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.49a(1).

<table>
<thead>
<tr>
<th>Points</th>
<th>OV 20—Terrorism</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>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).</td>
</tr>
<tr>
<td>50</td>
<td>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).</td>
</tr>
</tbody>
</table>

157 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 “[t]he defendant did not make any . . . formal admission” with respect to several contested offense variable scores).
For purposes of scoring this variable, the terms “act of terrorism” and “terrorist” are defined in MCL 750.543b. MCL 777.49a(2)(a).158

“Harmful biological substance,” “harmful biological device,” “harmful chemical substance,” “harmful chemical device,” “harmful radioactive material,” and “harmful radioactive device” are defined in MCL 750.200h. MCL 777.49a(2)(b).

“Incendiary device’ includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device.” MCL 777.49a(2)(c).

For purposes of OV 20, “terrorist organization” is defined in MCL 750.543c. MCL 777.49a(2)(d).

### B. Case Law Under the Statutory Guidelines

Scoring 100 points for OV 20 is appropriate only when a defendant’s use or threatened use of one of the substances or devices enumerated in MCL 777.49a also constitutes an act of terrorism as defined by MCL 750.543b(a); a score of 100 is inappropriate when a defendant’s threats to cause harm using certain substances or devices do not themselves constitute acts of terrorism. People v Osantowski, 481 Mich 103, 105 (2008). To merit 100 points, the plain language of MCL 777.49a(1)(a) requires “the offender [to] have ‘committed an act of terrorism by using or threatening to use’ one of the enumerated substances or devices.” Osantowski, 481 Mich at 108-109; MCL 777.49a(1)(a)-(b). In other words, “the use or threatened use must constitute the means by which the offender committed an act of terrorism.” Osantowski, 481 Mich at 109. “To constitute an act of terrorism, a threat must be a violent felony and also must itself be ‘a willful and deliberate act’ that the offender ‘knows or has reason to know is dangerous to human life’ and ‘that is intended to intimidate or coerce a civilian population or influence or affect the

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158 An “act of terrorism” is “a willful and deliberate act that . . . would be a violent felony under [Michigan law, no matter where the act was committed, a]n act that the person knows or has reason to know is dangerous to human life[, and a]n act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.” MCL 750.543b(a)(i)-(iii). A “terrorist” is “any person who engages or is about to engage in an act of terrorism.” MCL 750.543b(g).
conduct of government or a unit of government through intimidation or coercion.” Id., quoting MCL 750.543b(a). Here, the trial court properly concluded that the defendant did not actually intend to intimidate or coerce a civilian population or influence or affect government conduct when he e-mailed to another teenager his threats to engage in violent conduct. Osantowski, 481 Mich at 112. However, where “[t]he record demonstrate[d] that [the] defendant used a computer . . . to send intimidating e-mails that threatened physical force against a particular civilian population[,]” the trial court did not err “in concluding that [the] defendant supported an act of terrorism and in assessing 25 points under OV 20.” People v Yaryan, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2011 (Docket No. 300763)159 (concluding that in Osantowski, 481 Mich at 111, the Michigan Supreme Court “specifically noted that a threat of terrorism may qualify as an act in support of terrorism for purposes of OV 20[)].”

159 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
# Chapter 4: Determination of Recommended Minimum Sentences for Offenders Not Sentenced as Habitual Offenders

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4.1 **Scope Note**

Chapter 4 discusses the standard method of determining the recommended minimum sentence ranges using the statutory sentencing guidelines and grids\(^1\) for offenders *not* being sentenced as habitual offenders.

4.2 **Felony Offenses Enumerated in §777.11a—§777.17g\(^2\)**

The felony offenses enumerated in MCL 777.11a to MCL 777.17g require no special application of the statutory sentencing guidelines. For offenses listed in MCL 777.11a to 777.17g, determine which OVs should be scored by finding the crime group to which the sentencing offense belongs and scoring only the OVs indicated for crimes in that group.\(^3\) MCL 777.21(1)(a). The total number of points scored for all OVs appropriate to the offense is the offender’s “OV level.” *Id.* Depending on the specific sentencing grid, an offender’s OV level will be designated in roman numerals from I to VI. The OV level’s numeric designation increases as the offender’s OV point total increases so that the severity of the corresponding penalty increases as does the offender’s OV level.

All seven PRVs are scored for felony offenses subject to the statutory sentencing guidelines. MCL 777.21(1)(b).\(^4\) The total number of points scored for an offender’s seven PRVs is the offender’s “PRV level.” *Id.* An offender’s PRV level is designated by capital letters from A to F according to the offender’s PRV point total. PRV level A represents the column with the fewest points and PRV level F represents the column with the most points. As with the OV level values, the severity of penalty increases with

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\(^1\) See for general discussion of the sentencing grids.


\(^3\) \(^{3}\) details the statutory instructions used to score each OV.

\(^4\) \(^{4}\) discusses in detail the statutory instructions pertaining to each PRV.
an offender’s transit from PRV level A up to PRV level F. The point values corresponding with PRV levels A through F are the same for all nine sentencing grids so that an offender’s criminal history is equally weighted regardless of the severity of the sentencing offense.

A defendant’s recommended minimum sentence is indicated by the range contained in the cell located at the intersection of the defendant’s OV level (vertical axis) and PRV level (horizontal axis) on the sentencing grid appropriate to the offense of which the defendant was convicted. MCL 777.21(1)(c). The appropriate sentencing grid is determined by the crime class to which the sentencing offense belongs, and the appropriate minimum sentence range is determined by whether the offender will be sentenced as a habitual offender. MCL 777.21(1)(c); MCL 777.21(3). For first-time offenders, or offenders not otherwise being sentenced as habitual offenders, the appropriate upper limit of a recommended minimum range is the number corresponding to the empty “offender status” box on the sentencing grid.5

<table>
<thead>
<tr>
<th>OV Level</th>
<th>PRV Level</th>
<th>Offender Status</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A 0 Points</td>
<td>B 1-9 Points</td>
</tr>
<tr>
<td>I 0-9 Points</td>
<td>3*</td>
<td>6*</td>
</tr>
<tr>
<td>3*</td>
<td>7*</td>
<td>11*</td>
</tr>
<tr>
<td>4*</td>
<td>9*</td>
<td>13*</td>
</tr>
<tr>
<td>6*</td>
<td>12*</td>
<td>18*</td>
</tr>
</tbody>
</table>

For example, in the sentencing grid above, the recommended minimum ranges for an individual being sentenced as a first-time offender are (in

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5 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.
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.

4.3 Felony Offenses Enumerated in §777.18 (Offenses Predicated on an Underlying Felony)\(^6\)

Special scoring instructions apply to offenses listed in MCL 777.18. Offenses in MCL 777.18 are offenses predicated on an offender’s commission of an underlying felony. The offenses listed in MCL 777.18 are those felony offenses for which the statutory maximum penalty is “variable.” “Variable” indicates that the term of imprisonment for the violations listed there is not limited to a specific number of years (as are the individual violations listed in MCL 777.11a to MCL 777.17g) because the offenses in MCL 777.18 refer to a variety of underlying felonies to which different statutory maximum penalties apply. In addition, some provisions of the felony offenses listed in MCL 777.18 provide for mandatory minimums or double or triple times the maximum terms of imprisonment authorized in the statutory language governing the underlying felonies themselves.

Scoring instructions for the offenses in MCL 777.18 are found in MCL 777.21(4), which states:

“If the offender is being sentenced for a violation described in [MCL 777.18], both of the following apply:

(a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in [MCL 777.18].

(b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G.”

MCL 777.21(4)(a) requires that all OV's appropriate to the crime group designated in MCL 777.18 must be scored as well as any additional OV's appropriate to the crime group of the underlying offense.

The crime class of the underlying offense determines which sentencing grid must be used to determine the offender’s recommended minimum sentence range once the offender’s PRV and OV levels have been calculated. MCL 777.21(4)(b) assigns a “default” crime class of G to an MCL 777.18 offense when none of the underlying offenses is a felony, e.g., a violation of MCL 333.7410(4) (possession of certain controlled substances on or within 1,000 feet of school property) based on a violation of MCL 333.7403(2)(d) (misdemeanor possession of marijuana).

The general rule of MCL 777.21(1)(b), requiring the scoring of prior record variables (PRVs) for all offenses enumerated in MCL 777.11–MCL 777.19, applies to “all cases . . . unless the language in another subsection of the statute directs otherwise.” People v Peltola, 489 Mich 174, 182 (2011). Thus, PRVs must be scored against offenders falling within the purview of MCL 777.21(4) for offenses listed in MCL 777.18, notwithstanding the absence of a reference to PRVs in MCL 777.21(4).

In Peltola, 489 Mich at 177, the defendant was convicted of a subsequent controlled substance violation (an MCL 777.18 offense), and his minimum and maximum sentences were doubled as permitted by MCL 333.7413(1). The defendant argued that MCL 777.21(1)(b), which directs the sentencing court to score a defendant’s PRVs “[e]xcept as otherwise provided[,]” does not apply to an offender who is being sentenced for a violation described in MCL 777.18 and who is therefore subject to the terms of MCL 777.21(4). Peltola, 489 Mich at 184. The Michigan Supreme Court disagreed, holding that “MCL 777.21(1) sets forth the general rule for determining a defendant’s minimum sentence range[,]” and that, because MCL 777.21(4) does not direct otherwise but instead “is merely intended to provide guidance regarding how to determine the OV level and offense class for offenders falling under MCL 777.18[,]” the rule requiring the scoring of PRVs remains applicable to those offenders. Peltola, 489 Mich at 176, 191.

There are eight felony offenses included in MCL 777.18 to which the statutory sentencing guidelines apply, and a conviction for any of the eight offenses requires the commission of an offense described in the statutory language of the eight respective felony offenses. Each of the eight offenses is discussed below.

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7 Peltola references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when Peltola was decided is now subsection (1).
A. Controlled Substance Violations Involving Minors or Near School Property or a Library

MCL 333.7410 addresses several felony violations to which the sentencing guidelines apply.

1. Delivery of Cocaine or a Narcotic Drug Listed in Schedule 1 or 2 to a Minor

MCL 333.7410(1) addresses an offender aged 18 or over who violates MCL 333.7401(2)(a)(iv) (less than 50 grams) by delivering or distributing a controlled substance in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv) (cocaine and related substances) to an individual under the age of 18 who is at least three years younger than the deliverer or distributor. For a conviction of MCL 333.7410(1), the trial court may:

- impose the $25,000 fine authorized under MCL 333.7401(2)(a)(iv); or
- sentence the offender to a term of imprisonment of not less than one year and not more than twice the 20-year maximum term authorized under MCL 333.7401(2)(a)(iv); or
- both.

2. Delivery of Gamma-Butyrolactone (GBL) or a Controlled Substance Listed in Schedules 1 to 5 to a Minor

MCL 333.7410(1) also provides the penalties for a person aged 18 or over who violates MCL 333.7401(2)(b), (c), or (d) or MCL 333.7401b by distributing or delivering any other controlled substance listed in schedules 1 to 5 or GBL to a person under age 18 who is at least three years younger than the distributor or deliverer. An offender convicted of violating this portion of MCL 333.7410(1) is subject to:

- a fine authorized by MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b,\(^8\) or
- a term of imprisonment not to exceed twice the term authorized under MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b,\(^9\) or

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\(^8\) The fine amounts vary according to the controlled substance involved.
• both.

3. **Delivery of Cocaine or a Narcotic Drug Listed in Schedule 1 or 2 Within 1,000 Feet of School Property or a Library**

MCL 333.7410(2) provides the penalty for a person aged 18 years or older who violates MCL 333.7401(2)(a)(iv) (less than 50 grams) by delivering or distributing a controlled substance described in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv) (cocaine and related substances) to another person on or within 1,000 feet of school property or a library. Conviction of violating MCL 333.7410(2) subjects an offender to:

• mandatory imprisonment for not less than two years\(^{10}\) and not more than three times the 20-year maximum term authorized by MCL 333.7401(2)(a)(iv); and

• a discretionary fine not to exceed three times the $25,000 fine permitted under MCL 333.7401(2)(a)(iv).

4. **Possession With Intent to Deliver Cocaine or a Narcotic Drug Listed in Schedule 1 or 2 Within 1,000 Feet of School Property or a Library**

MCL 333.7410(3) provides the penalty for a person aged 18 years or older who violates MCL 333.7401(2)(a)(iv) (less than 50 grams) “by possessing with intent to deliver to another person on or within 1,000 feet of school property or a library a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(iv)]” (cocaine and related substances). An offender convicted of violating MCL 333.7410(3) is subject to:

• mandatory imprisonment for not less than two years\(^{11}\) and not more than two times the maximum term of 20 years authorized under MCL 333.7401(2)(a)(iv); and

• a discretionary fine not to exceed three times the $25,000 fine permitted under MCL 333.7401(2)(a)(iv).

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\(^9\) The maximum terms of imprisonment vary according to the controlled substance involved.

\(^{10}\) The trial court may depart from the mandatory minimum term for “substantial and compelling” reasons. MCL 333.7410(5).

\(^{11}\) The trial court may depart from the mandatory minimum term for “substantial and compelling” reasons. MCL 333.7410(5).
A defendant is subject to an enhanced penalty under MCL 333.7410(3) only if the prosecution presents “proof that the defendant specifically intended to deliver a controlled substance to a ‘person on or within 1,000 feet of school property or a library[,]’” rather than that the defendant possessed the drugs on or within 1,000 feet of school property or a library. People v English, 317 Mich App 607, 610, 612, 616-617 (2016) (opinion by Wilder, P.J.) (quoting MCL 333.7410(3) and holding that the trial court properly dismissed the charges against the defendants where “although the prosecution presented evidence to establish that [they were] arrested within 1,000 feet of school property while in possession of drugs, the prosecution failed to demonstrate that [they] intended to deliver those drugs to a person on or within 1,000 feet of school property[.]”). See also English, 317 Mich App at 617 (Murphy, J., concurring in decision to affirm dismissal because “the Legislature intended MCL 333.7410(3) to apply when an offender possesses a controlled substance either inside or outside a school zone with the intent to deliver the controlled substance within a school zone[.]”).

5. Possession of GBL or Other Controlled Substance on or Within 1,000 Feet of School Property or a Library

MCL 333.7410(4) provides the penalty for persons aged 18 years or older who violate MCL 333.7401b or 333.7403(2)(a)(v), (b), (c), or (d), by possessing GBL or a controlled substance on or within 1,000 feet of school property or a library. An offender convicted of violating MCL 333.7410(4) is subject to:

- mandatory imprisonment, or the imposition of a fine, or both, not to exceed two times the term of imprisonment or twice the amount of fine authorized by MCL 333.7401b or MCL 333.7403(2)(a)(v), (b), (c), or (d).12

6. Manufacturing Methamphetamine Within 1,000 Feet of School Property or a Library

MCL 333.7410(6) provides the penalty for persons aged 18 years or older who violate MCL 333.7401 by manufacturing methamphetamine on or within 1,000 feet of school property or a library. For a conviction under MCL 333.7410(6), the trial court may:

12 The terms of imprisonment and the amounts of the fines vary with the controlled substance involved in each of these statutes.
• impose a fine of up to twice the $25,000 fine authorized under MCL 333.7401(2)(b)(i); or

• sentence the offender to a term of imprisonment of not more than twice the 20-year maximum term authorized under MCL 333.7401(2)(b)(i); or

• both.

B. Subsequent Controlled Substance Violations

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). 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)13], by authorizing a trial court to enhance the sentence of a defendant who is a repeat drug offender to a ‘term not more than twice the term otherwise authorized,’ allows the trial court to double both the defendant’s minimum and maximum sentences.” People v Lowe, 484 Mich 718, 719 (2009), overruled in part on other grounds by People v Peltola, 489 Mich 174 (2011). “[W]hen calculating a defendant’s recommended minimum sentence range under the sentencing guidelines when the defendant’s minimum and maximum sentences may be enhanced pursuant to [MCL 333.7413(1)14], a trial court should score the PRVs [prior record variables].” Peltola, 489 Mich at 190. In Peltola, 489 Mich at 184, the defendant contended that MCL 777.21(1)(b), requiring the sentencing court to score a defendant’s PRVs “[e]xcept as otherwise provided[,]” does not apply to offenders falling within the purview of MCL 777.21(4).15 The Michigan Supreme Court disagreed, holding that “MCL 777.21(1) sets forth the general rule for determining a defendant’s minimum sentence range” and that, because MCL 777.21(4) does not direct otherwise but instead “is merely intended to provide guidance regarding how to determine the OV level and offense class for

13 Lowe references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when Lowe was decided is now subsection (1).

14 Peltola references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when Peltola was decided is now subsection (1).

15 MCL 777.21(4) applies to an offender who “is being sentenced for a violation described in [MCL 777.18],” which includes subsequent controlled substance violations under MCL 333.7413(2).
offenders falling under MCL 777.18[,]” the rule requiring the scoring of PRVs remains applicable to those offenders. *Peltola*, 489 Mich at 176, 191.\(^{16}\)

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).\(^{17}\) 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 five years\(^{18}\) but may not be sentenced to more than two times the term authorized in MCL 333.7410(2) and MCL 333.7410(3).
- The offender may be fined up to three times the amount authorized by MCL 333.7410(2) and MCL 333.7410(3).
- The offender is not eligible for probation or suspension of his or her sentence during the term of imprisonment.

MCL 333.7413(4) provides:

“[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug.” (Emphasis added.)

“Another state” for purposes of MCL 777.51(2) (one of the statutory instructions for scoring prior record variable 1 under the sentencing guidelines) does not include foreign states. *People v Price (Tore)*, 477 Mich 1, 5 (2006) (the defendant’s previous conviction in Canada was improperly counted for purposes of PRV 1). The Court’s reasoning for its interpretation of “another state” as used in MCL 777.51(2) likely applies to the language used in MCL 333.7413(4)\(^{19}\) to define second or subsequent offenses. According to the Court, “[t]he common understanding of ‘state’ in Michigan law is a state of the United

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\(^{16}\)The *Peltola* Court additionally clarified that because its conclusion was contrary to obiter dicta statements made in *Lowe*, 484 Mich at 729-730, that the Legislature apparently intended that PRVs not be scored under MCL 777.21(4), “the holding in [Lowe, 484 Mich 718] is limited to whether [MCL 333.7413(1)] permits a trial court to enhance a defendant’s minimum and maximum sentence.” *Peltola*, 489 Mich at 190. *Peltola* references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when *Peltola* was decided is now subsection (1).

\(^{17}\)Discussed in Section 4.3(A).

\(^{18}\)The trial court may depart from the mandatory minimum for “substantial and compelling” reasons. MCL 333.7413(3).

\(^{19}\)*Price* references MCL 333.7413(5); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (5) when *Price* was decided is now subsection (4).
States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of ‘another state’ in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not a conviction for ‘a felony under a law of the United States or another state[.]” Price, 477 Mich at 4-5.

Note: The concurrent (or exclusive) application of the general habitual offender statutes and the penalties prescribed by the Public Health Code for subsequent controlled substance offenses are discussed in .

C. Recruiting or Inducing a Minor to Commit a Controlled Substance Felony

MCL 333.7416(1)(a) provides the penalty for a person aged 17 years or older20 who has recruited, induced, solicited, or coerced a minor less than 17 years of age to commit or attempt to commit a controlled substance offense that would be a felony if committed by an adult. Offenders convicted of violating MCL 333.7416(1) may be fined up to the amount authorized for an adult convicted of the underlying offense. In addition to any fine imposed, offenders convicted under MCL 333.7416(1) must be sentenced as follows:21

- to a mandatory minimum term22 not less than one-half the maximum term of imprisonment authorized for an adult convicted of the crime;

- to a maximum term of imprisonment that does not exceed the maximum term authorized by statute for an adult convicted of the crime;


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 nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with Miller, 567 US 460, by effectively eliminating the mandatory imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 19.

22 The court may depart from the minimum term for “substantial and compelling” reasons. MCL 333.7416(3).
• to imprisonment for life if the act committed or attempted is a violation of MCL 333.7401(2)(a)(i);

• an offender sentenced under MCL 333.7416(1) is not eligible for probation and the sentence received must not be delayed or suspended. MCL 333.7416(2).

Note: MCL 333.7416(1) does not apply to an act that is a violation of MCL 333.7401(2)(d) that involves the manufacture, delivery, possession, etc., of marijuana. MCL 333.7416(4).

D. Conspiracy

MCL 750.157a(a) provides the penalty for a person who conspires with at least one other person to commit an act prohibited by law when commission of the prohibited act is punishable by at least one year of imprisonment. An offender convicted under MCL 750.157a(a) must be sentenced to a term of imprisonment equal to the term authorized for conviction of the offense the offender conspired to commit. In addition to a term of imprisonment, the court may impose a $10,000 fine on an offender convicted of conspiracy.

E. Recruiting or Inducing a Minor to Commit a Felony

MCL 750.157c provides the penalty for a person aged 17 years or older23 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.24 In addition to the mandatory term of imprisonment, the court may impose a fine on the offender of not more than three


24 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 nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with Miller, 567 US 460, by effectively eliminating the mandatory imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 19.
times the amount authorized by law for conviction of the act committed or attempted.

F. Voluntarily Allowing a Prisoner to Escape

MCL 750.188 provides the penalty for a jailor or other officer who voluntarily allows a prisoner in his or her custody to escape. Under MCL 750.188, an officer convicted of this offense must be sentenced to the same punishment and penalties to which the escaped prisoner was or would have been subject.

G. Felony Offenses Committed in Weapon-Free School Zones

MCL 750.237a describes conduct prohibited in weapon-free school zones and provides the penalties for convictions based on that conduct. MCL 750.237a is a separate felony offense based on an offender’s violation of one of the thirteen underlying weapons-related statutes when the violation occurs in a weapon-free school zone. An offender may be charged with and convicted of an offense under MCL 750.237a when he or she is a first-time offender of the following statutes:

- MCL 750.224 (manufacture, sale, or possession of machine gun, silencer, bomb, chemical agents, etc.);
- MCL 750.224a (possession or sale of a device emitting an electrical current or impulse—a “stun gun”);\(^{25}\)
- MCL 750.224b (manufacture, sale, or possession of a short-barreled shotgun or rifle);
- MCL 750.224c (manufacture, distribution, sale, or use of armor-piercing ammunition);
- MCL 750.224e (manufacture, sale, distribution, or possession of device to convert semi-automatic weapons to fully-automatic ones);
- MCL 750.226 (going armed with a dangerous weapon with unlawful intent);
- MCL 750.227 (carrying a concealed weapon (CCW)).

\(^{25}\) In People v Yanna, 297 Mich App 137, 139 n 1, 142-147 (2012), the Michigan Court of Appeals held that the pre-amended version of MCL 750.224a, completely banning the sale or possession of stun guns and similar devices by anyone other than law enforcement officers, was unconstitutional under the Second Amendment; the Yanna Court, however, emphasized that its holding was limited to the complete ban under former MCL 750.224a, which was amended, effective August 6, 2012, by 2012 PA 122 to permit the possession and use of electro-muscular disruption devices by licensed individuals under certain circumstances.
• MCL 750.227a (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).

An offender may be charged with and convicted of an offense under MCL 750.237a for second or subsequent violations of MCL 750.223(2) (knowingly selling a firearm longer than 26 inches to a person under the age of 18), when the violations occurred in a weapon-free school zone.

Violators of MCL 750.237a are guilty of a felony and subject to one or more of the following:

• imprisonment for not more than the maximum term authorized by the specific statutory section violated, MCL 750.237a(1)(a); or

• not more than 150 hours of community service, MCL 750.237a(1)(b); or

• a fine of not more than three times the fine authorized by the specific statutory section violated, MCL 750.237a(1)(c).

H. Larceny of Rationed Goods

MCL 750.367a provides the penalties for stealing “any goods, wares, or merchandise, the manufacture, distribution, sale or use of which is restricted or rationed by the federal government, or any of its agencies or instrumentalities, during a state of war between the United States and any other country or nation . . . .” An offender convicted of an offense under MCL 750.367a may be sentenced to a term of imprisonment not more than two times the term authorized for conviction of the underlying offense. In addition, an offender convicted under this statute may be ordered to pay a fine of not more than twice the amount permitted for conviction of the underlying offense.
4.4 Felony Offenses Enumerated in §777.19 (Attempts)26

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.27 MCL 777.19(1).

To determine the OVs appropriate to an attempted felony subject to the
sentencing guidelines, use the crime group of the offense attempted.
MCL 777.19(2); MCL 777.21(5). For example, if an offender is convicted of
attempted armed robbery, OVs designated for scoring are those for the
crime group “person” because armed robbery (the offense attempted) is
categorized as a crime against a person. MCL 750.89; MCL 777.16d.

Once the offender’s OV and PRV levels have been totaled for an
attempted offense, the proper sentencing grid on which to find the
recommended minimum sentence range is determined by the attempted
offense’s original crime class designation:

- Attempts to commit offenses in classes A, B, C, or D are
classified as class E offenses. MCL 777.19(3)(a).

- Attempts to commit offenses in classes E, F, or G are
classified as class H offenses. MCL 777.19(3)(b).

4.5 Sentencing a Sexually Delinquent Person28

A. Definition

A sexually delinquent person is defined in MCL 750.10a as “any
person whose sexual behavior is characterized by repetitive or
compulsive acts which indicate a disregard of consequences or the
recognized rights of others, or by the use of force upon another
person in attempting sex relations of either a heterosexual or

26 In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines
(2014) and overruling People v Herron, 303 Mich App 392 (2013). Although “sentencing courts [are no
longer] bound by the applicable sentencing guidelines range,” they must “continue to consult the
applicable guidelines range and take it into account when imposing a sentence[, and they] . . . must justify
the sentence imposed in order to facilitate appellate review.” Lockridge, 498 Mich at 392, citing People v
Coles, 417 Mich 523, 549 (1983), overruled in part on other grounds by People v Milbourn, 435 Mich 630,
644 (1990). See Section 2.2 for discussion of Lockridge.

27 Intermediate sanctions apply to attempted class H felonies punishable by more than one year of
imprisonment. MCL 769.34(4)(b). See Section 2.6 for more information.

28 For additional discussion of sentencing a sexually delinquent person, see the Michigan Judicial Institute’s
Sexual Assault Benchbook, Chapter 3.
homosexual nature, or by the commission of sexual aggressions against children under the age of 16.”

A charge of sexual delinquency may only be brought in conjunction with the following offenses:

- Crime against nature or sodomy, MCL 750.158
- Indecent exposure, MCL 750.335a
- Gross indecency between male persons, MCL 750.338
- Gross indecency between female persons, MCL 750.338a
- Gross indecency between male and female persons, MCL 750.338b

“Conviction of sexual delinquency can be obtained only in conjunction with conviction on the principal charge. Yet, sexual delinquency is a matter of sentencing, unrelated to proof of the original charge.” People v Helzer, 404 Mich 410, 417 (1978), overruled in part by People v Breidenbach, 489 Mich 1 (2011); see also People v Franklin (John), 298 Mich App 539, 547 (2012) (noting that “sexual delinquency is not an actual element of [indecent exposure]; rather, a finding of sexual delinquency merely allows for an enhancement of the sentence for [an] indecent exposure offense”). With the exception of indecent exposure, MCL 750.335a, each of the above-listed offenses contains language stating that if the person was sexually delinquent at the time of the offense, he or she may be punished by imprisonment for an indeterminate term, and that the minimum term must be one day, and the maximum term must be life in prison. See Helzer, 404 Mich at 416-417. Regarding MCL 750.335a, the Court has specifically held that the “1 day to life” provision in MCL 750.335a(2)(c) provides “an option a trial court could use its discretion to consider imposing alongside the other statutory penalties available under [MCL 750.335a],” and that if the trial court chooses to impose a “1 day to life” sentence it cannot be modified. People v Arnold, 502 Mich 438, 482 (2018). The trial court may also impose “a term consistent with the advisory sentencing guidelines” because “the sentencing guidelines provide another option or alternative, in addition to the sexual delinquency scheme, when sentencing an individual convicted of indecent exposure.” People v Arnold (On Remand), ___ Mich App ___, ___ (2019).

**B. Procedure**

MCL 767.61a sets out the procedures to be employed concerning a sexually delinquent person:
“In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person.

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In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in [MCL 768.35], and before sentencing the accused, shall conduct an examination [in open court] of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony.

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Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense.”

“Sexual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme.” People v Kelly (Robert), 186 Mich App 524, 528 (1990). See also People v Winford, 404 Mich 400, 404 n 5 (1978) (“the indeterminate penalty for a sexual delinquency conviction [i]s an alternate form of sentencing”; 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. People v Arnold, 502 Mich 438, 471 (2018).

Under MCL 767.61a, if a defendant pleads guilty or nolo contendere to both the principal and delinquency charges, “the trial court [may not] . . . sentenc[e the] defendant as a sexually delinquent person without first holding a hearing to determine if [the] defendant was sexually delinquent.” Franklin (John), 298 Mich App at 542, 544 (because “[e]ntering a plea of nolo contendere is ‘an admission of all the essential elements of a charged offense,’” and because the defendant pleaded nolo contendere to “indecent exposure under circumstances subjecting him to alternative sentencing as a sexually delinquent person,” the “plea should be understood as an admission
of guilt with regard to the indecent exposure charges and the sexually delinquent person charge” within the meaning of MCL 767.61a) (emphasis added).

The examination required under MCL 767.61a can “take[] place at the plea hearing or later,” but it must be conducted at a “‘separate hearing’”; therefore, “an examination of [the defendant’s] criminal history is [not] sufficient to meet the [examination] requirement[,]” Franklin (John), 298 Mich App at 544-545, quoting People v Breidenbach, 489 Mich 1, 10 (2011).

The statutory sentencing guidelines apply to a person convicted of sexual delinquency and a corresponding Class A felony offense. See MCL 777.16q. “MCL 750.335a [(indecent exposure by sexual delinquent) and MCL 777.16q provide[] multiple, but exclusive, sentencing options.” People v Arnold (On Remand), ___ Mich App ___, ___. (2019). Specifically, “the sentencing guidelines provide another option or alternative, in addition to the sexual delinquency scheme, when sentencing an individual convicted of indecent exposure,” and “a trial court has the option to sentence a defendant to ‘1 day to life’ under MCL 750.335a(2)(c), or to a term consistent with the advisory sentencing guidelines.” Arnold, ___ Mich App at ___.

4.6 Juvenile Sentencing29

See the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapters 14-16, for information on sentencing a juvenile in automatic waiver cases, i.e., criminal proceedings in circuit court concerning juveniles against whom the prosecution has authorized the filing of a criminal complaint charging a specified juvenile violation (instead of approving the filing of a petition in the family division of the circuit court); traditional waiver cases,30 i.e., cases in which a juvenile is charged solely with an offense over which the family division has waived jurisdiction under MCL 712A.4; or designated proceedings,31 i.e., cases in which a juvenile is tried in an adult criminal proceeding within the family division of the circuit court, and where, if convicted, the court may sentence the juvenile as an adult, delay sentence, or order a juvenile disposition. See Chapter 19 of

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29 As used in the Juvenile Code, the term juvenile generally refers to a person who is less than 17 years of age. See MCL 712A.1(1)(i); MCL 712A.2(a). “[T]he birthday rule of age calculation applies in Michigan.” People v Woolfolk, 304 Mich App 450, 504 (2014), aff’d 497 Mich 23 (2014). Under the birthday rule, “a person attains a given age on the anniversary date of his or her birth.” Woolfolk, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which “one becomes of full age the first moment of the day before the anniversary of his or her birth[,]” is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant’s eighteenth birthday, “was not yet eighteen years of age when the shooting occurred[?]”) (emphasis supplied; citations omitted).

30 See the Michigan Judicial Institute’s Juvenile Justice Benchbook for more information.

31 See the Michigan Judicial Institute’s Juvenile Justice Benchbook for more information.
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 5: Habitual Offender Provisions

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5.1 Establishing a Defendant’s Habitual Offender Status

Michigan’s sentencing law is designed so that the punishment possible for conviction of a crime may be increased in proportion to the offender’s number of previous felony convictions. The “general” habitual offender statutes are found in the habitual offender act (HOA), MCL 769.10, MCL 769.11, and MCL 769.12, and operate to raise the statutory maximum sentence allowed for repeat offenders based on both the number of a defendant’s prior felony convictions and the specific maximum penalty authorized for conviction of the sentencing offense. MCL 777.21 is the statutory provision that allows for an incremental increase in the upper limit of the recommended minimum sentence range (the “maximum-minimum” sentence) under the statutory sentencing guidelines based on the number of the defendant’s previous felony convictions. The trio of “general” habitual offender statutes and MCL 777.21 are discussed in detail in Sections 5.2, 5.3, 5.4, and 5.5.

A. Notice of Intent to Seek Enhancement

In cases in which the prosecuting attorney intends to seek enhancement of a defendant’s sentence on the basis that the defendant is a habitual offender, the prosecuting attorney must file

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The Lockridge Court did not address habitual-offender sentencing. However, “the top of the guidelines range does not implicate the Sixth Amendment[.]” Lockridge, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the upper limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable statutory maximum sentence) are presumably not implicated by Lockridge. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

2 Additionally, MCL 769.12, governing fourth habitual offender status, provides for a mandatory minimum sentence of 25 years’ imprisonment for an offender who has been convicted of three or more prior felonies or felony attempts, including at least one “[l]isted prior felony” as defined in MCL 769.12(6)(a), and who commits or conspires to commit a subsequent “[s]erious crime” as defined in MCL 769.12(6)(c). MCL 769.12(1)(a). See Section 5.5 for discussion of fourth habitual offender status.
written notice with the court within 21 days after the defendant’s arraignment on the information. MCR 6.112(F); MCL 769.13(1). 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.” People v Head, 323 Mich App 526, 543 (2018) (quotation marks and citation omitted).

“[If] arraignment is waived or eliminated as allowed under MCR 6.113(E), the notice of enhancement must be filed “within 21 days after the filing of the information charging the underlying offense.” MCL 769.13(1); MCR 6.112(F). This rule applies “in the absence of an arraignment,” even if the defendant “never formally waived arraignment.” People v Marshall, 298 Mich App 607, 627 (2012), vacated in part on other grounds 493 Mich 1020 (2013) (holding that where “it [was] undisputed that [the] defendant was never arraigned on the underlying offense in the circuit court, the first period [set out in MCL 769.13(1) was] not applicable[,]” and that “MCL 769.13(1) clearly contemplates that in the absence of an arraignment, the period for filing the habitual offender notice is to be measured from the date the information charging the underlying offense is filed”).

3 “[T]he applicable time period for measuring the 21-day period” for the prosecution’s notice of intent to seek an enhanced sentence under MCL 769.13(1), when the defendant does not waive arraignment, “begins with the date of [the] defendant’s arraignment on the information charging the underlying offense[,]” i.e., the circuit court arraignment, rather than the date of the arraignment on the warrant or complaint. People v Richards (Kyle), 315 Mich App 564, 588 (2016), rev’d in part on other grounds 501 Mich 921 (2017) (quoting MCL 769.13(1) and noting that “there is a distinction between an arraignment on the information and an arraignment on the warrant or complaint”) (additional citations omitted). Accordingly, the prosecution’s notice of intent to seek an enhanced sentence was timely filed where “[the d]efendant was arraigned on the information in circuit court . . . [and o]n that same day, the prosecution filed the first amended information, which contained a fourth offense habitual offender notice.” Richards (Kyle), 315 Mich App at 588, 589. Note: with regard to Richards (Kyle), 315 Mich App 564, for more information on the precedential value of an opinion with negative subsequent history, see our note.

4 MCR 6.113(E) provides that “[a] circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence[ pursuant to MCL 769.13], as provided in MCR 6.112(F).”

5 For more information on the precedential value of an opinion with negative subsequent history, see our note.
If a defendant pleads guilty or no lo contendere at arraignment on the information to the offense charged or to a lesser offense, the prosecuting attorney may file the notice of enhancement after the defendant’s conviction by plea or within the 21-day period after the arraignment. MCL 769.13(3).\(^6\)

Before, during, or after trial, the court may permit the prosecutor to amend the notice of intent to seek an enhanced sentence “unless the proposed amendment would unfairly surprise or prejudice the defendant.” MCR 6.112(H).

“The failure to file a proof of service of the notice of intent to enhance the defendant’s sentence may be harmless if the defendant received the notice of the prosecutor’s intent to seek an enhanced sentence and the defendant was not prejudiced in his ability to respond to the habitual offender notification.” Head, 323 Mich App at 543-544 (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”).

B. List of Prior Convictions on Which Prosecutor Will Rely

The prosecuting attorney must identify the prior convictions on which the offender’s status as a habitual offender is based and on which the prosecutor intends to rely in seeking sentence enhancement. MCL 769.13(2). The list of prior convictions on which the prosecutor’s enhancement notice is based must be filed with the court and served on the defendant or his or her attorney within 21 days of the defendant’s arraignment on the information, or if arraignment is waived, within 21 days after the information is filed. MCL 769.13(2).

\(^6\) “[A]n arguable conflict exists between MCR 6.302(B)(2) [(requiring the trial court, before accepting a plea, to “advise the defendant . . . of . . . the maximum possible prison sentence for the offense”)] and MCL 769.13(3).” People v Brown (Shawn), 492 Mich 684, 701 (2012). In Brown (Shawn), 492 Mich at 687, the Michigan Supreme Court held that “MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea,” and that MCR 6.310(C)(4) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. Noting that “MCL 769.13(3) . . . permits a prosecuting attorney to file a notice of intent to seek an enhanced sentence under the habitual-offender statute after a defendant has entered a plea,” the Court concluded that “the remedy provided by [MCR 6.310(C)(4)] will apply [even] when a defendant is not notified of the enhancement until after pleading guilty.” Brown (Shawn), 492 Mich at 701 (emphasis supplied). Note that Brown refers to MCR 6.310(C); however, after Brown was decided MCR 6.310 was amended, see ADM File No. 2016-07, and the text of MCR 6.310(C) pertinent to the holding in Brown was re-numbered as MCR 6.310(C)(4).
C. Establishing the Existence of a Prior Conviction

A defendant charged as a habitual offender may challenge the accuracy or constitutional validity of any of the prior convictions listed in the prosecutor’s notice of enhancement. MCL 769.13(4). To challenge a prior conviction, the defendant must file a written motion with the court and serve the prosecutor with a copy of the motion. Id. The court must resolve any challenges raised by the defendant to the accuracy or constitutional validity of a prior conviction at sentencing or at a separate hearing held before sentencing. MCL 769.13(6).

The court must determine the existence of any of the prior convictions listed in the prosecutor’s notice to seek enhancement at sentencing, or at a separate hearing scheduled before sentencing for that purpose. MCL 769.13(5); People v Green (David), 228 Mich App 684, 699 (1998). Any evidence relevant to establishing the existence of a prior conviction may be used for that purpose, including one or more of the following items listed in MCL 769.13(5):

“(a) A copy of a judgment of conviction.
(b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
(c) A copy of a court register of actions.
(d) Information contained in a presentence report.
(e) A statement of the defendant.”

A trial court properly identified the defendant at sentencing as a second habitual offender and sentenced him accordingly based on the defendant’s presentence report, which contained details of the defendant’s prior felony conviction. MCL 769.13(5)(d); Green (David), 228 Mich App at 699, citing MCL 769.13(5)(c) (relettered to MCL 769.13(5)(d) by 2006 PA 655).

MCL 769.13(6) describes the process by which the trial court must resolve a defendant’s properly raised challenge to the use of a prior conviction to enhance his or her sentence under the general habitual offender statutes:

“The court shall resolve any challenges to the accuracy or constitutional validity of a prior conviction or convictions that have been raised in a motion filed under [MCL 769.13(4)] at sentencing or at a separate hearing scheduled for that purpose before sentencing. The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or
information pertaining to the defendant’s prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose. The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. If the defendant establishes a prima facie showing that information or evidence concerning an alleged prior conviction is inaccurate, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the information or evidence is accurate. If the defendant establishes a prima facie showing that an alleged prior conviction is constitutionally invalid, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the prior conviction is constitutionally valid.”

1. **Classification of the Prior Conviction**

A “felony” is “a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.” MCL 761.1(f). For purposes of the habitual offender statutory provisions, a “prior felony conviction” is a conviction for conduct or attempted conduct that would be a felony if committed in Michigan no matter where the crime was actually committed. MCL 769.10, MCL 769.11, and MCL 769.12. Therefore, whether obtained in Michigan or in another jurisdiction, a defendant’s previous convictions for conduct punishable under Michigan law by imprisonment for more than one year or for conduct expressly designated by Michigan law as felonious conduct are “prior felony convictions” for purposes of determining a defendant’s habitual offender status. See also People v Smith (Timothy), 423 Mich 427, 434 (1985) (holding that for purposes of the Code of Criminal Procedure’s habitual-offender statutes, “felony” includes two-year misdemeanors); People v Washington, 501 Mich 342, 347, 357 (2018) (stating, in the context of determining whether a prior misdemeanor conviction under the Public Health Code constituted a felony for purposes of serving as a predicate felony for the defendant’s felony-firearm conviction under the Penal Code, that “[a]lthough the Legislature intended the offense of keeping or maintaining a drug house to be a misdemeanor for purposes of the Public Health Code, that offense is punishable by imprisonment in a state prison, and, therefore, it unquestionably satisfies the definition of ‘felony’ in the Penal Code”; “an offense expressly labeled a misdemeanor in one code does not necessarily mean the same
offense is a misdemeanor for purposes of interpreting and applying a different code”).

A prior conviction obtained in another state that, by offense title alone, would qualify only as a misdemeanor offense in Michigan, is not necessarily invalid for purposes of establishing a defendant’s habitual offender status. *People v Quintanilla*, 225 Mich App 477, 478-479 (1997). “The [habitual offender statutes] require[] that the offense be a felony in Michigan under Michigan law, irrespective of whether the offense was or was not a felony in the state or country where originally perpetrated. Hence, the facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose, are determinative.” *Id.* at 479.

Prior convictions for offenses that were felonies at the time they were committed but were later reclassified as misdemeanors may be used to establish a defendant’s habitual offender status. *People v Odendahl*, 200 Mich App 539, 543-544 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686 (1996). In support of its conclusion, the *Odendahl* Court cited the Michigan Supreme Court’s reasoning in an earlier case:

“[T]he purpose of the habitual offender statute was punishment for the recidivist, and [] repealing a criminal law did not ‘remove from the offender the character of being a violator of the law.’” *Odendahl*, 200 Mich App at 543, quoting *In re Jerry*, 294 Mich 689, 692 (1940).

An adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11. *People v Jones (Jeffrey)*, 297 Mich App 80, 83-86 (2012) (noting that “MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant’s sentence”).

### 2. Double Jeopardy Challenges

The habitual offender statutes expressly prohibit the use of a conviction to enhance a sentence “if that conviction is used to enhance a sentence under a statute that prohibits use of the
Use of a defendant’s prior felony conviction as the basis for the crime of felon in possession of a firearm and to establish the defendant’s status as a habitual offender does not violate the constitutional prohibitions against double jeopardy. People v Phillips (William), 219 Mich App 159, 162-163 (1996). In resolving the defendant’s challenge to use of the same prior felony conviction for both purposes, the Michigan Court of Appeals stated:

“Neither the habitual offender statute nor the felon in possession of a firearm statute prohibits the application of the statutory habitual offender sentence enhancement provision for a conviction of felon in possession of a firearm. Nor do these statutes expressly preclude a prior felony conviction that is used to establish the crime of felon in possession of a firearm from also being used as a prior conviction under the habitual offender statutes.” Phillips (William), 219 Mich App at 163.

The same prior felonies may be used to establish a defendant’s habitual offender status for more than one subsequent felony conviction when the subsequent felonies were committed at different times. People v Anderson (Scott), 210 Mich App 295, 298 (1995). Because the habitual offender sentencing provisions do not create substantive offenses separate from the underlying prior convictions, a defendant’s double jeopardy protection is not implicated. Id. at 298.

### 3. Multiple Convictions From the Same Judicial Proceeding

When counting prior felonies under Michigan’s habitual offender statutes, each felony conviction that preceded the sentencing offense is a separate felony conviction, even if more than one conviction arose from the same criminal transaction. People v Gardner, 482 Mich 41, 44 (2008). The Court explained that the plain language of the habitual offender statutes, MCL 769.10, MCL 769.11, and MCL 769.12, “directs courts to count each separate felony conviction that preceded the sentencing

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8 See Section 5.7 for detailed discussion of concurrent/exclusive application of sentencing enhancement schemes contained in the habitual offender statutes and those in other statutory penalty provisions.
offense, not the number of criminal incidents resulting in felony convictions.” *Gardner*, 482 Mich at 44.\(^9\)

4. **Convictions Older Than Ten Years**

A trial court may consider convictions that are more than ten years old in determining a defendant’s habitual offender status. *People v Zinn*, 217 Mich App 340, 349 (1996). This is unlike the “10-year gap” rule that limits the age of previous convictions that may be counted against a defendant for the purposes of scoring his or her prior record variables under the statutory sentencing guidelines. MCL 777.50.

5.2 **Determining a Habitual Offender’s Recommended Minimum Sentence Range Under the Statutory Sentencing Guidelines\(^10\)**

Note: The general habitual offender provisions contained in MCL 769.10, MCL 769.11, and MCL 769.12 establish the *maximum* term of imprisonment that may be imposed on a defendant being sentenced as a habitual offender under those statutory provisions. There is a critical distinction between the general habitual offender provisions of MCL 769.10, MCL 769.11, and MCL 769.12 and the sentence enhancements authorized by MCL 777.21. MCL 769.10, MCL 769.11, and MCL 769.12 relate to the *maximum penalty authorized by the statute* under which the defendant’s conduct was prohibited. These habitual offender enhancement provisions permit a sentencing court to impose on a habitual

\(^9\) However, for purposes of MCL 769.12(1)(a), which provides for a mandatory 25-year minimum sentence for certain fourth habitual offenders, “[n]ot more than [one] conviction arising out of the same transaction shall be considered a prior felony conviction[.]” See Section 5.5 for discussion of MCL 769.12(1)(a).


The *Lockridge* Court did not address habitual-offender sentencing. However, “the top of the guidelines range does not implicate the Sixth Amendment[.]” *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the *upper* limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable *statutory maximum* sentence) are presumably not implicated by *Lockridge*. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.
offender a sentence greater than the maximum sentence permitted by statute for a first conviction of the sentencing offense. The maximum term of imprisonment permitted for a habitual offender’s felony conviction (as authorized under MCL 769.10, MCL 769.11, and MCL 769.12) must be determined by reference to the specific criminal statute the defendant’s conduct violated. In contrast to the general habitual offender provisions, the enhancements authorized by MCL 777.21 increase the recommended minimum sentence ranges calculated under the sentencing guidelines as the ranges apply to habitual offenders.

The nine sentencing grids in MCL 777.61 to MCL 777.69 represent the proper sentence ranges for offenders not being sentenced as habitual offenders. Separate grids reflecting the recommended sentence ranges for habitual offenders for the same nine crime classes (A through H, and second-degree murder, M2) do not exist in the statutory provisions governing felony sentencing. However, statutory authority exists for determining the upper limit of a habitual offender’s recommended minimum sentence range by adding an incremental percentage of the range calculated for first-time offenders (or offenders who are not otherwise being sentenced as habitual offenders).11 The statutory method of calculating the minimum range recommended for habitual offenders is found in MCL 777.21(3):

“If the offender is being sentenced under [MCL 769.10, MCL 769.11, or MCL 769.12],12 determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under [MCL 777.61–MCL 777.69] for the underlying offense as follows:

“(a) If the offender is being sentenced for a second felony, 25%.

(b) If the offender is being sentenced for a third felony, 50%.

(c) If the offender is being sentenced for a fourth or subsequent felony, 100%.”

MCL 761.1(f) defines a felony as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment

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11 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.

12 The “general” habitual offender statutory provisions.
for more than 1 year or an offense expressly designated by law to be a felony.” For purposes of the habitual offender statutory provisions, a prior felony conviction is a conviction for conduct or attempted conduct that would be a felony if committed in Michigan no matter where the crime was actually committed. MCL 769.10, MCL 769.11, and MCL 769.12. Therefore, whether obtained in Michigan or in another jurisdiction, a defendant’s previous convictions for conduct punishable under Michigan law by imprisonment for more than one year or for conduct expressly designated by Michigan law as felonious conduct are prior felony convictions for purposes of determining a defendant’s habitual offender status.13

When sentencing a defendant as a habitual offender, “[a] court shall not fix a maximum sentence that is less than the maximum term for a first conviction.” MCL 769.10(2), MCL 769.11(2), and MCL 769.12(2).

“A trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence.” People v Bonilla-Machado, 489 Mich 412, 429 (2011), quoting People v Turski, 436 Mich 878 (1990). Therefore, where the trial court erroneously asserted that it lacked discretion in enhancing a maximum sentence under MCL 769.10(1)(a), the case was properly remanded “to allow the trial court to either clarify that it understood it had discretion in imposing the enhanced sentence[] or to redetermine the maximum sentence[] after properly exercising its discretion.” Bonilla-Machado, 489 Mich at 430.

The sentencing grids printed in the Michigan Sentencing Guidelines Manual (available by clicking here), and as shown in the example in Section 5.3, combine the ranges recommended under the guidelines for all offenders—first-time and habitual.14 Locating the appropriate cell for a habitual offender in any of the nine sentencing grids is addressed in the subsections below.

### 5.3 Second Habitual Offender Status (HO2)

A person who commits a felony in Michigan and who has been previously convicted of a felony or attempted felony (whether or not the previous conviction occurred in Michigan as long as the violation would have been a felony violation if it had been obtained in Michigan) is a second habitual offender subject to the following penalties:

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13 See Section 5.1(C) for further discussion of establishing prior felony convictions.

14 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.
• If the subsequent felony is punishable on first conviction by a term less than life imprisonment, the court may, in its discretion, place the person on probation 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 or sentence the person to imprisonment for life, or for a lesser term. MCL 769.10(1)(b).

• If the subsequent felony is a major controlled substance offense, the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.10(1)(c).

• The court must not sentence an offender to a maximum term of imprisonment that is less than the maximum term indicated for a first conviction of the sentencing offense. MCL 769.10(2).

In People v Jones (Jeffrey), 297 Mich App 80, 83-86 (2012), the Michigan Court of Appeals held that because “MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant’s sentence,” an adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11.18

“A trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence.” People v Bonilla-Machado, 489 Mich 412, 429 (2011), quoting People v Turski, 436 Mich 878 (1990). Therefore, where the trial court erroneously asserted that it lacked discretion in enhancing a maximum sentence under MCL 769.10(1)(a), the case was properly remanded “to allow the trial court to either clarify that it understood it had discretion in imposing the enhanced sentence[] or to redetermine the maximum sentence[] after properly exercising its discretion.” Bonilla-Machado, 489 Mich at 430.

A sentence imposed for a conviction of violating the Sex Offenders Registration Act (SORA) as a second offender (“SORA-2”), MCL 15 Subject to the requirements of MCL 771.1.

16 Subject to the requirements of MCL 771.1.

17 Sentences for subsequent major controlled substance offenses are discussed in Section 5.6.

18 MCL 769.10(1) is textually similar to MCL 769.11(1), and would therefore presumably be subject to the same construction.
28.729(1)(b), “may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a).” People v Allen (Floyd), 499 Mich 307, 326-327 (2016), rev’g 310 Mich App 328 (2015). “Nothing in SORA or the [habitual offender act, MCL 769.10—MCL 769.13,] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute.” Allen (Floyd), 499 Mich at 311, 313, 322, 326 (concluding that “MCL 28.729(1) sets forth a recidivism statutory scheme that creates three separate felonies that elevate on the basis of repeat [SORA] offenses[,]” rather than a single offense “with escalating punishments for repeat convictions,” and that “the Court of Appeals mistakenly concluded that the phrase ‘first conviction of that offense’ in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)” rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because “[the] defendant was subject to a 7-year maximum term of imprisonment[ for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years.” Allen (Floyd), 499 Mich at 323.19

The recommended minimum sentence range for an offender being sentenced as a second habitual offender is indicated by the numeric values shown in the “HO2” cells of each sentencing grid. The upper limit of a habitual offender’s minimum range is calculated by reference to the percentage outlined in MCL 777.21(3)(a). As already indicated, the enhancement authorized by the general habitual offender statutes applies only to the maximum term of imprisonment. Therefore, the sentence enhancement authorized by MCL 769.10 is not shown in the sentencing grids. In the example below, the minimum ranges recommended for a second habitual offender, as calculated by the percentages outlined in MCL 777.21(3)(a), are (in months): for level A-I, 0 to 3; for level B-I, 0 to 7; for level C-I, 0 to 11; for level D-I, 2 to 21; for level E-I, 5 to 28; and for level F-I, 10 to 28.20

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<td></td>
<td>E 50-74 Points</td>
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19 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.
MCL 769.10(1)(a) and MCL 769.10(1)(b) specifically designate probation as a possible disposition in cases involving a criminal defendant being sentenced as a second habitual offender. MCL 771.1 authorizes a court in certain circumstances to place a defendant convicted of a felony on probation rather than sentence the defendant to a term of imprisonment. MCL 771.1(1) also applies to defendants being sentenced as habitual offenders under MCL 769.10(1)(a) and MCL 769.10(1)(b) and limits the court’s use of probation to specific circumstances:

“In all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.”21


The Lockridge Court did not address habitual-offender sentencing. However, “the top of the guidelines range does not implicate the Sixth Amendment[].” Lockridge, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the upper limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable statutory maximum sentence) are presumably not implicated by Lockridge. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

21 See for more information about probation.
5.4 Third Habitual Offender Status (HO3)

A person who commits a felony in Michigan and who has been convicted of any combination of two or more felonies or felony attempts (whether or not the two or more previous convictions occurred in Michigan as long as the violations would have been felony violations if the convictions had been obtained in Michigan) is a third habitual offender subject to the following penalties:

- If the subsequent felony is punishable on first conviction by a term of imprisonment less than life, the court “may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term.” MCL 769.11(1)(a).

- If the subsequent felony is punishable by life imprisonment on first conviction, the court may sentence the person to life imprisonment, or to a lesser term. MCL 769.11(1)(b).

- If the subsequent felony is a major controlled substance offense, the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.11(1)(c).

- The court must not sentence an offender to a maximum term of imprisonment that is less than the maximum term indicated for a first conviction of the sentencing offense. MCL 769.11(2).

An adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11. People v Jones (Jeffrey), 297 Mich App 80, 83-86 (2012) (noting that “MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant’s sentence[]”).

A sentence imposed for a conviction of violating the Sex Offenders Registration Act (SORA) as a second offender (“SORA-2”), MCL 28.729(1)(b), “may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a).” People v Allen (Floyd), 499 Mich 307, 326-327 (2016), rev’d 310 Mich App 328 (2015). “Nothing in SORA or the [habitual offender act, MCL 769.10—MCL 769.13] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute.” Allen (Floyd), 499 Mich at 311, 313, 322, 326 (concluding that “MCL 28.729(1) sets forth a recidivism statutory scheme that creates three separate felonies that elevate on the basis of repeat [SORA] offenses[,]” rather than a single offense “with

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22 Sentences for subsequent major controlled substance offenses are discussed in Section 5.6.
escalating punishments for repeat convictions,” and that “the Court of Appeals mistakenly concluded that the phrase ‘first conviction of that offense’ in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)” rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because “[the] defendant was subject to a 7-year maximum term of imprisonment[ for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years.” Allen (Floyd), 499 Mich at 323.23

The recommended minimum sentence range for an offender being sentenced as a third habitual offender is indicated by the numeric values shown in the “HO3” cells of the respective sentencing grids. The upper limit of a third habitual offender’s minimum range is calculated by reference to the percentage outlined in MCL 777.21(3)(b). The sentence enhancement authorized by MCL 769.11 refers to the maximum sentence permitted by law for a specific offense as increased by the applicable habitual offender provision and is not shown in the sentencing grids. In the grid below, the minimum ranges recommended for an individual being sentenced as a third habitual offender are (in months): for level A-I, 0 to 4; for level B-I, 0 to 9; for level C-I, 0 to 13; for level D-I, 2 to 25; for level E-I, 5 to 34; and for level F-I, 10 to 34.24

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23 MCL 769.11 is textually similar to MCL 769.10, and would therefore presumably be subject to the same construction.
5.5 Fourth Habitual Offender Status (HO4)

A. General Enhancement

A person who commits a felony in Michigan and who has been convicted of any combination of three or more felonies or felony attempts (whether or not the previous felony convictions were obtained in Michigan or in another state as long as the offenses would have been felony offenses if they had occurred in Michigan) is a fourth habitual offender subject to the following penalties:25

- If the subsequent felony is punishable on first conviction by a maximum term of imprisonment of five years or more or for life, the court may sentence the person to life imprisonment, or to a lesser term. MCL 769.12(1)(b).

- If the subsequent felony is punishable on first conviction by a maximum term of imprisonment less than five years, the court may sentence the person to a maximum term of imprisonment of 15 years. MCL 769.12(1)(c).

- If the subsequent felony is a major controlled substance offense,26 the court must sentence the person as provided by MCL 333.7401 to MCL 333.7461. MCL 769.12(1)(d).

- The court must not sentence an offender to a maximum term of imprisonment that is less than the maximum term indicated for a first conviction of the sentencing offense. MCL 769.12(2).

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The Lockridge Court did not address habitual-offender sentencing. However, “the top of the guidelines range does not implicate the Sixth Amendment[.]” Lockridge, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the upper limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable statutory maximum sentence) are presumably not implicated by Lockridge. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.

25 In addition to these general enhancement provisions, MCL 769.12(1)(a) provides for a mandatory 25-year minimum sentence for certain violent fourth habitual offenders. See Section 5.5(B).

26 Sentences for subsequent major controlled substance offenses are discussed in Section 5.6.
In *People v Jones (Jeffrey)*, 297 Mich App 80, 83-86 (2012), the Michigan Court of Appeals held that because “MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant’s sentence,” an adult conviction resulting in a juvenile sentence qualifies as a prior conviction for purposes of sentencing a defendant as a third-time habitual offender under MCL 769.11.27

A sentence imposed for a conviction of violating the Sex Offenders Registration Act (SORA) as a second offender (“SORA-2”), MCL 28.729(1)(b), “may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a).” *People v Allen (Floyd)*, 499 Mich 307, 326-327 (2016), rev’g 310 Mich App 328 (2015). “Nothing in SORA or the [habitual offender act, MCL 769.10—MCL 769.13,] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute.” *Allen (Floyd)*, 499 Mich at 311, 313, 322, 326 (concluding that “MCL 28.729(1) sets forth a recidivism statutory scheme that creates three separate felonies that elevate on the basis of repeat [SORA] offenses[,]” rather than a single offense “with escalating punishments for repeat convictions,” and that “the Court of Appeals mistakenly concluded that the phrase ‘first conviction of that offense’ in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)” rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because “[the] defendant was subject to a 7-year maximum term of imprisonment[ for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years.” *Allen (Floyd)*, 499 Mich at 323.28

The recommended minimum sentence range for a fourth habitual offender is determined by reference to the numeric values shown in the “HO4” cells of each sentencing grid. The upper limit of a habitual offender’s minimum range is calculated by reference to the percentage outlined in MCL 777.21(3)(c). The sentence enhancement authorized by MCL 769.12 refers to the maximum sentence permitted by law for a specific offense as increased by the applicable habitual offender provision and is not shown in the sentencing grids. In the grid appearing below, the minimum ranges recommended for a person being sentenced as a fourth habitual offender are (in months): for level A-I, 0 to 6; for level B-I, 0 to 12; for

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27 MCL 769.12(1) is textually similar to MCL 769.11(1), and would therefore presumably be subject to the same construction.

28 MCL 769.12 is textually similar to MCL 769.10, and would therefore presumably be subject to the same construction.
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.\(^{29}\)

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**B. Mandatory Minimum Sentence Enhancement For Subsequent Conviction of a “Serious Crime”**

In addition to the general sentence enhancement provisions set out in MCL 769.12 for fourth habitual offenders, MCL 769.12(1)(a) provides for a mandatory minimum sentence of 25 years’ imprisonment for certain violent offenders. The sentencing court *must* impose a sentence of imprisonment for not less than 25 years if:

- the offender has been convicted of three or more prior felonies or felony attempts, including at least one “[l]isted prior felony” as defined in MCL 769.12(6)(a),\(^{30}\) and


The *Lockridge* Court did not address habitual-offender sentencing. However, “the top of the guidelines range does not implicate the Sixth Amendment[]” *Lockridge*, 498 Mich at 376 n 15. Accordingly, MCL 777.21 (the statutory guidelines habitual-offender provision allowing for an increase in the upper limit of the minimum guidelines range) and the general habitual offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12, which operate to raise the applicable statutory maximum sentence) are presumably not implicated by *Lockridge*. In any event, it is assumed, in the absence of further guidance from the appellate courts, that the provisions governing habitual offenders continue to apply, with the caveat that the applicable guidelines range is advisory only.
• the offender is convicted of committing or conspiring to commit a subsequent felony that is a “[s]erious crime” as defined in MCL 769.12(6)(c).

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).

5.6 Sentencing an Offender for a Subsequent Major Controlled Substance Offense

When an offender has a previous felony conviction and is subsequently convicted of a major controlled substance offense, MCL 769.10(1)(c), MCL 769.11(1)(c), and MCL 769.12(1)(d) mandate application of the sentencing provisions in part 74 of the Public Health Code (MCL 333.7401-MCL 333.7461). However, as discussed below, the Michigan Court of Appeals and the Michigan Supreme Court have held that if an offender has no prior felony convictions for controlled substance offenses, the sentencing court may enhance an offender’s sentence under the general habitual offender statutes.

30 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)).

MCL 769.12(6)(a) defines listed prior felony as “a violation or attempted violation of any of the following:

“(i) . . . MCL 257.602a[(4), MCL 257.602a(5)], [or MCL 257.625((4)].

(ii) . . . MCL 333.7101[–MCL 333.7545], [if] punishable by imprisonment for more than 4 years.

(iii) . . . MCL 750.72, [MCL 750.82, [MCL 750.83, [MCL 750.84, [MCL 750.85, [MCL 750.86, [MCL 750.87, [MCL 750.88, [MCL 750.89, [MCL 750.91, [MCL 750.110a[(2)], [MCL 750.110a(3)], [MCL 750.136b[(2)], [MCL 750.136b(3)], [MCL 750.145n[(1)], [MCL 750.145n(2)], [MCL 750.157b, [MCL 750.197c, [MCL 750.226, [MCL 750.227, [MCL 750.234a, [MCL 750.234b, [MCL 750.234c, [MCL 750.317, [MCL 750.321, [MCL 750.329, [MCL 750.349, [MCL 750.349a, [MCL 750.350, [MCL 750.397, [MCL 750.411h[(2)], [MCL 750.411l, [MCL 750.479a[(4), [MCL 750.479a(5)], [MCL 750.520b, [MCL 750.520c, [MCL 750.520d, [MCL 750.520g, [MCL 750.529, [MCL 750.529a, [or] [MCL 750.530.

(iv) A second or subsequent violation or attempted violation of . . . MCL 750.227b.

(v) . . . MCL 752.542a.”
A *major controlled substance offense* is limited to convictions for the commission of one of nine crimes described in MCL 761.2(a)–MCL 761.2(c):

- a violation of MCL 333.7401(2)(a)(i)–MCL 333.7401(2)(a)(iv).
- conspiracy to commit an offense under MCL 333.7401(2)(a)(i)–MCL 333.7401(2)(a)(iv) or MCL 333.7403(2)(a)(i)–MCL 333.7403(2)(a)(iv).

The major controlled substance offense described in MCL 333.7401(2)(a) prohibits an individual from manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a controlled substance listed in the statute, a prescription form, or a counterfeit prescription form. Penalties for violating MCL 333.7401(2)(a) with respect to specific quantities of cocaine or a narcotic drug listed in schedule 1 or 2 are as follows:

- a violation involving 1,000 grams or more of a mixture containing the controlled substance is a felony punishable by life imprisonment or any term of years, a fine of not more than $1,000,000, or both. MCL 333.7401(2)(a)(i).
- a violation involving 450 grams or more, but less than 1,000 grams, of a mixture containing the controlled substance is a felony punishable by not more than 30 years in prison, a fine of not more than $500,000, or both. MCL 333.7401(2)(a)(ii).
- a violation involving 50 grams or more, but less than 450 grams, of a mixture containing the controlled substance is a felony punishable by not more than 20 years in prison, a fine of not more than $250,000, or both. MCL 333.7401(2)(a)(iii).
- a violation involving less than 50 grams of a mixture containing the controlled substance is a felony punishable by not more than 20 years in prison, a fine of not more than $25,000, or both. MCL 333.7401(2)(a)(iv).

**Note:** The ameliorative changes made to sentencing for major controlled substance offenses effective March 1, 2003, are not retroactive. *People v*
Thomas (Carl), 260 Mich App 450, 459 (2004). In Thomas (Carl), 260 Mich App at 458, the defendant was sentenced to 10 to 20 years in prison when MCL 333.7401(2)(a)(iii) had a mandatory minimum of ten years. Thereafter, MCL 333.7401(2)(a)(iii) was amended to provide for imprisonment for not more than 20 years, or a fine of not more than $250,000, or both. Thomas (Carl), 260 Mich App at 458. The Michigan Court of Appeals held that although the statutory change did not retroactively apply to the defendant, the Legislature “specifically provided relief—in the form of early parole eligibility—for individuals, such as [the] defendant, who were convicted and sentenced before the amendatory act became effective.” Id. at 459. That is, “the plain language of MCL 791.234 specifically provides that individuals previously convicted under MCL 333.7401(2)(a)(iii) may become eligible for parole ‘after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.’” Thomas (Carl), 260 Mich App at 459, quoting MCL 791.234.

The major controlled substance offense described in MCL 333.7403(2)(a) prohibits an individual from knowingly or intentionally possessing a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner acting in the course of his or her professional practice. Penalties for violating MCL 333.7403(2)(a) with respect to specific quantities of cocaine or a narcotic drug listed in schedule 1 or 2 are as follows:

• a violation involving 1,000 grams or more of a mixture containing the controlled substance is a felony punishable by life imprisonment or any term of years, a fine of not more than $1,000,000, or both. MCL 333.7403(2)(a)(i).

• a violation involving 450 grams or more, but less than 1,000 grams, of a mixture containing the controlled substance is a felony punishable by not more than 30 years in prison, a fine of not more than $500,000, or both. MCL 333.7403(2)(a)(ii).

• a violation involving 50 grams or more, but less than 450 grams, of a mixture containing the controlled substance is a felony punishable by not more than 20 years in prison, a
fine of not more than $250,000, or both. MCL 333.7403(2)(a)(iii).

- a violation involving 25 grams or more, but less than 50 grams, of a mixture containing the controlled substance is a felony punishable by not more than four years in prison, a fine of not more than $25,000, or both. MCL 333.7403(2)(a)(iv).

A. Mandatory Sentence Enhancement

MCL 333.7413(2) contains a mandatory sentence enhancement provision for offenders who have multiple convictions of specific controlled substance offenses. MCL 333.7413(2) states:

“An individual convicted of a second or subsequent offense under section 7410(2) or (3) must be punished, subject to subsection (3), by a term of imprisonment of not less than 5 years nor more than twice that authorized under section 7410(2) or (3) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7410(2) or (3); and is not eligible for probation or suspension of sentence during the term of imprisonment.”

The mandatory enhancement provision applies only to offenders who have been convicted of two or more of the drug-related offenses specifically enumerated in MCL 333.7413(2). Note that not all of the major controlled substance offenses, as defined in MCL 761.2, are included within the mandatory enhancement provision of MCL 333.7413(2).

As written, the general habitual offender statutes do not require a sentencing court to follow the Public Health Code’s sentencing scheme unless the offender’s subsequent conviction is for a major controlled substance offense. However, as discussed in Section 5.6(B), it appears that a sentencing court may sentence an offender convicted of a subsequent major controlled substance offense under either of the two sentencing schemes, without regard to the directive found in the general habitual offender statutes for subsequent major controlled substance offenses.

32 Subsection (3) deals with a court’s departure from the minimum term of imprisonment.

33 The offenses addressed by MCL 333.7413(2) are predicated on the offender’s violation of MCL 333.7401(2)(a)(iv) within 1,000 feet of school property or a library.
B. Application of the General Habitual Offender Statutes to Cases Involving Controlled Substance Offenses

Michigan’s appellate courts have addressed the issue whether the sentencing scheme described in the general habitual offender statutes is to be concurrently applied to criminal offenses contained in part 74 of the Public Health Code or whether the scheme described in the Public Health Code operates to the exclusion of the habitual offender provisions.

Michigan courts have consistently held that a defendant’s sentence cannot be “doubly enhanced” by application of the habitual offender statutes and any enhancement provisions contained in the statutory language prohibiting the conduct for which the defendant was convicted. People v Elmore, 94 Mich App 304, 305-306 (1979); People v Edmonds, 93 Mich App 129, 135 (1979). With regard to the enhancement provisions contained in the controlled substances act and those contained in the habitual offender provisions, the Michigan Court of Appeals utilized standard statutory interpretation principles to determine that the more specific sentence enhancements found in the controlled substances act prevailed over general enhancement provisions of the habitual offender statutes:

“It must be noted that application of the controlled substances act penalty augmentation is proper when the defendant is being sentenced on a drug conviction. If the defendant commits a nondrug felony after one or more drug convictions then the habitual offender act applies upon conviction of that nondrug felony.” Edmonds, 93 Mich App at 135 n 1.

Where a defendant was convicted of offenses that are not major controlled substance offenses and his sentences were quadrupled when the trial court applied the enhancement provisions of the Public Health Code and the habitual offender statutes to the defendant’s underlying offenses, the Michigan Court of Appeals held that such “double enhancement” was improper. People v Fetterley, 229 Mich App 511, 525, 540-541 (1998).34

Where a defendant with no previous drug-related felony convictions was convicted of a major controlled substance offense, the Michigan Court of Appeals concluded that the Public Health Code’s enhancement provisions (MCL 333.7413(1) and MCL 333.7413(2)) were “inapplicable by [their] own terms.” People v

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34 Fetterley, 229 Mich App 511, provides a detailed overview of case law involving the applicability of multiple enhancement provisions.
Franklin (Gwendolyn), 102 Mich App 591, 594 (1980). However, “use of the general habitual offender statutes” to impose an enhanced sentence on the defendant based on the defendant’s multiple prior felony convictions was permissible. Id. at 594.

Sentence enhancement under either the habitual offender sentencing scheme or the Public Health Code’s subsequent offender sentencing scheme is permissible where a defendant with prior felony convictions is subsequently convicted of a major controlled substance offense. People v Wyrick, 474 Mich 947 (2005). “[T]he prosecutor may seek a greater sentence under the habitual offender statute even when a defendant is sentenced under the Public Health Code.” Wyrick, 474 Mich at 947, citing People v Primer, 444 Mich 269, 271-272 (1993) (holding that “the legislative purpose [of the provisions of the Code of Criminal Procedure providing that if a subsequent felony is a major controlled substance offense, the person shall be punished as provided in the Public Health Code] was to assure that the mandatory sentences for the commission of a first or subsequent major controlled substance offense would not be ameliorated as the result of the exercise of discretion regarding the length of sentence provided in the habitual offender provisions in the Code of Criminal Procedure, and not to preclude enhancement of a sentence under the habitual offender provisions that might be imposed on a person who has a record of prior felony conviction, albeit not for a major controlled substance offense”).

C. Discretionary Sentence Enhancement

Unlike the provision in MCL 333.7413(2), MCL 333.7413(1) permits, but does not require, a sentencing court to double the term of imprisonment authorized by the applicable statute for a first conviction of the offense. Where an offender is convicted of a second or subsequent controlled substance offense—“major” or “non-major”—MCL 333.7413(1) authorizes a trial court to impose a term of imprisonment not more than twice the term permitted for a first conviction of the offense. MCL 333.7413(1) states:

“Except as otherwise provided in [MCL 333.7413(2)], an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.”

35 Franklin references MCL 333.7413(2) and (3); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what were subsections (2) and (3) when Franklin was decided are now subsections (1) and (2).
The discretionary authority in MCL 333.7413(1) to sentence a repeat offender to not more than twice the term of imprisonment otherwise authorized includes an increase in both the minimum and maximum terms in the minimum range recommended by the statutory sentencing guidelines.36 People v Williams (John), 268 Mich App 416, 429-431 (2005).37 In Williams (John), 268 Mich App at 430-431, the trial court properly concluded that MCL 333.7413(1) authorized it to double both values in the range recommended under the guidelines—in that case, from the range of 5 to 23 months “otherwise authorized” for conviction, to a range of 10 to 46 months. The Michigan Court of Appeals held that “the clear and unambiguous language of [MCL 333.7413(1)] does not differentiate or suggest a distinction, either explicitly or implicitly, between maximum and minimum sentences; therefore, the word ‘term’ can entail and contemplate both maximum and minimum sentences.” Williams (John), 268 Mich App at 427.

See also People v Lowe, 484 Mich 718, 724 (2009), overruled in part on other grounds in People v Peltola, 489 Mich 174, 189-190 (2011), where the Michigan Supreme Court explained:

“[U]nder Michigan’s scheme of indeterminate sentencing[38] and the courts’ implementation of that scheme, the ‘term otherwise authorized’ is not exclusively the minimum sentence or the maximum limits for that sentence. In other words, the ‘period of time’ that a defendant could potentially spend in prison lies somewhere between the minimum and the maximum allowable sentences, and accordingly those sentences operate in tandem to define the ‘term’ for which a defendant has been sentenced. In order to double this ‘term,’ a trial court necessarily has to double both the minimum and maximum sentences because both are required to constitute a particular ‘term.’”

“[W]hen calculating a defendant’s recommended minimum sentence range under the sentencing guidelines when the defendant’s minimum and maximum sentences may be enhanced

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37 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).
pursuant to MCL 333.7413(1), a trial court should score the PRVs [prior record variables].” *Peltola*, 489 Mich at 190.\(^{39}\) In *Peltola*, 489 Mich at 184, the defendant contended that MCL 777.21(1)(b), requiring the sentencing court to score a defendant’s PRVs “[e]xcept as otherwise provided[,]” does not apply to offenders falling within the purview of MCL 777.21(4).\(^{40}\) The Supreme Court disagreed, holding that “MCL 777.21(1) sets forth the general rule for determining a defendant’s minimum sentence range[,]” and that, because MCL 777.21(4) does not direct otherwise but instead “is merely intended to provide guidance regarding how to determine the OV level and offense class for offenders falling under MCL 777.18[,]” the rule requiring the scoring of PRVs remains applicable to those offenders. *Peltola*, 489 Mich at 176, 191.

MCL 333.7413(4) defines “second or subsequent offense” for the purposes of subsection (2):

“[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marijuana, depressant, stimulant, or hallucinogenic drug.”

Sentence enhancement under MCL 333.7413(1) requires only that an offender’s convictions must follow one another: there is no requirement in the statute regarding the temporal sequence of the commission dates of the offenses on which the offender’s convictions are based. *People v Roseburgh*, 215 Mich App 237, 239 (1996).\(^{41}\)

\(^{38}\) As the term is used in Michigan, an *indeterminate sentence* is a sentence of unspecified duration. In *Lockridge*, 498 Mich at 380 n 18, the Michigan Supreme Court explained:

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

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

\(^{39}\) *Peltola* references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when *Peltola* was decided is now subsection (1).

\(^{40}\) MCL 777.21(4) applies to an offender who “is being sentenced for a violation described in [MCL 777.18],” which includes subsequent controlled substance violations under MCL 333.7413(1).

\(^{41}\) *Roseburgh* references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when *Roseburgh* was decided is now subsection (1).
5.7 Application of the Habitual Offender Provisions to Offenses Involving Statutory Escalation Schemes

Whether the habitual offender sentencing provisions may be concurrently applied to specific subsequent felony convictions is dependent on whether the Legislature has already provided a sentencing enhancement scheme for successive felony violations. “Where the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted.” People v Fetterley, 229 Mich App 511, 540-541 (1998); see also People v Allen (Floyd), 499 Mich 307, 324-325 (2016). However, where the statute under which a defendant was convicted enhances the punishment based on prior convictions of that offense, use of the general habitual offender provisions is improper. See, e.g., People v Honeycutt, 163 Mich App 757, 762 (1987) (because MCL 750.227b, the felony-firearm statute, mandates enhanced sentences for subsequent violations of that statute, application of the general habitual offender provisions is improper).

A number of statutes elevate the severity of the offense based on an offender’s prior conviction. This section discusses the following offenses:

- criminal sexual conduct offenses;
- violations of the Sex Offenders Registration Act (SORA);
- offenses involving the operation of a motor vehicle while intoxicated or with any amount of certain controlled substances in the body;
- retail fraud offenses; and
- fleeing and eluding offenses.

In addition, a number of statutes expressly prohibit the use of an offender’s previous conviction to enhance a sentence under the general habitual offender statutes if the conviction is used to enhance the offense under an internal statutory escalation scheme.

See also the Michigan Judicial Institute’s Statutory Offense Enhancement Table.

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42 In addition to prohibiting the possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1), MCL 750.227b(2) was added by 2015 PA 26, effective July 1, 2015, to prohibit the possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony.
A. Subsequent Criminal Sexual Conduct (CSC) Convictions

MCL 750.520f provides the penalty for offenders convicted on subsequent occasions of specific criminal sexual conduct (CSC) offenses. That provision requires that a defendant convicted of a second or subsequent violation of MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), or MCL 750.520d (CSC-III) be sentenced to a mandatory minimum term of at least five years. MCL 750.520f(1). For purposes of MCL 750.520f, an offense is considered a second or subsequent offense if, before conviction of the second or subsequent offense, the offender has been convicted under MCL 750.520b, MCL 750.520c, MCL 750.520d, or “under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense.” MCL 750.520f(2).

Additionally, MCL 750.520b(2)(c) imposes a mandatory sentence of imprisonment for life without the possibility of parole for a conviction of CSC-I, if committed against an individual less than 13 years of age by a defendant 18 years of age or older and if the defendant was previously convicted of an enumerated sex crime against an individual less than 13 years of age.

**Note:** CSC-I, CSC-II, and CSC-III are always considered to be felony convictions. CSC-IV, MCL 750.520e, is not designated as a felony offense by the statutory language defining the crime. However, because CSC-IV is punishable by more than one year of imprisonment, MCL 750.520e(2), it is a felony for purposes of the Code of Criminal Procedure. See MCL 761.1(f). Thus, CSC-IV may be used as a prior felony conviction to enhance an offender’s sentence under the general habitual offender provisions.

Because the habitual offender statutes address a defendant’s maximum possible sentence and the subsequent offense provisions of MCL 750.520f address a defendant’s minimum possible sentence, concurrent application of the statutes is permitted. *People v VanderMel*, 156 Mich App 231, 234-237 (1986). A defendant’s habitual offender status and the applicability of MCL 750.520f to a defendant’s conviction may be based on the same previous felony conviction. *People v James (Edwin)*, 191 Mich App 480, 482 (1991). In contrast to the habitual offender statutes, MCL 769.10 et seq., no additional notice has to be filed to proceed against defendants charged as subsequent offenders under MCL 750.520f. *People v*

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43 See the Michigan Judicial Institute’s *Sexual Assault Benchbook* for detailed discussion of CSC offenses.

“[T]he legislative sentencing guidelines apply to minimum sentences in excess of 5 years that are imposed under MCL 750.520f.” People v Wilcox (Larry), 486 Mich 60, 73 (2010). “Although MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it[,]” therefore, “for purposes of applying MCL 769.34(2)(a), the ‘mandatory minimum’ sentence referred to in MCL 750.520f(1) is a flat 5–year term.” Wilcox (Larry), 486 Mich at 69, 73. “Because the trial court imposed a 10-year minimum sentence [under MCL 750.520f’s repeat offender provision, and because the 10-year minimum sentence] exceeded both the applicable guidelines range and the 5-year mandatory minimum, [the] defendant’s sentence was a departure from the guidelines[,]” and the trial court was required to state substantial and compelling reasons to justify the departure. Wilcox (Larry), 486 Mich at 62-63.

B. Subsequent Sex Offenders Registration Act (SORA) Offenses

MCL 28.729(1) sets out penalties for a first, second, or third (or subsequent) violation of SORA (“SORA-1,” “SORA-2,” or “SORA-3”). See Allen (Floyd), 499 Mich at 320-322. MCL 28.729(1) provides:

“Except as provided in [MCL 28.729(2), MCL 28.729(3), and MCL 28.729(4)], an individual required to be registered under [SORA] who willfully violates [SORA] is guilty of a felony punishable as follows:

(a) If the individual has no prior convictions for a violation of [SORA], by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

44 MCL 769.34(2)(a) provides:

“If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.”

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

46 See the Michigan Judicial Institute’s Sexual Assault Benchbook for detailed discussion of SORA.
(b) If the individual has 1 prior conviction for a violation of [SORA], by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both.

(c) If the individual has 2 or more prior convictions for violations of [SORA], by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

A sentence imposed for a conviction of violating the Sex Offenders Registration Act (SORA) as a second offender (“SORA-2”), MCL 28.729(1)(b), “may be elevated under the second-offense habitual-offender statute, MCL 769.10(1)(a).” Allen (Floyd), 499 Mich at 326-327. “Nothing in SORA or the habitual offender act, MCL 769.10—MCL 769.13,] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute.” Allen (Floyd), 499 Mich at 311, 313, 322, 326 (concluding that “MCL 28.729(1) sets forth a recidivism statutory scheme that creates three separate felonies that elevate on the basis of repeat [SORA] offenses[,]” rather than a single offense “with escalating punishments for repeat convictions,” and that “the Court of Appeals mistakenly concluded that the phrase ‘first conviction of that offense’ in MCL 769.10(1)(a) referred to MCL 28.729(1)(a) (SORA-1)” rather than to the specific SORA offense of which the defendant was convicted) (emphasis added). Accordingly, because “[the] defendant was subject to a 7-year maximum term of imprisonment[ for SORA-2 under MCL 28.729(1)(b)], . . . the trial court appropriately exercised its discretion in sentencing [the] defendant [as a second habitual offender under MCL 769.10(1)(a)] to 1½ times that statutory maximum, i.e., 10.5 years.” Allen (Floyd), 499 Mich at 323.47

C. Third or Subsequent Convictions of Operating While Intoxicated or Operating With Any Amount of Certain Controlled Substances in the Body

For offenses occurring after January 3, 2007,48 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

47 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.

48 See 2006 PA 564, effective January 3, 2007, amending MCL 257.625(9)[c].
than ten years before the defendant’s third conviction. MCL 257.625(9)(c); People v Perkins (James), 280 Mich App 244, 245-246 (2008). A defendant’s prosecution under MCL 257.625(9)(c), as amended by 2006 PA 564, does not violate the ex post facto clauses of the state or federal constitutions. Perkins (James), 280 Mich App at 251-252. The Michigan Court of Appeals explained that although the amended MCL 257.625(9)(c) “certainly works to [the defendant’s] disadvantage, [it] did not attach legal consequences to [his] prior offenses, which occurred before the amendment’s effective date. Rather, the amendment made the consequences of [the defendant’s] current offense[], which occurred after January 3, 2007, more severe on the basis of [the defendant’s] prior convictions.” Perkins (James), 280 Mich App at 251. See also People v Sadows, 283 Mich App 65, 66 (2009) (MCL 257.625, as amended by 2006 PA 564, does not violate the prohibition against ex post facto laws and does not deny a defendant his or her federal and state constitutional rights to equal protection and due process).

For purposes of offenses involving the operation of a motor vehicle while intoxicated, a prior conviction may be a misdemeanor conviction. People v Bewersdorf, 438 Mich 55, 64 (1991). “[T]he sentence for [a third conviction of operating while intoxicated], if it is a first felony conviction, shall be as provided in the Motor Vehicle Code[]. . . . However, any subsequent . . . felony [operating while intoxicated] conviction is subject to the repeat offender provisions of the habitual offender act regardless of whether the underlying felony conviction is also [a third or subsequent operating while intoxicated] offense.” Bewersdorf, 438 Mich at 70-71; see also People v Stewart (Jerry) (On Remand), 219 Mich App 38, 43-44 (1996).

Note: Violations of MCL 257.625(9)(c) are subject to alternate mandatory minimum sentences under MCL 769.34(2), and the trial court may sentence the defendant to either alternative. See People v Hendrix, 471 Mich 926 (2004), modifying in part 263 Mich App 18 (2004).

D. Subsequent 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[,] [r]ather, the domestic-violence statute 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 (holding that the defendant’s sentence for third-offense domestic violence under former *MCL 750.81(4)*49 was properly enhanced to reflect fourth-offense habitual offender status under *MCL 769.12(1)(b)*) (quotation marks and citation omitted; fourth alteration in original).

In *Stricklin*, 322 Mich App at 539, the defendant argued “that the ‘first conviction’ for the purposes of his habitual-offender enhancement should be taken to mean a conviction for a first offense of domestic violence [under *MCL 750.81(2)*], which is a misdemeanor]” with a maximum penalty of 93 days in jail; under this reading of *MCL 769.12(1)*, the defendant’s sentence could have been enhanced to a maximum of only 15 years under *MCL 769.12(1)(c)*, rather than a maximum of life imprisonment under *MCL 769.12(1)(b)*. The Court of Appeals disagreed and held that “[t]he trial court did not err by recognizing that it was authorized to enhance [the] defendant’s sentence to a maximum of life imprisonment.” *Stricklin*, 322 Mich App at 542. “[T]he defendant was convicted of violating [former] *MCL 750.81(4)*, not *MCL 750.81 generally*, and] [t]hird-offense domestic violence is . . . a separate offense, the first conviction of which is punishable by a maximum of 5 years[’] imprisonment[;] [t]herefore, the trial court’s application of *MCL 769.12(1)(b)* was appropriate, because the subsequent felony was punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life.” *Stricklin*, 322 Mich App at 542 (quotation marks and citation omitted).

E. **Subsequent First-Degree Retail Fraud Convictions**

The retail fraud statutes are similar to the operating while intoxicated statutes in that both statutory schemes increase the severity of the offense from misdemeanor to felony as a defendant is convicted of successive violations, and each successive violation is subject to a possibly greater sentence. However, the statute governing retail fraud offenses contains an express prohibition against using a defendant’s previous felony conviction for enhancement under both the retail fraud statute and the habitual offender statute. *MCL 750.356c(6)* states:

“If the sentence for a conviction under this section is enhanced by 1 or more prior convictions, those prior convictions shall not be used to further enhance the sentence for the conviction pursuant to . . . [sections] 769.10, 769.11, and 769.12.”

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49 *MCL 750.81(4)* has been renumbered as *MCL 750.81(5)*. See 2016 PA 87, effective July 25, 2016.
The corresponding language in the habitual offender statutes is included in subparagraph (3) of each habitual offender statute:

“A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section.” MCL 769.10(3), MCL 769.11(3), and MCL 769.12(3).

In addition to retail fraud offenses, there are numerous statutory schemes that *expressly prohibit* using an offender’s previous conviction for enhancement under the general habitual offender statutes if that conviction was used to enhance the offender’s sentence under the statute prohibiting the conduct for which the offender was convicted. The statutory schemes governing these offenses contain a provision identical to the provision found in MCL 750.356c(6) (quoted above). Each statutory scheme containing the express prohibition against using an offender’s previous conviction to enhance a sentence under the general habitual offender statutes if the conviction is used to enhance the offense under the specific internal escalation scheme also contains a provision requiring the prosecutor to file notice with the court of the intent to seek enhancement under the statute based on an offender’s previous convictions. See MCL 750.356c(4), for example.

Similar to the notice requirements of the general habitual offender statutes, where a prosecutor seeks to enhance an offense under an internal escalation scheme, the prosecutor must list the offender’s previous convictions on which the enhancement sought will be based. The existence of a prior conviction can be established by any relevant evidence including, but not limited to:

“(a) A copy of the judgment or conviction.
(b) A transcript of a prior trial, plea-taking, or sentencing.
(c) Information contained in a presentence report.
(d) The defendant’s statement.” MCL 750.356c(4).

F. Subsequent Fleeing and Eluding Convictions

Both MCL 257.602a and MCL 750.479a prohibit fleeing and eluding a police or conservation officer. Like felony-firearm and criminal sexual conduct convictions, any fleeing and eluding conviction is considered to be a felony offense. The statutory scheme governing
fleeing and eluding offenses does not contain a method for imposing determinate sentences that increase or escalate with the number of times a defendant is convicted of the same offense. Consistent with the Michigan Supreme Court’s decision in *Bewersdorf*, 438 Mich at 70, the Michigan Court of Appeals concluded that where a defendant had prior felony convictions the general habitual offender statutes may be used to enhance the offender’s sentence for a subsequent fleeing and eluding conviction even where the fleeing and eluding statute already provided for an enhanced sentence based on the defendant’s subsequent conviction of fleeing and eluding. *People v Lynch*, 199 Mich App 422, 424 (1993).

### 5.8 Habitual Offender’s Parole Eligibility and Judicial Authorization

MCL 769.12(4) provides:

> “An offender sentenced [as an habitual offender] under [MCL 769.10, MCL 769.11, or MCL 769.12] for an offense other than a major controlled substance offense is not eligible for parole until expiration of the following:

(a) For a prisoner other than a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law.

(b) For a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge.”

Although “MCL 769.12(4)(a) requires written approval before a prisoner otherwise selected for parole will become eligible for the actual grant of parole[, i]t does not require[] . . . written approval before a prisoner can even be considered for conditional release.” *Hayes v Parole Bd*, 312 Mich App 774, 780 (2015) (emphasis added). “Once that consideration is complete, if the [Parole] Board decides that parole is proper, then it must obtain [judicial] approval before granting parole, as required under MCL 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).

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51 CSC-I, CSC-II, and CSC-III are designated as felonies without regard to possible penalty. CSC-IV is a felony because it is punishable by more than one year of imprisonment. See MCL 761.1(f).
Chapter 6: Sentence Departures

6.1 Introduction and Effect of Lockridge on Departure Caselaw ............... 6-2
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6.1 Introduction and Effect of *Lockridge* on Departure Caselaw

### A. Imposition of Departure Sentence Under *Lockridge*

For felony convictions listed in MCL 777.11 through MCL 777.19 that occur on or after January 1, 1999, the statutory sentencing guidelines require a sentencing court to calculate the appropriate minimum sentence range under the version of the guidelines in effect at the time the crime was committed. MCL 769.34(2). A “departure” is a sentence that does not fall within the appropriate minimum sentence range calculated under the guidelines. MCL 769.31(a).

Previously, sentencing courts were generally required to either impose a minimum sentence within the appropriate minimum range as calculated under the sentencing guidelines, MCL 769.34(2), or to articulate “a substantial and compelling reason” to depart from that range, MCL 769.34(3). “[U]nder the [previously-mandatory] sentencing guidelines, the abuse of discretion standard . . . applie[d] when an appellate court review[ed] a circuit court’s conclusion that there was a ‘substantial and compelling reason’ to depart from the guidelines.” *People v Hardy (Donald)*, 494 Mich 430, 438 n 17 (2013), effectively superseded in part on other grounds by 2015 PA 137, effective January 5, 2016, quoting *People v Babcock*, 469 Mich 247, 265 (2003).

However, in 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US 99 (2013), and *Apprendi v New Jersey*, 530 US 466 (2000), held that “Michigan’s sentencing guidelines . . . [are] constitutionally deficient[.] . . . [to] the extent [that they] . . . require judicial fact-finding beyond facts admitted by the defendant[2] or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range[.]” *People v Lockridge*, 498 Mich 358, 364, 399 (2015), rev’g in part 304

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1 Notably, the Legislature made no distinction between upward and downward departures. *People v Hegwood*, 465 Mich 432, 440 n 16 (2001). *Section 6.3* and *Section 6.4* distinguish between upward and downward departures for the purpose of discussing factors considered by a sentencing court in determining whether to depart from the guidelines.
Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)[,]” further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399, citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis supplied).

Under Lockridge, “the sentencing court may exercise its discretion to depart from [the applicable] guidelines range without articulating substantial and compelling reasons for doing so.” Lockridge, 498 Mich at 392. In order to facilitate appellate review, the court must justify any sentence imposed outside the advisory minimum guidelines range. Id., citing People v Coles, 417 Mich 523, 549 (1983), overruled in part on other grounds by People v Milbourn, 435 Mich 630, 644 (1990). “A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable.” Lockridge, 498 Mich at 392 (emphasis supplied), citing Booker, 543 US at 261. “[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 at 636],

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2 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 Garness, 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 “[t]he defendant did not make any . . . formal admission” with respect to several contested offense variable scores).

3 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.

4 MCR 6.425(D), which provides, in part, that the sentencing court “must use the sentencing guidelines, as provided by law[,]” and MCR 6.425(E)(1)(e), which provides that “[i]f the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure,” have not yet been amended to conform to Lockridge, 498 Mich 358.
[and reaffirmed in Babcock, 469 Mich 247, and People v Smith (Gary), 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.’” People v Steanhouse (Steanhouse II), 500 Mich 453, 459-460, 473 (2017), aff’g in part and rev’g in part 313 Mich App 1 (2015). Further, “the standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion.” Steanhouse II, 500 Mich at 471.5

B. Reasonableness of Departure Sentence

See the Michigan Judicial Institute’s Articulation of Reasons for Sentencing Departure sample form.

1. History: Reasonableness in Federal Courts Post-Booker Versus Michigan’s Traditional Proportionality Review

The Lockridge Court did not elaborate on the concept of reasonableness. This resulted in a conflict among Court of Appeals panels addressing the appropriate standard of review of departure sentences post-Lockridge.

In People v Steanhouse (Steanhouse I), 313 Mich App 1, 47-48 (2015), aff’d in part and rev’d in part on other grounds by People v Steanhouse (Steanhouse II), 500 Mich 453, 459-461 (2017),6 the Court of Appeals panel rejected the analysis that has been used in the federal courts since Booker, 543 US 220, in favor of the principle of proportionality test that was previously used in Michigan in reviewing sentences under the advisory judicial sentencing guidelines.7 “[A departure] sentence that fulfills the principle of proportionality under [People v] Milbourn[, 435 Mich 630 (1990),] and its progeny constitutes a reasonable sentence under Lockridge[, 498 Mich 358].” Steanhouse I, 313 Mich App at 47, 48 (concluding that “reinstating the previous standard of review in Michigan, as a means of determining the reasonableness of a sentence, is preferable to adopting the analysis utilized by the federal courts and is most consistent with the Supreme Court’s directives in Lockridge[]”) (citations omitted). However, in People v Masroor, 313 Mich App 358, 399 (2015), aff’d in part and

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5 See Section 3.9(I)(2)(a).

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

7 See Section 3.9(I)(2)(a).
rev’d in part 500 Mich 453, 459-461 (2017), a different panel declared a conflict with Steanhouse I, opining that “the application of a reasonableness standard as outlined by the federal courts[8] better comports with Lockridge and the Sixth Amendment.” 9

In People v Steanhouse (Steanhouse II), 500 Mich 453, 460-461 (2017), the Michigan Supreme Court “affirm[ed] the Court of Appeals’ holding in [Steanhouse I, 313 Mich App 1], that the 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 [Milbourn, 435 Mich at 636], ‘which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.’” 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.

2. Proportionality Test

Under the advisory judicial sentencing guidelines, a defendant’s sentence was reviewed for proportionality under People v Milbourn, 435 Mich 630 (1990). Under Milbourn, a sentence was proportionate when it reflected the seriousness of the circumstances surrounding the offense and the offender’s criminal history. Id. at 636.


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8 The *Booker* Court commented as follows concerning the concept of reasonableness:

“We infer appropriate review standards from related statutory language, the structure of the statute, and the ‘“sound . . . administration of justice.” . . . And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness].’” [Former 18 USC 3742(e)(3)].

9 Ultimately, the Court of Appeals “order[ed] that a special panel shall not be convened . . . to resolve [the] conflict[,]” People v Masroor, unpublished order of the Court of Appeals, issued December 18, 2015 (Docket Nos. 322280, 322281, and 322282).
for reasonableness is whether the trial court abused its discretion by violating the ‘principle of proportionality’ set forth in [Milbourn, 435 Mich at 636], [and reaffirmed in People v Babcock, 469 Mich 247 (2003), and People v Smith (Gary), 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).

In “declin[ing] 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[,]” as urged by the Court of Appeals majority in Masroor, 313 Mich App at 398, the Steanhouse II Court noted that “[t]he Masroor panel was concerned that dicta in [the Michigan Supreme Court’s] proportionality cases could be read to have ‘urg[ed] that the guidelines should almost always control,’” which would violate the United States Supreme Court’s holding in Gall v United States, 552 US 38, 47 (2007), that a guidelines system cannot create “‘an impermissible presumption of unreasonableness for sentences outside the Guidelines range.’” Steanhouse II, 500 Mich at 460, 473-474. However, the Steanhouse II Court stressed that “[t]he Michigan principle of proportionality[] . . . does not create such an impermissible presumption.” Steanhouse II, 500 Mich at 473-474 (disavowing, as inconsistent with Gall, dicta in some Michigan Supreme Court proportionality cases suggesting that the guidelines should almost always control) (citations omitted).10 “[T]he guidelines ‘remain a highly relevant consideration in a trial court’s exercise of sentencing discretion’ that trial courts

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10 In People v Steanhouse (On Remand) (Steanhouse III), 322 Mich App 233 (2017), the Court of Appeals, in dicta, repeated pre-Lockridge caselaw holding that “sentences falling within the minimum sentencing guidelines range are [generally] presumptively proportionate,” Steanhouse III, 322 Mich App at 238, citing People v Cotton, 209 Mich App 82, 85 (1995), but that “under ‘unusual circumstances,’ a sentence within the guidelines range may ‘be disproportionately severe or lenient,’ which would result in a sentence that violates the principle of proportionality even though it is within the guidelines range,” Steanhouse III, 322 Mich App at 238 n 3, quoting Milbourn, 435 Mich at 661. See also People v McFarlane, 325 Mich App 507, 538 (2018) (where a defendant’s sentence is presumptively proportionate, he or she 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”). However, other post-Lockridge panels of the Court of Appeals have held that MCL 769.34(10) requires appellate courts to affirm a non-departure sentence “unless there was an error in the scoring or the trial court relied on inaccurate information.” People v Anderson (Henry), 322 Mich App 622, 636 (2018); see also People v Schrauben, 314 Mich App 181, 196 (2016). The Michigan Supreme Court has not yet indicated whether a post-Lockridge sentence within the applicable guidelines range is subject to proportionality review. See Steanhouse II, 500 Mich at 471 n 14 (noting that both of the defendants at issue had received departure sentences, and therefore declining to “reach the question of whether MCL 769.34(10), which requires the Court of Appeals to affirm a sentence that is within the guidelines absent a scoring error or reliance on inaccurate information in determining the sentence, survives Lockridge”).
“must consult’’ and ‘‘take . . . into account when sentencing[;]’’ however, ‘‘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[.]’’ Steanhouse II, 500 Mich at 474-475 (citations omitted; ellipsis and some alterations in original).

The Steanhouse II Court did not provide further elaboration with respect to the principles governing proportionality review. In Steanhouse I, however, the Court of Appeals noted that the following principles historically applied when determining the proportionality of a sentence under the Milbourn test:

“Under the [proportionality] test, ‘a given sentence [could] be said to constitute an abuse of discretion if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.’ As such, trial courts were required to impose a sentence that took ‘into account the nature of the offense and the background of the offender.’

. . . [T]he [Milbourn] Court stated:

‘The guidelines represent the actual sentencing practices of the judiciary, and . . . the sentencing guidelines [are] the best “barometer” of where on the continuum from the least to the most threatening circumstances a given case falls.

. . . We note that departures [from the guidelines] are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. . . . To require strict adherence to the guidelines would effectively prevent their evolution, and, for this reason, trial judges may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime.’
The [Milbourn] Court also provided the following guidance for appellate courts reviewing a departure from the guidelines:

‘Where there is a departure from the sentencing guidelines, an appellate court’s first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.’

Factors previously considered by Michigan courts under the proportionality standard included, among others, (1) the seriousness of the offense[,] (2) factors that were inadequately considered by the guidelines[,] and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant’s misconduct while in custody, the defendant’s expressions of remorse, and the defendant’s potential for rehabilitation[]."

Steanhouse I, 313 Mich App at 46, citing People v Houston, 448 Mich 312, 321, 323-324 (1995), and quoting Milbourn, 435 Mich at 636, 651, 656-657, 659-660 (citations omitted).\footnote{The Steanhouse I panel additionally held that “the ['Crosby remand'] procedure articulated in Lockridge, and modeled on that adopted in United States v Crosby, 397 F3d 103, 117-118 (CA 2, 2005), . . . applies . . . [and] is the proper remedy when[] . . . the trial court was unaware of and not expressly bound by a reasonableness standard rooted in the Milbourn principle of proportionality at the time of sentencing.” Steanhouse I, 313 Mich App at 48. However, in Steanhouse II, 500 Mich at 475-476, the Michigan Supreme Court disavowed this portion of Steanhouse I. “[T]he purpose for the Crosby remand is not present in cases involving departure sentences[].” “the Crosby remand procedure [is] for [the] very specific purpose[ of] determining whether trial courts that had sentenced defendants under the mandatory sentencing guidelines had their discretion impermissibly constrained by those guidelines[,]” and “departure sentences [are exempted] from that remand procedure, at least for cases in which the error was unpreserved, because a defendant who [has] received an upward departure [cannot] show prejudice resulting from the constraint on the trial court’s sentencing discretion.” Steanhouse II, 500 Mich at 475-476 (citing Lockridge, 498 Mich at 395 n 31; aff’d in part and rev’g in part Masroor, 313 Mich App 358). See Section 1.12(E) for discussion of Crosby remands.}
To overcome the presumption that a sentence within the guidelines range is proportionate, a defendant must “show that there was something unusual about the circumstances of his case that made the sentence disproportionate.” *People v McFarlane*, 325 Mich App 507, 538 (2018) (rejecting the defendant’s claim that his sentence was disproportionate and amounted to cruel and unusual punishment where the defendant failed to identify “any unusual circumstances of his case that made the sentence disproportionate,” and argued only “that his sentence was invalid as a result of flaws in his trial and sentencing”).

3. **Post-Lockridge Departures Caselaw**

- **Guidelines advisory in all applications.** Under *Lockridge*, 498 Mich 358, “the Legislative sentencing guidelines are advisory in every case, regardless of whether the case actually 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 (Anthony)*, 318 Mich App 688, 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”).

- **Articulation of basis for departure required when imposing sentence under a Cobbs plea.** “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

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12 The *Steanhouse II* Court rejected the prosecution’s contention that *Lockridge*, 498 Mich 358, “rendered the legislative sentencing guidelines advisory only in cases that involved judicial fact-finding that [unconstitutionally] increased the applicable guidelines range and that[, by virtue of MCL 8.5,] the guidelines remain mandatory in all other cases.” *Steanhouse II*, 500 Mich at 465. “[T]rial courts [cannot be] statutorily directed to score the ‘highest number of points’ possible but [be] constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are found by a judge rather than by a jury or admitted by a defendant.” *Steanhouse II*, 500 Mich at 467-468.
take it into account when imposing a sentence” and to “justify the sentence imposed in order to facilitate appellate review” as required under *Lockridge*, 498 Mich at 392. *People v Williams (Eddie)*, ___ Mich ___, ___ (2018).

**Modest departure in homicide 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 *Milbourn*, 435 Mich 630, and accordingly . . . was reasonable under *Lockridge*, 498 Mich at 391-392].” *People v Walden*, 319 Mich App 344, 353, 355 (2017) (noting that “[the] defendant was sentenced . . . after *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; the court noted, for example, that [the] 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.” *Id.* at 353, 354, 355. 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 comprised 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.* at ___ (noting that the defendant “was also subject to an active personal protection order”). Finally, “[i]n relation to the prosecution’s recommendation[ of an upward departure sentence of 180 to 270 months], the upward departure imposed was modest indeed.” *Id.* at ___.

**Modest departure in child abuse case.** The defendant’s sentence of one year in jail, which constituted 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 under \textit{Lockridge}, 498 Mich at 392, and “fulfilled the ‘principle of proportionality’” under \textit{Milbourn}, 435 Mich at 636; “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 [the] 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.” \textit{People v Lawhorn}, 320 Mich App 194, 210-211 (2017) (citing \textit{Houston}, 448 Mich at 320-321, and further noting that “[a] departure sentence does not need to be arithmetically measured”). “[T]he 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 [the] defendant’s treatment of the victim and the accompanying home environment had on the victim[;]” that “[the] defendant must have known that . . . [the] defendant’s stepfather[] beat the victim[;]” that “it was highly likely that [the] defendant knew that there was cocaine in the home and that [the defendant’s stepfather] was using cocaine[;]” “that there were deplorable conditions inside the home[;]” and that the defendant had likely been involved in prior child abuse or neglect incidents. \textit{Lawhorn}, 320 Mich App at 207-211.

\begin{itemize}
\item \textbf{Moderate departure in criminal sexual conduct case.}\n\end{itemize}

Although “the out-of-guidelines sentence was 13 months above the high end of the guidelines range,” “considering the seriousness of the circumstances surrounding the offense and the offender, the trial court’s out-of-guidelines sentence did not violate the principle of proportionality, and was reasonable.” \textit{People v Lampe}, ___ Mich App ___, ___, ___ (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.” \textit{Id.} at ___. “[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 ___ (“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 this variable was given inadequate weight.” Id. at ___.

• **Substantial departure in armed robbery and bank 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*, ___ Mich App ___, ___ (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. at ___.

• **Failure to adequately support extent of departure.** An upward departure of 15 years for the defendant’s conviction of second-degree murder was not “more reasonable and proportionate than a sentence within the recommended guidelines range would have been.” *People v Dixon-Bey*, 321 Mich App 490, 529
In concluding that the trial court had violated the principle of proportionality by imposing a 35-year minimum sentence, the Dixon-Bey Court noted the following:

• **Consideration of offender’s background.** Nothing about the defendant’s background supported a finding “that a departure sentence was more proportionate than a sentence within the guidelines.” *Dixon-Bey*, 321 Mich App at 526. The defendant’s “prior record variable (PRV) score was zero[,]” and “[w]ithout a criminal history, the trial court had no basis to conclude that [the] defendant was a ‘recidivist . . . criminal’ that deserved a ‘greater . . . punishment’ than that contemplated by the guidelines.” *Id.* at 525-526, quoting *People v Smith (Gary)*, 482 Mich 292, 305 (2008).

• **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 a departure[,]” . . . most, if not all, of the factors referenced 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 the fact that [the] defendant stabbed the victim twice in the chest[, h]owever, [the] 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 [the] 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), which relates to brutality or similarly egregious
conduct, should not be scored[].” *Id.* (citation omitted).

• **Irrelevant factors.** Neither “the victim’s standing in the community” nor “[the] defendant’s attempt[] to minimize her role in the stabbing[]” was “unique to [the] defendant’s crime,” and “[t]here [was] nothing on the record to indicate that [the] defendant’s marriage to a different man impacted her relationship with the victim[]” therefore, these factors were not “relevant to a proportionality determination.” *Dixon-Bey*, 321 Mich App at 529.

• **Premeditation and OV 6.** Where the defendant was charged with first-degree murder but jury-convicted of second-degree murder, the departure sentence could not properly be premised on the trial court’s “belief that the killing was premeditated[]” *Dixon-Bey*, 321 Mich App at 528. Because OV 6 must be scored “consistent with a jury verdict unless the judge has information that was not presented to the jury,” . . . a sentencing court may be constrained under the guidelines from scoring OV 6 as high as it otherwise would have[,]” presumably, however, a trial court may not “sentence a defendant convicted of second-degree murder as though the murder were premeditated.” *Id.* (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 [the] defendant acted with premeditation”). Furthermore, because scoring OV 6 at 50 points to reflect premeditated intent would have resulted in an unchanged minimum sentence range, it did not support “that a departure sentence was more proportionate.” *Id.* at 528-529.

• **Appellate review and deference to trial court’s judgment.** “[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[].” *Dixon-Bey*, 321 Mich App at 530, quoting *Milbourn*, 435 Mich at 647.

• **Inadequate articulation of departure reasons.** Resentencing 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; “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 based on” the single valid factor. People v Steanhouse (On Remand) (Steanhouse III), 322 Mich App 233, 242 (2017). In concluding that the trial court had violated the principle of proportionality by failing to provide an adequate rationale for imposing a 30-year minimum sentence, the Steanhouse III Court noted the following:

- **Factors already contemplated by offense variables for which zero points were assessed.** “[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.” Steanhouse III, 322 Mich App at 240, 242. “[H]aving determined [when scoring zero points for OV 7] that the facts . . . only 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. at 241.

- **Consideration of prior relationship between the defendant and the victim.** 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. Steanhouse III, 322 Mich App at 242, citing Milbourn, 435 Mich at 660. “[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.” Steanhouse III, 322 Mich App at 242, quoting Milbourn, 435 Mich at 660-661. 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 demonstrate[d] 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.

• Prospect of federal charges against defendant. Resentencing was required where the trial court departed downward on the basis of “the highly speculative, apparently looming, yet also apparently still unfulfilled, prospect of potential federal charges against [the] defendant.” People v Salami, unpublished per curiam opinion of the Court of Appeals, issued December 19, 2017 (Docket No. 323073), p 1.13 “The ‘key test’ applicable to sentencing is ‘whether the sentence is proportionate to the seriousness of the matter,’” yet “the trial court’s sentencing decision had little, if anything, to do with the seriousness of [the] defendant’s crimes[]” indeed, the trial court acknowledged “that the circumstances of the case warranted a more severe sentence” and “that its sentencing decision was not a reflection of the seriousness of the offense and [the] defendant’s background, but rather, an application of the trial court’s subjective philosophy with regard to the interplay between state and federal prosecutions.” Id. at 3, quoting Milbourn, 435 Mich at 661.

• Non-guideline considerations in sentencing for domestic violence offense. An upward departure of 19 months from the guidelines maximum-minimum sentence of 281 months for assault with intent to commit murder was reasonable under Lockridge, 498 Mich 358. People v Rosa, 322 Mich App 726, 748 (2018). In Rosa, 322 Mich App at 744, 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. “Considering the record and the trial

13 An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).
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 “defendant’s long history of abusing KR, the presence of a child during the assault, and the damage done to a family of four children were not fully accounted for in the guidelines.” Id. at 748 (noting that the extent of the departure, which “was an increase of approximately 7%” from the guidelines maximum, was “a proportional increase given the non-guideline considerations”).

A word of caution is warranted regarding the following sections in this Part. It is unknown whether or to what extent caselaw addressing departures under the previously-mandatory guidelines will be of continued relevance on review of sentence departures under the now-advisory guidelines. Similarly, it is unknown whether statutory provisions (and corresponding court rules) related to departures, but not expressly struck by the Lockridge Court, continue to apply in the absence of the “substantial and compelling” articulation requirement.14 Accordingly, until further guidance is provided by the appellate courts, discussion of the statutory provisions and caselaw in this Part will not be deleted from this benchbook. However, the pre-Lockridge content of the following sections should be approached with caution.

6.2 Requirements of a Sentence Departure Under the Previously-Mandatory Guidelines15

Previously, sentence departures were governed by the language in MCL 769.34(3), which permitted a court to depart from the range recommended by the guidelines if there was a “substantial and compelling reason” for that departure, and the court articulated that reason on the record. People v Babcock, 469 Mich 247, 259-260 (2003). Of critical importance was the trial court’s statement (on the record) concerning how the substantial and compelling reason justified the

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14 The Lockridge Court stated that “[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1, emphasis supplied. In light of the emphasized limiting language, it is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in Lockridge.

In construing the former *substantial and compelling reason* departure scheme, the Michigan Supreme Court held that “the statutory guidelines require[d] more than an articulation of reasons for a departure; they require[d] justification for the particular departure made.” *People v Smith (Gary)*, 482 Mich 292, 303 (2008) (the trial court abused its discretion when it sentenced a defendant to twice the highest minimum term recommended under the sentencing guidelines without justifying the extent of the departure on the record). The Michigan Supreme Court concluded that providing substantial and compelling reasons for a departure did not satisfy the trial court’s duty to “establish why the sentences imposed were proportionate to the offense and the offender.” *Id.* at 295.

The Michigan Supreme Court set out the following summary to assist trial courts in fulfilling their statutory obligations under MCL 769.34(3):

“(1) The trial court bears the burden of articulating the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.

(2) The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made.

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15 Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

There is no longer a requirement that a court articulate a substantial and compelling reason to depart from the guidelines range. In 2015, holding that Michigan’s mandatory sentencing guidelines scheme was constitutionally deficient, the Michigan Supreme Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3),” holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are *advisory* only.” *People v Lockridge*, 498 Mich 358, 364-365, 391-392, 399 (2015) (emphasis supplied). A sentencing court has discretion to depart from the guidelines range, and a departure sentence “will be reviewed by an appellate court for *reasonableness.*” *Lockridge*, 498 Mich at 392, citing *United States v Booker*, 543 US 220, 261 (2005) (emphasis supplied). “[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 (Gary)*, 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.” *People v Steanhouse (Steanhouse II)*, 500 Mich 453, 459-460, 473 (2017), aff’d in part and rev’d in part 313 Mich App 1 (2015). Because it is unknown whether or to what extent pre-*Lockridge* caselaw will be of continued relevance in determining the reasonableness of a departure sentence, discussion of these cases will not be deleted from this benchbook at this time. See *Section 6.1*; see also for additional discussion of *Lockridge*. 
(3) The trial court’s articulation of reasons for the departure must be sufficient to allow adequate appellate review.

(4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.

(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.

(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence.

(7) Departures from the guidelines recommendation cannot be assessed with mathematical precision. The trial court must comply reasonably with its obligations under the guidelines...to further the legislative goal of sentencing uniformity.” Smith (Gary), 482 Mich at 318-319.

A. Substantial and Compelling Reason

According to the Michigan Supreme Court, a reason justifying a departure was substantial and compelling if it was “objective and verifiable,” if it “‘keenly’” or “‘irresistibly’” grabbed a court’s attention, if it was “‘of considerable worth’” in deciding the length of a sentence, and if it arose only in “‘exceptional cases.’” Babcock,

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16 In People v Lockridge, 498 Mich 358, 391(2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1; see also for additional discussion of Lockridge.

17 In People v Lockridge, 498 Mich 358, 391(2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1; see also for additional discussion of Lockridge.

“The phrase ‘objective and verifiable’ has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” People v Abramski, 257 Mich App 71, 74 (2003).

Proportionality remained a component of sentencing under the mandatory statutory guidelines. Babcock, 469 Mich at 262. When deciding whether and to what degree to depart from the recommended sentence, “[a] trial court [was required to] consider whether its sentence [was] proportionate to the seriousness of the defendant’s conduct and his [or her] criminal history[.]” Id. at 264. “If [the sentence was] not [proportionate], the trial court’s departure [was] necessarily not justified by a substantial and compelling reason.” Id.

Although there was likely no single correct outcome in cases where a departure from the guidelines was considered and imposed, a departure was required to fall within “th[e] principled range of outcomes.” Babcock, 469 Mich at 269; People v Reincke (On Remand), 261 Mich App 264, 268 (2004). As long as the trial court chose a sentence departure within that principled range of outcomes, the court had properly exercised its discretion. Reincke, 261 Mich App at 268. In Reincke, 261 Mich App at 265, the trial court imposed a sentence that exceeded by more than four times the minimum sentence recommended under the guidelines—the guidelines recommended a minimum of 81 to 135 months and the court imposed a minimum of 360 months. The Court of Appeals concluded that the trial court’s extreme departure from the recommended guidelines range was justified by the “incomprehensible brutality” of the crime. Id. at 269 (three-year-old child penetrated with such force that the tissue between the child’s rectum and vaginal wall was torn to the point of being unidentifiable, general anesthesia was necessary just to examine the extent of the child’s injuries, and the injuries were so extensive that the child required major reconstructive surgery).

18 “[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 (Gary), 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.’” People v Steanhouse (Steanhouse II), 500 Mich 453, 459-460, 473 (2017), aff’g in part and rev’g in part 313 Mich App 1 (2015). See for a detailed discussion of proportionality.
An upward departure requires that the trial court, at sentencing, advise the defendant of his or her appellate rights regarding the sentence departure. MCR 6.425(F)(4) states:

“When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 et seq., are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines.”

The legislative sentencing guidelines apply to a defendant’s sentence of imprisonment following probation revocation when the offense for which the defendant was sentenced to probation was committed on or after January 1, 1999. MCL 769.34(2); People v Hendrick, 472 Mich 555, 557, 560 (2005). Trial courts were required to articulate substantial and compelling reasons for imposing a sentence outside of the guidelines range, and it was “perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist[ed] to warrant an upward departure from the legislative sentencing guidelines.” Id. at 557, 562-563. Accordingly, a court was permitted to consider “the acts giving rise to the probation violation” as a substantial and compelling reason to depart. People v Church, 475 Mich 865, 865 (2006), citing Hendrick, 472 Mich at 564.

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19 There is no indication in Lockridge, 498 Mich 358, that the requirements of MCR 6.425(F)(4) no longer apply, and MCR 6.425(F)(4) has not been amended; therefore, it is unclear to what extent courts must continue to advise defendants of the right to appeal a departure sentence as required under that provision.

20 In People v Lockridge, 498 Mich 358, 391 (2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” The Lockridge Court additionally stated that “[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1, emphasis supplied. The Lockridge Court did not specifically address intermediate sanctions such as probation. See for discussion of intermediate sanctions. See also for discussion of Lockridge.
B. Statutory Prohibitions and Caselaw21

In addition to the pre-Lockridge requirement that the trial court articulate a substantial and compelling reason for departing from the guidelines, the statutory sentencing guidelines expressly prohibited a sentencing court from basing a departure on specific characteristics of a defendant and his or her defense. MCL 769.34(3)(a) states:

“The court shall not use an individual’s gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.”

Unless the court concluded that a factor had been given disproportionate or inadequate weight, the guidelines also expressly prohibited a court from basing a sentence departure on a characteristic of the offense or the offender addressed by the offense variables (OVs) and prior record variables (PRVs). MCL 769.34(3)(b) states:

“The court shall not base a departure on an offense characteristic [(OV)] or offender characteristic [(PRV)] already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.”

Because points are assessed in each OV and PRV according to the applicable statement having the highest number of points and because each variable consists of a finite number of somewhat generic statements, the guidelines necessarily cannot account for the unique circumstances of specific offenses and offenders. The “all or nothing” characteristic of some of the variables further limits the guidelines from accurately accounting for circumstances of an offense not precisely described by the choices available under each variable. For example, OV 7 addresses the aggravated physical abuse component of an offense and allows for only two choices. MCL 777.37. Fifty points must be scored if a victim was subject to treatment characterized as aggravated physical abuse under OV 7.

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21 In People v Lockridge, 498 Mich 358, 391 (2015), the Michigan Supreme Court “[s]truck down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1; see also for additional discussion of Lockridge.
or zero points must be scored if a victim was not subject to such abuse. MCL 777.37(1). OV 7 cannot account for a victim’s treatment that falls somewhere in between, or well beyond, the two choices offered by OV 7.

The Michigan Supreme Court has provided guidance for determining when a characteristic of the offense or the offender is already adequately measured by an OV or a PRV:

“[I]f a defendant convicted of armed robbery is scored 25 points under offense variable one because he [or she] stabbed his [or her] victim, see MCL 777.31, that the defendant stabbed his [or her] victim probably could not constitute a substantial and compelling reason to justify a departure because the Legislature has already determined what effect should be given to the fact that a defendant has stabbed his [or her] victim and the courts must abide by this determination. However, if the defendant stabbed his [or her] victim multiple times, or in a manner designed to inflict maximum harm, that might constitute a substantial and compelling reason for a departure because these characteristics may have been given inadequate weight in determining the guidelines range.” Babcock, 469 Mich at 258 n 12.

A trial court’s upward departure based on the defendant’s extensive criminal history was held to be appropriate even where the PRVs “partially accounted for” the defendant’s prior convictions. People v Deline, 254 Mich App 595, 598-599 (2002), vacated in part on other grounds 470 Mich 895 (2004).22, 23 The Court of Appeals explained:

“[A]lthough defendant’s history of misdemeanors and felonies was partially accounted for in the scoring of prior record variables, that scoring did not account for the number or extent of [the defendant’s prior] offenses. Other factors not accounted for in the guidelines scoring indicate that defendant is unwilling or unable to accept responsibility for his actions or make the changes needed to protect the public from further driving offenses by him. For example, he was on probation for drunken driving at the time of his offense, he had a

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

23 Conduct scored under OV 19 was also at issue in Deline, 254 Mich App 595, and the Deline Court’s interpretation of OV 19—that OV 19 was limited to conduct that interfered with the judicial process—was disapproved in People v Barbee, 470 Mich 283, 287-288 (2004). The Michigan Supreme Court vacated the part of “the Court of Appeals judgment [in Deline] to the extent that it is inconsistent with [the Michigan Supreme Court’s] decision in Barbee.” People v Deline, 470 Mich 895 (2004). See for discussion of OV 19.
blood-alcohol level far in excess of the legal limit, he was driving although his license had been suspended, and he has been sentenced to jail for numerous drunken driving offenses.” Deline, 254 Mich App at 598-599.

A trial court’s upward departure based on the defendant’s commission of multiple acts of aggravated physical abuse against his wife did not constitute an abuse of discretion where the maximum score of 50 points for OV 7 (aggravated physical abuse) could be assigned for a single incident; OV 7 did not take into account the number of times (18) the defendant treated his victim with sadism, torture, or excessive brutality. People v Cline (Stephen), 276 Mich App 634, 652 (2007). Similarly, the trial court’s upward departure based on the defendant’s conviction of 18 counts of crimes against a person did not constitute an abuse of discretion where the defendant’s score of 25 points (offense was part of a pattern of felonious criminal activity involving three or more crimes against a person) for OV 13 (continuing pattern of criminal behavior) did not take into account the 18 times the defendant committed a crime against a person. Id. at 652-653.

There was no requirement that a trial court’s determination that the guidelines gave inadequate or disproportionate weight to a factor be expressly stated—the court’s determination could be implied from the record. People v Lowery, 258 Mich App 167, 170 (2003). In Lowery, 258 Mich App at 171, the Court of Appeals noted that “[t]he trial court expressed its reasoning for the departure by implying that the characteristics were given inadequate weight.” The Court of Appeals agreed with the trial court that the guidelines sentence recommendation did not adequately account for the fact that the defendant actually shot the victim. Id. The Court of Appeals explained:

“Although offense variable (OV) 1 considers whether a firearm was discharged at or toward a human being and OV 3 considers whether a victim suffered bodily injury that required medical treatment, . . . neither variable considers someone actually being shot. Injury to a victim as a result of being shot is in fact a substantial and compelling reason to depart from the guidelines, and constituted a substantial and compelling reason for the trial court’s particular departure in this case[.].” Lowery, 258 Mich App at 171.

But see People v Jackson (James), 474 Mich 996 (2006), where, in a peremptory order,24 the Michigan Supreme Court clearly indicated that a sentencing court must make a record finding when its departure from the sentencing guidelines recommendation was based on a characteristic’s failure to adequately account for a defendant’s
conduct or when a characteristic is given disproportionate weight in light of the defendant’s conduct. *Id.* at 996. According to the *Jackson (James)* Court:

“The sentencing court . . . commented on the ‘excessive brutality, violence, and terrorism’ to which the victims were subjected. But the 50-point score [the] defendant received on Offense Variable 7 already accounted for these circumstances. A sentencing court may base a departure on a characteristic already taken into account by the sentencing guidelines only if the court finds that the characteristic was given inadequate or disproportionate weight. No such finding was made here.” *Id.* at 996 (emphasis added; internal citations omitted).

In a concurring opinion in *Jackson (James)*, 474 Mich at 998, Justice Corrigan noted that “[t]he defendant’s crimes [were] ‘off the charts’ in terms of extreme brutality, terrorism, and violence[, but b]ecause the trial court failed to state that the factor of excessive brutality, violence, and terrorism was given inadequate weight under the guidelines,” the defendant should be remanded for resentencing. Justice Corrigan recognized that language appearing in both MCL 769.34(3)(b) and *People v Babcock*, 469 Mich 247, 268 (2003), justified departure when a characteristic was inadequate or disproportionate to the circumstances of the offense or the offender, and stated that “[i]t appear[ed] to [her] that such magic language [was] now indisputably required before [the] Court [would] sustain an upward departure.” *Jackson (James)*, 474 Mich at 998.

See also *People v Corrin*, 489 Mich 855 (2011), where the Michigan Supreme Court agreed that “[t]he psychological injury suffered by the victim’s family members and the likelihood of the defendant’s reoffending were properly considered by the trial court as substantial and compelling reasons that [justified] a departure from the statutory guidelines;”*25 People v Lockridge*, 304 Mich App 278, 283 (2014), aff’d in part, rev’d in part on other grounds 498 Mich 358 (2015)*26 (“given . . . the escalation of the defendant’s domestic-violence conduct toward the victim, the fact that the crime occurred

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25 In this case, the trial court expressed frustration with the fact that OV 4 made no allowance for the severity of a victim’s serious psychological injury. *People v Corrin*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 290747). The trial court also expressed its displeasure with the fact that OV 4 did not consider psychological injury to the victim’s family members. *Id.* Note: OV 5, the variable that reflects psychological injury to a victim’s family members, did not apply to the defendant’s CSC-II conviction; OV 5 applies only when the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1).
in plain view of [their] children, and that [the] defendant left his children alone with the trauma of attempting to revive their mother, the trial court did not err by finding that the prior record and offense variables inadequately accounted for [the] defendant’s conduct["").

“The fact that a defendant might have to serve county jail time following additional prison incarceration for a parole violation [was not] a substantial and compelling reason to depart from the sentencing guidelines.” People v Lucey, 287 Mich App 267, 273 (2010). Citing People v Ratliff, 480 Mich 1108 (2008), the Lucey Court noted that the Supreme Court in Ratliff, 480 Mich 1108, had “suggested that the logistical inconvenience that may occur when sentencing a parolee to an intermediate sanction [did] not constitute a substantial and compelling reason for departure from the sentencing guidelines.” Lucey, 287 Mich App at 272. See also MCL 769.34(4)(a).

That a defendant presented a danger to him- or herself and the public was not an objective and verifiable factor that could be used as a substantial and compelling reason to depart from the statutory guidelines. People v Solmonson, 261 Mich App 657, 670 (2004).

A trial court’s characterization of the defendant’s offenses as “egregious” was not an objective and verifiable determination that could be used as a substantial and compelling reason to depart from the statutory guidelines. People v Havens, 268 Mich App 15, 18 (2005).

However, a trial court’s determination that “[a] defendant’s repeated perpetration of vicious acts against his wife within a short period was a ‘particularly aggravating,’ ‘particularly compelling,’ and ‘staggering’ factor” was objective and verifiable and constituted a substantial and compelling reason for the trial court’s upward departure from the minimum sentence recommended by the statutory guidelines. People v Horn (Marvin), 279 Mich App 31, 46 (2008). The Michigan Court of Appeals noted that the “[d]efendant’s determined course to terrorize and abuse his wife, clearly evident from the recurring and escalating acts of violence, [wa]s an objective and verifiable reason . . . based on occurrences external to the sentencing judge’s mind, and capable of being confirmed.” Id. at 46.

If the trial court failed to score points under OV 7, it could not upwardly depart from the guidelines range on the basis that “the

26For more information on the precedential value of an opinion with negative subsequent history, see our note.
sentencing guidelines did not adequately account for [the] defendant’s intent to terrorize the victims.” People v Anderson (Michael), 298 Mich App 178, 186 (2012) (noting that “OV 7 could have been scored to account for the victims’ fear and anxiety that resulted as a result [sic] of waking up to find their home on fire and their escape route blocked by fire, and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant’s conduct in this regard[ ]”).

A defendant’s cooperation with his attorney and his respectful conduct in the courtroom were not objective and verifiable factors and did not serve as substantial and compelling reasons for departure. People v Young (Raymond), 276 Mich App 446, 458 (2007). Additionally, a defendant’s punctuality in reporting to the court, while objective and verifiable, could not serve as a substantial and compelling reason for departure because it did not “keenly” or “irresistibly” grab a court’s attention. Id. at 458.

6.3 Downward Departures

Objective and verifiable factors appropriately considered in determining whether to depart downward from the recommended minimum sentence range under the previously-mandatory sentencing guidelines included: (1) any mitigating circumstances of the offense; (2) the defendant’s previous criminal record; (3) the defendant’s age; (4) the defendant’s employment history; and (5) any relevant post-arrest events, such as the defendant’s cooperation with the police. People v Daniel (Danny), 462 Mich 1, 7 (2000), citing People v Fields (Warren), 448 Mich 58, 76-79 (1995). See People v Young (Raymond), 276 Mich App 446, 449-458 (2007) (addressing all of the factors specified by the Court in Fields (Warren), 448 Mich 58, as appropriate for a sentencing court to consider in deciding whether to depart downward from the recommended minimum sentencing guidelines range).

A. Work History

A sentencing court could consider a defendant’s stable and long-term work history when determining whether a substantial and

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27 Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

In People v Lockridge, 498 Mich 358, 391(2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1; see also for additional discussion of Lockridge.

**B. Education**


The fact that a defendant pursued an education despite having a learning disability was also an appropriate factor to consider in determining whether to depart downward. *People v Portellos*, 298 Mich App 431, 455-456 (2012), overruled in part on other grounds by *People v Calloway*, 500 Mich 180 (2017).28

**C. Guidelines Range Versus Mandatory Minimum**

If a crime was scored under the previously-mandatory guidelines and resulted in a lesser minimum sentence than the mandatory minimum term contained in the penal statute under which a defendant was convicted, the guidelines range did not itself constitute a substantial and compelling reason for departing from the mandatory minimum. *People v Izarraras-Placante*, 246 Mich App 490, 498 (2001). Only when— independent of the guidelines range— a substantial and compelling reason to depart from a statutory mandatory minimum existed could a trial court properly look to the minimum range recommended by the guidelines in order to fashion a sentence more proportionate to the offense and the offender. *Id.* at 498-499.

**D. Family Support**

Strong family support could be considered as a substantial and compelling reason for a trial court’s downward departure from the recommended minimum sentencing guidelines range. *People v
Harvey (Charles), 203 Mich App 445, 448 (1994); Portellos, 298 Mich App at 454-455 (noting that “[u]nlike a defendant’s remorse, whether a defendant ha[d] family and community support [was] external to the mind and capable of being confirmed[]”).

E. Minimal Criminal History

Minimal criminal history could properly be considered as a substantial and compelling reason for a trial court’s downward departure from the recommended minimum sentencing guidelines range. Daniel (Danny), 462 Mich at 7. “Though the defendant’s lack of criminal record alone [was] not a substantial and compelling factor, it [could] become a substantial and compelling factor when considered in conjunction with the defendant’s age and other history.” Portellos, 298 Mich App at 455, citing Daniel (Danny), 462 Mich at 7; People v Young (Raymond), 276 Mich App 446, 455-456 (2007).

However, the fact that the defendant at the age of 26 had only one previous misdemeanor conviction did not constitute a substantial and compelling reason for a downward departure from the recommended minimum sentencing guidelines range. Claypool, 470 Mich at 727. See also People v Bosca, 310 Mich App 1, 55 (2015) (“[t]he mere fact of [the] defendant’s prior, relatively unblemished criminal history was not a substantial and compelling reason for departure from the guidelines[]”).

F. Police Misconduct

“[P]olice misconduct, [] alone, [was] not an appropriate factor to consider at sentencing[, but] if it [could] be objectively and verifiably shown that police conduct or some other precipitating cause altered a defendant’s intent, that altered intent [could] be considered by the sentencing judge as a ground for a downward sentence departure.” Claypool, 470 Mich at 718.

G. Rehabilitative Potential

Where the trial court indicated that its concern was seeing that the defendant receive the rehabilitative services needed to address the context-specific criminal conduct engaged in by the defendant, and taking judicial notice of the fact that community-based services were more available and better than those offered by the Department of Corrections, the trial court did not abuse its discretion in departing downwardly from the recommended sentence, which resulted in the defendant’s probation rather than incarceration for a minimum of 19 to 38 months under the
guidelines. *People v Doolittle*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2010 (Docket No. 292423), slip op pp 1-3.29

The Court of Appeals noted that the trial court was in a “vastly superior position to observe and evaluate not only the defendant, but the victim, the context, the community, and anyone else who might have an effect on or be affected by its sentencing decision.” *Doolittle*, slip op at 3. Finally, the Court of Appeals further noted that it was clear “that the trial court’s real concern was ensuring to the maximum extent possible that [the] defendant would be a ‘changed man’ after completing whatever sentence was imposed.” *Doolittle*, slip op at 2.

**H. Immigration Status**

The trial court erred in departing downward from the minimum guidelines range based on its erroneous belief that imposing a jail sentence of under one year for the defendant’s drug convictions would prevent his deportation under federal immigration law. *People v Akhmedov*, 297 Mich App 745, 749-752 (2012) (“the trial court lacked substantial and compelling reasons to depart from the guidelines” range of 51 to 85 months’ imprisonment where its sole stated reason for the departure was “premised on a misinterpretation of federal law[]” regarding whether the defendant’s convictions qualified as “aggravated felonies” requiring deportation).

**I. Learning Disabilities**

The fact that a defendant pursued an education despite having a learning disability was an appropriate factor to consider in determining whether to depart downward from the sentencing guidelines range. *Portellos*, 298 Mich App at 455-456.

Additionally, the fact that a defendant’s learning disability affected his or her decision-making capacity was an appropriate consideration in determining whether to depart downward. *Portellos*, 298 Mich App at 455-456 (holding that evidence that the defendant “was learning disabled, that she required extra time to process information, and that she did not perform well when making quick decisions and judgments[]” supported “the trial court’s finding that [the defendant’s] learning disability diminished her ability to make decisions[]”).

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29 An unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).
J. Admission to Specialty Court

Under MCL 600.1062 and MCL 600.1068(2), “[a] court[ ] [was not permitted to] admit a defendant into a drug treatment court program when doing so depart[ed] from the [previously-mandatory] sentencing guidelines and the prosecutor [had] not approved.” People v Baldes, 309 Mich App 651, 657 (2015). Moreover, a “prosecuting attorney’s decision to sign [a] referral form” for completion of a drug treatment court predations screening and evaluation assessment under MCL 600.1064(3) “did not constitute a waiver [of the right to challenge the trial court’s decision to depart from the sentencing guidelines] or approval[ of the defendant’s admission into drug treatment court]” where the form “did not state that it constituted approval of the individual’s admission into the drug treatment court program[;]” furthermore, “a prosecutor’s silence [was] not sufficient to constitute approval under [MCL 600.1068] and [did] not waive the prosecutor’s right to later demand enforcement of sentencing guidelines.” Baldes, 309 Mich App at 656-657.

6.4 Upward Departures30

The following factors have been addressed by Michigan’s appellate courts when reviewing a trial court’s upward departure from the previously-mandatory sentencing guidelines:

A. Factors Related to a Victim of the Offense

1. Identity of the Victim

A defendant’s “complete disregard” for a law enforcement officer’s life was not adequately accounted for by the guidelines and was properly considered as a substantial and compelling reason to depart from the recommended minimum sentencing guidelines range. People v Thomas (Samuel), 263 Mich App 70, 79 (2004).

30 Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

In People v Lockridge, 498 Mich 358, 391(2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1; see also for additional discussion of Lockridge.
2. **Identity of the Victims Involved in a Defendant’s Repeated Criminal Conduct**

A “defendant’s past criminal history of sex crimes with children, his [or her] admitted sexual attraction to children, and his [or her] repeated failure to rehabilitate himself [or herself] when given the opportunity[,]” were objective and verifiable factors constituting substantial and compelling reasons to depart from the recommended minimum sentencing guidelines range. *People v Geno*, 261 Mich App 624, 636 (2004). See also *People v Anderson (Michael)*, 298 Mich App 178, 189 (2012) (noting that “OV 4 . . . [did] not adequately consider the ways in which an offense affects familial relationships, . . . nor [did] it always account for the unique psychological injuries suffered by individual victims,” and holding that the trial court properly departed from the guidelines range where the defendant set his parents’ house on fire, trapping them inside).

3. **Violent Conduct Repeatedly Directed at the Same Individual**

A defendant’s “actual, established pattern and practice of repeatedly victimizing a targeted individual[ ]” was properly considered as an objective and verifiable factor constituting a substantial and compelling reason to depart from the recommended minimum sentencing guidelines range. *People v Horn (Marvin)*, 279 Mich App 31, 33 (2008).

4. **Domestic Violence**

The trial court properly departed upward from the sentencing guidelines range in imposing an eight-year minimum sentence for the defendant’s involuntary manslaughter conviction based on the facts “(1) that [the] defendant had violated court orders regarding contact with the victim, (2) that the sentencing guidelines did not reflect the extent of [the] defendant’s prior altercations with the victim, (3) that [the] defendant killed the victim in the presence of their children, and then left the residence while the children attempted to revive the victim, and (4) that during and after the offense, [the] defendant showed no concern for the physical or emotional well-being of the children.” *People v Lockridge*, 304 Mich App 278, 282-283 (2014), aff’d in part, rev’d in part on other grounds 498 Mich 358 (2015) (holding further that “given . . . the escalation of the [defendant’s] domestic-violence conduct toward the victim, the fact that the crime occurred in plain view of [their] children, and that [the] defendant left his children alone with
the trauma of attempting to revive their mother, the trial court did not err by finding that the prior record and offense variables inadequately accounted for [the] defendant’s conduct[”]).

5. **Effect of the Offense on the Victim**

A departure could be justified where the recommended minimum sentencing guidelines range “[did] not take into account the violation of the victim’s parents’ trust in defendant, the effect on the family occasioned by the victim’s loss of trust in all men, including his own father, or the effect on the victim and his sister from having to learn about sexual matters at such a young age.” *People v Armstrong (Rodney)*, 247 Mich App 423, 425-426 (2001).

6. **Severity of the Victim’s Physical Injury**

The degree of physical injury sustained by a victim was properly considered as a substantial and compelling reason for departure when the degree of brutality was not adequately accounted for by the sentencing guidelines. *People v Granderson*, 212 Mich App 673, 680 (1995). “Where a defendant’s actions [were] so egregious that standard guidelines scoring methods simply fail[ed] to reflect their severity,” the Court of Appeals affirmed a trial court’s upward departure from the recommended sentence under the judicial guidelines then in effect. *Id.* at 680. The Court of Appeals explained:

> “Defendant severely beat an elderly woman who was a near invalid, breaking her nose and arm, and then repeatedly stabbed and shot her. His actions are rendered more appalling by the fact that he committed these acts against a woman who trusted him and who had previously hired him to perform odd jobs around her house. Must a reasonable court conclude that these circumstances are adequately accounted for by the relevant robbery offense variables, such as offense variable (OV) 1, ‘A firearm is discharged by offender during commission of the offense,’ or OV 2, ‘Victim killed’? The answer is obvious. We wholeheartedly agree with the sentencing court in finding that the circumstances of the present crime were not

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31 For more information on the precedential value of an opinion with negative subsequent history, see our note.
adequately reflected in the offense variables.”


See also Anderson (Michael), 298 Mich App at 188 (“[t]he fact that the victims [of an arson] suffered extreme burns over much of their bodies is objective and verifiable[,]” and “the severity of those injuries was a substantial and compelling reason in support of [the trial court’s] sentencing departure[]”); People v Reincke (On Remand), 261 Mich App 264, 269-270 (2004) (an upward departure from the recommended minimum sentencing guidelines range was appropriate where a three-year-old child was penetrated with such force that the tissue between the child’s rectum and vaginal wall was torn to the point of being unidentifiable, general anesthesia was necessary just to examine the extent of the child’s injuries, and the injuries were so extensive that the child required major reconstructive surgery).

7. Ethnicity of the Victim

The ethnicity of a victim was not a factor already taken into account by the guidelines and was properly considered as a sufficient substantial and compelling reason for departure from the recommended minimum sentencing guidelines range under specific circumstances. People v Phung, unpublished memorandum opinion of the Court of Appeals, issued June 12, 2003 (Docket No. 239098), aff’d sub nom Phung v Bell, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 4, 2005 (No. 04-CV-73582-DT).32

8. Identity or Age of the Victim

An upward departure could be justified if OV 4 did not adequately account for the additional psychological harm resulting when the defendant and the victim were family members. Anderson (Michael), 298 Mich App at 180, 189 (noting that “OV 4 . . . [did] not adequately consider the ways in which an offense affects familial relationships, . . . nor [did] it always account for the unique psychological injuries suffered by individual victims,” and holding that the trial court properly departed from the guidelines range where the defendant set his parents’ house on fire, trapping them inside).

A trial court’s upward departure from the recommended minimum sentencing guidelines range was appropriate where

32 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
evidence showed that the “defendant performed sexual acts, including forced fellatio, on defenseless four- and five-year-old children, including his own son.” People v Kahley, 277 Mich App 182, 190 (2007). The Court explained that although offense variable (OV) 4 addresses psychological injury to a victim, and OV 10 addresses exploitation of a vulnerable victim, those variables were “simply inadequate to address the abhorrent nature of the crimes committed by [the] defendant.” Id. at 190-191.

However, if the trial court failed to score points under a relevant variable, it could not depart from the sentencing guidelines range on the basis that the guidelines did not adequately account for a fact that could have been scored under that variable. Anderson (Michael), 298 Mich App at 186 (noting that “OV 7 [should] have been scored to account for the victims’ fear and anxiety[,] . . . and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant’s conduct in this regard[”]).

See also People v Keane, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2004 (Docket No. 248541) (upward departure from the recommended minimum sentencing guidelines range was appropriate where offense variable (OV) 9 (number of victims) “d[id] not consider the age of the victims or the fact that [the] defendant was willing to forego the lives of his own [two] children in [his] plot [to have his former girlfriend and her eight-year-old daughter murdered to eliminate them as potential witnesses after he was charged with criminal sexual conduct involving the daughter]”.

9. Unusual Consequences to a Victim of the Offense

A trial court’s upward departure from the recommended minimum sentencing guidelines range was appropriate where evidence showed that the trial court based its departure on the victim’s—and the victim’s family’s—exposure to the defendant’s sexually transmitted disease, “the communicable nature of the disease[,] and the consequences of such a disease on a young victim.” People v Castro-Isaquirre, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2004 (Docket No. 242134).
10. Terrorizing a Victim

A trial court’s determination that “[a] defendant’s repeated perpetration of vicious acts against his wife within a short period was a ‘particularly aggravating,’ ‘particularly compelling,’ and ‘staggering’ factor” was objective and verifiable and constituted a substantial and compelling reason for the trial court’s upward departure from the minimum sentence recommended by the statutory guidelines. *People v Horn (Marvin)*, 279 Mich App 31, 46 (2008). The Michigan Court of Appeals noted that the “[d]efendant’s determined course to terrorize and abuse his wife, clearly evident from the recurring and escalating acts of violence, [wa]s an objective and verifiable reason . . . based on occurrences external to the sentencing judge’s mind, and capable of being confirmed.” *Id.* at 46.

However, if the trial court failed to score points under OV 7 (”conduct designed to substantially increase the fear and anxiety a victim suffered during the offense”), it could not upwardly depart from the guidelines range on the basis that “the sentencing guidelines did not adequately account for the defendant’s intent to terrorize the victims.” *Anderson (Michael)*, 298 Mich App at 186 (noting that “OV 7 could have been scored to account for the victims’ fear and anxiety that resulted as a result [sic] of waking up to find their home on fire and their escape route blocked by fire, and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant’s conduct in this regard[“]).

B. Factors Involving the Offender

1. Repeat Violent Offenders and Community Protection

A trial court’s upward departure from the recommended minimum sentencing guidelines range was proper where the defendant committed the sentencing offense shortly after his release from a 15-year sentence for a criminal episode that involved robbery, kidnapping, and sexual assault. *People v Hicks (Rodney)*, 259 Mich App 518, 535-537 (2003). The sentencing court further explained the departure by noting that the guidelines did not account for the fact that the defendant received 34 misconduct tickets during his previous incarceration and that the conduct precipitating both convictions was predatory conduct from which the community ought to be protected. *Id.* at 535-537.
2. **Credible Prediction of the Defendant’s Future Conduct**

“A court’s opinion or speculation about a defendant’s future dangerousness [was] not objective or verifiable.” *Anderson (Michael)*, 298 Mich App at 189, citing *People v Cline (Stephen)*, 276 Mich App 634, 651 (2007). However, “the trial court [could] base a sentencing departure on a defendant’s future dangerousness if objective and verifiable facts support[ed] the court’s conclusion, such as the defendant’s past failures to rehabilitate or demonstrated ‘obsessive or uncontrollable urges to commit certain offenses.’” *Anderson (Michael)*, 298 Mich App at 189-190, quoting *Horn (Marvin)*, 279 Mich App at 45. “[S]pecific characteristics of an offense and an offender that strongly presage[d] future criminal acts [could] justify an upward departure from the recommended sentencing range if they [were] objective and verifiable, and if they [were] not already adequately contemplated by the guidelines. Although a trial court’s mere opinion or speculation about a defendant’s general criminal propensity [was] not, in itself, an objective and verifiable factor, objective and verifiable factors underlying that conclusion or judgment [were] not categorically excluded as proper reasons for an upward departure.” *Id.* at 45.

In *Horn (Marvin)*, 279 Mich at 44, the trial court engaged in an upward departure from the recommended minimum sentencing guidelines range based on its conclusion that the particular danger the defendant presented to his wife justified an increased sentence because the danger was clear from the defendant’s pattern of extreme violence against his wife, and the sentencing guidelines did not take into consideration the defendant’s determined course of targeting a specific victim. In affirming the trial court, the Court of Appeals noted that “the trial court did not err in finding that [the] defendant’s repeated criminal assaults upon his wife and his relentless attempts to brutalize and kill his wife presage future violence and aggression. An individual’s established pattern of predatory conduct toward a selected victim clearly constitutes probative evidence of future behavior toward that victim. Accordingly, anticipatory harm based on an established pattern of violence toward a specific victim [was] an objective and verifiable factor, not a speculative prediction.” *Id.* at 47-48. See also *Anderson (Michael)*, 298 Mich App at 190 (noting that “[r]ecurring and escalating acts of violence [were] objective and verifiable because they [were] external occurrences that [could] be confirmed[,]” and holding that “[t]he defendant’s history of violence toward his parents and his inability to
benefit from previous counseling justified an upward departure from the guidelines["").

A trial court’s conclusion that the defendant was a pedophile who was likely to repeat his conduct and whose condition was not amenable to treatment was based on facts external to the mind of the court and supported by experts in the area of psychiatry. Kahley, 277 Mich App at 188-190. Accordingly, the Court of Appeals affirmed the trial court’s upward departure from the recommended minimum sentencing guidelines range, noting its agreement with the trial court’s finding “that the guidelines inadequately addressed the factual situation in which the defendant sexually abused extremely young, defenseless children, including his own child.” Id. at 190.

See also People v Solmonson, 261 Mich App 657, 671 (2004), where the trial court properly based its upward departure from the recommended minimum sentencing guidelines range on the defendant’s continued criminal conduct despite multiple prior sentences for the same conduct (probation, jail, and prison for drinking and driving offenses).

3. Pattern of Previous Convictions

In People v Gagnier, unpublished opinion per curiam of the Court of Appeals, issued August 6, 2009 (Docket No. 281868),33 the Court of Appeals explained:

“Although the PRVs [(prior record variables)] take into account an offender’s general criminal history, the PRVs do not account for the fact that this was [the defendant’s] fourth bank robbery and that he was released from parole for committing a previous bank robbery only 14 months before he committed this robbery. As the trial court noted, [the defendant] has been incarcerated for a large part of his adult life, but this fact has had no deterrent effect on his extreme recidivism. Also as the trial court noted, [the defendant] has fled parole and escaped from jail, demonstrating his noncompliance with previous sentences. This factor was not accounted for in the scoring of the PRVs. Accordingly, the trial court recognized that rehabilitation was not a likely goal and that society needed to be protected from [the defendant’s] continuing criminal behavior. . . . In short, the trial

33 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
court did not abuse its discretion by determining that [the defendant’s] extreme recidivism and noncompliance with previous sentences and conditions of parole constituted substantial and compelling reasons to depart from the sentencing guidelines.”

4. **Excessive Prior Convictions and Adjudications**

An upward departure could be justified where a defendant’s prior felonies and felony juvenile adjudications greatly exceeded the maximum number scored under the guidelines. *People v Annabel*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2004 (Docket No. 249238) (the trial court’s upward departure from the recommended minimum sentencing guidelines range was affirmed where the defendant had eight previous adult felonies (and prior record variable (PRV) 2 only accounts for “4 or more” prior low severity felony convictions); ten previous felony juvenile adjudications (and prior record variable (PRV) 3 only accounts for “3 or more” prior high severity juvenile adjudications); and the defendant was only 22 years of age and had been convicted of felonies in four different states).

See also *People v Lalone*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2005 (Docket No. 251326) (the trial court’s upward departure from the recommended minimum sentencing guidelines range was affirmed where each of the three victims described “a dozen or more incidents of sexual abuse” and offense variable (OV) 13 only accounted for “a pattern of felonious criminal activity involving 3 or more crimes against a person”).

5. **Type and Severity of Prior Convictions Not Accounted for by PRVs**

“[A]lthough foreign convictions cannot be considered under PRV [(prior record variable)] 1 [(prior high severity felony convictions)], they [could], under appropriate circumstances, give rise to a substantial and compelling reason to justify a departure from the guidelines range.” *People v Price (Tore)*, 477 Mich 1, 5 (2006).

An upward departure from the recommended minimum sentencing guidelines range could be appropriate where the type and severity of a defendant’s prior convictions were not accounted for by the prior record variables (PRVs). *People v Thomas (Ernest)*, unpublished opinion per curiam of the Court
of Appeals, issued October 12, 2004 (Docket No. 248097), slip op p 3 (the trial court did not abuse its discretion when it departed from the guidelines because PRVs 1 and 7 failed to adequately reflect the circumstances of the offense and the offender—although PRV 1 (prior high severity felony convictions) accounted for the defendant’s previous conviction in which a death occurred, it did not reflect the defendant’s history of shooting offenses, and although PRV 7 (subsequent or concurrent felony convictions) accounted for the fact that the defendant had a subsequent felony conviction, it did not reflect that the conviction was for first-degree murder).

6. Parole Absconder Status

That a defendant had absconded from parole was not reflected in the sentencing guidelines and was an objective and verifiable factor that was properly considered as a substantial and compelling reason to justify an upward departure from the recommended minimum sentencing guidelines range. People v Nichols (Terry), unpublished opinion per curiam of the Court of Appeals, issued September 16, 2004 (Docket No. 246973).

7. Absconding on Bond

A trial court’s upward departure from the recommended minimum sentencing guidelines range “for [an] attempted absconding on bond conviction on the basis of its finding that [the] defendant fled the state and tried to establish a different identity” was appropriate where the “conduct went beyond that of the average absconder” and “show[ed] the great lengths to which [the] defendant was willing to go to evade the charges against him.” People v Kohns, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2005 (Docket No. 251327).

8. Other Relevant Information About a Defendant’s Status at the Time of the Offense

A trial court’s upward departure from the recommended minimum sentencing guidelines range could be appropriate where additional information about a defendant’s status at the time of the offense was not adequately taken into account by the sentencing guidelines. People v Ossowski, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 246667), slip op pp 2-3. For example, in Ossowski, slip op at 2-3, while prior record variable (PRV) 6 (relationship to criminal justice system) “accounted for the fact
that [the] defendant committed the [sentencing] offense while on probation,” it did not account “for the short time he was on probation before lapsing back into criminal activity[,]” or the “fact that [the] defendant left a rehabilitation program in which he had been ordered to participate as a condition of his probation[.]” In affirming the trial court’s upward departure, the Court of Appeals noted that “[the defendant’s] rapid violation of his probation and his unauthorized departure from a court-ordered rehabilitation program were objective and verifiable indications of [the] defendant’s unwillingness to appreciate his wrongdoing and modify his behavior.” *Id.*, slip op at 3.

9. **Perjury**

A trial court’s upward departure from the recommended minimum sentencing guidelines range could be appropriate where a defendant’s perjury was an objective and verifiable factor, and combined with other factors, constituted a substantial and compelling reason for departure from the guidelines. *Kahley*, 277 Mich App at 188. In *Kahley*, 277 Mich App at 188, the defendant’s perjury was objective and verifiable where he “admitted at his sentencing that he lied to the jury and that he committed the offenses.” The Court of Appeals recognized, however, that a defendant’s perjured testimony was not always an objective and verifiable factor capable of supporting a sentence departure because “whether a person perjured himself or herself at trial [could] on some occasions be a subjective conclusion, i.e., an internal belief that the person was lying without a firm confirmation.” *Id.* The Court further noted that a defendant’s objective and verifiable commission of perjury alone “would be insufficient to constitute a substantial and compelling reason for departure from the guidelines; otherwise, a departure might be warranted every time a defendant testified and was found guilty.” *Id.*

10. **Failure to Admit Guilt or Show Remorse**


“[A] defendant’s expression of remorse [was] a subjective factor that a trial court [could] not consider in determining whether a departure from the sentence mandated by statute
[was] justified.” Daniel (Danny), 462 Mich at 6; People v Davis (Marcus) (On Rehearing), 250 Mich App 357, 370 (2002).

C. Factors Involving the Sentencing Offense

1. Dismissed or Uncharged Criminal Conduct

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range based on the prosecutor’s dismissal of a more serious charge, as well as the fact that other criminal conduct occurred with which the defendant was not charged. Armstrong (Rodney), 247 Mich App at 426 (“the prosecutor’s decision, in exchange for [the] defendant’s guilty plea, to dismiss a charge of first-degree CSC [(criminal sexual conduct)], which carries a potential life sentence, and the fact that [the] defendant was not charged with attempted CSC for trying to have the victim perform oral sex on him [were] additional factors that the court [could] consider when deciding whether departure [was] warranted.”).

2. Specific Method and Cause of a Victim’s Injury

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range where the guidelines failed to account for a very specific consequence of criminal conduct not precisely described in the prior record variables (PRVs) or offense variable (OVs). People v Lowery, 258 Mich App 167, 171 (2003). In Lowery, 258 Mich App at 171, the Court of Appeals affirmed the trial court’s upward departure because no offense variable or combination of variables adequately accounted for the fact that the defendant used a firearm to shoot the victim, the victim was actually shot, and the victim’s injuries resulted from being shot.

3. Peculiar Circumstances of the Offense or the Offender

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range where the guidelines failed to take into account the peculiar circumstances of the offense or the offender. People v Evans (Mario), unpublished opinion per curiam of the Court of Appeals, issued March 18, 2004 (Docket No. 240357), slip op pp 6-734 (the trial court did not abuse its discretion by engaging in

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34 Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).
an upward departure where the guidelines did not take into account that the defendant “committed two murders, under similar circumstances, i.e., in both cases the evidence established that [the] defendant shot multiple times from a shotgun at close range and that he killed two people he did not know[”].

4. OVs Cannot Measure the Context of the Offense in its Entirety

“In departing from the sentencing guidelines, a trial court [could] ‘not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court [found] from the facts contained in the court record, including the presentence investigation report, that the characteristic [was] given inadequate or disproportionate weight.”’ People v Lockridge, 304 Mich App 278, 283 (2014), aff’d in part, rev’d in part on other grounds 498 Mich 358 (2015)35 (quoting MCL 769.34(3)(b) and holding that “given . . . the escalation of the [defendant’s] domestic-violence conduct toward the victim, the fact that the crime occurred in plain view of [their] children, and that [the] defendant left his children alone with the trauma of attempting to revive their mother, the trial court did not err by finding that the prior record and offense variables inadequately accounted for [the] defendant’s conduct[”]) (emphasis added by Court of Appeals).

A trial court could engage in an upward departure from the recommended minimum sentencing guidelines range where the guidelines did not adequately account for “the nature of dangers” presented by the defendant’s conduct. People v Staffney, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2004 (Docket No. 244516), slip op pp 2, 4 (the trial court did not abuse its discretion by engaging in an upward departure when, although offense variable (OV) 9 (number of victims) accounted for the fact that the defendant “lost control of his vehicle which ran onto a lawn and struck three people, two of whom died[,]” the guidelines did not account for the fact that the “[d]efendant led police on a chase at 80 to 90 miles per hour in a residential area, placing many other residents and police officers at risk[”].

However, if the trial court failed to score points under a relevant variable, it could not depart from the sentencing

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35For more information on the precedential value of an opinion with negative subsequent history, see our note.
guidelines range on the basis that the guidelines did not adequately account for a fact that could have been scored under that variable. Anderson (Michael), 298 Mich App at 186 (noting that “OV 7 [should] have been scored to account for the victims' fear and anxiety[,] . . . and the trial court did not satisfactorily explain why a score for that variable would have been inadequate to account for [the] defendant’s conduct in this regard[”]).

5. Planning and Deliberation

A defendant’s planning and deliberation concerning the commission of a crime could constitute a substantial and compelling reason to support an upward departure. Anderson (Michael), 298 Mich App at 185-186 (holding that “[the d]efendant’s attempt to enlist assistance [in burning down his parents’ house was] a logical fact supporting the trial court’s conclusion that [the] defendant planned and thought about the crime[,”] and that “the trial court did not abuse its discretion when it found that [the] defendant’s planning and deliberation constituted a substantial and compelling reason to depart from the guidelines[”]).

6. Failure to Assist a Victim

“Whether [a] defendant could have [done more] to assist [a] victim[] [was] not objective and verifiable.” Anderson (Michael), 298 Mich App at 186-187 (citing People v Abramski, 257 Mich App 71, 74 (2003), and holding that “other actions [the] defendant could have taken to assist [the] victims were] not occurrences external to the mind and [were] not capable of being confirmed[”]).

6.5 Exceptions: When a Departure Is Not a Departure36

Due to recent substantive changes in the law, making this area unsettled, MJI cautions the reader about relying on the information contained in this section.

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36 In People v Lockridge, 498 Mich 358, 391 (2015), the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” Discussion of pre-Lockridge caselaw has not been deleted from this benchbook because it is unknown to what extent it might be of continued relevance in reviewing sentence departures. See Section 6.1.
The sentencing guidelines expressly describe situations in which a trial court’s departure from the minimum sentence recommended under the guidelines is not a departure.

A. Mandatory Minimum Sentences

“If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute.” 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).

However, the legislative sentencing guidelines did apply when a court imposed a sentence that exceeded a flat mandatory minimum term. People v Wilcox (Larry), 486 Mich 60, 62-63, 73 (2010); People v Payne (Jarrud), 304 Mich App 667, 672 (2014). In Wilcox (Larry), 486 Mich 62-63, the trial court imposed a 10-year minimum sentence under MCL 750.520f(1), which requires “a mandatory minimum sentence of at least 5 years[ ]” for certain repeat criminal sexual conduct offenses. Noting that “[a]lthough MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it[,]” the Wilcox (Larry) Court concluded that “for purposes of applying MCL 769.34(2)(a), the ‘mandatory minimum’ sentence referred to in MCL 750.520f(1) is a flat 5–year term.” Wilcox (Larry), 486 Mich 69, 73. “Because the trial court imposed a 10-year minimum sentence that exceeded both the applicable guidelines range and the 5-year mandatory minimum, [the] defendant’s sentence was a departure from the guidelines[,]” and the trial court was required to state substantial and compelling reasons to justify

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37 However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See Miller v Alabama, 567 US 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 nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with Miller, 567 US 460, by effectively eliminating the mandatory imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 19.
the departure. Wilcox (Larry), 486 Mich at 62-63. Similarly, a trial
court was required to articulate substantial and compelling reasons
sufficient to justify an upward departure from the 25-year
mandatory minimum set out in MCL 750.520b(2)(b) for a conviction
of first-degree criminal sexual conduct committed against a victim
who was less than 13 years of age by a defendant who was 17 years
of age or older. Payne (Jarrud), 304 Mich App at 672-673, citing
Wilcox (Larry), 486 Mich at 62, 70-73.

MCL 769.34(2)(a) provides:

“If the Michigan vehicle code . . . MCL 257.1 to [MCL]
257.923, mandates a minimum sentence for an
individual sentenced to the jurisdiction of the
department of corrections and the Michigan vehicle
code . . . MCL 257.1 to [MCL] 257.923, authorizes the
sentencing judge to impose a sentence that is less than
that minimum sentence, imposing a sentence that
exceeds the recommended sentence range but is less
than the mandatory minimum sentence is not a
derivation under this section.”38

See, e.g., People v Hendrix, 263 Mich App 18, 19-22 (2004), modified
in part 471 Mich 926 (2004), where the trial court’s sentence of one
year of probation to be served in the county jail, which was equal to
the alternative one-year mandatory minimum term of
imprisonment under the jurisdiction of the Department of
Corrections (DOC) specified in MCL 257.625(9)(c)(i), was not a
derivation under MCL 769.34(2)(a), even though the recommended
guidelines range for the defendant’s vehicle code violations was 0 to
11 months.39

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38 In People v Lockridge, 498 Mich 358, 391 (2015), the Michigan Supreme Court “[struck] down the
requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL
769.34(3).” The Lockridge Court additionally stated that “[t]o the extent that any part of MCL 769.34 or
another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the
guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n
1, emphasis supplied. It is unclear whether or to what extent such statutory references (together with
caselaw construing them) are of continuing relevance, or which such references are severed or struck
down by operation of footnote 1 in Lockridge. See for discussion of Lockridge.

39 In People v Lockridge, 498 Mich 358, 391 (2015), the Michigan Supreme Court “[struck] down the
requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL
769.34(3).” The Lockridge Court additionally stated that “[t]o the extent that any part of MCL 769.34 or
another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the
guidelines, that part or statute is also severed or struck down as necessary.” Lockridge, 498 Mich at 365 n 1,
emphasis supplied. The Lockridge Court did not specifically address intermediate sanctions such as
probation. See for discussion of intermediate sanctions. See also for discussion of Lockridge.
B. Mandatory Determinate Sentences

“If a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. [MCL 769.34] does not apply to sentencing for that crime.” MCL 769.34(5).40

C. Sentences Pursuant to Valid Plea Agreements

“[A] sentence that exceed[ed] the sentencing guidelines satisfie[d] the requirements of MCL 769.34(3) when the record confirm[ed] that the sentence was imposed as part of a valid plea agreement.” People v Wiley, 472 Mich 153, 154 (2005). “Under such circumstances, the statute [did] not require the specific articulation of additional ‘substantial and compelling’ reasons by the sentencing court.” Id. at 154. Similarly, 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). See also People v Malinowski, 301 Mich App 182, 184-186 (2013) (citing Wiley, 472 Mich at 154, and holding that “[t]he trial court did not abuse its discretion by continuing [the] defendant’s probation with additional terms” following his plea of guilty of a probation violation, as permitted under MCR 6.445(G), and was not required to “articulate [a] substantial and compelling reason to justify [a] downward departure from the sentencing guidelines range[ for the original offense]”).

D. Enhancement Under the Repeat Offender Provision of §333.7413(1)

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 (John), 268 Mich App 416, 428 (2005).41 For example, if the recommended minimum range under the guidelines is 5 to 23

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40 However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See Miller v Alabama, 567 US 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 nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with Miller, 567 US 460, by effectively eliminating the mandatory imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 19.
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 (John), 268 Mich App at 431. When, subject to the ranges discussed above, a court imposes a minimum sentence of 38 months, the sentence falls within the enhanced range authorized by MCL 333.7413(1). Williams (John), 268 Mich App at 430-431 (holding that even though a term of 38 months exceeded the original range of 5 to 23 months, the sentence did not represent a departure for which the trial court was required to articulate a substantial and compelling reason).

E. Determining Whether Probation is an Authorized Alternative to Imprisonment

The legislative sentencing guidelines expressly authorize probationary terms for offenses subject to the guidelines when the recommended minimum sentence range falls within an intermediate sanction cell. MCL 769.31(b). However, even where the guidelines do not expressly authorize a probationary term, “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). The Lockridge Court did not specifically address intermediate sanctions such as probation. However, the Court of Appeals has held that, “[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.” People v Schrauben, 314 Mich App 181, 194-195 (2016) (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,’” and “strik[ing] down the requirement that a trial court must articulate substantial and compelling reasons to depart from an intermediate sanction”) (emphasis added). Moreover, “because, 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.

41 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).
Chapter 7: The Sentencing Hearing

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7.1 Requirements and Rights

Timeliness. A defendant’s sentence, based on accurate information prepared in advance of the sentencing hearing for the purpose of fashioning an appropriate sentence, must be imposed “within a reasonably prompt time” after the defendant’s conviction by plea or verdict unless the court has delayed the defendant’s sentencing in a manner provided by law. MCR 6.425(E)(1). The Sixth Amendment’s Speedy Trial Clause “does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]” and therefore does not “apply to the sentencing phase of a criminal prosecution[.]” Betterman v Montana, 578 US ___, ___ (2016) (holding “that the Clause does not apply to delayed sentencing[.]”). However, “although the Speedy Trial Clause does not govern[ inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.” Id. at ___.

Due process. A sentence based on inaccurate information implicates a defendant’s constitutional right to due process. US Const, Am XIV; Const 1963, art 1, § 17; Townsend v Burke, 334 US 736, 740-741 (1948); People v Smith (Timothy), 423 Mich 427, 453-454 (1985). Because the sentencing proceeding and the information on which a sentencing court bases its sentencing decision are matters of constitutional magnitude, the Michigan Supreme Court has required strict adherence to the detailed statutory and court rule provisions that govern the sentencing process. At a defendant’s sentencing hearing, the court must, on the record, satisfy the requirements listed in MCL 771.14 and MCR 6.425(E)(1)(a)-(f).1

Rules of evidence. With the exception of rules involving privilege, the rules of evidence do not apply to sentencing proceedings. MRE 1101(b)(3); People v Waclawski, 286 Mich App 634, 690 (2009). However, a

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1 However, MCR 6.425(E)(1)(e), which provides that “if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure,” has not yet been amended to conform to People v Lockridge, 498 Mich 358 (2015), in which the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)];” although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence,” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 365, 391-392, 399 (emphasis supplied; citation omitted). See Section 2.2 for discussion of Lockridge.
defendant must be given an adequate opportunity to rebut any matter he or she believes is inaccurate. Id. at 690.

Right to counsel. The sentencing hearing is a critical stage in the criminal proceedings against a defendant at which the defendant—absent a valid waiver—must be represented by counsel. Mempa v Rhay, 389 US 128, 134 (1967); Smith (Timothy), 423 Mich at 452. The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 et seq., requires the trial court to “assure that each criminal defendant[2] is advised of his or her right to counsel” and further requires that all defendants, 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). Even if a defendant has previously waived his or her right to counsel, the trial court is under a continuing duty to inform the defendant of the right to counsel and to obtain the defendant’s valid waiver of that right at all subsequent proceedings, including sentencing. MCR 6.005(E). A criminal defendant does not have an absolute right to be represented at sentencing by the same attorney who represented him or her at trial. People v Evans, 156 Mich App 68, 70 (1986). However, see MCL 780.991(2)(d), requiring representation by “[t]he same [appointed] defense counsel . . . at every court appearance throughout the pendency of the case,” with the permissible exception of “ministerial, nonsubstantive tasks, and hearings[.]”

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

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2 The MIDCA applies to an indigent defendant who “is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant’s initial appearance in court to answer to the criminal charge.” MCL 780.983(f)(i) (defining “[i]ndigent criminal defense services” for purposes of the MIDCA) (emphasis added).

3 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 4, for discussion of the MIDCA.

4 See the Michigan Judicial Institute’s Criminal Proceedings Benchbook, Vol. 1, Chapter 4, for discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 et seq.
Section 7.1

A defendant has the right to be represented by counsel at a presentence conference between the trial judge and a prosecutor. *People v Von Everett*, 110 Mich App 393, 396-397 (1981).


7.2 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).

“The presentence report, mandatory for felony cases in Michigan since 1931, allows the court to make an informed judgment as to possibilities for rehabilitation, and to effectively utilize sentencing alternatives. The presentence report has been widely regarded as an effective method of supplying information essential to an informed sentencing decision.” *People v Lee (Doursey)*, 391 Mich 618, 635 (1974).

The presentence investigation report is a tool by which the sentencing court gathers information important to the court’s ability to fashion a sentence appropriate to the criminal and to the circumstances under which the crime was committed. *Morales v Michigan Parole Bd*, 260 Mich App 29, 45-46 (2003). Long before the statutory sentencing guidelines were enacted, the PSIR was intended to ensure that criminal sentences

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

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

7 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.
were tailored both to the offense committed and the offender who committed it. *People v Miles (Dwayne)*, 454 Mich 90, 97 (1997).

A copy of the PSIR (and any amended report) must be provided to the prosecutor and defense counsel or the defendant, if he or she is not represented by an attorney. MCL 771.14(7); MCR 6.425(B). The copy of the PSIR must be provided no fewer than two business days before sentencing unless the defendant waives that time period. *Id.* The prosecutor and defense counsel or the defendant, if he or she is not represented by an attorney, have the right to keep a copy of the report (and any amended report). *Id.*

### A. PSIR Content Required for all Felony Offenses

The information that must be included in a PSIR is addressed by both statute and court rule. MCL 771.14(1) indicates that a PSIR is a probation officer’s written report of information obtained through the officer’s inquiry into the defendant’s “antecedents, character, and circumstances[].” Notwithstanding the specific language found in MCL 771.14(2)(a)-(h) (discussed below), the statute provides little guidance for completing the section of an offender’s PSIR in which his or her “antecedents, character, and circumstances” are summarized. But see MCR 6.425(A)(1)(a)-(l), which contain very specific guidance about the information required in this section of the PSIR. These provisions are discussed in Section 7.2(C).

Several provisions in the statute and the court rule address the same information to be included in an offender’s PSIR. Specifically, MCL 771.14(2)(a)-(d) and equivalent provisions of MCR 6.425(A)(1) detail four items required in a PSIR for all felony offenses:

- Based on factual information contained in the PSIR, an evaluation of and prognosis for the offender’s community adjustment. MCL 771.14(2)(a); MCR 6.425(A)(1)(j).

- A written victim impact statement if requested and provided by a victim. MCL 771.14(2)(b); MCR 6.425(A)(1)(g).

- A written recommendation for a specific disposition. The recommended disposition should be based on “the evaluation and other information as prescribed by the assistant director of the department of corrections in charge of probation.” MCL 771.14(2)(c); MCR 6.425(A)(1)(k).

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8 The Department of Corrections requires that an offender’s PSIR comply with its operating procedures and policy directives.
• A statement from the prosecuting attorney regarding whether consecutive sentencing is mandatory or discretionary for the offender’s sentencing. MCL 771.14(2)(d); MCR 6.425(A)(1)(i).

A PSIR must not include

“any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual.” MCL 771.14(2); MCR 6.425(A)(2).

B. PSIR Content Required for Felony Offenses Under the Sentencing Guidelines

In addition to the information contained in Section 7.2(A), the PSIR of an offender being sentenced for a felony offense under the statutory sentencing guidelines in chapter XVII (MCL 777.11 to MCL 777.19) must include the specific sentence range recommended under the guidelines based on the offender’s prior record variable (PRV) and offense variable (OV) scores. MCL 771.14(2)(e)(v). After points are assessed for the PRVs and the appropriate OVs, the point totals—the “PRV level” and the “OV level”—determine the offender’s placement on the appropriate sentence grid.10

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9 An offender’s scores were formerly calculated on a SCAO form known as a “Sentencing Information Report” or “SIR.” SCAO’s SIR form has been discontinued, and sentencing courts are no longer required to submit scoring information to SCAO. Administrative Order 1988-4, as amended, effective July 13, 2005. 473 Mich xviii (2005).

In addition to the scoring of an offender’s PRVs and OVs, an offender’s PSIR must also include:

• The appropriate sentence grid\textsuperscript{11} showing the recommended minimum sentence range for each conviction subject to a mandatory or discretionary consecutive sentence. MCL 771.14(2)(e)(i).

• Unless a conviction is subject to consecutive sentencing, the sentence grid showing the recommended minimum sentence range for each crime having the highest crime class. MCL 771.14(2)(e)(ii).

• Unless a conviction is subject to consecutive sentencing, the computation of OV and PRV scores used to determine the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(iii).

• A statement regarding the applicability of intermediate sanctions. MCL 771.14(2)(e)(iv).

• The recommended sentence. MCL 771.14(2)(e)(v).

• A statement as to whether the offender has provided to the Department of Corrections personal identification documents, such as a Social Security card, photographic identity document, or birth certificate, for purposes of obtaining an operator’s license or state personal identification card upon release from incarceration. MCL 771.14(2)(h).\textsuperscript{12}

C. PSIR Content Defined by Court Rule

The court rule governing a probation officer’s compilation of an offender’s PSIR requires that the probation officer verify material information included in the report. MCR 6.425(A)(1). The statute governing PSIR content states that an offender’s PSIR must include a written report of the offender’s “antecedents, character, and circumstances[.]” MCL 771.14(1). According to MCR 6.425(A)(1), a

\textsuperscript{11} Sentence grids are found in MCL 777.61 to MCL 777.69. Sentence grids are available by clicking here.

\textsuperscript{12} Effective February 23, 2012, 2012 PA 27, as part of a package of public acts designed to assist prisoners in obtaining operator’s licenses and state personal identification cards upon their release, amended MCL 771.14(9) to require that a person committed to a state correctional facility be provided notification explaining the importance of obtaining an operator’s license or a state identification card, listing the personal identification documents that are necessary to do so, and requesting that the person obtain those documents and provide them to the Department of Corrections. MCL 771.14(9)(b). 2012 PA 27 additionally amended MCL 771.14(2) to require that a PSIR include “[a] statement as to whether the person has provided the identification documents referenced in [MCL 771.14(9)(b)].” MCL 771.14(2)(h). Related provisions were amended or added by 2012 PA 24—2012 PA 26, also effective February 23, 2012. See, e.g., MCL 791.234c and MCL 28.291.
PSIR is a succinct and written report of the probation officer’s investigation into the defendant’s background and character. In addition to any information required as discussed in previous subsections of this chapter and depending on the circumstances of the offense and the offender, a PSIR must include:

“(a) a description of the defendant’s prior criminal convictions and juvenile adjudications,

(b) a complete description of the offense and the circumstances surrounding it,

(c) a brief description of the defendant’s vocational background and work history, including military record and present employment status,

(d) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,

(e) the defendant’s medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,

(f) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,

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(h) any statement the defendant wishes to make,

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(l) any other information that may aid the court in sentencing.” MCR 6.425(A)(1).

D. PSIR Content Required in Limited Situations

**Crimes involving alcohol or a controlled substance.** “If a person is to be sentenced for a felony or for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance,” the PSIR must contain a statement, if applicable, indicating whether the person is licensed or registered under the public health code (MCL 333.16101 to MCL 333.18838). MCL 771.14(2)(f). See also MCL 769.1(14).
Diagnostic opinions. Unless a diagnostic opinion is exempt from disclosure under MCL 771.14(3), available diagnostic opinions must be included in an offender’s PSIR. MCL 771.14(2)(g).

Juveniles. Before a court imposes an adult sentence on a juvenile, the Department of Human Services\textsuperscript{13} or county juvenile agency must submit a report required by MCL 771.14a(1) (a written report about “the juvenile’s antecedents, character, and circumstances”).\textsuperscript{14}

E. PSIR Must Be “Reasonably Updated”

The PSIR on which a sentencing court relies must be “reasonably updated.” People v Triplett, 407 Mich 510, 515 (1980). 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”).

A PSIR that is “several years old” is not “reasonably updated.” See Hemphill, 439 Mich at 580-581. “Without reaching the question of whether a four-month gap between the preparation of the original presentence report and sentencing comports with the reasonableness requirement of Triplett, [407 Mich 510,] . . . a defendant is entitled to be sentenced on the basis of a presentence report that is prepared especially for the offense for which he [or she] is being sentenced.” People v Anderson (Kenneth), 107 Mich App 62, 66-67 (1981). See also People v McKeever, 123 Mich App 533, 540-541 (1983), where the trial court used a five-month-old PSIR prepared for a different offense, and the Court of Appeals held “that a defendant may not be sentenced on the basis of a presentence report prepared for another offense even though the defendant was convicted after a trial. Accordingly, [a] defendant . . . is entitled to resentencing on the basis of a reasonably updated presentence report prepared for the offense for which he [or she] is to be sentenced.” The Michigan Supreme Court summarized the issue:

“Presentence reports that are several years old have been held not to be ‘reasonably updated.’ Reports that were prepared several months earlier, in connection with unrelated offenses, have also been held not to be adequate. A five-month-old report was found not to have been properly used where there were significant allegations that the defendant’s circumstances had

\textsuperscript{13} Formerly the Family Independence Agency.

\textsuperscript{14} See the Michigan Judicial Institute’s Juvenile Justice Benchbook for additional information.
changed during the interim. However, the Court of Appeals also has held that a supplemental presentence report can provide the necessary updating.” Hemphill, 439 Mich at 580-581.

An updated PSIR may not be necessary where the sentencing court has no discretion in the length of the sentence imposed. Hemphill, 439 Mich at 581; People v Foy, 124 Mich App 107, 111-112 (1983) (trial court directed to impose statutorily mandated two-year term of imprisonment for the defendant’s felony-firearm conviction). The requirement that an updated PSIR be utilized at a defendant’s sentencing may be satisfied by the submission of a supplementary report. Hemphill, 439 Mich at 581; People v Hart (Leon), 129 Mich App 669, 674 (1983). 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, ___ Mich App ___, ___ (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. at ___, citing Hemphill, 439 Mich at 581-582.

A defendant may not waive the requirement that a presentence report be utilized at his or her sentencing hearing. Hemphill, 439 Mich at 581. However, a defendant may waive the right to an updated PSIR at the defendant’s resentencing as long as the waiver is made intelligently, understandingly, and voluntarily. Id. at 581-582. The prosecution may also waive completion of an updated PSIR at a resentencing hearing. Id. Where a sentencing court relies on a defendant’s previously prepared PSIR when resentencing the defendant, the PSIR must be accurate or believed to be accurate by both parties. Id. A defendant may not waive preparation of an updated PSIR for resentencing if the information contained in the existing PSIR is “manifestly outdated.” Id.

F. Review of the Presentence Investigation Report (PSIR) at the Sentencing Hearing

At the sentencing hearing, the court must determine that all parties (prosecutor, defendant, and defense attorney) have had an opportunity to read and discuss the presentence investigation report (PSIR). MCR 6.425(E)(1)(a).
MCR 6.425(B) states:

“The court must provide copies of the presentence report to the prosecutor, and the defendant’s lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available to the prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that the information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court’s decision to exempt part of the report from disclosure is subject to appellate review.”

G. Objections to Accuracy or Content of the Presentence Investigation Report (PSIR)

Due process requires that a defendant’s sentence be based on accurate information and that the defendant be given an opportunity at sentencing to challenge the accuracy of the information on which the trial court bases the defendant’s sentence. *People v Eason*, 435 Mich 228, 233 (1990). A sentence is invalid if it is based on inaccurate information. *People v Miles (Dwayne)*, 454 Mich 90, 96 (1997).

Each party must be given an opportunity at the sentencing hearing to explain or challenge the accuracy or relevancy of any information
contained in the presentence investigation report (PSIR). MCL 771.14(6); MCR 6.425(E)(1)(b). When a defendant alleges inaccuracies in his or her PSIR, the trial court must respond to those allegations. People v McAllister, 241 Mich App 466, 473 (2000). Unless a defendant effectively challenges the contents of his or her PSIR, the contents are presumed accurate and may be relied on by the sentencing court. People v Callon, 256 Mich App 312, 334 (2003). See also People v Maben, 313 Mich App 545, 554 (2015) (holding that the trial court erred in “fail[ing] to adequately resolve [the defendant’s] challenges to the accuracy of the PSIR” based on the court’s erroneous belief that “it was not required to resolve [the] challenges because the PSIR is presumptively accurate; [t]he presumption of accuracy applies only to unchallenged information”). “A defendant is not precluded from challenging information in the presentence report that had appeared in an earlier presentence report for a different offense but went unchallenged at that time.” People v Wade (Kristopher), 500 Mich 936, 936 (2017).

A “trial court . . . err[s] by refusing to consider [a defendant’s] challenges to factual information related in [a victim’s] impact statement” in the PSIR. Maben, 313 Mich App at 554-555. “[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, ___ Mich App ___, ___ (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); People v Norfleet, 317 Mich App 649, 669 (2016) (the trial court abused its discretion in finding, based solely on the prosecutor’s statements, “that the prosecution met its burden to prove [a] challenged statement in the PSIR” indicating that the defendant was affiliated with a gang; “[e]ven assuming the truth of the prosecutor’s assertions, the assertions at most established that defendant was, at one time, affiliated with [the] gang[, and they did] not establish that [he] was affiliated with the gang at the time of the alleged crimes or thereafter, as the PSIR suggest[ed]”).

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 (Eddie), 326 Mich
App 185, 199 (2018) (noting that the PSIR cannot list a defendant’s actual sentence because it is prepared before sentencing).

**MCL 771.14(6) and MCR 6.425(E)** discuss the procedural requirements for disposing of any contemporaneous objections to the information prepared for use at the sentencing hearing.15

Challenges to the accuracy or relevancy of information in the PSIR must be made on the record. **MCL 771.14(6); MCR 6.425(E)(1)(b).** The court may adjourn the sentencing hearing to permit the parties to prepare a challenge or a response to a challenge. **MCL 771.14(6).** Having given the parties the opportunity to challenge information in the PSIR, the sentencing court is obligated to respond to all challenges raised using any of the discretionary methods approved under the statute, court rule, and relevant case law. **McAllister**, 241 Mich App at 473; **MCL 771.14(6); MCR 6.425(E)(1)(b); MCR 6.425(E)(2)(a)-(b).** The court must make a record of its response to the challenges raised, and the presentence report must be amended accordingly. **MCL 771.14(6); MCR 6.425(E)(2)(a).**

There are additional statutory and court rule provisions governing postjudgment challenges to the content of a defendant’s PSIR. See **MCL 769.34(10).** Postjudgment appeals and issue preservation requirements are discussed in Section 1.12.

### H. Challenges to the Constitutional Validity of a Prior Conviction or Adjudication

A defendant’s prior conviction obtained without counsel or without a proper waiver of counsel must not be considered in sentencing. **United States v Tucker**, 404 US 443, 449 (1972); **People v Carpentier**, 446 Mich 19, 31 n 6 (1994). Constitutionally infirm convictions may not be used to establish a defendant’s habitual offender status or to determine a defendant’s prior record variable (PRV) level. **People v Daoust**, 228 Mich App 1, 18 (1998), overruled on other grounds by **People v Miller (Michael)**, 482 Mich 540 (2008);16 **People v Richert (After Remand)**, 216 Mich App 186, 195 (1996). Similarly, a juvenile adjudication obtained in violation of the juvenile’s right to counsel is constitutionally infirm and cannot be used to enhance a criminal sentence. **People v Ristich**, 169 Mich App 754, 758 (1988). When a defendant challenges the constitutional validity of a prior conviction used to establish habitual offender status or to score the

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15 These provisions are detailed below in Section I.

16 For more information on the precedential value of an opinion with negative subsequent history, see our note.
defendant’s PRVs, the trial court is obligated to address and resolve the challenge. MCR 6.425(E)(1)(b).

Note: There are important distinctions between the use of a defendant’s prior convictions to establish habitual offender status and the use of a defendant’s prior convictions or adjudications to determine the defendant’s PRV level: (1) prior convictions used to establish a defendant’s habitual offender status are limited to prior felony convictions; (2) PRV scoring accounts for all of a defendant’s prior convictions, misdemeanor and felony, as well as all of a defendant’s prior juvenile adjudications; (3) prior convictions used to establish a defendant’s habitual offender status are not subject to the 10-year gap requirement; and (4) prior convictions and juvenile adjudications used in scoring a defendant’s PRVs must satisfy the 10-year gap requirement. This section does not discuss the use of a defendant’s prior convictions to establish habitual offender status. That issue is discussed fully in

1. Prima Facie Showing Required

A defendant who raises a challenge to a previous conviction allegedly obtained in violation of his or her Sixth Amendment right to counsel bears the initial burden of establishing that the previous conviction was obtained in violation of Gideon v Wainwright, 372 US 335 (1963); that is, the defendant must show that the previous conviction was obtained without counsel or without a proper waiver of counsel. Carpentier, 446 Mich at 31. A defendant may satisfy this initial burden in one of two ways:

“1) by presenting ‘prima facie proof that a previous conviction was violative of Gideon, such as a docket entry showing the absence of counsel or a transcript evidencing the same,’ or

2) by presenting evidence that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time.” Carpentier, 446 Mich at 31, quoting People v Moore (Reuben), 391 Mich 426, 440-441 (1974).

17 See for a detailed discussion of this rule.
“Mere silence regarding counsel is not the equivalent of the prima facie proof required by Moore[, 391 Mich at 440-441,] and Carpentier[, 446 Mich at 31.]” People v Zinn, 217 Mich App 340, 344 (1996). Similarly, that a defendant simply “ha[s] not received” the requested records is insufficient to satisfy the defendant’s burden of proof. Carpentier, 446 Mich at 32-33.

“[The requirement of] Moore is in part directed at those situations in which a sentencing court affirmatively and intentionally acts to deny a defendant access to requested trial records. For example, where a sentencing court ignores a proper request for records, that court has ‘failed to reply’ within the meaning of Moore. Alternatively, where a court refuses to forward records in its possession or control, that court has ‘refused to furnish’ under Moore. Accordingly, to interpret Moore as only requiring a defendant to have requested but not received trial records opens the door to collateral challenges in a variety of situations not intended by the strict and narrow rule of Moore.” Carpentier, 446 Mich at 33.

In Carpentier, 446 Mich at 33-35, the defendant’s request was met with neither of the two qualifying responses detailed in Moore, 391 Mich at 440-441. The sentencing court did not fail to reply to the defendant’s request because it sent the defendant a letter explaining that the defendant’s records were unavailable. Carpentier, 446 Mich at 34. Further, the sentencing court did not refuse to furnish records in its possession because the court no longer possessed expunged court records. Id. The absence or unavailability of a defendant’s records does not satisfy the defendant’s initial burden. Id. at 34 n 9.

A defendant may establish prima facie proof that a prior conviction or juvenile adjudication was obtained without counsel where the presentence report contains a notation to that effect. People v Alexander (Hamilton) (After Remand), 207 Mich App 227, 230 (1994).

2. Burden-Shifting Analysis

If a defendant makes a prima facie showing that a prior conviction or adjudication was obtained without counsel, the court must hold a Tucker 18 hearing where the prosecution has

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18 Tucker, 404 US 443.
the burden of establishing that the prior conviction was constitutionally valid. *Carpentier*, 446 Mich at 31.

Where a defendant’s presentence report contains a notation that a prior conviction or juvenile adjudication was obtained without counsel, the burden shifts to the prosecution to establish the constitutional validity of the prior conviction. *Alexander (Hamilton)*, 207 Mich App at 230.

Generally, the prosecution may satisfy this burden in one of three ways:

• producing evidence that the defendant was, in fact, represented by counsel at the prior conviction or adjudication, *Alexander (Hamilton)*, 207 Mich App at 230;

• producing evidence that the defendant effected a valid waiver of the right to counsel at the prior conviction or adjudication, *Moore (Reuben)*, 391 Mich at 441; or

• producing evidence that no right to counsel existed at the prior conviction or adjudication, *Richert*, 216 Mich App at 195 (no right to counsel exists in misdemeanor cases if incarceration is not ultimately imposed).

Absent any other constitutional infirmity (and presumably subject to the 10-year gap requirement for prior record variable (PRV) scoring), a defendant’s expunged juvenile records are properly considered when imposing sentence. *People v Smith (Ricky)*, 437 Mich 293, 302-303 (1991).

I. Sentencing Court’s Duty to Remedy Errors

“If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account, it must direct the probation officer to

“(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant’s lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.” MCR 6.425(E)(2).
“[A] sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges.” People v Spanke, 254 Mich App 642, 648 (2003), overruled in part on other grounds by People v Barrera, 500 Mich 14 (2017).19 “[T]he duty of the trial judge to respond involves something more than acknowledging that he [or she] has heard the defendant’s claims regarding the contents of a presentence report. [The trial court] must indicate, in exercising [its] discretion, whether [it] believes those claims have merit.” People v Garvie, 148 Mich App 444, 455 (1986), quoting People v Edenburn, 133 Mich App 255, 258 (1983). “The court may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” Id. at 648.

The defendant must establish a factual predicate for any claim of inaccuracy. People v Odom, ___ Mich App ___, ___ (2019) (rejecting defendant’s argument “that the PSIR was inaccurate because it did not include a victim impact statement by a different victim, whom 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”).

1. Determining the Information’s Accuracy or Relevance

“If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR [(presentence investigation report)] before sending the report to the Department of Corrections.” Spanke, 254 Mich App at 649; MCL 771.14(6). Remand is necessary to correct factual inaccuracies in a defendant’s PSIR. Spanke, 254 Mich App at 650. Whenever information is corrected in or deleted from a defendant’s PSIR, the defendant’s attorney must be given the opportunity to review the amended PSIR before it is forwarded to the Department of Corrections. MCR 6.425(E)(2)(b).

An investigating officer’s opinion need not be stricken from a defendant’s PSIR when the opinion is not declared to be a statement of fact. Spanke, 254 Mich App at 649. Similarly, a trial court need not “resolve a claimed inaccuracy in the presentence report where the defendant’s objection was not to an alleged factual inaccuracy in the report but to a conclusion drawn from the undisputed facts.” People v Wybrecht, 222 Mich App 160, 173 (1997) (quotation marks and citation omitted).

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19For more information on the precedential value of an opinion with negative subsequent history, see our note.
See also *People v Lampe*, ___ Mich App ___, ___, ___ n 6 (2019) (the trial court properly declined to strike the phrase “the 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).

2. Ignoring the Disputed Information

If the court decides to disregard the challenged information, “it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence.” *Spanke*, 254 Mich App at 649. Where the sentencing court’s response to a defendant’s allegation of inaccuracy is ambiguous, remand is necessary. *People v Brooks (Denford)*, 169 Mich App 360, 364-365 (1988).

A trial court’s decision that it will not consider information in a defendant’s presentence investigation report (PSIR) that the defendant claims is inaccurate does not conclude the trial court’s responsibility regarding the challenged information; the trial court must direct the probation officer to strike the information from the PSIR. *People v Britt*, 202 Mich App 714, 718 (1993); MCL 771.14(6); MCR 6.425(E)(2)(a). Additionally, the probation officer is required to provide defense counsel with an opportunity to review the corrected PSIR before it is sent to the Department of Corrections. MCR 6.425(E)(2)(b).

3. Harmless Error

A trial court’s failure to respond to a defendant’s challenge to information contained in his or her presentence investigation report (PSIR) or introduced at his or her sentencing hearing may be harmless error if the inaccuracies alleged by the defendant would have no effect on the sentence imposed. *People v McAlister*, 241 Mich App 466, 473-474 (2000) (although the defendant was employed part-time, his PSIR indicated that he was unemployed).
Where the defendant failed to preserve the issue for appeal, the Michigan Court of Appeals declined to remand the defendant’s PSIR to correct the plain error regarding the crime for which the defendant was convicted. *People v McCrady*, 244 Mich App 27, 32 (2000). In *McCrady*, 244 Mich App at 32, the defendant’s PSIR indicated that he was convicted of first-degree premeditated murder when, in fact, the jury had convicted him of first-degree felony murder. The Court of Appeals acknowledged that the PSIR’s misstatement constituted plain error, but held that remand for correction of the PSIR was unnecessary because the error did not deprive the defendant of any substantial right. *Id.*

### 7.3 Allocution

“‘Allocution’ generally refers to ‘[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.’” *People v Petty*, 469 Mich 108, 119 n 7 (2003), quoting Black’s Law Dictionary (7th ed).

The defendant, the defendant’s lawyer, the prosecutor, and the victim must be given “an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]” MCR 6.425(E)(1)(c). MCR 6.425(E)(1)(c) is “straightforward” in its requirement that a defendant must be given an “opportunity” to address the court before sentence is imposed; however, the court rule does not require a sentencing court to make a “personal and direct inquiry” of the defendant to determine whether he or she would like to speak in his or her own behalf. *People v Petit*, 466 Mich 624, 627-629 (2002). In *Petit*, 466 Mich at 629, 636, the Michigan Supreme Court held that the trial court complied with the mandate of the court rule by “asking generally if there was ‘anything further.’” However, the Court noted that “asking generally if there is ‘anything further’ is certainly not the best way to provide a defendant with an opportunity to allocute. Rather, the best way to provide such an opportunity is to specifically ask the defendant if he [or she] has anything to say.” *Id.* at 629 n 3. The Court, in so interpreting MCR 6.425, overruled *People v Berry*, 409 Mich 774, 781 (1980), which indicated that the trial court must “inquire specifically of the defendant separately whether he or she wishes to address the court before the sentence is imposed.” *Petit*, 466 Mich at 631-633 n 11.

See *United States v Haygood*, 549 F3d 1049, 1055 (CA 6, 2008) (in federal court, prejudice is presumed when allocution is overlooked, and a new sentencing hearing must be held when a defendant does not receive the
shortest allowable sentence because it is at least possible that the
defendant’s allocution might have affected the sentence imposed).

Where no record evidence indicated that the trial court had decided on a
particular sentence before the defendant’s allocution, a defendant’s right
to allocate at his or her sentencing hearing is not rendered meaningless
simply because the sentencing judge has prepared a written statement of
reasons for departing from the sentencing guidelines before the sentence
is actually imposed. People v Grady, 204 Mich App 314, 316 (1994).

“[T]he mandatory nature of a sentence does not ipso facto render the
common-law right to allocate inapposite.” Petty, 469 Mich at 120-121.
Even where a defendant’s statement will not affect the sentence
imposed—as in a mandatory term or the penalty outlined in a sentence
agreement—a defendant must be given the opportunity to allocate.

A juvenile’s right to allocution. A juvenile defendant who is convicted
in a designated case proceeding and who receives an adult sentence must
be given an opportunity to allocate at his or her sentencing hearing.
Petty, 469 Mich at 121. In Petty, 469 Mich at 122-123, the Michigan
Supreme Court remanded a juvenile’s case to the trial court for
resentencing where a juvenile defendant was not permitted to allocate
before the court imposed an adult sentence. The Court explained: “To
deny a juvenile a meaningful opportunity to allocate at the only
discretionary stage of a combined dispositional and sentencing
proceeding would seriously affect the fairness and integrity of the
judicial proceeding, particularly when the juvenile is subject to an adult
criminal proceeding.” Id. at 121. See MCR 3.955(A)(6) (“The court . . .
shall give the juvenile . . . an opportunity to advise the court of any
circumstances [he or she] believe[s] the court should consider in deciding
whether to enter an order of disposition or to impose or delay imposition
of sentence.”).

7.4 Crime Victim’s Impact Statement

For purposes of the crime victim’s written and oral impact statements,
“victim” is broadly defined in the Crime Victim’s Rights Act (CVRA)20 as
follows:

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20 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).
• “An individual[21] who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime[.]” MCL 780.752(1)(m)(i).

• If the victim is deceased, one of the following individuals (other than the defendant or the juvenile offender) in descending order of priority:
  
  • the spouse of the deceased victim, MCL 780.752(1)(m)(ii)(A);
  
  • a child of the deceased victim if the child is age 18 or older, MCL 780.752(1)(m)(ii)(B);
  
  • a parent of the deceased victim, MCL 780.752(1)(m)(ii)(C);
  
  • the guardian or custodian of a child of the deceased victim if the child is younger than age 18, MCL 780.752(1)(m)(ii)(D);
  
  • a sibling of the deceased victim, MCL 780.752(1)(m)(ii)(E); or
  
  • a grandparent of the deceased victim, MCL 780.752(1)(m)(ii)(F).

• A parent, guardian, or custodian (if the individual is not the defendant and is not incarcerated) of a victim who is younger than age 18 if the parent, guardian, or custodian so chooses. MCL 780.752(1)(m)(iii).

• A parent, guardian, or custodian (if the individual is not the defendant and is not incarcerated) of a victim who is mentally or emotionally unable to participate in the legal process. MCL 780.752(1)(m)(iv).

• For purposes of submitting or making an impact statement only, where the victim, as defined in MCL 780.752(1)(m)(i), is deceased, mentally incapacitated so that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation, the following individuals may be victims:
  
  • the spouse of the victim;
  
  • a child of the victim if the child is 18 years or age or older;
  
  • a parent of the victim;

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[21] “Person” includes both individuals and business or governmental entities. MCL 780.752(1)(jj).
• the guardian or custodian of a child of the victim is the child is less than 18 years of age;

• a sibling of the victim;

• a grandparent of the victim;

• a non-incarcerated 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. MCL 780.752(1)(m)(v).

A crime victim has a constitutional right “to make a statement to the court at sentencing.” Const 1963, art 1, § 24. The CVRA gives a victim the opportunity to make a statement about the impact of the offense at the defendant’s sentencing hearing.22 MCL 780.765(1); People v Cobbs, 443 Mich 276, 285 (1993); People v Williams (Anterio), 244 Mich App 249, 253-254 (2001). A crime victim who is physically or emotionally unable to make an oral impact statement at the defendant’s sentencing hearing may designate any other person (who is at least 18 years of age and who is not the defendant and who is not incarcerated) to make the impact statement on his or her behalf. MCL 780.765(1). 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.

A crime victim may also make an oral impact statement or submit a written impact statement for consideration in preparing the defendant’s presentence investigation report (PSIR). MCL 780.764; Cobbs, 443 Mich at 285. The victim must be informed that the PSIR in its entirety will be available to the defendant unless the court exempts certain portions from disclosure. MCL 780.763(1)(e). The court has authority to exempt from disclosure “sources of information obtained on a promise of confidentiality.” MCL 771.14(3). See also MCR 6.425(B). When information is exempted from disclosure, the court must state on the record its reasons for the exemption, inform the parties of the nondisclosure, and include a notation in the PSIR indicating the exemption. MCL 771.14(3); MCR 6.425(B). If a crime victim requests that

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22 see the Michigan Judicial Institute’s Crime Victim Rights Benchbook for more information about a victim’s impact statement.
his or her written impact statement be included in the defendant’s PSIR, the statement must be included. MCL 771.14(2)(b); MCL 780.764.

The content of a defendant’s PSIR (which may include a victim’s impact statement) is not limited by statute or court rule. People v Fleming, 428 Mich 408, 418 (1987). Therefore, a defendant’s PSIR “may include information about a defendant that was not admissible nor admitted at defendant’s trial or plea including hearsay, character evidence, prior convictions or alleged criminal activity for which defendant was not charged or convicted, and the victims’ version of the offense.” Id. at 418. However, a “trial court . . . err[s] by refusing to consider [a defendant’s] challenges to factual information related in [a victim’s] impact statement[]” 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.

The CVRA requires that a victim be given specific notice that his or her impact statement may include, but is not limited to, the following subject matter:

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

(b) An explanation of the extent of any economic loss or property damage suffered by the victim.

(c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.

(d) The victim’s recommendation for an appropriate sentence.” MCL 780.763(3)(a)-(d).

Subject to the defendant’s objections to the information at sentencing and the sentencing court’s duty to resolve disputes, the content of a defendant’s PSIR and by extension, the content of any victim impact statements included in the PSIR, are properly considered by the sentencing court in making its sentencing decision. Fleming, 428 Mich at 418-419.

For purposes of sentencing, a trial court may also consider statements of persons who are not “victims” as defined by the CVRA, MCL
because a sentencing court “is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant’s life and characteristics.” People v Albert, 207 Mich App 73, 74 (1994) (attorney representing one of the victims in a civil case against the defendant was permitted to address the court at sentencing). See also People v Kisielewicz, 156 Mich App 724, 728-729 (1986) (letters from persons not considered victims that were attached to the PSIR concerning society’s perceived need for protection from the offender were properly considered by the trial court at sentencing).

In resentencing a defendant after an original sentence is vacated, “[t]he trial court may consider the contents of the [PSIR] when calculating the guidelines and the victims may have their statements included in the PSIR.” People v Davis (Stafano), 300 Mich App 502, 509-510 (2013) (holding that “the trial court was able to consider and decide other issues at resentencing . . . includ[ing] consideration of [a] newly appended victim’s impact statement”).

### 7.5 Additional Information Required at Sentencing

In addition to the content already discussed, the record of a defendant’s sentencing hearing must also include the following:

- The court must state the sentence being imposed, the minimum and maximum term of the sentence if applicable, and any credit for time served to which the defendant is entitled. MCR 6.425(E)(1)(d).


- The court must “order that the defendant make full restitution as required by law to any victim of the defendant’s course of

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23 MCR 6.425(E)(1)(e), which provides that “if the sentence imposed is not within the guidelines range, [the sentencing court must] articulate the substantial and compelling reasons justifying that specific departure,” has not yet been amended to conform to Lockridge, 498 Mich 358, in which the Michigan Supreme Court “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)[,]” although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only” Lockridge, 498 Mich at 365, 391-392, 399 (emphasis supplied; citation omitted).
conduct that gives rise to the conviction, or to that victim’s estate.” MCR 6.425(E)(1)(f).

See also the Michigan Judicial Institute’s Sample Sentencing Guide.
Chapter 8: Special Sentencing Considerations

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8.1 Concurrent and Consecutive Sentences

Sentences run concurrently unless otherwise indicated; consecutive sentences may not be imposed unless expressly authorized by law. *People v Gonzalez (Israel)*, 256 Mich App 212, 229 (2003). Where consecutive sentencing is authorized, the statutory language will indicate whether the consecutive nature of the sentence is mandatory or discretionary. A defendant’s presentence investigation report (PSIR) must contain “[a] statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law.” MCL 771.14(2)(d). Similarly, a defendant’s judgment of sentence must specify whether the sentence for which the defendant is committed to the jurisdiction of the Department of Corrections (DOC) “is to run consecutively to or concurrently with any other sentence the defendant is or will be serving[,]” MCL 769.1h(1). The prosecuting attorney or defense counsel, or the defendant, if he or she is not represented by an attorney, may file an objection to the consecutive or concurrent nature of sentences described in the judgment of sentence. MCL 769.1h(3).

MCL 771.14(2)(e)(i) states that the sentencing guidelines must be calculated for each conviction for which consecutive sentencing is required or authorized. *People v Mack*, 265 Mich App 122, 126-127 (2005); see also *People v Alfaro*, 497 Mich 1024, 1024 (2015). Where sentences will run concurrently, the sentencing guidelines need only be calculated for the offense with the highest crime class. MCL 771.14(2)(e)(iii); *People v Lopez (Jorge)*, 305 Mich App 686, 690-692 (2014); *Mack*, 265 Mich App at 127-128. However, “when imposing concurrent sentences, . . . [courts should] ensure that each individual sentence, irrespective of any guidelines calculations used, does not exceed its statutory maximum.” *Lopez (Jorge)*, 305 Mich App at 686. Further, 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*, ___ Mich ___, ___ (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’).

Note: “Mack was called into question in dicta in People v Johnigan, 265 Mich App 463, 470-472 (2005), and . . . two justices of [the Michigan] Supreme Court have noted that Johnigan raises a question regarding whether a trial court is obligated under the statutory sentencing guidelines to score all felonies or only the highest class felony. See People v Getscher, 478 Mich 887, 887-888 (2007), and People v Smith [(Rhasiaon)], 475 Mich [891,] 891-892 (2006).” People v Stevens (Richard), unpublished per curiam opinion of the Court of Appeals, issued June 23, 2009 (Docket No. 284000).

In Lopez (Jorge), 305 Mich App at 690 n 2, the Michigan Court of Appeals addressed the question raised in Johnigan, 265 Mich App at 470:

“Mack[, 265 Mich App at 126-130,] was . . . called into question by [the Court of Appeals in] [Johnigan, 265 Mich App at 470], in which the lead opinion criticized Mack’s failure to properly interpret MCL 777.21(2). The lead opinion in Johnigan concluded that Mack was erroneous because at the time Mack was decided, MCL 777.21(2) stated, “‘If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part.’” [Johnigan, 265 Mich App at 470] (emphasis added). The lead opinion observed that §14 of Chapter IX was MCL 769.14, which was inapplicable to Mack. [Johnigan, 265 Mich App at 470]. The lead opinion, however, noted that if MCL 777.21(2) had referred to “§14 of chapter XI (MCL 777.14)” instead of Chapter IX, then the author would have agreed with Mack’s conclusion. [Johnigan, 265 Mich App] at 471 (emphasis added).

“Johnigan, however, does not compel us to deviate from Mack. First, the opinion’s criticism of Mack was nonbinding dicta because it was not necessary to the resolution of the case. . . . Second, the Legislature, after the Johnigan opinion was issued, amended MCL 777.21(2) to refer to Chapter XI instead of Chapter IX.
See 2006 PA 655. Thus, with the amendment of MCL 777.21(2), the lead opinion in Johnigan now fully supports Mack’s holding. Johnigan, 265 Mich App at 471.” (Citation omitted.)

For purposes of consecutive sentencing, a “term of imprisonment” includes a defendant’s jail sentence. People v Spann, 250 Mich App 527, 531-533 (2002) (Spann I), aff’d 469 Mich 904 (2003) (Spann II). In affirming the Michigan Court of Appeals, the Michigan Supreme Court, in Spann II, 469 Mich at 904, noted its disapproval of the Court of Appeals determination that statutory use of the term “imprisonment” was ambiguous; according to the Supreme Court, the Legislature uses the term “imprisonment” to refer to both confinement in prison and confinement in jail. See, e.g., MCL 769.28; MCL 35.403; MCL 66.8; MCL 430.55.

“Although a misdemeanor that may result in two years’ imprisonment may be deemed a felony for purposes of the . . . consecutive sentencing provision[] of the Code of Criminal Procedure, MCL 760.1 et seq.[], it cannot be deemed a felony for purposes of the Penal Code.” People v Williams (Derrick), 243 Mich App 333, 335 (2000). However, for purposes of the Public Health Code, offenses “expressly designate[d]” as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. People v Wyrick, 474 Mich 947 (2005) (misdemeanor possession of marijuana, second offense, does not constitute a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)).¹

Unless the Legislature clearly manifests a contrary intent, sentencing provisions in effect at the time an offense is committed apply to a trial court’s imposition of sentence, not the amended sentencing provisions that became effective after the offense was committed but before the defendant was sentenced. People v Doxey, 263 Mich App 115, 121-123 (2004)²; People v Dailey, 469 Mich 1019 (2004).

A. Computation of Sentences

A correctional facility computes the length of an offender’s sentence by reference to the offender’s judgment of sentence. MCL 791.264(3). Except in cases where the sentencing offense is for one of the five offenses expressly listed in MCL 791.264(4)–MCL 791.264(5), if a judgment of sentence does not specify whether a sentence is to run

¹ Peremptory order vacating the Court of Appeals decision in People v Wyrick, 265 Mich App 483 (2005).
² Doxey, 263 Mich App at 117, 120, specifically dealt with 2002 PA 665, the amendment to the controlled substance sentencing provisions that eliminated the mandatory consecutive nature of sentences under MCL 333.7401(3) and gave the trial court discretion over whether such a sentence was to be concurrent or consecutive to other sentences.
concurrently or consecutively to an offender’s other sentences, the sentence must be computed as if it is to be served concurrently. MCL 791.264(3).

Where the conviction is for a violation of MCL 750.193 (breaking prison), MCL 750.195(2) (breaking jail when jailed for felony), MCL 750.197(2) (breaking jail while awaiting court proceeding), MCL 750.227b (felony-firearm or possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony), or MCL 750.349a (prison inmate taking a hostage), the sentence must be computed as consecutive to other sentences unless the judgment of sentence indicates that the sentence shall run concurrently with an offender’s other sentences. MCL 791.264(4).

If an offender’s judgment of sentence fails to specify whether the sentence is to be served concurrently with or consecutively to the offender’s other sentences, or if the judgment of sentence indicates that the sentence was to be served concurrently with other sentences and the sentencing offense was one of the five mandatory consecutive sentences enumerated in MCL 791.264(4), the Department of Corrections must notify the sentencing judge, the prosecuting attorney, and the affected prisoner not more than seven days after the sentence is computed. MCL 791.264(5).

A trial court’s failure to specify in the judgment of sentence whether the sentence is consecutive to or concurrent with another sentence that the defendant is, or will be, serving, as required under MCL 769.1h(1), may constitute “a mistake arising from an omission under MCR 6.435(A)” that may be corrected by an amendment to the judgment of sentence without a hearing. People v Howell (Marlon), 300 Mich App 638, 646-651 (2013) (the trial court was permitted under MCR 6.435(A) to amend the defendant’s judgments of sentence to specify that the sentences were to be served consecutively to the sentence for which he was on parole when the sentencing offenses were committed, as required by MCL 768.7a(2) and MCL 769.1h(1); no hearing was required under MCR 6.435(A) before correction of a clerical error in a judgment of sentence, and the defendant’s rights of due process did not entitle him to a hearing because “[t]he trial court [did] not have the discretion to impose any other sentence than that contained in the judgments of sentence as amended”).
B. Mandatory Consecutive Sentences

1. Felony or Misdemeanor Offense Punishable by Imprisonment Committed During Offender’s Incarceration or Escape

Consecutive sentencing is mandatory when a defendant is convicted of committing a crime punishable by imprisonment when the offense was committed while the defendant was incarcerated in, or had escaped from, a penal institution. MCL 768.7a(1). The unambiguous language of MCL 768.7a(1) indicates that the consecutive sentencing mandated by the statute applies only to offenders who commit a crime while incarcerated in a penal institution in Michigan, or while on escape from a penal institution in Michigan. People v Alexander (Ronald), 234 Mich App 665, 676-677 (1999) (consecutive sentencing did not apply to the defendant’s sentence for commission of a crime in Michigan while on escape from a Louisiana prison). A defendant in the custody of a halfway house is in a penal institution for purposes of the consecutive sentencing mandate. People v Jennings, 121 Mich App 318, 319 (1982). Mandatory consecutive sentencing also applies to sentences imposed for crimes committed by an offender during his or her incarceration in a federal penal or reformatory institution located in Michigan. People v Kirkland, 172 Mich App 735, 737 (1988).

The consecutive sentencing mandate of MCL 768.7a(1) applies when an offender commits a misdemeanor offense “punishable by imprisonment” while incarcerated in or on escape from a penal institution in Michigan. People v Weatherford, 193 Mich App 115, 119 (1992). Any sentence imposed for the offender’s misdemeanor conviction must be served in the custody of the Department of Corrections and consecutively to the term of imprisonment the offender was serving at the time of the offense. Id. at 119.

The consecutive sentencing mandate may result in “stacked” sentences involving more than one consecutive sentence. People v Piper, 181 Mich App 583, 585-586 (1989). In Piper, 181 Mich App at 584, the defendant escaped from jail where he was serving a life sentence that was imposed in 1966. The defendant committed several felony offenses while he was on escape in 1984 and 1985. Id. The defendant was convicted of the offenses that occurred during his escape and sentences for

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3 “Apparently because of overcrowding in the state prison system, defendant had been transferred to the county jail because he had been a model prisoner.” Piper, 181 Mich App at 584 n 1.
these convictions were imposed in 1986. *Id.* Pursuant to MCL 768.7a(1), the sentences were made consecutive to the defendant’s 1966 life sentence. *Piper*, 181 Mich App at 585. In 1988, the defendant pleaded guilty to second-degree murder, an offense he committed while an escapee, and the murder sentence imposed was made consecutive to the terms of imprisonment already imposed in 1966 and 1986. *Id.* at 584. That the defendant’s sentence was made consecutive to a term of imprisonment already consecutive to the defendant’s original term of imprisonment did not result in impermissible stacking. *Id.* at 585-586.

However, “MCL 768.7a(1) [may not be used] as a means of imposing consecutive sentences for convictions arising out of contemporaneous offenses that were tried together in one trial.” *People v Williams (Robert)*, 294 Mich App 461, 476 (2011). In *Williams (Robert)*, 294 Mich App at 465, the defendant was convicted of two offenses that were committed contemporaneously while he was serving a jail sentence for domestic violence. The Court of Appeals held that although the trial court correctly applied MCL 768.7a(1) in ordering that the sentences for the two subsequent convictions run consecutively to the original domestic violence sentence, the trial court erred in further ordering that the sentences for the two subsequent convictions run consecutively to each other. *Williams (Robert)*, 294 Mich App at 476-477. “[A] defendant ‘has become liable to serve’ a sentence [under MCL 768.7a(1)] only if that sentence was imposed (or the act underlying the sentence occurred) in the past[,]” accordingly, because “[t]he [defendant’s two subsequent] offenses occurred at the same time, the charges were tried together, and the court imposed the sentences at one proceeding[,]” the sentences for those offenses were required to run concurrently with each other. *Williams (Robert)*, 294 Mich App at 476-477.

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).” *People v Parker (Sabrina)*, 319 Mich App 410, 419 (2017). “Literal confinement[,] . . . ‘is not a controlling factor if the person continues to be under the control of the [DOC].’” *Id* at 416 (citation omitted). However, “even a liberal construction of the phrase ‘incarcerated in a
penal or reformatory institution’ [did] not bring [the] defendant within MCL 768.7a(1) for sentencing purposes,” because “[a]fter the DOC erroneously released [her,] . . . the DOC stopped asserting any type of control over [her] or her activities[, and t]here [was] no evidence that the DOC was aware of or attempted to contact [the] defendant regarding her erroneous release.” Parker (Sabrina), 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 (Sabrina), 319 Mich App at 419-420 (citing People v Veilleux, 493 Mich 914 (2012), and additionally rejecting the prosecution’s argument “that [the] 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).

2. Felony Offense Committed During Offender’s Parole

A person convicted and sentenced for a felony committed while the person was on parole from a sentence for a previous offense is subject to a mandatory consecutive sentence for the subsequent offense. MCL 768.7a(2). The term of imprisonment for the subsequent offense “shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.” Id.

Exactly when a sentence imposed under MCL 768.7a(2) begins to run has been examined in the context of a consecutive, indeterminate prison term and in the context of a consecutive, fixed jail term. See Wayne Co Prosecutor v Dep’t of Corrections, 451 Mich 569, 571-572 (1996); People v Beard, ___ Mich App ___ (2019).

Regarding 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, 451 Mich at 584.4

4In Wayne Co Prosecutor, 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.” Wayne Co Prosecutor, 451 Mich at 571. 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.
Regarding the imposition of a consecutive, fixed jail term, the Court held that “[a] jail sentence imposed consecutive to an indeterminate prison sentence does not begin to run until the defendant is paroled from the prison sentence or completes his maximum term.” *Beard*, ___ Mich App at ___ (holding “the trial court erred in 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”).

The trial court’s failure to specify that a defendant’s sentence is to be served consecutively to a sentence for which he or she was on parole when the sentencing offense was committed, as required by MCL 768.7a(2) and MCL 769.1h(1), may constitute “a mistake arising from an omission under MCR 6.435(A)” that may be corrected by an amendment to the judgment of sentence without a hearing. *Howell (Marlon)*, 300 Mich App at 646-651. See also *Beard*, ___ Mich App at ___ (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 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”).

“[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 (Tyrone)*, 315 Mich App 219, 225 (2016) (noting that “even though the purpose of each is similar, there are significant differences between ‘parole’—under the plain meaning of that term and as practiced in Michigan—and federal ‘supervised release’”) (citations omitted).

### 3. Major Controlled Substance Offense When a Previous Felony Is Pending Disposition

If a defendant commits a major controlled substance offense while the disposition of another felony offense is pending, consecutive sentencing is mandatory. MCL 768.7b(2)(b). A felony is pending disposition for purposes of consecutive sentencing “if the second offense is committed at a time when a warrant has been issued in the original offense and defendant has notice that the authorities are seeking him [or her] with regard to that specific criminal episode.” *People v Waterman*, 140 Mich App 652, 655 (1985) (the defendant left
Michigan after he was told that the police were looking for him and a warrant had issued by the time of his arrest in Texas, where he had committed the subsequent offense). See also People v Henry (William), 107 Mich App 632, 637-638 (1981) (a felony charge was not pending where although a warrant had been issued for the defendant’s first offense, the defendant was unaware that his conduct was the subject of a criminal prosecution).

“Pending disposition” includes the entire period of time up to the date of sentencing for the pending offense. People v Morris (Otis), 450 Mich 316, 330-331 (1995). A felony charge is no longer pending if probation is imposed following conviction of the charge. People v Hardy, 212 Mich App 318, 322 (1995).

4. Convictions of Felony-Firearm or Possession and Use of a Pneumatic Gun in Furtherance of Committing a Felony

The sentence imposed for a felony-firearm conviction under MCL 750.227b(1), or a conviction of possession and use of a pneumatic gun in furtherance of committing or attempting to commit a felony under MCL 750.227b(2), must be consecutive to the sentence imposed for the felony or attempted felony on which the conviction is based. MCL 750.227b(3). A sentence for a violation of MCL 750.227b(1) or MCL 750.227b(2) is a determinate number of years depending on the number of the defendant’s previous convictions under the applicable subsection. MCL 750.227b(1); MCL 750.227b(2).

A felony-firearm conviction requires that the defendant “carr[y] or ha[ve] in his or her possession a firearm when he or she commits or attempts to commit a felony[.]” MCL 750.227b(1).5 Similarly, a conviction under MCL 750.227b(2) requires that the defendant “carr[y] or ha[ve] in his or her possession a pneumatic gun and use[] that pneumatic gun in furtherance of committing or attempting to commit a felony[.]” These provisions list four weapons offenses on which a conviction under MCL 750.227b(1) or MCL 750.227b(2) cannot be based:

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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 of felony-firearm even if the jury acquits the defendant of the underlying felony. People v Powell (Willie), 303 Mich App 271, 273-274 (2013) (noting that MCL 750.227b “necessarily includes a finding that the defendant committed or attempted to commit a felony,” and that “[t]he jury may have reached the conclusion that defendant was not guilty of possession of marijuana with intent to deliver under MCL 333.7401(2)(d)(iii)(b), but that he did possess marijuana with intent to deliver for purposes of MCL 750.227b”) (citation omitted).
• unlicensed sale of firearms and sales to convicted felons and minors, MCL 750.223;

• carrying a concealed weapon (CCW), MCL 750.227;

• unlawful possession of a pistol by a licensee, MCL 750.227a; and

• alteration, removal, or obliteration of a firearm’s identification mark, MCL 750.230.

A sentence imposed for a violation of MCL 750.227b(1) or MCL 750.227b(2) is to be consecutive only to the sentence imposed for the felony or attempted felony on which the conviction is based. MCL 750.227b(3); see also People v Clark (Rajahaan), 463 Mich 459, 463-464 (2000); People v Coleman, ___ Mich App ___, ___ (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”). If a conviction is based on a qualifying underlying felony (i.e., not MCL 750.223, MCL 750.227, MCL 750.227a, or MCL 750.230), the defendant may also be convicted of any of the four offenses exempted from the consecutive sentencing mandate, but the sentence imposed for the conviction must be concurrent to the felony-firearm/pneumatic gun sentence. See, e.g., People v Cortez, 206 Mich App 204, 207 (1994) (trial court erred in ordering the defendant’s felony-firearm sentence under MCL 750.227b to run consecutively to his sentence for carrying a concealed weapon under MCL 750.227).

The consecutive sentencing requirement applies only when the penalty imposed for the underlying felony is a term of imprisonment. People v Brown (Darryl), 220 Mich App 680, 682 (1996). If the court imposes a sentence of probation for the felony offense underlying an offender’s felony-firearm conviction, the mandatory two-year sentence must run concurrently with the term of probation. Id. at 682-685.

5. Other Statutes That Mandate Consecutive Sentencing

MCL 750.193(1) mandates consecutive sentencing for defendants convicted of escape or attempting to escape confinement. A person who violates the terms of his or her parole is not an escapee for purposes of this statute. MCL 750.193(3).
Consecutive sentencing is mandatory when a felony offender escapes or attempts to escape from jail before or after court proceedings related to a felony charge. MCL 750.197(2). Consecutive sentencing is required when a prisoner takes a hostage. MCL 750.349a. MCL 750.195(2) mandates consecutive sentencing when an offender who is in jail on a felony offense escapes or attempts to escape from jail.

C. Discretionary Consecutive Sentences

1. Articulation Requirement and Judicial Factfinding

“[T]rial courts imposing one or more discretionary consecutive sentences are required to articulate on the record the reasons for each consecutive sentence imposed.” People v Norfleet, 317 Mich App 649, 654 (2016). “The decision regarding each consecutive sentence is its own discretionary act and must be separately justified on the record. . . . While imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each 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 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”).

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, . . . [the] defendant [had] no Sixth Amendment right to have a jury make that determination[]” before the trial court could impose a consecutive sentence under MCL 750.520b(3). Deleon, 317 Mich App at 726, quoting MCL 750.520b(3) (second alteration in original).

2. Controlled Substance Offenses

A sentence imposed for a controlled substance offense under MCL 333.7401(2)(a)6 may be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. MCL 333.7401(3).

“MCL 333.7401(3) provides discretion to impose ‘[a] term of imprisonment . . . to run consecutively[]’ . . . [t]herefore, a trial court may not impose multiple consecutive sentences as a single act of discretion nor explain them as such.” Norfleet, 317 Mich App at 665 (first alteration and first ellipses in original). “The decision regarding each consecutive sentence is its own discretionary act and must be separately justified on the record[,]” because MCL 333.7401(3) “clearly provides that a discretionary decision must be made as to each sentence and not to them all as a group.” Norfleet, 317 Mich App at 665-666 (remanding for resentencing where “the trial court spoke only in general terms[]” about the defendant’s background and history and the nature of the offenses involved and “did not give particularized reasons—with reference to the specific offenses and the defendant—to impose each sentence under MCL 333.7401(2)(a)(iv) consecutive to the others[]”).

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6See for a description of these offenses.
3. **Violations Arising Out of the Same Transaction as the Sentencing Offense**

For the following offenses, consecutive sentencing is discretionary for violations *arising out of the same transaction as the sentencing offense.*

- **MCL 333.7401c**, possession or provision of equipment or buildings for the purpose of manufacturing controlled substances in violation of MCL 333.7401 or counterfeit controlled substances or controlled substance analogues in violation of MCL 333.7402. MCL 333.7401c(5).

- **MCL 750.81d**, assaulting or obstructing a law enforcement officer, firefighter, conservation officer, federal peace officer, emergency medical personnel, or an individual involved in a search and rescue operation when the offender should know that the individual is performing his or her duties. MCL 750.81d(6).

- **MCL 750.110a(2)**, first-degree home invasion. MCL 750.110a(8).

- **MCL 750.479**, assaulting, battering, wounding, obstructing, or endangering authorized process servers or officers enforcing township ordinances. MCL 750.479(7).

- **MCL 750.479b**, taking a firearm or other weapon from a peace officer or corrections officer. MCL 750.479b(4).

- **MCL 750.529a**, carjacking. MCL 750.529a(3).

- **MCL 769.36**, permitting multiple charges against an offender for each death that results from violating MCL 257.602a(5), MCL 257.617(3), MCL 257.625(4), MCL 257.904(4), MCL 750.317, MCL 750.321, MCL 750.479a(5), MCL 324.80176(4), MCL 324.81134(7), MCL 324.82127(4), MCL 259.185(4), or MCL 462.353(6). MCL 769.36(1).

- **MCL 750.520b**, first-degree criminal sexual conduct. MCL 750.520b(3).

- **MCL 750.520n(2)**, violations involving equipment used for certain offenders subject to lifetime electronic monitoring under MCL 791.285. MCL 750.520n(4).
“[T]he Sixth Amendment does not prohibit the use of judicial fact-finding to impose” a consecutive sentence under MCL 750.520b(3). Deleon, 317 Mich App at 723. Therefore, although the jury’s verdict “did not necessarily incorporate a finding that [the defendant’s first-degree criminal sexual conduct] conviction ‘ar[ose] from the same transaction’ as did his [second-degree criminal sexual conduct] conviction, . . . [the] defendant [had] no Sixth Amendment right to have a jury make that determination[’]” before the trial court could impose a consecutive sentence. Id. at 726, quoting MCL 750.520b(3) (second alteration in original).8

4. Sentences Imposed for Any Other Crime, Including Crimes Arising Out of the Same Transaction as the Sentencing Offense

For the following offenses, a sentence may be consecutive to a sentence imposed for any other crime, including crimes arising out of the same transaction as the sentencing offense.

- MCL 750.50, various violations involving the proper care and treatment of animals. MCL 750.50(7).
- MCL 750.119, corruption with the intent to bias the opinion or influence the outcome of any matter pending before the court or other decision-maker. MCL 750.119(3).

7 “[A]n ongoing course of sexually abusive conduct involving episodes of assault does not in and of itself render the crimes part of the same transaction]; rather, f]or multiple penetrations to be considered as part of the same transaction, they must be part of a ‘continuous time sequence,’ not merely part of a continuous course of conduct.” People v Bailey (Ryan), 310 Mich App 703, 709-710, 723, 725-726 (2015) (citing People v Brown (Tommy), 495 Mich 962, 963 (2014), and People v Ryan (Sean), 295 Mich App 388, 402-403 (2012), and holding that “the trial court erred by ordering that [the defendant’s] mandatory minimum sentence [for one count of CSC-I] be served consecutively to his concurrent sentences [for three additional CSC-I convictions]” stemming from the molestation of three victims over a course of several years, because there was no evidence that any offense occurred during the same transaction as any other offense. See also Brown (Tommy), 495 Mich at 962-963 (holding that “[t]he trial court imposed an invalid sentence when it imposed seven consecutive sentences for the defendant’s seven convictions of first-degree criminal sexual conduct[,]” under Ryan (Sean), 295 Mich App at 402-403, “the trial court had discretion to impose consecutive sentences for at most three of the . . . convictions, because the three sexual penetrations that resulted in those convictions . . . ‘grew out of a continuous time sequence’ and had ‘a connective relationship that was more than incidental[’]”).

Under MCL 750.520b(3), the trial court may order that a sentence imposed for a conviction of first-degree criminal sexual conduct (CSC-I) be served consecutively to a sentence for a second conviction of CSC-I arising from the same transaction. Ryan (Sean), 295 Mich App at 404-405 (rejecting the defendant’s assertion that the phrase “any other criminal offense arising from the same transaction[”]” in MCL 750.520b(3) permits consecutive sentencing for a CSC-I offense only when the other sentence is for an offense other than CSC-I, and concluding that “the phrase ‘any other criminal offense’ means a different sentencing offense[]”).
5. Sentences Imposed for an Underlying Misdemeanor or Felony Offense

An offender’s sentence for the following offenses may be made consecutive to a sentence imposed for an underlying misdemeanor or felony offense.

- **MCL 750.145d**, using the internet or a computer to engage in prohibited conduct. MCL 750.145d(3).

- **MCL 750.212a**, criminal conduct under the provisions of the Penal Code committed in or directed at a vulnerable target. MCL 750.212a(1).

- **MCL 750.227f**, committing or attempting to commit a violent act against a person while wearing body armor. MCL 750.227f(1).

- **MCL 752.796**, using a computer or computer network to commit a crime, to conspire to commit a crime, or to solicit another person to commit a crime. MCL 752.797(4).

6. Pending Felonies

With the exception of major controlled substance offenses, **MCL 768.7b(2)(a)** authorizes consecutive sentencing for an offense committed pending disposition of a prior felony charge. The discretionary authority to impose consecutive sentences applies only to the “last in time” sentencing court. *People v Chambers*, 430 Mich 217, 231 (1988).

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8 See Section 3.33(C)(1) for additional discussion of the Sixth Amendment in the context of discretionary consecutive sentencing.
7. **Medicaid Fraud**

A trial court may impose consecutive sentences for an offender’s “conviction of separate offenses under [the Medicaid False Claim Act].” MCL 400.609(2).

8. **Identity Theft**

A sentence imposed for a violation of MCL 445.65 (identity theft) or MCL 445.67 (identity theft and communication under false pretenses involving a business) may be made to run consecutively to any term of imprisonment imposed for another violation committed during a defendant’s violation or attempted violation of MCL 445.65 or MCL 445.67, or for another violation occurring after the initial violation using information obtained as a result of the initial violation. MCL 445.69(4).

9. **False Statement in Petition for Postconviction DNA Testing**

A sentence imposed for a violation of MCL 750.422a(1) (when, pursuant to MCL 770.16, a defendant intentionally makes a material false statement when petitioning for DNA testing of biological material identified during the investigation leading to the defendant’s conviction) may be made consecutive to any term of imprisonment the defendant is serving. MCL 750.422a(2).

10. **Gang-Related Crimes**

A sentence imposed for a violation of MCL 750.411u(1) (gang member/associate guilty of a felony if he or she commits or attempts to commit a felony and his or her relationship with the gang provides the motive, means, or opportunity to commit the felony) is in addition to, and may be made to run consecutively with, and preceding, any term of imprisonment imposed for the conviction of the underlying felony or attempt to commit the underlying felony. MCL 750.411u(2).

A sentence imposed for a violation of MCL 750.411v (causing, encouraging, recruiting, soliciting, coercing another to join, participate in, or assist a gang in committing a felony) is in addition to a sentence imposed for the conviction of another felony or attempted felony arising out of the same transaction, and may be ordered to be served consecutively with, and preceding, a term of imprisonment imposed for the conviction of that felony or attempted felony. MCL 750.411v(4).
11. **Embezzlement From Vulnerable Adult**

A sentence imposed under MCL 750.174a(4) (embezzlement from vulnerable adult of $1,000 to $20,000 or with prior convictions), MCL 750.174a(5) (embezzlement from vulnerable adult of $20,000 to $50,000 or with prior convictions), MCL 750.174a(6) (embezzlement from vulnerable adult of $50,000 to $100,000 or with prior convictions), or MCL 750.174a(7) (embezzlement from vulnerable adult of $100,000 or more or with prior convictions) may be ordered to be served consecutively to any other sentence imposed for a violation of MCL 750.174a.

12. **Animal Crimes**

A sentence imposed under MCL 750.50 (animal neglect or cruelty) may be ordered to be served consecutively to a term of imprisonment imposed for any other crime including any other violation of law arising out of the same transaction as the violation of MCL 750.50. MCL 750.50(7).

A sentence imposed under MCL 750.50b (killing or torturing animals) may be ordered to be served consecutively to a term of imprisonment imposed for any other crime including any other violation of law arising out of the same transaction as the violation of MCL 750.50b. MCL 750.50b(9).

13. **Standard of Review**

“[W]hen a statute grants a trial court discretion to impose a consecutive sentence, the trial court’s decision to do so is reviewed for an abuse of discretion, i.e., whether the trial court’s decision was outside the range of reasonable and principled outcomes.” Norfleet, 317 Mich App at 654, citing People v Babcock, 469 Mich 247, 269 (2003).

“[E]ach sentence is to be reviewed on its own merits[,]” and “a proportionality challenge [under People v Milbourn, 435 Mich 630, 635-636 (1990),] to a given sentence must be based on the individual term imposed and not on the cumulative effect of multiple sentences.” Norfleet, 317 Mich App at 663, citing People v Warner (Marshall), 190 Mich App 734, 735-736 (1991). However, “although the combined term [resulting from the imposition of consecutive sentences] is not itself subject to a proportionality review, the decision to impose a consecutive sentence when not mandated by statute is reviewable for an abuse of discretion.” Norfleet, 317 Mich App at 664-665 (noting that “[t]he decision regarding each consecutive sentence is its
own discretionary act and must be separately justified on the record"]).

## 8.2 Principle of Proportionality

“The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *People v Babcock*, 469 Mich 247, 263 (2003).

### A. Judicial Sentencing Guidelines

Under the judicial sentencing guidelines, a defendant’s sentence was reviewed for proportionality under *People v Milbourn*, 435 Mich 630 (1990). A sentence is proportionate when it reflects the seriousness of the circumstances surrounding the offense and the offender’s criminal history. *Id.* at 636; *People v Crawford*, 232 Mich App 608, 621 (1998). Sentences imposed within the range recommended by a defendant’s properly scored judicial guidelines were presumptively proportionate; that is, a sentence within the guidelines was neither excessively severe nor unfairly lenient. *People v Wybrecht*, 222 Mich App 160, 175 (1997); *People v Kennebrew*, 220 Mich App 601, 609 (1996). A sentence imposed within the range indicated by the judicial guidelines could violate the principle of proportionality only in unusual circumstances. *Milbourn*, 435 Mich at 661; *People v Hadley*, 199 Mich App 96, 105 (1993).

**Note:** Although the judicial sentencing guidelines did not apply to habitual offender sentences, those sentences were subject to the principle of proportionality. *People v Coy*, 258 Mich App 1, 23 (2003); *People v McFall*, 224 Mich App 403, 415 (1997).

The proportionality of a defendant’s sentence is considered by reference to the sentences in the abstract; that is, where a defendant is sentenced to multiple consecutive terms of imprisonment, the proportionality of the sentence is not determined by the cumulative effect of the defendant’s sentences. *People v Miles (Dwayne)*, 454 Mich 90, 94-95 (1997); *Kennebrew*, 220 Mich App at 609.

A trial court is not required to consider a codefendant’s sentence when imposing sentence on another codefendant; that is, each individual convicted of a crime, when more than one individual participated in the same crime, is not entitled to receive a sentence similar to the sentences received by other participants. *People v Colon*, 250 Mich App 59, 64 (2002).
B. Statutory Sentencing Guidelines

The concept of proportionality is built into the statutory sentencing guidelines. An offender’s offense variable (OV) and prior record variable (PRV) levels, as determined by reference to the offense and the offender, are intended to place the offender in a cell on the appropriate sentencing grid that recommends a minimum sentence proportionate to that offense and offender.

“Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender’s criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant’s criminal history.” Babcock, 469 Mich at 263-264.

In 2015, the Michigan Supreme Court held that “Michigan’s sentencing guidelines . . . [are] constitutionally deficient[] . . . [to] the extent [that they] . . . require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range[].” People v Lockridge, 498 Mich 358, 364, 399 (2015), rev’d in part 304 Mich App 278 (2014) and overruling People v Herron, 303 Mich App 392 (2013). “To remedy the constitutional violation,” the Lockridge Court “sever[ed] MCL 769.34(2) to the extent that it is mandatory” and “[struck] down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3)[,]” further holding that although “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence[,]” the legislative sentencing guidelines “are advisory only.” Lockridge, 498 Mich at 364-365, 391, 399 citing United States v Booker, 543 US 220, 233, 264 (2005) (emphasis supplied).

Under Lockridge, “the sentencing court may exercise its discretion to depart from [the applicable] guidelines range without articulating
substantial and compelling reasons for doing so.” *Lockridge*, 498 Mich at 392. In order to facilitate appellate review, the court must justify any sentence imposed outside the advisory minimum guidelines range. *Id.*, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). “A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for *reasonableness*, and . . . [r]esentencing will be required when a sentence is determined to be unreasonable.” *Lockridge*, 498 Mich at 392 (emphasis supplied), citing *Booker*, 543 US at 261.


See for discussion of *Lockridge*. See for discussion of the reasonableness of a departure sentence.

### 8.3 Additional Information to Consider Before Imposing Sentence

Before the statutory sentencing guidelines were established, the Michigan Supreme Court declined to rigidly define or classify the facts and circumstances surrounding the offense and the offender into facts and circumstances either properly or improperly considered in fashioning a defendant’s sentence. *People v Adams (Steven)*, 430 Mich 679, 687 (1988) (“It remains the role of the sentencing judge to weigh facts deemed relevant to the sentencing decision, . . . Our function is to identify those factors which when injected into the sentencing process tread unfairly upon the defendant’s rights.”).
A. Proper Considerations

Permissible factors that may be considered by the trial court when imposing sentence include:

- the severity and nature of the crime committed;
- the circumstances surrounding the criminal conduct;
- the defendant’s attitude toward his or her criminal behavior;
- the defendant’s social and personal history; and

“A sentencing judge may consider the defendant’s false testimony when passing sentence.” *Adams (Steven)*, 430 Mich at 688. “[W]hen the record contains a rational basis for the trial court’s conclusion that the defendant’s testimony amounted to willful, material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant’s prospects for rehabilitation, the trial court properly may consider this circumstance in imposing sentence.” *Id.* at 693.

A defendant’s post-arrest conduct in prison was properly considered by the court when imposing sentence where the judicial guidelines in effect at the time did not account for a defendant’s misconduct while in custody. *People v Houston (John)*, 448 Mich 312, 318, 323 (1995). “[J]ust as an exemplary custodial record might be found to be a mitigating circumstance, misconduct in custody may be an aggravating circumstance indicating a disposition to violence or impulsiveness.” *Id.* at 323.

Evidence of a defendant’s lack of remorse may be properly considered in determining his or her potential for rehabilitation. *People v Wesley*, 428 Mich 708, 711 (1987).

Evidence of the effect a crime has had on a victim is an appropriate consideration in fashioning a defendant’s sentence. *People v Compagnari*, 233 Mich App 233, 236 (1998).

A sentencing court may properly consider a defendant’s age in light of other permissible and relevant factors—criminal history and admitted drug use, for example—to determine the defendant’s potential for rehabilitation. *People v Randolph*, 242 Mich App 417, 423 (2000), aff’d in part, rev’d in part 466 Mich 532 (2002). However, a sentencing court may not arbitrarily lengthen an offender’s prison sentence for the expressed purpose of incarcerating the offender.
“beyond the age of violence.” People v Fisher (Richard), 176 Mich App 316, 318 (1989). It is also inappropriate to consider a defendant’s age in assessing the risk of recidivism where no evidence was presented to support the court’s opinion of the defendant’s probable recidivism. People v McKernan, 185 Mich App 780, 781-783 (1990) (“The theory that the advanced age of a defendant increases the probability of recidivism and justifies a longer sentence than would be given to a younger person (even within the [judicial] guidelines) is sufficiently complex and controversial to require scientific justification before it may be relied upon by a court.”).

A sentencing court may consider an adult defendant’s juvenile records when imposing sentence, even when the juvenile records have been automatically expunged. People v Smith (Ricky), 437 Mich 293, 301-303 (1991).

As long as the defendant has an opportunity to refute it, a court may consider a defendant’s alleged criminal conduct even when the conduct does not result in conviction. People v Wiggins (Warren), 151 Mich App 622, 625 (1986). A sentencing court may also consider a defendant’s conduct in charges dismissed as a result of a plea agreement:

“The fact that defendant was properly charged in [the dismissed case], had been brought before the trial court on the matter, had not denied the accuracy of the charges themselves, and would have had to answer for these charges except for the agreement between the parties, provides an accurate and adequate basis upon which the judge could consider evidence of that criminal conduct[.]” People v Moore (Sloan), 70 Mich App 210, 213 (1976).

The statutory sentencing guidelines have quantified many of the historical considerations discussed above. For example, the seven prior record variables (PRVs)\(^\text{10}\) account for the extent and severity of a defendant’s criminal history by assigning point values to a defendant’s previous high and low severity felony convictions (PRVs 1 and 2), a defendant’s previous high and low severity juvenile adjudications (PRVs 3 and 4), a defendant’s prior misdemeanor convictions or prior misdemeanor juvenile adjudications (PRV 5), a defendant’s relationship to the criminal justice system at the time he or she is sentenced for the scored offense (PRV 6), and the number of concurrent or subsequent felony convictions accumulated by the defendant at the time of sentencing for the scored offense (PRV 7). Similarly, the offense variables (OVs)

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\(^{10}\) See [footnote text] for detailed information on scoring a defendant’s PRVs and OVs.
account for the circumstances surrounding the defendant’s commission of the sentencing offense. For example, OVs 1 and 2 assign points for the defendant’s use of a weapon during the offense.

**B. Improper Considerations**

It is improper to consider the following factors when fashioning an offender’s sentence:

- A defendant’s refusal to provide authorities with information about other criminal conduct. *People v Johnson (James)*, 203 Mich App 579, 584 (1994).


  - “To determine whether sentencing was improperly influenced by the defendant’s failure to admit guilt, the appellate court focuses on three factors: (1) the defendant’s maintenance of innocence after conviction; (2) the judge’s attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe.” *Dobek*, 274 Mich App at 104, quoting *People v Wesley*, 428 Mich 708, 713 (1987).

  - Resentencing was required when a sentencing court implied that the defendant would be sentenced more leniently for his felony-firearm conviction if he revealed the location of the weapon, thereby effectively admitting his guilt. *People v Conley*, 270 Mich App 301, 313-315 (2006).

  - An independent finding of guilt with regard to other offenses with which a defendant is charged. *People v Grimmett*, 388 Mich 590, 608 (1972), overruled on other grounds by *People v White (George)*, 390 Mich 245 (1973). But see *People v Shavers*, 448 Mich 389, 393 (1995) (it is not an independent finding of guilt when a court considers evidence presented at trial as an aggravating factor to determine the appropriate sentence), and *People v Granderson*, 212 Mich App 673, 679-680 (1995) (a trial court may properly consider facts underlying a defendant’s previous acquittal of other charges).
• A defendant’s last-minute plea or waiver of the right to a jury trial. *People v Earegood*, 383 Mich 82, 85 (1970).

• A defendant’s exercise or waiver of his or her constitutional right to a jury trial. *People v Godbold*, 230 Mich App 508, 517-520 (1998). See also *People v Pennington*, 323 Mich App 452, 468 (2018) (vacating the defendant’s sentences where “the judge’s sentencing policy was to impose the maximum guideline 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).


• The possibility that a defendant may be granted early release or community placement. *People v Miller (Bradley)*, 206 Mich App 638, 642 (1994); *People v McCracken*, 172 Mich App 94, 101-103 (1988).


### 8.4 Sentence Credit

A defendant is entitled to credit for presentence time served on the offense for which he or she was convicted and is being sentenced if the presentence incarceration was due to the denial of bond or the defendant’s inability to furnish bond. MCL 769.11b. Specifically, MCL 769.11b states:

11 However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 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 nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US 460, by effectively eliminating the mandatory imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see the Michigan Judicial Institute’s *Juvenile Justice Benchbook*, Chapter 19.
“Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he [or she] is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.”

“A defendant is entitled to credit for time served before sentencing [under MCL 769.11b] even if the defendant is sentenced to serve a mandatory term of life imprisonment without parole.” People v Seals, 285 Mich App 1, 18-19 (2009).

Presentence incarceration must be for sentencing offense. Credit for time served must be time a defendant spent incarcerated for the sentencing offense against which the credit is awarded; a defendant cannot receive credit for time served for an offense unrelated to the sentencing offense. People v Prieskorn, 424 Mich 327, 341 (1985).

When a defendant is serving time on a sentence and a subsequent offense is adjudicated during the incarceration, the defendant is not entitled to credit against the second offense for time served before sentencing because he or she was incarcerated and serving time on an unrelated offense. People v Givans, 227 Mich App 113, 125-126 (1997); People v Alexander (Hamilton) (After Remand), 207 Mich App 227, 229 (1994).

A defendant is not entitled to credit for time served against a sentence that must run consecutively to a sentence the defendant was serving at the time of the subsequent offense. People v Connor, 209 Mich App 419, 431 (1995). Time spent incarcerated while awaiting disposition of the subsequent offense is “presentence time served that [the defendant] was already obliged to serve under a prior sentence.” Id. at 431.

A defendant is not entitled to credit against a sentence imposed for a crime committed while the defendant was on parole; time served in jail before being sentenced for the subsequent offense is properly credited against the unexpired portion of the sentence for the offense for which the defendant was paroled. MCL 791.238(2); People v Stewart (Eric), 203 Mich App 432, 433 (1994). See also People v Stead, 270 Mich App 550, 551-552 (2006) (a defendant who spends time in jail for an offense committed while the defendant was on parole is a parole detainee for whom bond is not considered; a parole detainee is entitled to credit against the sentence from which he or she was paroled for any time spent in jail awaiting disposition of the new offense).

Presentence incarceration must be due to denial or inability to furnish bond. “[T]he primary purpose of the sentencing credit statute is to equalize, as far as possible, the status of the indigent or lower-income
accused with the status of the accused who can afford to post bail.” *Givans*, 227 Mich App at 125. “Given that the primary purpose of [MCL 769.11b] is to equalize the position of one who cannot post bond with that of a person who is financially able to do so, a showing that presentence confinement was the result of inability to post bond is an essential prerequisite to the award of sentence credit under the statute.” *People v Whiteside*, 437 Mich 188, 196 (1991).

A defendant is not entitled to credit for time spent in boot camp when the defendant’s participation in the program was not due to his being denied bond or being unable to furnish bond. *People v Wagner*, 193 Mich App 679, 682 (1992) (the defendant was sentenced after he failed to complete a boot camp program originally imposed in lieu of prison; he was not entitled to sentence credit for the time in boot camp because it did not result from a denial or inability to post bond).

A defendant is not entitled to credit for time spent in a tether program when the defendant’s participation in the program was not due to his being denied bond or being unable to furnish bond. *People v Reynolds (Michael)*, 195 Mich App 182, 183 (1992).

A defendant is not entitled to credit for time spent in a drug rehabilitation program, even when participation in the program was a condition of probation, unless the defendant’s placement in the program was due to his or her inability to furnish bond. *Whiteside*, 437 Mich at 196-197. See also *People v Scott (John)*, 216 Mich App 196, 199-200 (1996) (where a defendant’s placement in a treatment or rehabilitation facility is not due to his being denied bond or being unable to furnish bond, MCL 769.11b does not apply).

MCL 769.11b does not require sentence credit “for time spent incarcerated in other jurisdictions, for offenses committed while [a defendant] was free on bond for the offense for which he [or she] seeks such credit, from the time that a detainer or hold either was or could have been entered against him [or her] by authorities in the jurisdiction where the defendant is to be sentenced.” *People v Adkins (Kenneth)*, 433 Mich 732, 734 (1989). See also *People v Patton*, 285 Mich App 229, 239 (2009) (the defendant was “not entitled to sentence credit for time served from the date a detainer could have, or was, entered against him[,]” because his incarceration in a federal penitentiary was not the result of his being denied or unable to furnish bond for the Michigan charge at issue).

The jail credit statute does not generally apply to parolees who commit new felonies while on parole. *People v Idziak*, 484 Mich 549, 562 (2009). Specifically, “the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of
his [or her] earlier sentence unless and until discharged by the Parole Board. For that reason, he [or she] remains incarcerated regardless of whether he [or she] would otherwise be eligible for bond before conviction on the new offense.” Id. at 562. Because the parolee is not being incarcerated due to being denied or unable to furnish bond for the new offense, the jail credit statute, MCL 769.11b, does not apply. Idziak, 484 Mich at 562-563 (“reach[ing] essentially the same conclusion as the Court of Appeals did in [People v Seiders[, 262 Mich App 702 (2004),] and [People v Filip[, 278 Mich App 635 (2008),] . . . [but] on the basis of a somewhat different analysis”). See also People v Armisted, 295 Mich App 32, 42, 49-51 (2011) (MCL 769.11b does not apply when a parolee commits a new felony prior to his or her release from a community residential center); People v Clark (Tyrone), 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[]”).

Refuting the popular argument of recidivist parolees that time spent awaiting sentence on a new conviction is “dead time,” the Michigan Court of Appeals explained in People v Johnson (Robert), 283 Mich App 303, 312-313 n 4 (2009), that regardless of whether parole is revoked or not revoked, time served awaiting a subsequent conviction is credited toward the conviction for which the defendant was on parole. “If parole is revoked, the defendant is obligated to serve out the balance of the maximum sentence for the conviction that formed the basis for parole.” Id. at 311, citing MCL 791.238(5) and MCL 791.234. “If parole is not revoked, the defendant continues to accrue time toward his [or her] ultimate discharge for the conviction upon which the defendant enjoys parole.” Johnson (Robert), 283 Mich App at 311, citing MCL 791.238(6). “The only time a defendant stops accruing time toward his or her ultimate discharge from the Department of Corrections is when a parolee has a warrant issued for a parole violation and the parolee remains at large. After a warrant is issued, ‘[t]he time from the date of the declared violation to the date of the prisoner’s availability for return to an institution shall not be counted as time served.’” Johnson (Robert), 283 Mich App at 311, quoting MCL 791.238(2).

Special alternative incarceration units. When a defendant is ordered to participate in a special alternative incarceration (SAI) unit12 as a condition of probation, double jeopardy considerations demand that the time spent there be credited against the sentence imposed after the defendant’s probation violation if placement in the SAI unit is the equivalent of being “in jail.” People v Hite (After Remand), 200 Mich App 1,
(the boot camp was enclosed by an eighteen-foot high fence topped with barbed wire).

**Double jeopardy considerations when presentence time served is the equivalent of being “in jail.”** “Sentence credit under the double jeopardy clauses [(US Const, Am V; Const 1963, art 1, § 15)] is only required for confinements amounting to time spent “in jail” as that term is commonly used and understood.” Reynolds (Michael), 195 Mich App at 183-184 (sentence credit not required for time defendant spent in tether program), quoting Wagner, 193 Mich App at 682 (sentence credit not required for time spent in boot camp). See also Whiteside, 437 Mich at 202 (sentence credit not required for time defendant spent in private rehabilitation program).

“The Double Jeopardy Clauses of the United States and Michigan Constitutions [(US Const, Am V; Const 1963, art 1, § 15)] require that a probationer be given credit for time served while incarcerated as a condition of probation.” Hite, 200 Mich App at 4. See also People v Grazhidani, 277 Mich App 592, 599 (2008) (credit for time served as a condition of probation limited to time actually spent while incarcerated “in jail”).

**Sheriff’s good-time/disciplinary credits.** “‘Good time’ and ‘disciplinary credit,’ as the terms are used in [MCL 800.33], refer[] to the graduated monthly reduction from sentences being served by prison inmates as set forth in the statute. It is designated to serve as an inducement to good conduct in state penal institutions and may be earned during the time the prisoner is confined in a penal institution and also while on parole.” 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 22:148. “Although . . . there is a distinction between good-time credits and disciplinary credits, [the Michigan Supreme Court] use[s] the terms interchangeably to refer to sentence reductions based on MCL 800.33.” People v Fleming, 428 Mich 408, 422 n 16 (1987). Under MCL 51.282(2), prisoners are entitled to good-time credit if their record shows that there are no violations of the rules and regulations.

“[A] sentencing court may not revoke good-time credit that a defendant already has earned while serving a jail sentence as a condition of probation.” People v Resler, 210 Mich App 24, 28 (1995). In Resler, 210 Mich App at 25, the defendant was originally sentenced to five years’ probation with the first year in jail, and was awarded sixty days of good-time credit under MCL 51.282(2). After release from jail, the defendant was found guilty of violating the terms of his probation and was sentenced to five to ten years in prison. Resler, 210 Mich App at 25. The trial court only allowed the defendant credit for the time he actually served in jail on the original charges. Id. The Michigan Court of Appeals ruled that the defendant was entitled to good-time credit against his
sentence for the probation violation, and ordered that his sentence be amended to reflect the additional credit. *Id.* at 28. The Court explained:

“[W]e hold that the constitutional guarantee against multiple punishments contemplates protection for good-time credit, but that the ultimate decision of whether such protection applies—that is, whether the good-time credit may be revoked—lies in the discretion of the Legislature. Absent legislative authority, a sentencing court may not revoke good-time credit that a defendant already has earned while serving a jail sentence as a condition of probation.” *Resler*, 210 Mich App at 28.

Good-time credit earned during a sentence that is later declared invalid does not transfer to the sentence imposed after the first sentence was declared invalid, where the defendant was not legally entitled to the good-time credit for the first sentence. *People v Tyrpin*, 268 Mich App 368, 369, 373-374 (2005) (holding that “the trial court correctly determined that [the] defendant [could not] benefit from a sentence credit that would not exist but for an error of law in [the] defendant’s original sentencing”).

“[A]lthough there is no constitutional right to good-time credit, once a good-time credit provision is adopted and a prisoner earns that credit, the deprivation of good-time credit constitutes a substantial sanction, and a prisoner may claim that a deprivation of good-time credit is a denial of a protected liberty interest without due process of law.” *People v Cannon (Terrence)*, 206 Mich App 653, 656 (1994). Accordingly, a trial court cannot deny a defendant the good-time credit opportunities provided in *MCL 51.282(2)*. *Cannon (Terrence)*, 206 Mich App at 657. That is, in a defendant’s probation order, a court cannot impose a specific term of imprisonment and indicate the date on which the defendant is to be released. *Id.*

*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 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 receiving disciplinary credits on their term-of-years sentences, and thus, it is a retroactive statute that increases their potential sentences or punishments”). See also *Hill v Snyder*, ___ F3d ___, ___ (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).
**Sentence reductions due to overcrowding.** Where a defendant is sentenced to probation, the terms of which include incarceration in the county jail, and the defendant is later sentenced to prison for a probation violation, he or she is not entitled to credit for any time by which the original incarceration in the county jail was reduced due to overcrowding. *Grazhidani*, 277 Mich App at 601. The *Grazhidani* Court stated:

“Obviously the days that defendant did not serve on his sentence because of his early release from the county jail under the jail overcrowding act are not time spent ‘in jail.’ Because we read *Whiteside*[13] 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.

### 8.5 Sentence Bargains and Plea Agreements

“Plea agreement” and “sentence bargain” refer generally to an agreement reached by the prosecutor, the defendant’s attorney, and the defendant about the offense(s) to which the defendant has agreed to plead guilty or nolo contendere in exchange for an agreed-on sentence or sentence recommendation. Plea agreements and sentence bargains may involve the prosecutor’s approval of the defendant’s plea to a lesser offense than might be charged under the circumstances and the defendant’s decision to accept a specific sentence or recommendation in exchange for his or her plea. The terms used to describe the negotiation process and eventual outcome are frequently used interchangeably; for example, *sentence bargain*, *plea bargain*, and *sentence agreement* may all be used to refer to a defendant’s plea in exchange for a specific sentence.

Where a defendant’s sentence will result from a plea-based conviction,[14] the trial court must determine whether the parties have made a plea agreement, “which may include an agreement to a sentence to a specific term or within a specific range[.]” MCR 6.302(C)(1). Any agreement “must be stated on the record or reduced to writing and signed by the parties[,]”[15] and “[t]he written agreement shall be made part of the case file.” *Id.*

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14 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.
15 “The parties may memorialize their agreement on a form substantially approved by the SCAO.” MCR 6.302(C)(1). See SCAO Form CC 414, “Plea Agreement.”
“If there is a plea agreement, the court must ask the prosecutor or the defendant’s lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.” MCR 6.302(C)(2).

Before a trial court may sentence a defendant whose guilty or no contest plea is part of a plea agreement, the court must comply with the procedure in MCR 6.302(C)(3):

“(3) If there is a plea agreement and its terms provide for the defendant’s plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to a specified term or within a specified range as agreed to; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, the defendant will be allowed to withdraw from the plea agreement. A judge’s decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant’s plea.”

If there is a plea agreement, the court must ask the defendant “whether anyone has promised anything beyond what is in the plea agreement”; “whether anyone has threatened the defendant”; and “whether it is the defendant’s own choice to plead guilty.” MCR 6.302(C)(4).

**Negotiating a plea agreement or sentence bargain.** A prosecutor and a defendant may reach a sentence agreement whereby the defendant agrees to plead guilty in exchange for a sentence to a specified term or within a specified range. The extent to which a trial court may involve itself in sentence negotiations has been set out by the Michigan Supreme Court in *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part by ADM File No. 2011-19,16 and *People v Cobbs*, 443 Mich 276 (1993).
In *Killebrew*, 416 Mich at 205, the Supreme Court held that a trial court may not initiate or participate in discussions “aimed at reaching a plea agreement.” In *Cobbs*, 443 Mich at 283, the Supreme Court modified *Killebrew* to allow the trial court, at the request of a party, to state on the record the length of the sentence that appears to be appropriate, based on the information available to the trial court at the time. The *Cobbs* Court made clear that the trial court’s preliminary evaluation did not bind the court’s ultimate sentencing discretion, “since additional facts may emerge during later proceedings, in the presentence report, through the allocation afforded to the prosecutor and the victim, or from other sources.” *Cobbs*, 443 Mich at 283.

**Sentence recommendation under Killebrew.** *Killebrew* limits a trial court’s involvement to the approval or disapproval of a nonbinding prosecutorial sentence recommendation linked to a defendant’s guilty plea. *Killebrew*, 416 Mich at 209. Under *Killebrew*, 416 Mich at 209, a trial court may accept a defendant’s guilty plea without being bound by any agreement between the defendant and the prosecution. Where a trial court decides not to adhere to the sentence recommendation accompanying the defendant’s plea agreement, the court must explain to the defendant that the recommendation was not accepted and state the sentence that the court finds is the appropriate disposition. *Id.* at 209-210. However, “[a] judge’s decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant’s plea.” MCR 6.302(C)(3).17

- **Characteristics of negotiations under Killebrew**
  - a defendant’s plea is linked to a nonbinding prosecutorial sentence recommendation.
  - the trial court may accept or reject the agreement as it exists.
  - if the court rejects the agreement, the court must indicate what sentence it believes is appropriate under the circumstances.

**Cobbs plea.** *Cobbs* authorizes the trial court, at the request of a party, to state on the record the sentence that appears appropriate for the charged

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17 See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013). But see *People v Foster (Michael)*, 319 Mich App 365, 373 (2017) (holding that where the trial court imposed a $500 fine that “was not a part of [the prosecutorial] sentence recommendation” contained in the parties’ sentencing agreement and was “not contemplated by the parties in relation to the . . . charge for which it was assessed, . . . the trial court plainly erred by not giving [the] defendant an opportunity to affirm or withdraw his plea after the fine was imposed”).
offense, on the basis of information available to the court at the time. *Cobbs*, 443 Mich at 283. Even when a defendant pleads guilty or nolo contendere to the charged offense in reliance on the court’s preliminary determination regarding the defendant’s likely sentence, the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id.* at 283. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id.*

**Characteristics of negotiations under *Cobbs***

- the defendant or the prosecution asks the trial court what sentence appears appropriate under the circumstances if a guilty plea was offered.
- the court’s preliminary evaluation is based on the information then available and the court retains discretion over the actual sentence imposed if additional information warrants a longer sentence.
- if the court decides to impose a sentence longer than the sentence first indicated by the court, the defendant must be given an opportunity to withdraw his or her plea.
- if the court’s modified sentence is unacceptable to the prosecution, the prosecutor must be permitted to withdraw from the plea agreement.

**Distinction between *Killebrew* and *Cobbs***. In *People v Williams (Avana)*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court’s role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams (Avana)* Court, *Cobbs* modified *Killebrew* “to allow somewhat greater participation by the judge.” *Williams (Avana)*, 464 Mich at 177. However, the *Williams (Avana)* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams (Avana)*, 464 Mich at 178-179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court’s impartiality in sentence negotiations by minimizing the potential coercive effect of a court’s participation in the process:

“In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge’s announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand,[18] is the first
involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge’s own initiative after reviewing the presentence report.

By contrast, the degree of the judge’s participation in a Cobbs plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.

Thus, we hold that in informing a defendant that the sentence will not be in accordance with the Cobbs agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand.” Williams (Avana), 464 Mich at 179-180.

• The impact of Williams (Avana) on negotiations

• the Williams (Avana) decision is implicated only when there exists a Cobbs agreement (the defendant has agreed to plead guilty based on the trial court’s preliminary sentence evaluation), and the trial court determines it will not adhere to the Cobbs agreement.

• the defendant must be given an opportunity to withdraw his or her guilty plea after the court informs the defendant it will not abide by the sentence first announced.

• unlike the requirement in Killebrew that arises when the court refuses to follow a prosecutorial sentence

18 However, see ADM File No. 2011-19, effective January 1, 2014, amending MCR 6.302(C)(3) and MCR 6.310(B)(2) to eliminate a defendant’s ability to withdraw a plea if the court rejects a plea agreement involving a prosecutorial sentence recommendation (effectively superseding Killebrew, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation). See 495 Mich lxxix (2013). But see People v Foster (Michael), 319 Mich App 365, 373 (2017) (holding that where the trial court imposed a $500 fine that “was not a part of [the prosecutorial] sentence recommendation” contained in the parties’ sentencing agreement and was “not contemplated by the parties in relation to the . . . charge for which it was assessed, . . . the trial court plainly erred by not giving [the] defendant an opportunity to affirm or withdraw his plea after the fine was imposed”).
recommendation, when the trial court decides against imposing the sentence first articulated by the court itself (the Cobbs agreement), it may not inform the defendant of the sentence the court has since decided is appropriate (because to do so would involve the court in the sentence negotiation process to an extent carefully avoided in Killebrew and Cobbs).

**Failure of a plea agreement.** Fundamental fairness requires that promises made during plea negotiations should be respected, provided that the person making the promise was authorized to do so and the defendant relied on the promise to his or her detriment. *People v Ryan (Thomas)*, 451 Mich 30, 41 (1996). A defendant is not constitutionally entitled to specific performance of a properly authorized plea agreement, but due process requires that some remedy be employed to cure a defendant’s detrimental reliance on the agreement. *People v Wyngaard*, 462 Mich 659, 666-667 (2000). Such remedies include specific performance of the agreement or withdrawal of the plea. *In re Guilty Plea Cases*, 395 Mich 96, 127 (1975).

**Violation of precondition.** Where a “defendant violate[s] a precondition of [a] plea agreement,” he or she “is not entitled to the benefit of [the] bargain,” and “the trial court [is neither] bound by the preliminary sentencing evaluation[ nor] . . . required to afford defendant an opportunity to withdraw [the] plea.” *People v White (Rickey)*, 307 Mich App 425, 434-435 (2014) (holding that where the defendant failed to make a restitution payment that “was a specific precondition of being sentenced in accordance with [his] Cobbs evaluation,” he was not entitled to withdraw his plea after sentencing on the ground that the sentence imposed exceeded the preliminary evaluation) (citation omitted).

**Plea agreements involving probation.** A trial court may impose additional conditions on a defendant’s sentence of probation, even when the sentence is part of the defendant’s plea agreement and did not contain the additional conditions. 19 *People v Johnson (Larry)*, 210 Mich App 630, 632-635 (1995). In *Johnson (Larry)*, 210 Mich App at 632, the defendant moved to withdraw his plea or to force specific performance of the sentence agreement on which he relied when he offered his nolo contendere plea. However, the Michigan Court of Appeals held that “[b]ecause probation is a matter of grace in lieu of a prison sentence aimed, in part, at rehabilitation and is at all times alterable and amendable, we believe that a sentencing court may place conditions on a defendant’s probation regardless of whether it was covered in the plea agreement.” *Id.* at 634-635.

19 See for more information on probation.
Withdrawal of plea before acceptance. A defendant has a right to withdraw any plea until the court accepts the plea on the record. MCR 6.310(A).

Withdrawal of plea before sentencing. “There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court.” People v Montrose, 201 Mich App 378, 380 (1993).

MCR 6.310(B) sets out the requirements for withdrawing a plea after the court accepts it, but before the court imposes sentence. Specifically, MCR 6.310(B) states:

“Except as provided in [MCR 6.310(B)(3)], after acceptance but before sentence,

(1) a plea may be withdrawn on the defendant’s motion or with the defendant’s consent, only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant’s motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by [MCR 6.310(C)].

(2) the defendant is entitled to withdraw the plea if

(a) the plea involves an agreement for a sentence for a specified term or within a specified range, and the court states that it is unable to follow the agreement; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(3) Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing,
violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing.”

Failure to “‘provide the defendant the opportunity to affirm or withdraw [a] plea[]’” as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. People v Franklin (Joseph), 491 Mich 916, 916 (2012). In Franklin (Joseph), 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court’s failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, “given [the] holding in People v Grove, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant’s objection[;]” however, the Franklin (Joseph) Court clarified that “Grove has been superseded by MCR 6.310(B)[,]” and cautioned that “in the future, such an error will be ‘plain[.]{’}” The Court further noted that, even assuming that plain and prejudicial error had occurred in Franklin, 491 Mich 916, “[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial,” the Court “[w]as exercising its discretion in favor of not reversing the defendant’s convictions.” Franklin (Joseph), 491 Mich at 916, citing People v Carines, 460 Mich 750, 763 (1999).

The United States Court of Appeals for the Sixth Circuit has developed the following multi-factor balancing test to guide district courts in deciding whether to grant a motion to withdraw a guilty plea:20

“(1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his [or her] innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant’s nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.” United States v Haygood, 549 F3d 1049, 1052 (CA 6, 2008).

“The relevance of each factor will vary according to the ‘circumstances surrounding the original entrance of the plea as well as the motion to withdraw.’” Haygood, 549 F3d at 1052, quoting United States v Triplett, 828 F2d 1195, 1197 (CA 6, 1987). A defendant should not generally be allowed to withdraw his or her plea if he or she made a strategic choice to plead guilty, and later determines that it was a poor decision. Haygood,

20 Rule 11 of the Federal Rules of Criminal Procedure concerns entry of a defendant’s a guilty plea.
549 F3d at 1052-1053 (defendant’s motion to withdraw his plea was properly denied because defendant did not move to withdraw his plea until more than four months after he entered it, and he used the motion to withdraw as an inappropriate way to challenge the validity of the search warrant that led to his arrest).

In the absence of a procedural error in receiving a plea, a defendant must establish a fair and just reason for withdrawing it. People v Harris (Lamar), 224 Mich App 130, 131 (1997). Examples of fair and just reasons for withdrawal include: when the plea resulted from fraud, duress, or coercion, People v Gomer, 206 Mich App 55, 58 (1994); when the plea involved erroneous legal advice coupled with actual prejudice to legal rights, People v Jackson (Andrew), 417 Mich App 243, 246 (1983); or “if the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement,” Harris (Lamar), 224 Mich App at 132. If the facts of the case indicate that the plea was voluntary, the plea will be upheld regardless whether the defendant received consideration in return. Id. at 132-133. “[R]equests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant’s true motivation for moving to withdraw is a concern regarding sentencing.” People v Haynes (Kermit), 221 Mich App 551, 559 (1997).

“MCR 6.310(B)(1) [does] not permit [a] circuit court to vacate [a] defendant’s plea” where “the defendant [has] neither moved for [withdrawal] nor consented to it.” People v Martinez (Gilbert), 307 Mich App 641, 647-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor’s agreement not to bring any additional charges regarding contact with the complainant “‘grow[ing] out of [the] same investigation that occurred during [a certain period of years]’” the “fact that the complainant, after [the] defendant’s plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[ ]” permitting the court to vacate the defendant’s plea under either MCR 6.310 or contract principles). A trial court may not sua sponte vacate an accepted plea without the defendant’s consent, even if the defendant indicates that he or she is innocent. People v Strong (Duel), 213 Mich App 107, 112 (1995) (after the trial court sua sponte vacated the defendant’s plea without the defendant’s consent, he was found guilty following a jury trial; the Michigan Court of Appeals reversed the defendant’s convictions and remanded the case to permit the defendant to plead guilty in exchange for the terms of the parties’ previous plea agreement).

Doubt about the veracity of a defendant’s nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. People v Patmore, 264 Mich App 139, 150 (2004). When recanted testimony provides a substantial part of the
factual basis underlying a defendant’s nolo contendere plea, the
defendant must prove by a preponderance of credible evidence that the
original testimony was untruthful, in order to constitute a fair and just
reason for allowing the defendant to withdraw his or her plea. Id. at 152.
If the defendant meets the burden, the trial court must then determine
whether other evidence is sufficient to support the factual basis of the
defendant’s plea. Id. If the defendant fails to meet the burden, or if other
evidence is sufficient to support the plea, then the defendant has failed to
present a fair and just reason to warrant withdrawal of his or her plea. Id.

If the defendant establishes a fair and just reason for withdrawal of the
plea, the burden then shifts to the prosecution to establish that
substantial prejudice would result from allowing the defendant to
withdraw the plea. People v Jackson (Dwayne), 203 Mich App 607, 611-612
(1994). To constitute substantial prejudice, the prosecution must
demonstrate that its ability to prosecute is impeded by the delay. People v
Spencer, 192 Mich App 146, 151-152 (1991) (substantial prejudice not
established even though trial was set to begin at the time the pleas were
entered, and some witnesses were from out of state). In deciding whether
a defendant may withdraw a plea, the trial court should bear in mind
what is in the interests of justice. Id. at 151-152 (“The fact that [the]
defendant’s pleas may have been induced by inaccurate legal advice
combined with his refusal or inability to personally recount a sufficient
basis to substantiate the[] charges made it incumbent upon the trial court
to allow [the] defendant to withdraw his pleas.”).

Withdrawal of plea after sentencing. MCR 6.310(C) governs withdrawal
of a plea after sentencing:

“(1) The defendant may file a motion to withdraw the plea
within 6 months after sentence or within the time provided
by [MCR 6.310(C)(2)].

(2) If 6 months have elapsed since sentencing, the defendant
may file a motion to withdraw the plea if:

(a) the defendant has filed a request for the appointment
of counsel pursuant to MCR 6.425(G)(1) within the 6-
month period,

(b) the defendant or defendant’s lawyer, if one is
appointed, has ordered the appropriate transcripts
within 28 days of service of the order granting or
denying the request for counsel or substitute counsel,
unless the transcript has already been filed or has been
ordered by the court under MCR 6.425(G), and

(c) the motion to withdraw the plea is filed in
accordance with the provisions of [MCR 6.310(C)]
within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

(3) Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500.

(4) If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

(5) If a motion to withdraw plea is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a plea was accepted on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to withdraw a plea in a Michigan court.”

“[MCR 6.310(C)(4)] permits a defendant to withdraw a guilty plea after sentencing only if the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside.” People v Sanford (Davontae), 495 Mich 989, 989 (2014).21 “A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.” Id., quoting People v Brown (Shawn), 492 Mich 684, 693 (2012).

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21Sanford refers to MCR 6.310(C); however, MCR 6.310 was amended after Sanford was decided, see ADM File No. 2016-07, and the text of MCR 6.310(C) pertinent to the holding in Sanford was re-numbered as MCR 6.310(C)(4).
“[In general], criminal defendants may not withdraw a guilty plea on the ground that they were unaware of the future collateral or incidental effects of the initial valid plea.” People v Haynes (Joseph), 256 Mich App 341, 349 (2003). However, defense counsel is constitutionally required to inform his or her client that a plea “may carry a risk of adverse immigration consequences[,]” e.g., deportation. Padilla v Kentucky, 559 US 356, 369 (2010).22

“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)(4) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. Brown (Shawn), 492 Mich at 687. In Brown (Shawn), 492 Mich at 687-688, the defendant pleaded guilty, as a second-offense habitual offender under MCL 769.10, to second-degree home invasion. The defendant was advised at his plea hearing that the maximum sentence for second-degree home invasion was 15 years in prison; however, the defendant was subsequently sentenced, as an habitual offender, to a maximum prison term of more than 22 years. Brown (Shawn), 492 Mich at 688. The Michigan Supreme Court concluded that MCR 6.302(B)(2) requires that “before pleading guilty, a defendant must be notified of the maximum possible prison sentence with habitual-offender enhancement, because the enhanced maximum becomes the ‘maximum possible prison sentence’ for the principal offense.” Brown (Shawn), 492 Mich at 693-694, overruling People v Boatman, 273 Mich App 405, 406-410 (2006). The Brown (Shawn) Court additionally held that “[MCR 6.310(C)(4)] . . . provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea.” Brown (Shawn), 492 Mich at 698.23

**Vacation of plea on prosecutor’s motion.** A plea may be vacated on the prosecutor’s motion if the defendant has failed to comply with the terms of his or her plea agreement. MCR 6.310(E). However, where a “prosecutor’s motion [to vacate a plea is] not based on [the] defendant failing to comply with the terms of the plea agreement[ and] the record

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22 “[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]” Abela v Gen Motors Corp, 469 Mich 603, 606 (2004). However, because Padilla, 559 US 356, “announced a ‘new rule,’” it does not apply retroactively on collateral review. Chaidez v United States, 568 US 342, 358 (2013). See also People v Gomez, 295 Mich App 411, 413-414, 418-419 (2012) (holding that “the new rule of criminal procedure announced in Padilla[, 559 US 356,] has prospective application only” under both federal and state rules of retroactivity, and that the defendant, who entered a no-contest plea to a drug-possession charge and was subsequently notified that his conviction rendered him subject to deportation, was not entitled to relief from judgment based on Padilla, 559 US 356, which was decided several years after he completed his sentence).

23 Brown refers to MCR 6.310(C); however, MCR 6.310 was amended after Brown was decided, see ADM File No. 2016-07, and the text of MCR 6.310(C) pertinent to the holding in Brown was re-numbered as MCR 6.310(C)(4).
shows that [the] defendant fully complied with his [or her] part of the plea bargain[,]” MCR 6.310(E) “[does not] permit[ ] the trial court to vacate [the] plea on its own motion or that of the prosecutor[,]” Martinez (Gilbert), 307 Mich App at 647-654 (holding that where the defendant entered a guilty plea in exchange for the prosecutor’s agreement not to bring any additional charges regarding contact with the complainant “‘grow[ing] out of [the] same investigation that occurred during [a certain period of years],’” the “fact that the complainant, after [the] defendant’s plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]” permitting the court to vacate the defendant’s plea under either MCR 6.310 or contract principles).

**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 [the] defendant to the low end of the appropriate guidelines range.” People v Smith (Brandon), 319 Mich App 1, 5 (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 “[the] defendant entered his plea with the understanding that he would receive a sentence at the low end of the correct guidelines range[,] to sentence [him] within a 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 of the plea.” 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”).

Where the prosecution agreed to recommend a sentence within a certain minimum-sentence range, but the defendant did not agree to a specific sentence range, “the defendant did not bind himself to a particular guidelines range as part of his plea agreement and did not waive his challenges to the offense variable scoring.” People v Osborne (Richard), 494 Mich 861, 861 (2013).

**Plea agreement resulting in departure sentence.** “[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). Similarly, 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).
However, “[t]he decision in [Cobbs, 443 Mich 276] 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 (Eddie), 501 Mich 966, 966 (2018) (quotation marks omitted).

Right to rescind sentence agreement. “By submitting a sentence agreement to the trial court, the prosecutor and the defendant enter[] into a contractual bargain”; “[b]ecause the defendant and the prosecutor are equally entitled to benefit from the agreement, when the defendant’s breach prevents the prosecutor from reaping the benefit of the contractual bargain, the prosecutor has a right to rescind the agreement.” People v Anderson (Josephus), ___ Mich App ___, ___ (2019) (the prosecution was entitled to rescind the sentence agreement where the defendant admitted to perjuring himself in violation of the agreement to provide truthful testimony in exchange for a lighter sentence).

8.6 Lifetime Electronic Monitoring

A. Mandatory Lifetime Electronic Monitoring for Certain CSC Offenses

MCL 750.520n(1) provides:

“A person convicted under [MCL 750.520b (first-degree criminal sexual conduct [CSC-I])] or [MCL 750.520c (second-degree criminal sexual conduct [CSC-II])] for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under . . . MCL 791.285.[27]”

“A person convicted under [MCL 750.520b], regardless of the ages [of the parties] involved, is to be sentenced to lifetime electronic monitoring, and a person convicted under [MCL 750.520c] is to be sentenced to lifetime monitoring only if the defendant was 17 or older at the time of the crime and the victim was less than 13.” People v Johnson (Todd), 298 Mich App 128, 136 (2012) (“[t]he defendant, having been convicted of first-degree criminal sexual conduct, was

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24 The defendant was convicted following a jury trial and entered into the sentence agreement with the prosecution while his appeal was pending. Anderson, ___ Mich App at ___.
properly ordered to submit to lifetime electronic monitoring even though [the victim] was not less than 13 years of age[)]. 28

1. 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), aff’g in part and rev’g in part People v Comer (Comer I), 312 Mich App 538 (2015). 29

Under MCL 750.520n(1), lifetime electronic monitoring is “part of the sentence itself for CSC-I[,]” and a “sentence [that does] not include electronic monitoring[. . . is] properly considered invalid[.]” Comer I, 312 Mich App at 544, citing People v Cole (David), 491 Mich 325, 327 (2012); see Comer II, 500 Mich at 292 (agreeing with the Comer I panel that “[b]ecause [the] defendant’s judgment of sentence did not include this statutorily mandated punishment, . . . his sentence was invalid[.]”).

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25 MCL 750.520b(2) provides:

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

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

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

(c) For a violation that is committed by an individual 18 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or [MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or [MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g] committed against an individual less than 13 years of age.

(d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.520n].”
2. **CSC-II Convictions**

In contrast to convictions of CSC-I under MCL 750.520b, "[u]nder [MCL 750.520c(2)(b)], lifetime electronic monitoring is only mandated for CSC-II convictions when the offender was 17 years of age or older and the victim was less than 13 years of age." *Comer II*, 500 Mich at 291-292 (concluding that, because "[n]o 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 that "the age limitation [therefore] only applies to convictions for CSC-II"); see also *Johnson (Todd)*, 298 Mich App at 136.

3. **Paroled Defendants**

An offender who is convicted of CSC-I under MCL 750.520b or an offender age 17 or older who is convicted of CSC-II against a victim less than 13 years old remains subject to mandatory lifetime electronic monitoring pursuant to MCL 750.520n even if he or she is granted parole for life under MCL 791.242(3). MCL 750.520b(2)(d); MCL 750.520c(2)(b); MCL 750.520n(1).

**Note:** "[L]ifetime electronic monitoring applies only to persons who have been released on parole, from prison, or both[.]") *People v Kern*, 288 Mich App 513, 519 (2010) (the defendant, who was sentenced to five years of probation, with 365 days to be served in jail, was not subject to lifetime electronic monitoring). See MCL 791.285(1); see

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26 **MCL 750.520c(2)** provides:

"Criminal sexual conduct in the second degree is a felony punishable as follows:

(a) By imprisonment for not more than 15 years.

(b) In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.520n] if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age."

27 Pursuant to **MCL 791.285(3)**, “electronic monitoring’ means a device by which, through global positioning system satellite or other means, an individual’s movement and location are tracked and recorded."

28 Before accepting a plea of guilty or nolo contendere, the trial court must advise the defendant of, and determine that he or she understands, “any . . . requirement for mandatory lifetime electronic monitoring under MCL 750.520b or [MCL 750.520c[,]” MCR 6.302(B)(2). Advising the defendant of a requirement for mandatory lifetime electronic monitoring is required because “mandatory lifetime electronic monitoring is part of the sentence itself.” *People v Cole (David)*, 491 Mich 325, 327 (2012). “Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring.” *Id.* at 337.
also Comer II, 500 Mich at 290 n 28 (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)]”).

Where an offender is not already subject to lifetime electronic monitoring pursuant to MCL 750.520n, the Parole Board may require electronic monitoring when granting parole to an offender convicted of violating or conspiring to violate MCL 750.520b (CSC-I) or MCL 750.520c (CSC-II). MCL 791.236(15). When an offender is subject to electronic monitoring under such circumstances, the monitoring is limited to the duration of the offender’s parole. MCL 791.236(15)(a).

B. Constitutional Concerns

Cruel or Unusual Punishment. “[W]hen employing an as-applied standard under the state Constitution, lifetime electronic monitoring is not cruel or unusual punishment[]” for a conviction of CSC-II committed by a defendant who is 17 years old or older against a victim under age 13, where “evidence of [the defendant’s] improper sexual acts . . . suggests that lifetime monitoring would help to protect potential victims from [the] defendant, who in turn would likely be deterred from engaging in such acts if he [or she] were closely monitored.” People v Hallak, 310 Mich App 555, 559-560, 576-577 (2015), rev’d in part on other grounds 499 Mich 879 (2016)30 (rejecting, “[f]or these same reasons,” the defendant’s “facial challenge under the state Constitution[]” and his claim of cruel and unusual punishment under the federal constitution).

Double Jeopardy. “Because the Legislature intended that both [a] defendant’s prison sentence and the requirement of lifetime monitoring be sanctions for [CSC-II committed by a defendant who is 17 years of age or older against a victim less than 13 years of age], there [is] no double jeopardy violation.” Hallak, 310 Mich App at 582-583.

29 The Comer II Court noted that “[i]n [People v Brantley, 296 Mich App 546, 559 (2012)], the panel erroneously stated that ‘any defendant convicted of CSC-I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring.’” Comer II, 500 Mich at 289-290 n 28. “Because [MCL 750.520b(2)(d)] omits any reference to [MCL 750.520b(2)(c)], 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)].” Comer II, 500 Mich at 290 n 28, citing Johnson (Todd), 298 Mich App at 135-136.

30For more information on the precedential value of an opinion with negative subsequent history, see our note.
**Fourth Amendment.** “[T]he placement of an electronic monitoring device to monitor [a] defendant’s movement constitutes a search for purposes of the Fourth Amendment.” *Hallak*, 310 Mich App at 579, citing *Grady v North Carolina*, 575 US __, ___ (2015). However, “lifetime electronic monitoring for a defendant 17 years or older convicted of CSC-II involving a minor under 13 is not unreasonable[]” because “on balance the strong public interest in the benefit of monitoring those convicted of CSC-II against a child under the age of 13 outweighs any minimal impact on [the] defendant’s reduced privacy interest.” *Hallak*, 310 Mich App at 579, 581.
Chapter 9: Fines, Costs, Assessments, and Restitution

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9.1 Scope Note and Introduction

MCL 769.34(6) states in part that “[a]s part of the sentence, the court may . . . order the defendant to pay any combination of a fine, costs, or applicable assessments.”

MCL 769.1k 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 769.1 at the time the defendant is sentenced, at the time the defendant’s sentence is delayed, or at the time entry of judgment is statutorily deferred. MCL 769.1k(1)(a). Under MCL 769.1k(1)(b) and MCL 769.1k(2), the court may also impose:

- “[a]ny fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty,” MCL 769.1k(1)(b)(i);
- “[a]ny cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty,” MCL 769.1k(1)(b)(ii);
- “any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case,” including, but not limited to, the following:

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

2 See Section 9.5 for discussion of minimum state costs.

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, 309 Mich App 345, 357 (2015). See Section 9.4(8) for additional discussion of 2014 PA 352 and the imposition of “court costs.”
• “[s]alaries and benefits for relevant court personnel,”
• “[g]oods and services necessary for the operation of the court,” and
• “[n]ecessary expenses for the operation and maintenance of court buildings and facilities,” MCL 769.1k(1)(b)(iii)4;

• the expenses of providing the defendant with legal assistance, MCL 769.1k(1)(b)(iv);

• any assessment authorized by law, MCL 769.1k(1)(b)(v);

• reimbursement under MCL 769.1f, MCL 769.1k(1)(b)(vi); and

• any additional costs incurred to compel the defendant’s appearance, MCL 769.1k(2).

The authorized fines, costs, and assessments set out in MCL 769.1k(1) and MCL 769.1k(2) “apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.” MCL 769.1k(3); see also People v Cunningham (Cunningham II), 496 Mich 145, 152 (2014).

“Beginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1)], including information about any cost imposed under [MCL 769.1k(1)(b)(iii)]. However, the information is not required to include the calculation of the costs involved in a particular case.” MCL 769.1k(7).5

“The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under [MCL 769.1k] by wage assignment.” MCL 769.1k(4). “The court may provide for the amounts imposed under [MCL

4 See 2014 PA 352, effective October 17, 2014 (adding new MCL 769.1k(1)(b)(iii)). MCL 769.1k(1)(b)(iii) is applicable “[u]ntil October 17, 2020[,]” See also 2014 PA 352, enacting section 1 (“[t]his amendatory act applies to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[ ] before June 18, 2014, and after [October 17, 2014].” 2014 PA 352 also added MCL 769.1k(8), which requires courts to annually report to the State Court Administrative Office (SCAO) certain information regarding the imposition and collection of costs under MCL 769.1k(1)(b)(iii).

5 MCL 769.1k(7) was added by 2014 PA 352, effective October 17, 2014.
MCL 769.1k(5). “Except as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine, cost, fee, or assessment that the same defendant owes in any other case.” MCL 769.1k(6).

MCL 769.3(1) states that the court may impose a conditional sentence and order a person convicted of an offense punishable by a fine or imprisonment or both, to pay a fine, with or without the costs of prosecution, within a limited time stated in the sentence. If the person defaults on the payment, the court may sentence him or her as provided by law. Id.

Ordinarily, unless a court permits and specifies a different due date, all fines, costs, penalties, and other financial obligations are due at the time the court orders them. MCL 600.4803(1); MCR 1.110. An individual who fails to satisfy in full a penalty, fee, or costs imposed by the court within 56 days after the amount was due is subject to a late penalty equal to 20 percent of the amount that remains unpaid. MCL 600.4803(1). The court must inform an individual that a late penalty will be assessed if payment is not made within 56 days of the order. Id.

If the court permits delayed payment of the amount due or permits the individual to pay the amount in installments, the court must inform the individual of the date on which, or time schedule under which, the total or partial amount of the fees, costs, penalties, and other financial obligations is due. MCL 600.4803(1). An individual’s late penalty may be waived if requested by the person subject to the penalty. Id.

Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See also MCL 769.1k(10), which provides that “[a] defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so.”

The following sections address the fines, costs, assessments, and restitution obligations that may, or must, be ordered under various statutory provisions. Additionally, the Appendix in this Benchbook

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6 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).

7 See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
contains three tables setting out statutory authority for imposing costs. See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply. For specific cost provisions applicable to individual criminal offenses, see the Table of Felony Costs and Table of Misdemeanor Costs.

For information on options to assist the court with collections issues that may arise, see the State Court Administrative Office’s Trial Court Collections Best Practices Manual.

9.2 Imprisonment for Failure to Pay Court-Ordered Financial Obligations: Determination of Ability to Pay

MCL 769.1k(10) provides that “[a] defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so.” Additionally, MCR 6.610(F)(2) provides that “[t]he court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3).” MCR 6.425(E)(3) provides as follows:

“(3) Incarceration for Nonpayment.

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

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

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

(i) Defendant’s employment status and history.

(ii) Defendant’s employability and earning ability.
(iii) The willfulness of the defendant’s failure to pay.

(iv) Defendant’s financial resources.

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

(vi) Any other special circumstances that may have bearing on the defendant’s ability to pay.”

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

Additionally, the court may not detain or incarcerate a juvenile or parent for the nonpayment of court-ordered financial obligations in probation violation or contempt proceedings involving juveniles without first determining “that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.” MCR 3.928(D); MCR 3.944(F); MCR 3.956(C); MCR 6.933(E).

An application for remission of a penalty, including a bond forfeiture, “may not be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty, unless waived by the court.” MCR 3.605(D) (emphasis added).

See the 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 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.

### 9.3 Fines

At the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose “[a]ny fine authorized by the statute for a violation of which the defendant entered a plea or guilty or nolo contendere or the court determined that the defendant was guilty.” MCL 769.1k(1)(b)(i). 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 ___.

Specific authority to impose a fine, and the maximum amount of that fine, is often included in the language of the applicable penal statute. For example, if an offender is convicted of violating MCL 750.365, larceny from a car or from a person detained or injured because of an accident involving a railroad locomotive, tender, or car, the offender may be assessed a fine of not more than $10,000. If a statute authorizes the imposition of a fine but is silent with regard to the amount, the maximum fine permitted for a felony conviction is $5,000. MCL 750.503. Excessive fines are prohibited by the Michigan Constitution. Const 1963, art 1, § 16. MCL 769.1k(1)(b)(i) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted. See People v Johnson (Jordan), 315 Mich App 163, 198-199 (2016); People v Johnson (Marion), 314 Mich App 422, 423 (2016) (citations omitted).

Whenever an offense is punishable by a fine and imprisonment, the court has discretion to impose a sentence comprised of any combination of those penalties: a fine and no imprisonment, no fine and imprisonment, or both a fine and imprisonment. MCL 769.5. The court may require a defendant to pay by wage assignment any fine imposed under MCL 769.1k, and the court may provide that any fine imposed under MCL 769.1k be collected at any time. MCL 769.1k(4); MCL 769.1k(5).

As a condition of probation. When a fine is imposed on a defendant sentenced to probation, payment of the fine may be made a condition of the defendant’s probation. MCL 771.3(2)(b). A sentencing court may order the probationer to pay the fine immediately or the court may permit the probationer to make payment within the time period of his or her probation. Id.

The fines authorized by MCL 769.1k(1)(b)(i) apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

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8 Former MCL 769.1k(1)(b)(i) provided simply for the imposition of “[a]ny fine.” However, in People v Cunningham (Cunningham II), 496 Mich 145, 158 n 10 (2014) (reversing 301 Mich App 218 (2013)), the Michigan Supreme Court noted that “interpreting MCL 769.1k(1)(b)(i) as providing courts with the independent authority to impose ‘any fine’ would . . . raise constitutional concerns, as ‘the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature.’” (Citation omitted.) Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k(1)(b)(i) to require that any fine imposed be “authorized by the [applicable penal statute].”

9 In addition to any term of imprisonment up to the statutory maximum of 20 years as determined by proper scoring of the sentencing guidelines.
9.4 Costs

A. Generally-Applicable Authority to Impose Costs

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.”

MCL 769.34(6) addresses the sentencing guidelines and the duties of the court when sentencing, and it generally authorizes the court to order court costs (“As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments.”). However, “MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute[.]” and “does not provide courts with the independent authority to impose any fine or cost.” Cunningham II, 496 Mich at 158 n 11.

MCL 769.3 and MCL 769.1f are examples of statutes in which specific court-ordered costs are expressly authorized. MCL 769.3(1) authorizes conditional sentencing where a court may order a defendant to pay the costs of prosecution in cases where the defendant was convicted of an offense punishable by a fine or imprisonment or both. MCL 769.1f(1) authorizes a sentencing court to order a defendant “to reimburse the state or a local unit of government” for certain expenses incurred when a defendant is convicted of the offenses listed in the statute.

B. Court Costs

1. MCL 769.1k

Effective October 17, 2014, 2014 PA 352 added MCL 769.1k(1)(b)(iii) to specifically provide for the imposition of court costs. MCL 769.1k(1)(b)(iii) provides:

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10 See the Table of General Costs for a list of generally-applicable cost provisions and the categories of offenses to which they apply.

11 As amended, 2014 PA 352, effective October 17, 2014.

12 The offenses for which costs are authorized under MCL 769.1f are discussed in Section 9.4(H).

13 The amendments effectuated by 2014 PA 352 “apply[y] to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] before June 18, 2014, and after [October 17, 2014].” 2014 PA 352, enacting section 1.
“Until October 17, 2020, [the court may impose] any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:

(A) Salaries and benefits for relevant court personnel.

(B) Goods and services necessary for the operation of the court.

(C) Necessary expenses for the operation and maintenance of court buildings and facilities.”

Prior to the enactment of 2014 PA 352, MCL 769.1k(1)(b)(ii) provided simply for the imposition of “[a]ny cost[,]” and MCL 769.1k did not contain any separate authorization for the imposition of “court costs.” In People v Cunningham (Cunningham II), 496 Mich 145 (2014), the Michigan Supreme Court 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. The Cunningham II Court concluded that “[former] MCL 769.1k(1)(b)(ii) [did] not provide courts with the independent authority to impose ‘any cost[,]’ but instead ‘provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute.’” Cunningham II, 496 Mich at 147, 158 (emphasis supplied), rev’g People v Cunningham (After Remand) (Cunningham I), 301 Mich App 218 (2013), and overruling People v Sanders (Robert) (After Remand), 298 Mich App 105 (2012), and People v Sanders (Robert), 296 Mich App 710 (2012).14

As “a curative measure that addresses the authority of courts to impose costs under . . . MCL 769.1k[ ] before the issuance of . . . [Cunningham II, 496 Mich 145,]” 2014 PA 352, effective October 17, 2014, added MCL 769.1k(1)(b)(iii) to specifically provide for the imposition of court costs.15 See 2014 PA 352, enacting section 2. 2014 PA 352 also added MCL 769.1k(7), which provides:

“Beginning January 1, 2015, the court shall make available to a defendant information about any fine, cost, or assessment imposed under [MCL 769.1k(1)], including information about any cost imposed under [MCL 769.1k(1)(b)(iii)]. However, the information is not required to include the
calculation of the costs involved in a particular case.”

“MCL 769.1k(1)(b)(iii) independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense,” and “[a] trial court possesses the authority, pursuant to MCL 769.1k, as amended by 2014 PA 352, to order court costs[].” People v Konopka, 309 Mich App 345, 350, 358 (2015). “However, although the costs imposed . . . need not be separately calculated, . . . the trial court [must] . . . establish a factual basis” demonstrating that “the court costs imposed [are] ‘reasonably related to the actual costs incurred by the trial court[,]’” Konopka, 309 Mich App at 359, quoting MCL 769.1k(1)(b)(iii).16

2. MCL 771.3

“Though probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not.” People v Butler-Jackson (Butler-Jackson II), 499 Mich 963, 963 (2016) (citing Cunningham II, 496 Mich 145 (2014), and People v Juntilka, 310 Mich App 306 (2015), and vacating “that part of the Court of Appeals’[ ] judgment[, 307 Mich App 667 (2014),] addressing the propriety of court costs under MCL 771.3(5)”).17 However, see also MCL 769.1k(3) (providing that MCL 769.1k(1) and (2), which authorize the imposition of certain fines, costs, and assessments, including court costs, “apply even if the

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14 In Sanders (Robert), 296 Mich App at 715, the Court of Appeals held that “a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(i) without the necessity of separately calculating the costs involved in the particular case,” but remanded for a hearing “to establish the factual basis for the [trial court’s] use of [a] $1,000 [court costs] figure[.]” After remand, the Court of Appeals held that the trial court “establish[ed] a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(i) [was] a reasonable amount in a felony case conducted in [that court],” based on financial data demonstrating that “the average cost of handling a felony case was, conservatively, $2,237.55 a case and, potentially . . . as much as $4,846 each.” Sanders (Robert) (After Remand), 298 Mich App at 107-108. Similarly, in Cunningham (After Remand), 301 Mich App at 220, the Court of Appeals affirmed the trial court’s imposition of $1,000 in “court costs” under the general authority of MCL 769.1k(1)(b)(i), holding that “a sentencing court may consider overhead costs when determining the reasonableness of a court-costs figure.”

However, in Cunningham II, 496 Mich at 159, the Michigan Supreme Court held that a sentencing court may not “rel[y] on MCL 769.1k(1)(b)(i) as independent authority to impose . . . court costs[.]” Accordingly, the Court reversed Cunningham (After Remand), 301 Mich App 218, and overruled Sanders (Robert), 296 Mich App 710, and Sanders (Robert) (After Remand), 298 Mich App 105 (as well as any “other decisions of the Court of Appeals [that] are consistent with Sanders, and inconsistent with [Cunningham II.]” Cunningham II, 496 Mich at 147, 159, 159 n 13.

15 2014 PA 352 additionally amended MCL 769.1k(1)(b)(i) to provide for the imposition of “[a]ny cost authorized by the [applicable penal] statute[.]”
defendant is placed on probation, probation is revoked, or the defendant is discharged from probation”).

C. Costs of a Court-Appointed Attorney

“If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.” MCR 6.005(C). MCL 769.1k(1)(b)(iv) specifically permits a court to impose on a defendant “[t]he expenses of providing legal assistance to the defendant.” However, “[a] court may not impose upon [a] defendant the expenses of providing his legal assistance [under MCL 769.1k(1)(b)(iv)] until defendant is found guilty, enters a plea of guilty, or enters a plea of nolo contendere.” People v Dyer, 497 Mich 863 (2014) (noting that “if [a] defendant withdraws his plea [under MCR 6.310(A)], imposition of attorney fees is not appropriate at [that] time”).

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, 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”).

A trial court is not required to analyze a defendant’s ability to pay a fee for a court-appointed attorney before imposing the fee; it is only required to do so if the fee is actually enforced. People v Jackson (Harvey), 483 Mich 271, 275 (2009), overruling in part People v Dunbar, 264 Mich App 240 (2004). However, “[o]nce an ability-to-pay assessment is triggered, the court must consider whether the

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16 The amended version of MCL 769.1k does not violate a defendant’s due process or equal protection rights; nor does it violate the constitutional prohibition on ex post facto punishments or the principle of separation of powers. Konopka, 309 Mich App at 365, 367-70, 376. Furthermore, “although it imposes a tax, MCL 769.1k(1)(b)(iii) is not unconstitutional.” People v Cameron (Shawn), 319 Mich App 215, 218 (2017). “Although the statute does not expressly state that it imposes a tax, [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[.]” furthermole, “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 such that it does not run afoul of the separation of powers provision of” the Michigan Constitution. Cameron, 319 Mich App at 236.

17 In People v Butler-Jackson (Butler-Jackson I), 307 Mich App 667, 680-681 (2014) (opinion by Cavanagh, J.), vacated in part by Butler-Jackson II, 499 Mich at 963, the Court of Appeals held that the trial court was “authorized by MCL 771.3(2)(c) [and MCL 771.3(5)] to impose” court costs in the amount of $1,000 as a condition of probation.
defendant remains indigent and whether repayment would cause manifest hardship.” *Id.* at 275. In any event, “remittance orders of prisoner funds, under MCL 769.1l, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment because the statute is structured to only take monies from prisoners who are presumed to be nonindigent.” *Jackson (Harvey)*, 483 Mich at 275.

**As a condition of probation.** A court may order a probationer to pay the expenses incurred in providing legal assistance to him or her. See MCL 771.3(2)(c) and MCL 771.3(5)–MCL 771.3(8). A probationer who is not in willful default of his or her payment of costs under MCL 771.3(2)(c) (expenses specifically incurred to prosecute the defendant, provide him or her with legal assistance, and supervise his or her probation) may petition the court at any time for remission of the unpaid part of the total costs ordered. MCL 771.3(6)(b). The court may modify the method of repayment or remit all or a portion of the amount due if the court finds that payment in full would impose a manifest hardship on the probationer or his or her family. *Id.*

The general authority to impose the monetary penalties listed in MCL 769.1k(1)(a) and (b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). A defendant may be required to pay by wage assignment the costs of his or her legal representation imposed pursuant to MCL 769.1k(1)(b)(iv), MCL 769.1k(4), and the court may provide that those costs be collected at any time, MCL 769.1k(5).

**Reasonableness of attorney fee and county fee schedule.** The trial court erred where it limited an award of attorney fees to the maximum allowed for plea cases under the county’s fee schedule without consideration of “the reasonableness of the fee in relation to the actual services rendered[]” *In re Attorney Fees of Ujlaky*, 498 Mich 890, 890 (2015) (citation omitted). “Although the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, ipso facto, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may.” *Id.* (directing the trial court, on remand, to “either award the requested fees[] or articulate on the record its basis for concluding that such fees are not reasonable”) (citations omitted).

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18 Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
Appellate counsel and court’s contingency policy. “[T]he trial court’s policy of not paying [appointed appellate] counsel for time spent in preparing a delayed application for leave to appeal or for preparing [appellate] motions . . . when [the Court of Appeals] ultimately denies leave to appeal ‘for lack of merit in the grounds presented’ or denies relief on the motions constitute[d] an abuse of discretion.” In re Attorney Fees of Foster, 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)[; t]herefore, no attorney in the state of Michigan could agree to be a court-appointed attorney . . . under [the trial] court’s current policy because to do so would require entering into a contingency-fee arrangement in violation of the attorney’s professional responsibilities.” Foster, 317 Mich App at 377.

Following nolle prosequi. Under MCL 768.34, a defendant may not be ordered to repay the cost of appointed counsel if the prosecution enters an order of nolle prosequi. People v Jose, 318 Mich App 290, 296 (2016). “MCL 768.34 precludes a trial court from ordering reimbursement of any costs—including the cost of appointed counsel—for a defendant whose prosecution is suspended or abandoned.” Jose, 318 Mich App at 297 (additional holding that MCR 6.005(C) did not provide authority for the trial court to order reimbursement for the work appointed counsel performed before trial where “[t]he court never determined that [the] defendant was ‘able to pay part of the cost of a lawyer’ and never ‘require[d] contribution’” under MCR 6.005(C)) (third alteration in original).

D. Costs Incurred to Compel Defendant’s Appearance

A defendant may be ordered to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). “The plain language of MCL 769.1k does not require the trial court to consider a defendant’s ability to pay before imposing discretionary costs and fees . . . .” People v Wallace (Steven), 284 Mich App 467, 470 (2009).

E. Costs Ordered as a Condition of Probation

Costs Authorized Under MCL 769.1k. The costs authorized by MCL 769.1k(1) and MCL 769.1k(2) also apply when a defendant is

19 MCL 768.34 provides:

“No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment has been found against him[ or her], or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he [or she] was in custody.”
placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

Costs of Prosecution, Legal Assistance, and Supervision. A trial court may require a probationer to pay certain costs as a condition of probation. MCL 771.3(2)(c). For example, offenders must pay a probation supervision fee when sentenced in circuit court. MCL 771.3(1)(d). If supervision fees are ordered for months in which a probationer is already subject to a supervision fee, the court must waive the fee having the shorter remaining duration. Id.

If the court requires the probationer to pay costs under MCL 771.3(2), “the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.” MCL 771.3(5). For example, a trial court may impose costs to reimburse the prosecution for the expense of engaging an expert witness for trial. People v Brown (Craig), 279 Mich App 116, 140 (2008). However, MCL 771.3(2)(d) (authorizing the imposition of “any assessment” other than the required crime victim’s rights assessment) “does not provide trial courts with the independent authority to impose any assessment as a condition of probation, but rather permits courts to impose only those assessments that are separately authorized by statute.” Juntikka, 310 Mich App at 313 (citing Cunningham II, 496 Mich at 147-156, and holding that “the trial court erred in imposing a probation enhancement fee[,]” which “accounted for general operating costs incurred by the probation department[,]” because the “fee was not separately authorized by statute[,] and . . . was not a cost ‘specifically incurred’ in [the] defendant’s case [as required] under MCL 771.3(5)[”]” (additional citations omitted).

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20 See  for a detailed discussion of probation.
21 MCL 771.3c(1) “does not require that the court consider the defendant’s current income, but, rather, his or her projected income.” People v Shenoskey, 320 Mich App 80, 85 (2017) (rejecting the defendant’s argument “that the trial court erred in failing to consider his income at the time it imposed the probation oversight fees[,]” and noting that because a condition of his probation was that he obtain employment for at least 30 hours per week, “[e]ven at minimum wage, [his] projected income would significantly exceed the $250 per month income necessary to justify the probation oversight fees imposed[”].
22 In People v Humphreys, 221 Mich App 443, 451-452 (1997), the Court of Appeals held that “the Legislature intended the ‘or’ in [former MCL 771.3(4), now MCL 771.3(5),] to mean ‘and[,]’” and, therefore, that “the trial court properly ordered [the] defendant to pay those costs relating to both the prosecution and the defense of his case.”
Additionally, “[t]hough probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not.” Butler-Jackson II, 499 Mich at 963 (citing Cunningham II, 496 Mich 145 (2014), and Juntikka, 310 Mich App 306, and vacating “that part of the Court of Appeals[’] judgment[, 307 Mich App 667 (2014),] addressing the propriety of court costs under MCL 771.3(5)[”).

**Ability to Pay.** If a trial court imposes costs under MCL 771.3(2) as part of a sentence of probation, the court must not require a probationer to pay those costs “unless the probationer is or will be able to pay them during the term of probation.” MCL 771.3(6)(a). “In determining the amount and method of payment of costs under [MCL 771.3(2)], the court shall take into account the probationer’s financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.” MCL 771.3(6)(a). A trial court may consider a defendant’s potential for employment when determining the defendant’s ability to pay. Brown (Craig), 279 Mich App at 139-140. Where the defendant opted to attend school full-time instead of working full-time, the trial court concluded that the defendant could pay if he chose to do so and properly imposed costs under MCL 771.3. Brown (Craig), 279 Mich App at 139-140.

“[A] defendant who timely asserts an inability to pay . . . costs must be heard.” People v Music, 428 Mich 356, 362 (1987). In that instance, a sentencing court must determine whether the costs are within the probationer’s means. Id. at 362.

A probationer who is not in willful default of his or her payment of costs under MCL 771.3(1)(g) (minimum state cost) or MCL 771.3(2)(c) (expenses specifically incurred in the case) may petition the court at any time for remission of the unpaid part of the total costs ordered. MCL 771.3(6)(b). The court may modify the method of repayment or remit all or a portion of the amount due if the court finds that payment in full would impose a manifest hardship on the probationer or his or her immediate family. Id.

“The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to
pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [(governing presentence investigation reports)] and [MCR 6.425(E) (governing sentencing procedure)].” MCR 6.445(G). MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.

**Conditional Sentence.** Except for defendants convicted of first- or third-degree criminal sexual conduct, MCL 769.3(2) authorizes a sentencing court to sentence a defendant to probation, conditioned on the probationer’s payment of costs, among other things. The court may establish a time within which the defendant must make repayment in installments, and if the probationer defaults on any payment, the court may sentence him or her to the sentence provided by law. *Id.*\(^{24}\)

**Cost of Electronic Monitoring.** Additionally, a probationer who is permitted to be released from jail for purposes of attending work or school under MCL 771.3 and who is ordered to wear an electronic monitoring device under MCL 771.3e must pay for the installation, maintenance, monitoring, and removal of the device. MCL 771.3e(1).

**Probation revocation for failure to comply with conditions.** Compliance with a court’s order to pay costs must be made a condition of probation. MCL 771.3(8). Revocation of probation\(^{25}\) is authorized where the probationer fails to comply with the order and has failed to make a good faith effort at compliance. *Id.*\(^{26}\) To determine whether an individual’s probation should be revoked on the basis of unpaid costs, the court must consider the following:

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\(^{24}\) Note, however, that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.

\(^{25}\) See Section 9.2 for more information on probation revocation.

\(^{26}\) Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
• the probationer’s employment status, earning ability, and financial resources;

• the willfulness of the probationer’s failure to pay; and

• any other circumstances that may impact the probationer’s ability to pay. MCL 771.3(8).

F. Costs Ordered as Part of Conditional Sentence

MCL 769.3(1) provides:

“If a person is convicted of an offense punishable by a fine or imprisonment, or both, the court may impose a conditional sentence and order the person to pay a fine, with or without the costs of prosecution, and restitution as provided under [MCL 769.1a] or the crime victim’s rights act, . . . MCL 780.751 to [MCL] 780.834, within a limited time stated in the sentence and, in default of payment, sentence the person as provided by law.”

Additionally, except for defendants convicted of first- or third-degree criminal sexual conduct, MCL 769.3(2) authorizes the court to sentence the defendant to probation, conditioned on the probationer’s payment of costs, among other things. MCL 769.3(2) provides:

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

G. Costs of Prosecution Specifically Authorized by Penal Statutes

Some individual penal statutes specifically authorize a sentencing court to order a defendant to pay the costs of prosecution after the defendant is convicted. These statutes address the costs of prosecution only and do not authorize a court to order other costs

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27 Note, however, that before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
that may be permitted pursuant to another statute, e.g., overtime wages for law enforcement personnel, etc.

For specific cost provisions applicable to individual criminal offenses, including statutes authorizing imposition of costs of prosecution, see the Table of Felony Costs and the Table of Misdemeanor Costs.

H. Costs of Emergency Response and Prosecution Under §769.1f

MCL 769.1f authorizes or requires the court to order the defendant to reimburse federal, state, or local units of government for the costs of emergency response and prosecution related to his or her commission of an offense specifically enumerated in the statute. MCL 769.1f(1); MCL 769.1f(9). Allowable expenses include:

- “[t]he salaries or wages, including overtime pay, of law enforcement personnel for time spent responding to the incident from which the conviction arose, arresting the person convicted, processing the person after the arrest, preparing reports on the incident, investigating the incident, 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).

- “[t]he salaries, wages, or other compensation, including overtime pay, of fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, for time spent in responding to and providing fire fighting, rescue, and emergency medical services in relation to the incident from which the conviction arose.” MCL 769.1f(2)(b).

- “[t]he cost of medical supplies lost or expended by fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, in providing services in relation to the incident from which the conviction arose.” MCL 769.1f(2)(c).

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28 See the Table of Felony Costs and the Table of Misdemeanor Costs for offenses to which MCL 769.1f applies.

29 For offenses set out in MCL 769.1f(1)(a)-(f), a sentencing court has discretion to order a defendant to pay the costs authorized under MCL 769.1f.

30 Reimbursement for expenses listed in MCL 769.1f(2)-(8) must be ordered against an offender for a conviction arising from any violation or attempted violation of the statutes enumerated in MCL 769.1f(9).
[“t]he salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction.” MCL 769.1f(2)(d).

“[t]he cost of extraditing a person from another state to this state including, but not limited to, all of the following:

- “[t]ransportation costs.
- “[t]he salaries or wages of law enforcement and prosecution personnel, including overtime pay, for processing the extradition and returning the person to this state.” MCL 769.1f(2)(e).

Costs ordered under MCL 769.1f must be paid immediately unless the court authorizes the individual to pay the amount ordered within a certain period of time or in specific installments. MCL 769.1f(4). If personnel from more than one unit of government incurred any of the expenses described in MCL 769.1f(2), the court may require the defendant to reimburse each unit of government for its expenses related to the incident. MCL 769.1f(3).

As a condition of probation or parole. If an individual required to pay costs under MCL 769.1f is placed on probation or is paroled, the court-ordered costs must be a condition of that probation or parole. MCL 769.1f(5).

Probation or parole revocation for failure to comply with court-ordered costs. An offender’s probation or parole may be revoked for his or her failure to comply with the court-ordered costs if the offender has not made a good faith effort at compliance. MCL 769.1f(5). To determine whether to revoke an offender’s probation or parole, the following circumstances must be considered:

- the offender’s employment status, earning ability, and financial resources;
- the willfulness of the offender’s failure to pay; and
- any other circumstances that may impact the offender’s ability to pay. MCL 769.1f(5).

For a comprehensive list of offenses to which MCL 769.1f applies, see the Table of Felony Costs and the Table of Misdemeanor Costs.

9.5 Minimum State Costs

MCL 769.1k(1)(a) expressly requires a court to “[impose] the minimum state costs as set forth in [MCL 769.1].” 31 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).

Note: Minimum state costs are to be assessed on each qualifying conviction based upon the offense convicted, so long as “any combination of other assessments is also ordered on that count (e.g. fine + cost, fine + restitution, crime victim assessment + restitution, etc.).” SCAO Crime Victim Assessment and Minimum State Cost Charts, p 2, p 2 n 5 (Revised April 1, 2012).

In addition to the authority to impose minimum state costs, a court may order a defendant to pay any costs incurred to compel his or her appearance. MCL 769.1k(2). MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL 769.1k(1) and MCL 769.1k(2). A court may provide for the collection of costs imposed under MCL 769.1k at any time. MCL 769.1k(5). Unless otherwise provided by law, a court may apply any payments made in excess of the total amount owed by a defendant in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

As a condition of probation. Payment of the minimum state cost must be a condition of probation. MCL 769.1j(3); MCL 771.3(1)(g). A probationer who is not in willful default of his or her payment of the minimum state cost may petition the court at any time for remission of the unpaid part of the total costs ordered. MCL 771.3(6)(b). The court may modify the method of repayment or remit all or a portion of the amount due if the court finds that payment in full would impose a manifest hardship on the probationer or his or her family. Id.

The requirement under MCL 769.1k(1)(a) to impose the minimum state costs set forth in MCL 769.1j also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

31 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 (Shawn), 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).

32 Effective April 1, 2012, 2011 PA 293 amended MCL 769.1j(1) and MCL 769.1j(7) to eliminate the distinction between “serious” and “specified” misdemeanors, and to provide for a minimum assessment of $50.00 against a defendant who commits any misdemeanor or ordinance violation. Related provisions were amended by 2011 PA 294—2011 PA 296, also effective April 1, 2012.

9.6 Crime Victim’s Rights Fund Assessment

The court is required to “order each person charged with an offense that is a felony, misdemeanor, or ordinance violation . . . that is resolved by conviction . . . or in another way that is not an acquittal or unconditional dismissal, to pay an assessment” of $130.00 if the offense is a felony or $75.00 if the offense is a misdemeanor or ordinance violation. MCL 780.905(1)(a)-(b). 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).

MCL 769.1k provides a court with general authority to impose “[a]ny assessment authorized by law” on a defendant at the time a defendant is sentenced, at the time a defendant’s sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(b)(v). In addition to any assessment imposed, a court may order a defendant to pay any costs incurred to compel his or her appearance. MCL 769.1k(2). MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment an assessment imposed pursuant to MCL 769.1k(1)(b)(v). A court may provide for the collection of any assessment imposed under MCL 769.1k(1) at any time. MCL 769.1k(5). Unless otherwise provided by law, a court may apply any payments made in excess of the total amount owed by a defendant in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

As a condition of probation. Payment of the crime victim assessment must be a condition of an offender’s probation. MCL 771.3(1)(f).

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34 See the Michigan Judicial Institute’s Crime Victim Rights Benchbook for more information about crime victim assessments.

35 Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime victim’s rights assessment of $75.00 in cases involving a conviction of any misdemeanor or ordinance violation (rather than only a “serious” or “specified” misdemeanor). Related provisions were amended by 2011 PA 293, 2011 PA 295, and 2011 PA 296, also effective April 1, 2012.

The imposition of an increased crime victim’s rights assessment against a defendant who committed a felony before the effective date of the statutory amendment effecting a fee increase from $60 to $130, 2010 PA 281, does not violate the Ex Post Facto Clauses of the United States Constitution and the Michigan Constitution. People v Earl (Ronald), 495 Mich 33, 34-35, 37, 49 (2014) (affirming People v Earl, 297 Mich App 104 (2012), and holding that “an increase in the crime victim’s rights assessment [does not] increase[] the punishment for a crime[]” rather, “the Legislature’s intent in enacting the assessment was civil in nature[, and] . . . . the purpose and effect of the assessment is not so punitive as to negate the Legislature’s civil intent[”]). For additional discussion of the crime victim’s rights assessment, see the Michigan Judicial Institute’s Crime Victim Rights Benchbook.

36 Minimum state costs are assessed on each count “if any combination of other assessments is also ordered on that count (e.g. fine + cost, fine + restitution, crime victim assessment + restitution, etc.).” SCAO Crime Victim Assessment and Minimum State Cost Charts, p 2, p 2 n 5 (Revised April 1, 2012).

37 The crime victim assessment is to be “[b]ased upon the [m]ost [s]erious [o]ffense [c]onvicted” in a case. SCAO Crime Victim Assessment and Minimum State Cost Charts, p 1 (Revised April 1, 2012).
The general authority to impose the monetary penalties in MCL 769.1k(1)(b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

9.7 Restitution


“At sentencing, the court must, on the record[,] order that the defendant make full restitution as required by law to any victim of the defendant’s course of conduct that gives rise to the conviction, or to that victim’s estate.” MCR 6.425(E)(1)(f); see also MCL 769.1a(2); MCL 780.766(2) (felony article); MCL 780.794(2) (juvenile article); MCL 780.826(2) (misdemeanor article).38 “[B]oth [the CVRA39 and MCL 769.1a(2)] impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete.” Garrison, 495 Mich at 368 (noting that “the plain meaning of the word ‘full’ is ‘complete; entire; maximum’”) (citation omitted). The court must order a defendant or juvenile convicted of a crime, misdemeanor, or offense to “make full restitution to any victim of the [defendant’s or juvenile’s] course of conduct that gives rise to the [disposition or] conviction or to the victim’s estate.” MCL 769.1a(2) (Code of Criminal Procedure provision corresponding to the CVRA and applicable to felonies, misdemeanors, or ordinance violations); MCL 780.766(2) (CVRA provision applicable to felonies); MCL 780.794(2) (CVRA provision applicable to misdemeanors); MCL 780.826(2) (CVRA provision applicable to juveniles) (emphasis added).

Restitution is “specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct.” People v Grant (Dennis), 455 Mich 221, 230 (1997). “In determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense.” MCL 780.767(1). These provisions are “‘remedial in character and should be liberally construed to effectuate [the] intent [of the CVRA].’” People v Allen (Regina), 295 Mich App 277, 282 (2012). “Because [MCL 780.766(2)]

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38 The felony, juvenile, and misdemeanor articles of the CVRA contain substantially similar language.

39 Although the Garrison Court specifically applied MCL 780.766(2) (the restitution provision that is contained in the felony article of the CVRA), the Court’s holding defining the term full restitution as “restitution that is maximal and complete[]” would presumably extend to the restitution provisions contained in the CVRA’s juvenile article (MCL 780.794(2)) and misdemeanor article (MCL 780.826(2)) as well. See Garrison, 495 Mich at 367 n 11 (noting that “MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)[i]”).
 plainly requires the trial court to order ‘full’ restitution, . . . a trial court abuses its discretion when it orders restitution other than full restitution.” Allen (Regina), 295 Mich App at 281 n 1.

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

The amount of restitution ordered must have evidentiary support. People v Guajardo, 213 Mich App 198, 200 (1995). Evidence in support of the loss may come from facts found in a defendant’s presentence report, from the content of a victim impact statement, or from information adduced at sentencing. Grant (Dennis), 455 Mich at 233-234; People v Hart, 211 Mich App 703, 706 (1995). “[T]he standard to be applied when calculating a restitution amount [under the CVRA] is simply one of reasonableness;” where “the evidence provides a reasonably certain factual foundation for a restitution amount, the statutory standard is met.” People v Corbin, 312 Mich App 352, 365 (2015), rejecting, as abrogated by statute, the “‘easily ascertained and measured’ formulation” set out in People v Heil, 79 Mich App 739, 748-749 (1977). There is no “need for absolute precision, mathematical certainty, or a crystal ball; however[,] . . . speculative or conjectural losses are not ‘reasonably expected to be incurred.’” Corbin, 312 Mich App at 365, quoting MCL 780.766(4)(a).

The court must “consider only the loss sustained by the victims,” and must not consider the defendant’s ability to pay. People v Lueth, 253 Mich App 670, 692 (2002). A defendant need not have personally benefited to the extent reflected by the restitution amount; all that is required is that the defendant’s criminal conduct caused the amount of loss addressed by the restitution order. Id. at 692.

For the purposes of restitution only, the Code of Criminal Procedure and the CVRA define “victim” as “an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a [crime].” MCL 769.1a(1); MCL 780.766(1). With a few exceptions, and for purposes of restitution, a victim can be “a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a [crime].” MCL 769.1a(1); MCL 780.766(1).

**Uncharged conduct and additional victims.** “Although courts must order defendants to pay ‘full restitution,’ their authority to order restitution is not limitless[,] . . . the losses included in a restitution order

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40 For example, legal entities are not victims for purposes of MCL 780.766(4) (physical or psychological injury to a victim), or MCL 780.766(5) (bodily injury resulting in a victim’s death or serious impairment of a victim’s body function).
must be the result of [the] defendant’s criminal course of conduct.” Garrison, 495 Mich at 372 (noting that MCL 780.766(1) defines “‘victim’ as ‘an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime’”). Moreover, because MCL 780.766(2) “authorizes the assessment of full restitution only for ‘any victim of the defendant’s course of conduct that gives rise to the conviction[,]’” trial courts are not “authorize[d] . . . to impose restitution based solely on uncharged conduct[;]” rather, “MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded.” People v McKinley, 496 Mich 410, 421 (2014), overruling People v Gahan, 456 Mich 264, 270 (1997), “to the extent that [it] held that MCL 780.766(2) ‘authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction.’” See also People v Raisbeck, 312 Mich App 759, 771-772 (2015) (citing McKinley, 496 Mich at 419-424, and holding that where the prosecutor specifically “charged [the defendant] with committing a single [racketeering] crime against 18 named individuals,” rather than “with committing a crime against any and all victims of her scheme[,]” the trial court “erred by ordering restitution for those individuals who were not named in the information[ ]”); Corbin, 312 Mich App at 361-362 (citing McKinley, 496 Mich at 419, and holding that although the defendant, when tendering his plea of guilty with respect to charged criminal sexual conduct involving one victim, admitted to engaging in criminal sexual conduct with a second victim, restitution should not have been ordered with respect to the second victim where the prosecutor had voluntarily dismissed the charge involving that victim because the statute of limitations had expired).

However, if the defendant affirmatively agrees to the imposition of restitution with respect to charges that are dismissed under a plea agreement, the trial court may order restitution based on the defendant’s conduct underlying the dismissed charges without violating McKinley, 496 Mich at 419-420, 424, or the defendant’s right to due process. People v Foster (Michael), 319 Mich App 365, 379 (2017). “[W]hen the defendant expressly agrees to pay restitution to receive the benefit of a bargain struck with the prosecution,” “[the] defendant intentionally relinquishes his [or her due process] right to have the prosecution prove every element of the charge beyond a reasonable doubt.” Id. at 382-383.

41 Although the Michigan Supreme Court’s holding in Garrison did not specifically address MCL 780.794 or MCL 780.826, its holding that restitution orders may include only those losses that are “the result of [the] defendant’s criminal course of conduct[”] would presumably extend to those statutes as well. See Garrison, 495 Mich at 367 n 11 (noting that “MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2)[”]).

42 The McKinley holding would presumably extend to the corresponding language in MCL 780.794(2) and MCL 780.826(2). See McKinley, 496 Mich at 418 n 8, which states that “other statutes allowing for the assessment of restitution . . . have identical language for all relevant purposes[; s]ee, e.g., MCL 769.1a(2); MCL 780.826(2).”
Additionally, if the defendant pleads guilty to an offense in exchange for dismissal of a charge of a predicate offense based on the same course of criminal conduct, restitution may be ordered for losses related to the dismissed predicate offense. *People v Bryant*, 319 Mich App 207, 213 (2017) (where the defendant, who broke into a home and stole items including firearms, pleaded guilty of possession of a firearm during the commission of a felony (felony-firearm) in exchange for the dismissal of a charge of home invasion, he was properly ordered to pay restitution for all of the homeowner’s losses associated with the entire course of criminal conduct; “[w]hile the [predicate] home invasion charge was dismissed, its commission was part and parcel of the felony-firearm conviction, and the course of conduct for the home invasion included stealing the victim’s belongings[1]”) (quotation marks omitted; first alteration in original).

**Future medical or psychological treatment.** “[F]uture (not yet incurred) psychological expenses indisputably fall within the ambit of MCL 780.766(4)(a); however[, the prosecution must demonstrate by an evidentiary preponderance that the claimed expenses are ‘reasonably expected to be incurred.’” *Corbin*, 312 Mich App at 366 (quoting MCL 780.766(4)(a) and holding that an expert witness’s “inability to provide the court with cost figures specific to [the victim,]” or “with sufficient grounds for a reasonably accurate restitution award” predicated on the direct harm sustained as a result of the commission of the crime, “render[ed] the court’s estimates fatally uncertain[1]”).

**Restitution to governmental entities.**

**Routine costs of criminal investigation and prosecution.** Restitution may not be awarded to a governmental entity for the general costs of criminal investigations and prosecutions, including salary or overtime compensation paid as a cost of investigation unrelated to the particular criminal offense, or for routine purchase or maintenance costs for equipment. *People v Wåhmöff*, 319 Mich App 264, 270-273 (2017). Although MCL 780.766(1) authorizes restitution for financial harm sustained by a governmental entity, restitution is not properly ordered for the routine costs of a criminal investigation when those costs are ordinarily incurred no matter what the outcome of the investigation. *People v Newton*, 257 Mich App 61, 69-70 (2003). See also *People v Gaines*, 306 Mich App 289, 323, 323 n 10 (2014) (holding that MCL 780.766(1) did not authorize the trial court to order “restitution for officer investigation[,] . . . [the cost of] a forensic analyst[,] . . . and [the cost of] disks[,]” and further noting that “the trial court [may not] . . . order[ ] [these] costs to be repaid under [the] general taxing authority of MCL 769.34(6), . . . [because] ‘MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute[1]’”
(quoting *People v Cunningham (Cunningham II)*, 496 Mich 145, 147 (2014)).

However, the loss of “buy money” may be included in an order of restitution because “buy money” does not represent the costs ordinarily incurred in a county’s criminal investigation and would not have been subject to loss were it not for the defendant’s commission of a crime. *Id.* at 69. Where a narcotics enforcement team fails to recover money expended during a criminal investigation, a victim (the enforcement team) has suffered financial harm (loss of the “buy money”) as a direct result of the defendant’s criminal conduct. *Id.*, citing *People v Crigler*, 244 Mich App 420, 427 (2001).

**Governmental costs resulting directly from defendant’s criminal activity.** Although restitution may not be awarded to a governmental entity for the general costs of criminal investigations and prosecutions, governmental costs that specifically resulted from the defendant’s criminal activity may be awarded if established with “a ‘reasonably certain factual foundation[,]’” *Wahmhoff*, 319 Mich App at 275, quoting *Corbin*, 312 Mich App at 365. “If the prosecution chooses to pursue restitution on behalf of . . . governmental entities, it must establish, with reasonable certainty, the amount of any loss that (1) did not constitute an ordinary, general cost of investigation or operation and (2) was directly caused by [the] defendant’s criminal offense.” *Wahmhoff*, 319 Mich App at 276, citing *Corbin*, 312 Mich App at 365; *Newton*, 257 Mich App at 69-70; *Crigler*, 244 Mich App at 427.

**Costs of emergency response.** Restitution may not be awarded “based on routine overtime compensation or regular compensation” for emergency responders responding to a crime scene. *Wahmhoff*, 319 Mich App at 273. However, if “a ‘reasonably certain factual foundation’” is established, costs of emergency response that are caused directly by the defendant’s criminal activity and that exceed “the ordinary costs of investigation or operation” may be awarded as restitution. *Id.* at 275, quoting *Corbin*, 312 Mich App at 365.

In *Wahmhoff*, 319 Mich App at 267, the defendant staged a protest by crawling inside a pipeline on property owned by Enbridge, Inc., and refused to leave until the end of the Enbridge employees’ workday, more than 10 hours later. Firefighters and police personnel remained at the scene throughout the day due to concerns for the

43 However, see 2014 PA 352, effective October 17, 2014, amending MCL 769.1k as “a curative measure” following the issuance of *Cunningham II*, 496 Mich 145. 2014 PA 352, enacting section 2. See Section 9.4 for discussion of *Cunningham II* and 2014 PA 352.
defendant’s safety. *Id.* The Court of Appeals held that the trial court erred to the extent that it awarded restitution for emergency responders’ regular compensation or routine overtime compensation. *Id.* at 273. Furthermore, “the prosecution failed to demonstrate, with reasonable certainty, the resources expended by the governmental entities in connection with defendant’s criminal activity beyond the ordinary costs of investigation or operation.” *Id.* at 275 (emphasis added). However, if properly established, “the responding authorities may [have been] entitled to some restitution given the extraordinary amount of time invested by [them] . . . solely due to [the] defendant’s calculated refusal to exit the pipe[,]” because “[the] defendant’s measured, illegal act prompted the expenditure of resources far beyond routine costs for investigation, prosecution, or emergency response that would ordinarily be expended to investigate or evacuate an individual in a pipe.” *Id.* at 273. If the prosecution could “establish a reasonably certain factual foundation” for “expenses incurred by responding governmental entities [that] specifically resulted from [the] defendant’s conscious decision to remain inside the pipe for several hours;” such expenses might be awardable as “a financial loss that ‘result[ed] directly from the crime itself.’” *Id.* at 274-275 (quoting *Crigler*, 244 Mich App at 427, and noting that “the record [did] not reveal the point at which [the] losses shifted from ordinary costs of investigation to financial losses directly resulting from [the] particular defendant’s criminal activity”).

**Property that cannot be returned.** In situations in which a defendant is ordered to make restitution to a victim for property that is lost, damaged, or destroyed, and the property cannot be returned, MCL 769.1a(3) applies. MCL 769.1a(3) states:

“If a felony, misdemeanor, or ordinance violation results in damage to or loss or destruction of property of a victim of the felony, misdemeanor, or ordinance violation or results in the seizure or impoundment of property of a victim of the felony, misdemeanor, or ordinance violation, the order of restitution may require that the defendant do 1 or more of the following, as applicable:

(a) Return the property to the owner of the property or to a person designated by the owner.

(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
(i) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

(ii) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

Civil damages. “[T]he amount of civil damages to which one is entitled is not necessarily equivalent to the amount of loss that one has experienced for purposes of the CVRA[,] . . . ‘the statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding.’” People v Lee (Edward), 314 Mich App 266, 278-279 (2016), quoting In re McEvoy, 267 Mich App 55, 67 (2005).

The amount of court-ordered restitution may not be reduced by the amount of an unpaid civil judgment obtained by the victim against the defendant. People v Dimoski, 286 Mich App 474, 482 (2009). The distinction between restitution and civil damages is reflected in the setoff scheme of MCL 780.766(9), which provides that “[a]ny amount paid to a victim . . . under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim[.]” Dimoski, 286 Mich App at 478. “Although [a] victim [may] have the benefit of both a civil judgment and a restitution order to obtain monetary relief from [a] defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed.” Id. at 482.

Additionally, “the fact that civil damages are not available . . . does not necessarily mean that restitution is also unavailable.” Lee (Edward), 314 Mich App at 275-276 (holding that “the mere fact that the [victim] may not be entitled to civil damages . . . does not render the trial court’s restitution order erroneous or excessive or establish that the [victim] did not incur any loss due to [the] defendant’s conduct[.]”).

Civil agreement. A civil agreement between a defendant and a crime victim limiting future claims against the defendant does not negate the statutory requirement that the defendant be ordered to pay restitution to any victim of the defendant’s conduct or to an entity from which a victim has received compensation. People v Bell (Bernice), 276 Mich App 342, 343-350 (2007).
**Insurance company.** “[A]n insurance company may be awarded restitution . . . for money paid to a victim for a defendant’s criminal act.” *Bell (Bernice)*, 276 Mich App at 346-347. “The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim, not the amount paid by an insurer or other entity.” *Id.* at 347.

The trial court did not clearly err in determining that an insurance company “suffered a direct financial loss as a result of [the defendant’s] course of criminal conduct[]” in attempting to purchase a controlled substance from a pharmacy using an insurance contract number that she extracted from a subscriber database during her employment with the company’s vendor. *Allen (Regina)*, 295 Mich App at 279, 283 (affirming the trial court’s order requiring the defendant to pay restitution to the company in an amount determined by “assigning a value to the hours [the company’s employee] spent on the [fraud] investigation[]”). See also *People v Fawaz*, 299 Mich App 55, 66 (2012) (where the defendant was convicted of arson of a dwelling house and making false statements about material matters for an insurance claim, “[t]he resources [the insurance company] spent determining that [the] defendant’s [insurance] claim was fraudulent . . . should have been included in the restitution amount[]”).

**Lost income.** The Court of Appeals “has interpreted the word ‘income’ as used in the [CVRA] to mean ‘the return in money from one’s business, labor, or capital invested; gains, profits, salary, wages, etc.’” *People v Turn*, 317 Mich App 475, 480-481 (2016), quoting *Corbin*, 312 Mich App at 371 (second alteration in original).

“(L)ost earning capacity is not the same as [the] ‘income loss[]’ that may be awarded under MCL 780.766(4)(c). *Corbin*, 312 Mich App at 371 (holding that where the victim “never had an ‘income’ that [the] defendant’s conduct caused him to lose[,]” the trial court erred in awarding restitution for lost wages; “[e]ven assuming that [a victim]’s loss of the ability to earn income . . . correlates to ‘income loss[,]’ the court [must make an] . . . effort to calculate after-tax income loss, as required by [MCL 780.766(4)(c)]”).

If the evidence demonstrates loss based on the replacement value of stolen items as well as expected profits, the trial court may consider lost profits in assessing restitution. *People v Cross (Clifton)*, 281 Mich App 737, 738-740 (2008) (trial court’s order of restitution for income loss was supported by prosecutorial evidence and by “the victim’s extensive, essentially expert, testimony”).

The victim “suffered a monetary loss[]” under the CVRA where he “had to use [accumulated] sick, personal, and vacation time in order to recuperate from . . . injuries[]” inflicted by the defendant. *Turn*, 317 Mich App at 477-478, 481. The victim “earned his accumulated sick, personal,
and vacation time by working, and he was entitled to receive monetary compensation from his employer for any unused time[;]” because the victim “lost the ability to use that paid leave time in the future, and . . . the opportunity to be paid for that time upon termination of his employment[,]” the time constituted income loss under MCL 780.766(4)(c) “even though he was paid by his employer for the time he used.” Turn, 317 Mich App at 479-481. “[T]he restitution order [did] not entitle [the victim] to be paid twice for the same time because, although [his] employer paid him the wages he would have earned if he had returned to work and had not used his accumulated time, [he] was not compensated by his employer for the loss of his accumulated leave time even though that time had monetary value.” Id. at 481.

**Pleas and admissions concerning uncharged conduct.** Because a “court lack[s] any authority to award restitution for [a] defendant’s uncharged conduct,” admissions in a plea concerning dismissed charges do not provide the basis for a restitution award. Corbin, 312 Mich App at 362 (citing McKinley, 496 Mich at 419, and holding that although the defendant, when tendering his guilty plea with respect to charged criminal sexual conduct involving one victim, admitted to engaging in criminal sexual conduct with a second victim, restitution should not have been ordered with respect to the second victim where the prosecutor had voluntarily dismissed the charge involving that victim because the statute of limitations had expired).

**Restitution hearing.** A restitution hearing is not required unless there is an actual dispute as to the amount. Grant (Dennis), 455 Mich at 244. “Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.” MCL 780.767(4). “‘Preponderance of the evidence’ means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” Cross (Clifton), 281 Mich App at 740.

“Pursuant to MRE 1101(b)(3), the Michigan Rules of Evidence apply to all proceedings except certain miscellaneous proceedings, including ‘sentencing.’ . . . [A restitution] hearing [is] exclusively conducted for purposes of sentencing. See MCL 780.766(2) (‘when sentencing a defendant convicted of a crime, the court shall order’ restitution when appropriate) (emphasis added).” People v Matzke, 303 Mich App 281, 284 (2013). Thus, because the rules of evidence are not applicable, “under the plain language of MRE 1101[,] hearsay evidence may be properly considered at a restitution hearing[.]” Matzke, 303 Mich App at 284-285.

**Incarceration for willful failure to pay restitution.** MCL 769.1a(14) “prohibits incarceration as a consequence for failure to pay [restitution] unless the failure was willful.” People v Collins (Richard), 239 Mich App
This is because “a sentence that exposes an offender to incarceration unless he [or she] pays restitution . . . violates the Equal Protection Clauses of the federal and state constitutions because it results in unequal punishments for offenders who have and do not have sufficient money.” Id. at 135-136 (trial court’s sentencing order violated Equal Protection principles because it “rewarded restitution payments with a suspension of jail time”).

**Time limitations on restitution.** Generally, restitution must be made immediately. MCL 780.766(10). The Department of Corrections may execute a restitution order by withdrawing funds from a prisoner’s account, and there is no legal right “to cessation of [] restitution payments while [a defendant] remains incarcerated.” White-Bey v Dep’t of Corrections, 239 Mich App 221, 222, 225 (1999). However, the court has the discretion to require a defendant to make restitution within a specified period or in installments. MCL 780.766(10).

**As a condition of probation.** While restitution must be imposed as a condition of probation, MCL 771.3(1)(e) and MCL 780.766(11), the court may not revoke probation on the basis of the defendant’s failure to pay restitution that he or she cannot afford. MCL 769.1a(14); MCL 780.766(14). The defendant may petition the sentencing judge to modify the method of payment based upon manifest hardship. MCL 769.1a(12); MCL 780.766(12).

**As a condition of parole.** While restitution must be imposed as a condition of parole, MCL 780.766(11), the Parole Board may not revoke parole on the basis of the defendant’s failure to pay restitution that he or she cannot afford. MCL 769.1a(14); MCL 780.766(14). The defendant may petition the sentencing judge to modify the method of payment based upon manifest hardship. MCL 769.1a(12); MCL 780.766(12).

Additionally, the sentencing court may not condition a grant of parole on the offender’s full or partial payment of restitution. People v Gosselin, 493 Mich 900 (2012) (citing People v Greenberg, 176 Mich App 296, 310-311 (1989), and holding that “[t]he trial court had no authority to impose the [requirement that the defendant pay one-third of her] restitution obligation as a condition of parole””). “The Department of Corrections

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44 Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.

45 Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
has exclusive jurisdiction over paroles,” and although MCL 780.766 “provides that any restitution ordered shall be a condition of parole and that the parole board may revoke parole if the defendant fails to comply[,]” the sentencing court has no authority to make “payment of restitution a prerequisite for obtaining parole or early release.” Greenberg, 176 Mich App at 310-311.

Restitution not dischargeable in bankruptcy. Restitution ordered as part of a sentence of imprisonment or imposed as a condition of probation is not dischargeable in bankruptcy. 11 USC 523(a)(13).

Joint and several liability. Conspirators and codefendants may be held jointly and severally liable for a victim’s loss. People v Grant (Dennis), 455 Mich 221, 228, 236-237 (1997) (noting that a defendant who is convicted of conspiracy is responsible not only for his or her own acts, but also “for the acts of his [or her] coconspirators made in furtherance of the conspiracy[”]; Lee (Edward), 314 Mich App at 279-280 (citing Grant (Dennis), 455 Mich at 236-237, and concluding that the trial court did not err in holding the defendant and his codefendants jointly and severally liable for the victim’s restitution award; although “[the] defendant was not convicted of conspiracy, . . . [he was] responsible for his acts and for the acts of those with whom he acted in concert to cause the [victim’s] losses[”]).

A “trial court may order a codefendant to pay the entirety of the restitution owed to a crime victim without violating the principle of proportionality[;]” because MCL 780.766(2) makes the imposition of full restitution “a mandatory part of a convicted defendant’s sentence,” rather than a discretionary matter akin to choosing between a range of possible sentences, the principle of proportionality set forth in People v Milbourn, 435 Mich 630 (1990), is inapplicable and does not prevent the trial court from awarding “joint and several restitution rather than individually fixing an amount for which each defendant would be responsible.” Foster (Michael), 319 Mich App at 384, 387 (additionally noting that Michigan’s “statutes do not apportion criminal liability based on a codefendant’s degree of participation in [a] crime,” and that a defendant who aids and abets a crime must pay restitution just as if he or she were a principal).

Standard of review. “A trial court does not have discretion to order a convicted defendant to pay restitution; it must order the defendant to pay restitution and the amount must fully compensate the defendant’s victims.” Allen (Regina), 295 Mich App at 281.

“Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and [the Court of Appeals] reviews de novo the proper interpretation of statutes. . . . However, [the] Court reviews the findings underlying a trial
court’s restitution order for clear error. . . . A finding is clearly erroneous if [the] Court is left with the definite and firm conviction that a mistake has been made.” *Allen (Regina)*, 295 Mich App at 281 (citations omitted).

**Sixth Amendment concerns.** “[T]he Sixth Amendment erects no obstacle to judicial fact-finding as to the amount [of restitution] owed[.]” *Corbin*, 312 Mich App at 372 (rejecting the defendant’s argument that “restitution is a form of punishment” that must be determined by a jury under *Apprendi v New Jersey*, 530 US 466 (2000), and its progeny) (additional citations omitted). See also *Foster (Michael)*, 319 Mich App at 389 (holding that “because a restitution order is not a penalty, the Sixth Amendment protections recognized in *Apprendi* do not apply,” and the amount of restitution need not be “factually supported by either an admission under oath[.] or a jury finding”) (internal quotation marks omitted).

### 9.8 Use of Bail Money to Pay Costs, Fines, Restitution, and Other Assessments

When a defendant personally makes the cash deposit required for his or her bond, the defendant must be notified that if he or she is convicted, the cash deposit may be applied to any court-ordered fine, costs, restitution, assessment, or other payment. MCL 765.6c. If a defendant’s bond or bail is discharged and the defendant himself or herself personally supplied cash for the bond or bail, the balance of the cash may be used toward payment of any court-ordered fine, costs, restitution, assessment, or other payment. MCL 765.15(2). In cases where the court orders a defendant to pay a fine, costs, restitution, assessment, or other payment, the court *must* order that payment be made from the defendant’s personally deposited cash bond or bail after it has been discharged. *Id.*

Unless otherwise provided by law, a court may apply any payments made in excess of the total amount owed by a defendant in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

Allocation of the funds available under MCL 765.15, and of payments made by a defendant toward the total amount owed, is governed by MCL 775.22.46

- Fifty percent of the amount available or received must be applied to victim payments (without regard to the underlying violation). MCL 775.22(2); MCL 780.766a(2); MCL 780.794a(2); and MCL 780.826a(2).

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46 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.
“‘Victim payment’ means restitution ordered to be paid to the victim or the victim’s estate, but not to a person who reimbursed the victim for his or her loss, or an assessment under . . . MCL 780.905.”47 MCL 775.22(5).

In cases involving violations of state law, the balance of the amount available or received (after fifty percent is applied to the victim payment) must be apportioned in the following order of priority:

- Payment of the minimum state cost under MCL 769.1j.48
- Payment of other costs.
- Payment of fines.
- Payment of probation or parole supervision fees.
- Payment of assessments and other payments.

MCL 775.22(3); MCL 780.766a(3); MCL 780.794a(3)49; and MCL 780.826a(3).50

In cases involving violations of local ordinances, the balance of the amount available or received (after fifty percent is applied to the victim payment) must be apportioned as follows:

- Payment of the minimum state cost under MCL 769.1j.51
- Payment of other costs.
- Payment of fines.
- Payment of assessments and other payments.

MCL 775.22(4); MCL 780.766a(4); MCL 780.794a(4); and MCL 780.826a(4).

MCL 780.766a(1) governs the allocation of money collected from an offender who is obligated to make payments in more than one proceeding and who, when making a payment, fails to specify the proceeding to which the payment applies. MCL 780.766a(1) states in part:

47 Crime victim’s rights fund assessment. See Section 9.6 for discussion of the crime victim’s rights fund assessment.

48 See Section 9.5 for discussion of minimum state costs.

49 MCL 780.794a(3) also expressly includes “reimbursement to third parties who reimbursed a victim for his or her loss.”

50 MCL 780.826a(3) also expressly includes “reimbursement to third parties who reimbursed a victim for his or her loss.”

51 See Section 9.5 for discussion of minimum state costs.
“If a person is subject to fines, costs, restitution, assessments, probation or parole supervision fees, or other payments in more than 1 proceeding in a court and if a person making a payment on the fines, costs, restitution, assessments, probation or parole supervision fees, or other payments does not indicate the proceeding for which the payment is made, the court shall first apply the money paid to a proceeding in which there is unpaid restitution to be allocated as provided in this section.”

If a person making a payment indicates that the payment is to be applied to victim payments, or if the payment is received as a result of a wage assignment or from the department of corrections, sheriff, department of human services, or county juvenile agency, the payment must first be applied to victim payments. MCL 780.766a(2); MCL 780.794a(2); MCL 780.826a(2).

9.9 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 ___, ___ (2017) (holding that a Colorado statute requiring a petitioner to “prove [his or] her innocence by clear and convincing evidence to obtain [a] refund of costs, fees, and restitution paid pursuant to an invalid conviction[ . . . does not comport with due process[”]).

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), lv den 453 Mich 903 (1996), 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 that where a “defendant’s conviction [is] reversed, there no longer is express provision for these fines or costs in the underlying statute.” 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 600.1475,52 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 [the] defendant could have” committed the uncharged crimes. Noting that “the county had simply acted as a conduit in channeling [the] defendant’s restitution payments to the victim[" and no longer had “the restitutio

al amount in its possession[,]” the *Diermier* Court concluded “that it would be unreasonable to require the county to reimburse [the] defendant for monies [she] 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 ___. In addition, 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

- MCL 780.622(2) and MCL 712A.18e(11)(a) (providing that an applicant 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).53

52 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.”
Nelson, 581 US ___, 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 for 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 10: Specific Types of Sentences

10.1 Probation
10.2 Delayed Sentencing
10.3 Deferred Adjudication of Guilt
10.4 Holmes Youthful Trainee Act (HYTA)—Deferred Adjudication
10.5 Conditional Sentences
10.6 Suspended Sentences
10.7 Mandatory Sentences
10.8 Special Alternative Incarceration (SAI) Units—“Boot Camp”
10.9 Additional Sentence Conditions Required for Criminal Sexual Conduct Offenders
10.1 Probation

A. In General

“It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance.” MCL 771.4.

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

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

Note: “[T]he Legislature did not include the attempt statute [(MCL 750.92)] in the list of felonies for which a defendant could not be given probation . . . [thereby] evidenc[ing] an intent to include probation as another alternative sentence under the attempt statute.” People v McKeown, 228 Mich App 542, 545 (1998).


The legislative sentencing guidelines expressly authorize probationary terms for offenses subject to the guidelines when the recommended minimum sentence range falls within an intermediate sanction cell. MCL 769.31(b).1 However, the sentencing guidelines are advisory only and courts need not express substantial and compelling reasons to depart downward. People v

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1 See Section 2.6 for discussion of intermediate sanctions.

Except as provided in MCL 771.2a (dealing with probation periods for various stalking and sex offenses) and MCL 768.36 (establishing sentencing and probation requirements for a person found guilty but mentally ill), the term of probation imposed on a defendant convicted of a felony offense must not exceed five years. MCL 771.2(1). For purposes of the Code of Criminal Procedure’s probation statute, “felony” includes two-year misdemeanors. MCL 761.1(f); People v Smith (Timothy), 423 Mich 427, 434 (1985).

“[A] trial court has the authority to modify and extend probation at any time within the [five-year] statutory maximum period [set out in MCL 771.2(1)], even after the initial probation period expires,” because “MCL 771.2(5) authorizes the modification of probation ‘at any time,’ does not refer to the ‘probation period,’ and in no way requires that modification occur within that period.” People v Vanderpool, 325 Mich App 493, 498, 499 (2018) (distinguishing the initiation of probation revocation proceedings under MCL 771.4, which must commence during the “probation period” imposed by the sentencing court, from the modification of probation orders under MCL 771.2(5), which may occur “at any time” during the five-year statutory maximum term of probation, and holding that “because the trial court modified [the defendant’s] probation within the five-year statutory limit and the revocation occurred while the new probation order was in effect, the trial court had jurisdiction to modify and subsequently revoke [the defendant’s] probation”).

If a court sentences a defendant to probation, it must, in a court order made a part of the record, set the length of the probationary period and determine the terms on which the probation is conditioned. MCL 771.2(5). “If the court reduces a defendant’s probationary term under [MCL 771.2(2)],[2] the period by which that term was reduced must be reported to the [D]epartment of [C]orrections.” MCL 771.2(5).

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2 See Section 10.1(F)(2) for discussion of reducing a felony probation term under MCL 771.2(2).
Note: Effective March 1, 2003, 2002 PA 666 eliminated the “lifetime probation” provision in MCL 771.1(4). Before the amendment, a trial court could sentence a defendant to lifetime probation for violating or conspiring to violate MCL 333.7401(2)(a)(iv) or MCL 333.7403(2)(a)(iv). 2002 PA 666 also amended MCL 771.2 to eliminate lifetime probation sentences imposed before the amendment’s effective date—March 1, 2003. MCL 771.2(6) (formerly subsection (3)). 2010 PA 351, effective December 22, 2010, amended MCL 771.2(6) (formerly subsection (3)) to extend the probation reforms of 2002 PA 666 to individuals placed on lifetime probation for an offense committed before March 1, 2003. MCL 771.2(6) continues to prohibit any reduction in the probation period imposed under former MCL 771.1(4) “other than by a revocation that results in imprisonment or as otherwise provided by law.”

B. Mandatory Conditions of Probation

During the term of an individual’s probation, he or she must comply with all of the mandatory conditions of probation set out in MCL 771.3(1)(a)-(h):

- the probationer must not violate any criminal law.
- the probationer must not leave Michigan without the court’s consent.
- the probationer must report (in person or in writing) to his or her probation officer each month, or as often as the probation officer requires.
- if the probationer is sentenced in circuit court, he or she must pay a probation supervision fee as set out in MCL 771.3c.
- the probationer must pay restitution to the victim of the probationer’s course of conduct leading to the conviction, or to the victim’s estate.
- the probationer must pay a crime victim assessment as set out in MCL 780.905.
- the probationer must pay the minimum state cost as set out in MCL 769.1j.
  - MCL 769.1k(1)(a) requires a court to impose the minimum state cost (set out in MCL 769.1j) on a defendant at the time the defendant is sentenced, at the time entry of judgment of guilt is deferred, or at the time sentence is delayed. The court may also
order the defendant to pay any additional costs incurred in compelling his or her appearance. MCL 769.1k(2). MCL 769.1k(1) and MCL 769.1k(2) “apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.” MCL 769.1k(3).

- For minimum state costs ordered pursuant to MCL 769.1k, MCL 769.1k(4) authorizes a court to order that a defendant pay such costs by wage assignment. In addition, a court may provide for the collection of any costs imposed pursuant to MCL 769.1k at any time. MCL 769.1k(5).

- Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

- if required, the probationer must be registered under the sex offenders registration act (MCL 28.721 to MCL 28.736).3

- If a defendant is placed on probation for a listed offense as that term is defined in MCL 28.722 of the sex offenders registration act (SORA), the defendant’s probation officer must register the defendant or must accept the defendant’s registration. MCL 771.2(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 10.1(J) for a detailed discussion.

C. Discretionary Conditions of Probation

A trial court has broad discretion in determining any additional terms and conditions to impose as part of probation. People v Oswald, 208 Mich App 444, 446 (1995). During the term of an individual’s probation, he or she may be required to comply with one or more of the following discretionary terms and conditions set out in MCL 771.3(2)(a)-(q) and MCL 771.3(3):

- be imprisoned in the county jail for a maximum period of 12 months or up to the maximum period of confinement allowed for the charged offense if less than 12 months.

3 See the Michigan Judicial Institute’s Sexual Assault Benchbook for detailed information concerning the Sex Offenders Registration Act.
• a period of incarceration may be served at one time or in consecutive or nonconsecutive intervals.

• the probationer may be allowed day parole as authorized under MCL 801.251 to MCL 801.258.

• the probationer may be permitted to be released from jail to work at his or her existing job or to attend a school in which he or she is enrolled as a student, subject to MCL 771.3d and MCL 771.3e.

Note: “If the court permits an individual convicted of a felony to be released from jail under [MCL 771.3] for purposes of attending work or school, the court shall order the individual to wear an electronic monitoring device on his or her person.” MCL 771.3e(1). 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).

• pay immediately, or within the period of his or her probation, any fine imposed when the individual was placed on probation.

Note: The probation statutory provision, MCL 771.3(2)(b), does not restrict the amount of the fine a trial court is authorized to impose as a condition of probation. Oswald, 208 Mich App at 445-446 ($1,500 fine imposed as a condition of probation was valid where underlying statute permitted a maximum fine of $1,000 for conviction).

• pay costs, limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant, and supervision of the probationer.

4 MCL 771.3d(1) provides that the court must not order release for work or school “unless the county sheriff or the [Department of Corrections] has determined that the individual is currently employed or currently enrolled in school,” and establishes requirements for ordering and providing this verification. MCL 771.3d(2) defines “school[,]” for purposes of MCL 771.3d, as “[a] school of secondary education[,] . . . [a] community college, college, or university[,] . . . [a] state-licensed technical or vocational school or program[,] . . . [or a] program that prepares the person for the general education development (GED) test.”

5 MCL 771.3e provides for the electronic monitoring of felony probationers who are released from jail for work or school.

6 MCL 771.3e was added by 2012 PA 610, effective March 28, 2013.
Note: Costs ordered by the trial court must be “limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.” MCL 771.3(5). A defendant may be ordered to pay the costs of prosecution and the costs of defense. People v Humphreys, 221 Mich App 443, 452 (1997). A trial court may impose costs under MCL 771.3(5) to reimburse the prosecution’s expense of an expert witness at trial, because such costs are “‘expenses specifically incurred in prosecuting the defendant[.]’” People v Brown (Craig), 279 Mich App 116, 139 (2008). However, “the Legislature did not intend the reimbursement of costs of confinement to be a proper condition of probation.” People v Houston (JT), 237 Mich App 707, 719 (1999); see also People v Juntikka, 310 Mich App 306, 315 (2015) (holding that “the trial court erred in imposing [a] probation enhancement fee[,]” which “was not a cost ‘specifically incurred’ in [the] defendant’s case [as required] under MCL 771.3(5)](citations omitted).”; People v Butler-Jackson (Butler-Jackson II), 499 Mich 963, 963 (2016) (vacating “that part of the Court of Appeals[.]’ judgment[, 307 Mich App 667 (2014)], addressing the propriety of court costs under MCL 771.3(5),” and holding that “[t]hough probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing [him or] her with legal assistance are authorized under [MCL 771.3(5)], court costs are not]” (citations omitted).

However, the express text of MCL 771.3(2)(p) authorizes a trial court to require, as a condition of probation, that the offender “[r]eimburse[] the county for expenses incurred by the county in connection with the conviction for which probation was ordered as provided in the prisoner reimbursement to the county act, . . . MCL 801.81 to [MCL] 801.93.” And see MCL 801.81, specifically referred to by the probation statute, MCL 771.3(2)(p), where the Legislature expressly provides authority—without judiciary involvement—to collect reimbursement for a defendant’s confinement in a county jail. MCL 801.83 states in relevant part:

7 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, 314-315, and holding that a flat-rate $100 probation supervision fee was not authorized under MCL 712A.18(1)(b), MCL 712A.18(3), or MCL 712A.18(12)). See the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 18, for discussion of the imposition of costs in juvenile proceedings.
“(1) The county may seek reimbursement for any expenses incurred by the county in relation to a charge for which a person was sentenced to a county jail as follows:

(a) From each person who is or was a prisoner, not more than $60.00 per day for the expenses of maintaining that prisoner or the actual per diem cost of maintaining that prisoner, whichever is less, for the entire period of time the person was confined in the county jail, including any period of pretrial detention.”

Additionally, a felony offender who is imprisoned as a condition of probation and who is permitted to be released from jail for purposes of attending work or school under MCL 771.3(2)(a) must pay for “[t]he installation, maintenance, monitoring, and removal costs of [an] electronic monitoring device” if he or she is ordered to wear such a device. MCL 771.3e(1).

MCL 800.404a and MCL 800.405 represent statutory authority to collect amounts owed by an offender using any appropriate legal action.

• pay any assessment ordered by the court other than the crime victim assessment.

Note: MCL 771.3(2)(d) (authorizing the imposition of “any assessment” other than the required crime victim’s rights assessment) “does not provide trial courts with the independent authority to impose any assessment as a condition of probation, but rather permits courts to impose only those assessments that are separately authorized by statute.” People v Juntikka, 310 Mich App 306, 313 (2015) (citing People v Cunningham (Cunningham II), 496 Mich 145, 147-156 (2014), and holding that “the trial court erred in imposing [a] probation enhancement fee[,]” which “accounted for general operating costs incurred by the probation department[,]” because the “fee was not separately authorized by statute[ ] and . . . was not a cost ‘specifically incurred’ in [the] defendant’s case [as required] under MCL 771.3(5)["]” (additional citations omitted).

• perform community service.

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8 MCL 800.403 - MCL 800.404.
• agree to pay by wage assignment any court-ordered restitution, assessment, fine, or cost.

• participate in inpatient or outpatient drug treatment or a drug treatment court.

  **Note:** A drug treatment court may accept participants from any other jurisdiction based on the participant’s residence or the unavailability of a drug treatment court in the jurisdiction where the participant is charged, if the defendant, the defendant’s attorney, the prosecutor, the judge of the transferring court, the judge of the receiving court, and the prosecutor of the receiving drug treatment court’s funding unit agree to the defendant’s participation in the drug treatment court. MCL 600.1062(4)(a)-(d).

• participate in mental health treatment.

• participate in mental health or substance abuse counseling.

• participate in a community corrections program.

• be under house arrest.

• be subject to electronic monitoring.

• participate in a residential probation program.

• satisfactorily complete a program of incarceration in a special alternative incarceration unit as set out in MCL 771.3b.  

• be subject to conditions reasonably necessary for the protection of one or more named persons.

• reimburse the county for expenses incurred in connection with the probationer’s conviction as set out in MCL 801.81 to MCL 801.93.

• complete a high school education or the equivalent by attaining a general education development (GED) certificate.

• be subject to other lawful conditions of probation deemed proper by the court or warranted by the circumstances of the case.

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9 See Section 10.8 for more information.
Note: “In setting additional conditions [under MCL 771.3(3)], a sentencing court must be guided by factors that are lawfully and logically related to the defendant’s rehabilitation.” People v Johnson (Larry), 210 Mich App 630, 634 (1995).

D. Requirements When Costs Are Imposed

If costs are imposed on a probationer under MCL 771.3(2) as part of a sentence of probation, all of the provisions of MCL 771.3(6) apply:

• the court must not require the probationer to pay costs unless he or she is, or will be, able to pay them during the term of probation.

• the court must take into account the probationer’s financial resources and the nature of the burden that payment of the costs will cause, considering the probationer’s other obligations.

• a probationer who is required to pay costs under MCL 771.3(1)(g) or MCL 771.3(2)(c), and who is not in willful default of payment, may at any time petition the sentencing judge (or his or her successor) for a remission of the payment of any unpaid portion of those costs.

• if the court determines that payment of the amount due will cause the probationer or his or her immediate family a manifest hardship, the court may remit all or part of the amount of costs due, or modify the payment method.

If a probationer is required to pay costs as part of a sentence of probation, the court may require him or her to pay the costs:

• immediately, or

• within a specified time period, or

• in installments. MCL 771.3(7).

Whenever a probationer is ordered to pay costs as part of his or her sentence of probation, compliance with that order must be a condition of probation. MCL 771.3(8). If the probationer fails to comply with the order to pay costs, and has not made a good faith effort at compliance, the court has discretion to revoke probation. Id.

In deciding whether to revoke probation, the court must consider the factors set out in MCL 771.3(8):

• the probationer’s employment status.

• the probationer’s earning ability.
• the probationer’s financial resources.
• the willfulness of the probationer’s failure to pay.
• any other special circumstances that may impact a probationer’s ability to pay.

“The court may not sentence the probationer to prison 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(E) (governing sentencing procedure)].” MCR 6.445(G). MCR 6.425(E)(3) requires that, before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. See for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.

E. Plea Agreements and Orders of Probation

A defendant is not entitled to withdraw his or her plea or to demand specific performance of a plea agreement when a trial court imposes otherwise valid conditions on the defendant’s probation even if the conditions were not included in the plea agreement. Johnson (Larry), 210 Mich App at 634-635.

F. Amending an Order of Probation

1. General Authority to Amend a Probation Order

A court may amend a probation order in form or substance at any time. MCL 771.2(5). Accordingly, “a trial court has the authority to modify and extend probation at any time within the [five-year] statutory maximum period [set out in MCL 771.2(1)], even after the initial probation period expires.” People v Vanderpool, 325 Mich App 493, 498-499 (2018). A defendant is not entitled to notice or an opportunity to be heard regarding an amendment, unless the amendment would result in a fundamental change in his or her liberty interest, such as confinement. People v Britt, 202 Mich App 714, 716 (1993) (placement in an electronic tether program is not the equivalent of confinement; accordingly, due process protections do not attach before amendment of a probation order to include placement in an electronic tether program).
2. Reduction of Felony Probation Period\textsuperscript{10}

\textit{MCL 771.2(2)} provides, in part:

\begin{quote}
“Except as provided in \textit{[MCL 771.2(4)]} (setting out offenses that are not subject to reduced probation), \textit{[MCL 771.2a]} (dealing with probation periods for various stalking and sex offenses), and \textit{[MCL 768.36]} (establishing sentencing and probation requirements for a person found guilty but mentally ill)], after the defendant has completed 1/2 of the original felony probation period of his or her felony probation, the [Department of Corrections (DOC)] or probation department may notify the sentencing court. If, after a hearing to review the case and the defendant’s conduct while on probation, the court determines that the defendant’s behavior warrants a reduction in the probationary term, the court may reduce that term by 100\% or less.”
\end{quote}

\textbf{Notice and hearing requirements.} The court must notify the prosecuting attorney and the defendant (or his or her attorney, if any) at least 28 days before reducing or terminating a period of probation or conducting a review under \textit{MCL 771.2, MCL 771.2(2)}. Additionally, the victim must be notified of the date and time of the hearing and must be given an opportunity to be heard. \textit{Id.} The court must “consider the impact on the victim and repayment of outstanding restitution caused by reducing the defendant’s probationary term.” \textit{Id.} If the court reduces the defendant’s probationary term under \textit{MCL 771.2(2)}, the period by which the term was reduced must be reported to the DOC. \textit{MCL 771.2(5)}.

\textbf{Ineligibility for probation reduction.} A defendant is not eligible for probation reduction under \textit{MCL 771.2(2)} if he or she

\begin{itemize}
    \item is subject to a mandatory probation term, \textit{MCL 771.2(2)}; or
    \item was convicted of a violation of one or more of the following:
        \begin{itemize}
            \item \textit{MCL 750.81(5)} (certain repeat offenses involving domestic assault or assault of a pregnant individual),
        \end{itemize}
\end{itemize}

\textsuperscript{10} See 2017 PA 10, effective June 29, 2017.
• **MCL 750.84** (assault with intent to do great bodily harm less than murder),

• **MCL 750.520c** (second-degree criminal sexual conduct (CSC-II)), or

• **MCL 750.520e** (fourth-degree criminal sexual conduct (CSC-IV)), **MCL 771.2(4)**.

**G. Revoking Probation**

“If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation.” **MCL 771.4**. A trial court’s jurisdiction to revoke a defendant’s probation and sentence him or her to imprisonment is limited to the duration of the probationary period; if the probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass*, 288 Mich App 399, 408-409 (2010).

**H. Termination of the Probation Period**

When a probationer’s term of probation terminates, the probation officer must report to the court that the probation period has ended. **MCL 771.5(1)** The officer must also inform the court of the probationer’s conduct during the probation period. *Id.* “Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded.” *Id.* “[A] trial court has the authority to modify and extend probation at any time within the [five-year] statutory maximum period [set out in MCL 771.2(1)], even after the initial probation period expires,” because “**MCL 771.2(5)** allows for modification ‘at any time,’ does not refer to the ‘probation period,’ and in no way requires that modification occur within that period.” *People v Vanderpool*, 325 Mich App 493, 498 (2018).

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11 A probationer who has committed a *technical probation violation*, as defined in **MCL 771.4b(7)**, may be subject to a temporary incarceration maximum sentence as set out under **MCL 771.4b**.
I. Stalking Offenses and Orders of Probation

1. Stalking

In accord with the general rule in MCL 771.2(1), an individual convicted of violating MCL 750.411h (stalking) may be sentenced to no more than five years of probation. MCL 771.2a(1); MCL 750.411h(3). A probationary period imposed for a stalking conviction is subject to the terms and conditions of probation contained in MCL 750.411h(3) and MCL 771.3. MCL 771.2a(1). In addition to other lawful conditions imposed, MCL 750.411h(3) permits a court to order a defendant sentenced to probation to:

- refrain from stalking any person during his or her probationary term;
- refrain from any contact with the victim of the offense for which the defendant is placed on probation;
- be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; and
- if the court determines it is appropriate, receive the indicated counseling at the defendant’s own expense. MCL 750.411h(3)(a)-(c).

2. Aggravated Stalking

An individual who is sentenced to probation for a violation of MCL 750.411i (aggravated stalking) may be sentenced to probation for any term of years, but the court must sentence the individual to a term of probation of not less than five years. MCL 771.2a(2); MCL 750.411i(4). A probationary period imposed for an aggravated stalking conviction is subject to the terms and conditions of probation contained in MCL 750.411i(4) and MCL 771.3. MCL 771.2a(2). MCL 750.411i(4) also authorizes a court to order a defendant who is sentenced to probation to:

- refrain from stalking any person during the term of probation;
- refrain from any contact with the victim of the offense for which the defendant is placed on probation;

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12 See Section 10.1(B) and Section 10.1(C) for mandatory and discretionary conditions of probation under MCL 771.3.
be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; and

if the court determines it is appropriate, receive the indicated counseling at the defendant’s own expense. MCL 750.411i(4)(a)-(c).

J. Sex Offenders and Probation Orders

Except for the nonprobationable offenses in MCL 771.1 and as otherwise provided by law, a court may place an individual convicted of a “listed offense” on probation for any term of years but not less than five years. MCL 771.2a(6). Additional conditions of probation must be ordered when an individual is placed on probation under MCL 771.2a(6). Subject to the provisions in MCL 771.2a(7)-(12), the court must order an individual placed on probation under MCL 771.2a(6) not to do any of the following:

• reside within a student safety zone, MCL 771.2a(7)(a);
• work within a student safety zone, MCL 771.2a(7)(b); or
• loiter within a student safety zone, MCL 771.2a(7)(c).

A “student safety zone” is defined as the area that lies 1,000 feet or less from school property. MCL 771.2a(13)(f).

For purposes of MCL 771.2a, “school” and “school property” are defined in MCL 771.2a(13) as follows:

“(d) ‘School’ means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school.

(e) ‘School property’ means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:

(i) It is used to impart educational instruction.

(ii) It is for use by students not more than 19 years of age for sports or other recreational activities.”

13 Tier I, tier II, and tier III listed offenses are described in the Sex Offenders Registration Act at MCL 28.722(s), MCL 28.722(u), and MCL 28.722(w), respectively.
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 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.

**K. Sex Offenders Exempted from Probation**

Even if a person was convicted of a “listed offense,” MCL 771.2a(12) permits the court to exempt that person from being placed on probation under MCL 771.2a(6) if either of the following circumstances apply:

“(a) The individual has successfully completed his or her probationary period under [the youthful trainee act, MCL 762.11-MCL 762.15] for committing a listed offense and has been discharged from youthful trainee status.

(b) The individual was convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)]\(^\text{15}\), and at the time of the violation was 17 years of age or older but less than 21 years of age and is not more than 5 years older than the victim.”

**L. School Safety Zones**

There are exceptions to the mandatory probation conditions concerning school safety zones. Under the circumstances described below, the prohibitions found in MCL 771.2a(7) do not apply to individuals convicted of a listed offense.

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\(^{14}\)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 750.520e(2)(a); and *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).

\(^{15}\)CSC-IV where the individual is at least 5 years older than the victim and the victim is at least 13 years of age but less than 16 years of age.
1. **Residing Within a Student Safety Zone**

The court shall not prohibit an individual on probation after conviction of a listed offense from residing within a student safety zone, **MCL 771.2a(7)(a)**, if any of the following provisions in **MCL 771.2a(8)** apply:

“(a) The individual is not more than 19 years of age and attends secondary school or postsecondary school, and resides with his or her parent or guardian. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends secondary school or postsecondary school in conjunction with that school attendance.

(b) The individual is not more than 26 years of age, attends a special education program, and resides with his or her parent or guardian or in a group home or assisted living facility. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends a special education program in conjunction with that attendance.

(c) The individual was residing within that student safety zone at the time the amendatory act that added this subdivision was enacted into law. However, if the individual was residing within the student safety zone at the time the amendatory act that added this subdivision was enacted into law, the court shall order the individual not to initiate or maintain contact with any minors within that student safety zone. This subdivision does not prohibit the court from allowing contact with any minors named in the probation order for good cause shown and as specified in the probation order.”

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In addition to the above exceptions, the prohibition against residing in a student safety zone, MCL 771.2a(7)(a), does not prohibit a person on probation after conviction of a listed offense from “being a patient in a hospital or hospice that is located within a student safety zone.” MCL 771.2a(9). The hospital exception “does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.” Id.

2. Working Within a Student Safety Zone

If an individual on probation under MCL 771.2a(6) was working within a student safety zone at the time the amendatory act adding these prohibitions was enacted into law,17 he or she cannot be prohibited from working in that student safety zone as indicated in MCL 771.2a(7)(b). MCL 771.2a(10). If a person was working within a student safety zone at the time of this amendatory act, “the court shall order the individual not to initiate or maintain contact with any minors in the course of his or her employment within that student safety zone.” Id. As with MCL 771.2a(8)(c), for good cause shown, a court is not prohibited by MCL 771.2a(10) from allowing the probationer contact with any minors named in the probation order and as specified in the probation order. MCL 771.2a(10).

If an individual on probation under MCL 771.2a(6) only intermittently or sporadically enters a student safety zone for work purposes, the court shall not impose the condition in MCL 771.2a(7)(b) that would prohibit the person from working in a student safety zone. MCL 771.2a(11). Even when a person intermittently or sporadically works within a student safety zone, he or she shall be ordered “not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone.” Id. For good cause shown and as specified in the probation order, the court may allow the person contact with any minors named in the order. Id.

M. Medical Probation

“Subject to [MCL 771.3g(4)], a court may enter an order of probation placing a prisoner18 on medical probation under the charge and

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18For purposes of MCL 771.3g, prisoner “means an individual committed or sentenced to imprisonment under [MCL 769.28].” MCL 771.3g(7)(c).
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[19] 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

[19]For purposes of MCL 771.3g, country sheriff “includes the sheriff of a county in this state or the sheriff’s designee.” MCL 771.3g(7)(a).
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[^20] 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).

N. Compassionate Release

“Subject to [MCL 771.3h(3)], a court may grant compassionate release to a prisoner[^21] if the court finds that the prisoner has a life expectancy of not more than 6 months and that the release of the

[^20]: For purposes of MCL 771.3g, physician “means an individual who is licensed under [Article 15 of the Public Health Code] to engage in the practice of medicine.” MCL 771.3g(7)(b); MCL 333.17001(1)(e).
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[22] may notify the court in writing that a prisoner may be eligible for compassionate release if the county sheriff has consulted with a physician[23] 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

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21For purposes of MCL 771.3h, prisoner “means an individual committed or sentenced to imprisonment under [MCL 769.28].” MCL 771.3g(7)(c).

22For purposes of MCL 771.3h, county sheriff “includes the sheriff of a county in this state or the sheriff’s designee.” MCL 771.3g(7)(a).

23For purposes of MCL 771.3h, physician “means an individual who is licensed under [Article 15 of the Public Health Code] to engage in the practice of medicine.” MCL 771.3g(7)(b); MCL 333.17001(1)(e).
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).

10.2 Delayed Sentencing

Under MCL 771.1(2), if a defendant is eligible for a sentence of probation, the court may elect to delay imposing sentence on the defendant for up to one year to allow the defendant to demonstrate that probation, or other leniency compatible with the ends of justice and the defendant’s rehabilitation, is an appropriate sentence for his or her conviction. MCL 771.1(2) provides:

“In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant’s rehabilitation, such as participation in a drug treatment court . . . . When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court’s records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay.”

“Reasonable conditions may be imposed for the delay if they will give the defendant an opportunity to prove his or her eligibility for probation or leniency.” People v Saenz, 173 Mich App 405, 409 (1988); see also, generally, People v Cannon (Todd), 145 Mich App 100, 104 (1985), People v Saylor (Barry), 88 Mich App 270, 274-275 (1979); People v Clyne, 36 Mich App 152, 154-155 (1971).

“The purpose of a delayed sentence is to give the defendant an opportunity to demonstrate that he [or she] can fairly be placed on probation rather than be sentenced to prison. The trial court may impose conditions and restrictions with

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which the defendant must comply during the period of the delay, so long as the restrictions are reasonably designed to help the court determine whether probation will ultimately be appropriate. The imposition of such conditions or restrictions should not be confused with a sentence of probation, even though they are similar to those associated with probation. Thus, a delayed sentence means that no sentence is initially imposed . . . .” *People v Salgat*, 173 Mich App 742, 745-746 (1988).

Requiring a defendant to participate in a drug court, MCL 771.1(2), or obtain psychiatric treatment, may be valid conditions of a delayed sentence. *Saenz*, 173 Mich App at 409. Incarceration in jail is not a valid condition of a delayed sentence. *Id.*

“The sentence ultimately imposed should be based upon all of the circumstances of the defendant’s background. Among the factors to be considered in sentencing [are] the defendant’s failure to comply with the conditions and restrictions imposed in conjunction with the sentence delay.” *Salgat*, 173 Mich App at 746.

A defendant generally does not have a right to a formal hearing on whether he or she violated a condition of a delayed sentencing arrangement. *Salgat*, 173 Mich App at 746. Due process is satisfied if a defendant is given the opportunity to respond to information contained in his or her presentence investigation report, and to bring any other pertinent information to the court’s attention. *Saylor (Barry)*, 88 Mich App at 275.

“[T]he plain language of MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence[.]” *People v Smith (Ryan)*, 496 Mich 133, 142-143 (2014), overruling *People v Boynton*, 185 Mich App 669 (1990), *People v Dubis*, 158 Mich App 504 (1987), *People v Turner (Halbert)*, 92 Mich App 485 (1979), and *People v McLott*, 70 Mich App 524 (1976) (“to the extent they hold that a court loses jurisdiction to sentence a defendant as a remedy for a violation of MCL 771.1(2)[]”). “After the one-year statutory limitation elapses, sentencing may no longer be delayed for the purpose of permitting a defendant the opportunity to prove that he [or she] is worthy of leniency, and the judge is required to sentence [the] defendant as provided by law.” *Smith (Ryan)*, 496 Mich at 142.

25 But see MCL 771.3(10), providing that “’[i]f sentencing is delayed or entry of judgment is deferred in the district court or in a municipal court, the court . . . may impose, as applicable, the conditions of probation described in [MCL 771.3(1), (2), and (3)]’” (emphasis supplied), and MCL 771.3(2)(a), which allows the court to order “imprison[men]t in the county jail for not more than 12 months[,]” MCL 771.3(9), which similarly permits the circuit court to “impose, as applicable, the conditions of probation described in [MCL 771.3(1), (2), and (3)],” applies only in cases in which “entry of judgment is deferred[;]” unlike MCL 771.3(10), MCL 771.3(9) does not state that it also applies to cases in which sentencing is delayed.
The Sixth Amendment’s Speedy Trial Clause “does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]” and therefore does not “apply to the sentencing phase of a criminal prosecution[,]” Betterman v Montana, 578 US ___, ___ (2016) (holding “that the Clause does not apply to delayed sentencing[.]”). However, “although the Speedy Trial Clause does not govern[ inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.” Id. at ___.

Supervision fees. In cases involving delayed sentencing, supervision fees are authorized under MCL 771.1(3).

If the court delays imposing sentence under MCL 771.1(2), it must indicate in the delayed sentence order that the Department of Corrections must collect a supervision fee from the defendant as provided in MCL 771.1(3).

MCL 771.1(3) contains the monetary considerations to be applied to a defendant whose sentencing has been delayed. The court must determine the amount of the monthly supervision fee owed by a defendant by considering the defendant’s projected income and financial resources. MCL 771.1(3). Unlike the supervision fee ordered when a defendant is sentenced to a probationary period that may be for as many as 60 months (MCL 771.3c(1)), the supervision fee ordered in cases of delayed sentencing can be for no more than 12 months. MCL 771.1(3). The maximum monthly amount that may be ordered is $135, and a defendant cannot be subject to more than one supervision fee at a time. Id. “If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration.” Id.

Other costs. In addition to a supervision fee, a defendant whose sentencing is delayed must pay the minimum state costs detailed in MCL 769.1j.26 MCL 769.1k(1)(a). MCL 769.1k provides a court with general authority to impose fines, costs (including court costs), expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1k on a defendant at the time his or her sentence is delayed. MCL 769.1k(1).27 A court may also order a defendant whose sentence is delayed to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). A court may require a defendant to pay any fine, cost, or assessment ordered to be paid under MCL 769.1k by wage assignment. MCL 769.1k(4). In addition, a court may provide for the amounts imposed under MCL 769.1k to be collected at any time. MCL

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26 See for discussion of minimum state costs.
27 As amended, 2014 PA 352, effective October 17, 2014. See for discussion of costs.
769.1k(5). Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

**Incarceration for failure to pay court-ordered financial obligations.** Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.

**Traffic offenses and Secretary of State records.** A trial court may not require the Secretary of State to amend driving records when a conviction is dismissed following a guilty plea and delayed sentencing under MCL 771.1. *In re McCann Driving Record*, 314 Mich App 605, 608, 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. *In re McCann Driving Record*, 314 Mich App at 614.

## 10.3 Deferred Adjudication of Guilt

Deferred adjudication refers to the situation in which a defendant pleads or is found guilty of a charged offense, but where the adjudication of guilt is not immediately entered. There are several specific statutes authorizing a court to defer sentencing a defendant for a plea-based conviction provided the defendant complies with any terms or conditions on which the period of deferment is based. Under these statutes, the court places the defendant on probation and if he or she successfully completes the terms and conditions of probation, the court must discharge the defendant and dismiss the proceedings; no judgment of guilt is entered against the defendant. If the defendant violates a term or condition of probation during the probationary period, the court has the discretion to continue the probationary period, or to enter an adjudication of guilt and sentence the defendant.

Under very specific circumstances, a court may defer adjudication of guilt and place an individual on probation for the following types of offenses:

- controlled substances, MCL 333.7411 (the statutory violations listed in MCL 333.7411 include both misdemeanor and felony
offenses). The offenses under MCL 333.7411 for which deferred adjudication is authorized are as follows:

- MCL 333.7403(2)(a)(v), possession of less than 25 grams of a schedule 1 or 2 controlled substance that is a narcotic drug or a cocaine-related substance (felony).
- MCL 333.7403(2)(b), possession of a schedule 1, 2, 3, or 4 controlled substance or controlled substance analogue, or ecstasy, or methamphetamine, etc. (felony).
- MCL 333.7403(2)(c), possession of a schedule 5 controlled substance, LSD, peyote, mescaline, etc. (misdemeanor).
- MCL 333.7403(2)(d), possession of marijuana (misdemeanor).
- MCL 333.7404, use of a controlled substance or controlled substance analogue without a valid prescription (misdemeanor).
- MCL 333.7341, possession/use of an imitation controlled substance—second offense (misdemeanor).

- minor in possession (“MIP”) (being a minor who purchases, consumes or possesses alcoholic liquor or attempts to purchase, consume or possess alcoholic liquor, or who has any bodily alcohol content) after one prior judgment, MCL 436.1703(1)(b) (misdemeanor).
- impaired healthcare professional, MCL 750.430 (misdemeanor).
- domestic violence/spousal abuse, MCL 769.4a. The offenses under MCL 769.4a for which deferred adjudication is authorized are:
  - MCL 750.81, domestic assault or assault of a pregnant individual—first offense (misdemeanor).
  - MCL 750.81a, assault causing serious injury—first offense (misdemeanor).
- parental kidnapping, MCL 750.350a (felony).

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28 Deferred adjudication is also permitted in certain circumstances for offenders admitted to a drug treatment court or a veterans treatment court. See Section 10.3(L) for discussion of these specialized courts. Additionally, certain crimes committed by youthful offenders are eligible for deferred adjudication under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 et seq. See Section 10.4 for discussion of the HYTA.
• certain prostitution offenses committed by human trafficking victims, MCL 750.451c.29

The procedure involved in deferred adjudication cases is similar for all of the areas listed above. The steps of the process for deferral under these statutes are discussed in general below, and provisions unique to any of the five areas in which a deferred adjudication of guilt is available will be noted within the discussion itself.

A. Defendant Must Have No Previous Convictions for Offenses Specified in Statute

To qualify for deferral, a defendant must not have a previous conviction for any of the offenses specified by the applicable statute, with the exception of MCL 750.451c (prostitution offenses committed by human trafficking victims).30

Controlled substances (“§7411”). A defendant must have no previous convictions for an offense listed under article 7 of the controlled substance act or an offense under any statute of the United States or any state related to narcotic drugs, cocaine, marijuana, stimulants, depressants, or hallucinogenic drugs. MCL 333.7411(1).

A conviction entered simultaneously with the charge to which a defendant seeks deferment under §7411 is not a “previous conviction” for purposes of §7411 and so does not render the defendant ineligible for §7411 status. People v Ware, 239 Mich App 437, 442 (2000).

Minor in possession (“MIP”). The only persons eligible for deferral of an MIP misdemeanor violation are those with one prior judgment as defined in MCL 436.1703(18)(d).31 See MCL 436.1703(1)(b); MCL 436.1703(3). “A misdemeanor violation of [MCL 436.1703(1)] successfully deferred, discharged, and dismissed under [MCL 436.1703(3)] is considered a prior judgment for the purposes of [MCL 436.1703(1)(c) (governing misdemeanor violations of MCL 436.1703(1))]”.

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29 See the Michigan Judicial Institute’s Sexual Assault Benchbook, Chapter 3, for detailed information concerning deferral for human trafficking victims.

30 Effective August 21, 2017, 2017 PA 34 amended MCL 750.451c to eliminate the requirement that an individual have no prior convictions for enumerated prostitution-related offenses in order to be eligible for discharge and dismissal of a prostitution-related offense committed as a direct result of being a victim of human trafficking, and to eliminate the restriction that an individual is eligible for only one discharge and dismissal under MCL 750.451c.

31 For purposes of MCL 436.1703, a prior judgment is “a conviction, juvenile adjudication, finding of responsibility, or admission of responsibility” under MCL 436.1703 (MIP) or any of several additional enumerated statutes, or under a substantially-corresponding local ordinance, federal law, or law of another state. MCL 436.1703(18)(d).
Impaired healthcare professional. A defendant must not have a previous conviction for violating MCL 750.430(1) (engaging in the practice of his or her profession with a bodily alcohol content specified in the statute or while under the influence of an illegally or improperly used controlled substance that visibly impairs the individual’s ability to practice safely). MCL 750.430(9). In addition, to qualify for deferral under this provision, the conduct for which the defendant seeks deferral must not have resulted in physical harm or injury to the patient. Id.

Domestic violence/spousal abuse. A defendant must have no previous convictions for an assaultive crime as defined in MCL 769.4a(8)(a). MCL 769.4a(1).

Parental kidnapping. A defendant must not have a previous conviction for violating MCL 750.349 (kidnapping), MCL 750.350 (taking a child under age 14 from the child’s parent, adoptive parent, or legal guardian), or MCL 750.350a (adoptive or natural parent taking a child, or retaining a child for more than 24 hours, with intent to conceal or detain the child), or for violating any statute of the United States or other state related to kidnapping. MCL 750.350a(4).

B. Defendant’s Guilt Is Established by Plea or by Verdict

Generally, to qualify for deferral a defendant must plead guilty to or be found guilty of an offense listed in the statutory provision under which deferred adjudication is sought.

§7411. A defendant must plead guilty to or be found guilty of an offense expressly listed in MCL 333.7411(1). These offenses are possession of a controlled substance under MCL 333.7403(2)(a)(v), MCL 333.7403(2)(b), MCL 333.7403(2)(c), or MCL 333.7403(2)(d); use of a controlled substance under MCL 333.7404; or possession or use of an imitation controlled substance under MCL 333.7341 for a second time. MCL 333.7411(1).

Minor in possession (“MIP”). The individual must plead guilty to, or offer a plea of admission in a juvenile delinquency proceeding for, a misdemeanor violation of MCL 436.1703(1)(b). MCL 436.1703(3).

Impaired healthcare professional. The statutory provision contains no language requiring a plea or other finding of guilt. See MCL 750.430(9). The provision later refers to the court’s entry of an
adjudication of guilt, an act that implicitly requires that the defendant’s guilt be established in some manner. 

**Domestic violence/spousal abuse.** An individual must plead guilty to or be found guilty of a violation of MCL 750.81 (domestic assault or assault of a pregnant individual) or MCL 750.81a (assault causing serious injury). MCL 769.4a(1). The statutory provision also requires that the victim of the defendant’s conduct be a person listed in the statute: the defendant’s spouse/former spouse; an individual with whom the defendant has a child in common; an individual who is dating or has dated the defendant; or an individual residing in or who has resided in the same household as the defendant. 

**Parental kidnapping.** An individual must plead guilty to or be found guilty of a violation of MCL 750.350a. MCL 750.350a(4).

**Prostitution offenses committed by human trafficking victims.** Deferral is available to an individual who pleads guilty to, or is found guilty of, a violation of MCL 750.448 (accosting/soliciting/inviting another person to commit prostitution or do a lewd/immoral act), MCL 750.449 (admitting another person for purposes of prostitution), MCL 750.450 (aiding/abetting another person in violating MCL 750.448, MCL 750.449, or MCL 750.449a32), or MCL 750.462 (detaining or allowing a person 16 years of age or less to remain in a house of prostitution for a purpose other than prostitution), or a local ordinance substantially corresponding to one of these provisions. MCL 750.451c(2).

### C. Defendant Must Consent to a Deferral of Adjudication

**§7411.** Deferred adjudication requires the defendant’s consent. MCL 333.7411(1).

**Minor in possession (“MIP”).** Deferred adjudication requires the defendant’s or juvenile’s consent. MCL 436.1703(3).

**Impaired healthcare professional.** In addition to the defendant’s consent, deferred adjudication also requires the prosecutor’s consent. MCL 750.430(9).

**Domestic violence/spousal abuse.** In addition to the defendant, the prosecuting attorney, in consultation with the victim, must consent to a defendant’s deferred adjudication. MCL 769.4a(1).

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32 MCL 750.449a prohibits engaging or offering to engage the services of another person for the purpose of prostitution, lewdness, or assignation.
Parental kidnapping. The defendant must consent to deferred adjudication. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. Both the accused and the prosecuting attorney must consent to deferral. MCL 750.451c(2).

D. Defendant Placed on Probation and Proceedings Deferred

When all of the requirements in Section 10.3(A), Section 10.3(B), and Section 10.3(C), are satisfied, the court places the defendant on probation, further proceedings are deferred, and no judgment or adjudication of guilt is entered.

§7411. MCL 333.7411(1).

Minor in possession ("MIP"). MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(9).

Domestic violence/spousal abuse. Before deferring proceedings under MCL 769.4a, the court must first contact the department of state police to determine whether, according to police records, the defendant has previously been convicted of an assaultive crime or has previously availed himself or herself of the deferral described in MCL 769.4a. MCL 769.4a(1). If the records show that a defendant was arrested for an assaultive crime but do not show a disposition, the court must contact the arresting agency and the court with jurisdiction over the violation to determine the disposition of the arrest. Id.

Parental kidnapping. MCL 750.350a(4).

Prostitution offenses committed by human trafficking victims. “The accused bears the burden of proving to the court by a preponderance of the evidence that the violation was a direct result of his or her being a victim of human trafficking.” MCL 750.451c(2)(a). “To prove that he or she is a victim of human trafficking, the accused shall state under oath that he or she meets the conditions described in [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)(b). Upon determining that the accused has met these requirements, without entering a judgment of guilt, the court may defer the proceedings, place the accused on probation, and impose any conditions permitted under MCL 771.3 or MCL 750.451c(4). MCL 750.451c(2); MCL 750.451c(4).
E. Terms and Conditions of Probation Imposed Pursuant to Deferred Adjudication Provisions

The offenses for which deferred adjudication is available are not limited to felony offenses. Therefore, jurisdiction over the offenses may be in district court or circuit court, depending on whether the offense is a misdemeanor or a felony. MCL 771.3(9) specifically applies to deferred adjudications occurring in circuit court, and MCL 771.3(10) specifically applies to deferred adjudications occurring in district court.

According to MCL 771.3(9):

“If entry of judgment is deferred in the circuit court, the court shall require the individual to pay a supervision fee in the same manner as is prescribed for a delayed sentence under [MCL 771.1(3)], shall require the individual to pay the minimum state costs prescribed by [MCL 769.1],[33] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)].” (Emphasis added.)

According to MCL 771.3(10):

“If . . . entry of judgment is deferred in the district court . . . , the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1],[34] and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)].” (Emphasis added.)

For deferred adjudications in circuit court, the supervision fee required by MCL 771.1(3) must be imposed on the defendant pursuant to MCL 771.3(9). However, no express language requires that a supervision fee be imposed on a defendant whose adjudication is deferred in district court.

Imposition of a supervision fee for a defendant whose adjudication is deferred by the district court appears to be authorized by MCL 771.3(5) when costs are imposed under MCL 771.3(2), a provision expressly mentioned in MCL 771.3(10). MCL 771.3(10) expressly authorizes a district court to impose any of the conditions described in MCL 771.3(1), (2), and (3), and MCL 771.3(2) expressly authorizes the district court to require the defendant to “[p]ay costs pursuant to subsection (5).” MCL 771.3(5) states: “If the court requires the

33 See Section 9.5 for discussion of minimum state costs.

34 See Section 9.5 for discussion of minimum state costs.
probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.” (Emphasis added.)

In sum, the interaction between and among MCL 771.3(9), MCL 771.3(10), and the individual deferred adjudication statutes must be examined carefully to determine the court’s authority with regard to the imposition of supervision fees. Supervision fees are expressly required when an adjudication is deferred in circuit court. Supervision fees are not required when an adjudication is deferred in district court. However, MCL 771.3(5) may provide the district court with the authority and the discretion to impose supervision fees when adjudication is deferred in district court for misdemeanor offenses.

In the benchbook’s discussion regarding the imposition of costs and supervision fees in deferred adjudication cases, care will be taken to first explain any express provisions in each individual deferred adjudication statute concerning the imposition of costs or supervision fees, followed by an explanation of the provisions in MCL 771.3(9) and MCL 771.3(10) concerning those same issues.

Any mandatory terms or conditions of probation\(^{35}\) imposed under each of the areas discussed in this subsection are outlined below.

§7411. Under §7411, the defendant must pay a probation supervision fee as prescribed by MCL 771.3c. MCL 333.7411(1). The statutory language in MCL 333.7411(1) expressly mentions only that a defendant may be ordered to participate in a drug treatment court, but MCL 771.3(9) and MCL 771.3(10) authorize the court to impose any other term or condition it deems appropriate to the offense and the offender.\(^{36}\)

A defendant convicted of violating article 7 of the controlled substance act (except for violations of MCL 333.7401(2)(a)(i) to (iv) or MCL 333.7403(2)(a)(i) to (iv)\(^{37}\)) may, as part of the defendant’s confinement or probation, be required to attend a program addressing the medical, psychological, and social effects of the misuse of drugs. MCL 333.7411(5). The defendant may be required to pay a fee for the program, and failure to complete a court-ordered

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\(^{35}\) See Section 10.1 for detailed information regarding terms and conditions of probation.

\(^{36}\) MCL 333.7411(1) expressly requires the court to impose on the probationer the supervision fee indicated in MCL 771.3c. This express language appears to require that the supervision fee be imposed without regard to whether the offense for which adjudication is being deferred is a misdemeanor or felony offense under the jurisdiction of either the district or the circuit court.

\(^{37}\) Major controlled substance offenses are discussed in detail in .
program is a violation of the terms and conditions of the defendant’s probation. *Id.*

If a defendant is twice convicted of violating MCL 333.7341(4), the court must, before the court imposes a sentence under MCL 333.7411(1), order the defendant to undergo substance abuse screening and assessment to determine whether rehabilitative services would likely benefit the defendant. MCL 333.7411(6). As part of a sentence imposed under MCL 333.7411(1), the defendant may be required to participate in and successfully complete one or more appropriate rehabilitation programs (e.g., alcohol or drug education and alcohol or drug treatment programs). MCL 333.7411(6). The defendant must pay the costs of screening, assessment, and rehabilitative services, and failure to complete a court-ordered rehabilitation program is a violation of the defendant’s probation. *Id.*

**Minor in possession (“MIP”).** The terms and conditions of probation under MCL 436.1703(3) include, but are not limited to:

- “the sanctions set forth in” MCL 436.1703(1)(c),
- payment of costs including the minimum state cost described in MCL 712A.18m and MCL 769.1j; and
- payment of probation costs required by MCL 771.3. MCL 436.1703(3).

Because a violation of MCL 436.1703(1)(b) is a misdemeanor offense over which the district court has jurisdiction, see also MCL 771.3(10), which expressly discusses terms and conditions of probation when adjudication is deferred in district court:

> “If . . . entry of judgment is deferred in the district court . . . , the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j][41] and

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38 Prohibits use/possession with intent to use an imitation controlled substance.

39 MCL 436.1703(1)(c) provides, in part:

> “A misdemeanor under this subdivision is punishable by 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, or by a fine of not more than $500.00, or both, as applicable. A court may order a minor under this subdivision to participate in substance use disorder services as defined in . . . MCL 333.6230, and designated by the administrator of the office of substance abuse services, to perform community service, and to undergo substance abuse screening and assessment at his or her own expense as described in [MCL 436.1703(5)].”

40 See for discussion of minimum state costs.

41 See for discussion of minimum state costs.
may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)]."

Supervision fees for deferrals in district court are authorized by MCL 771.3(5). According to MCL 771.3(5), “[i]f the court requires the probationer to pay costs under [MCL 771.3(2)], the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.”

**Impaired healthcare professionals.** The defendant must participate in the health professional recovery program established by MCL 333.16167. MCL 750.430(9). The statutory provision also expressly mentions that a defendant may be ordered to participate in a drug treatment court as a condition of his or her probation. *Id.*

Other than the specific conditions of probation discussed above, MCL 750.430(9) makes no other express reference to the terms and conditions of probation found in MCL 771.3. MCL 750.430(9) states only that court “may defer further proceedings and place the accused on probation[.]” However, because a violation of MCL 750.430 is a misdemeanor under the district court’s jurisdiction, “the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j]" and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)].” MCL 771.3(10).

Supervision fees for deferred adjudications in district court are authorized by MCL 771.3(5). According to MCL 771.3(5), “[i]f the court requires the probationer to pay costs under [MCL 771.3(2)], the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.”

**Domestic violence/spousal abuse.** No mandatory terms or conditions of probation are required by the provision authorizing deferral for the offenses listed in this statute. MCL 769.4a(3) expressly indicates that a defendant may be required to participate both in a mandatory counseling program and a drug treatment court, and that “[a]n order of probation entered under [MCL 769.4a(1)] may include any condition of probation authorized under [MCL 771.3].” MCL 769.4a(3). The defendant may be required to pay the reasonable costs of the counseling program. MCL 769.4a(3).

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42 See for discussion of minimum state costs.
In addition, because the qualifying violations under MCL 750.430 are misdemeanor offenses under the district court’s jurisdiction, \(^{43}\) “the court shall require the individual to pay the minimum state costs prescribed by [MCL 769.1j] \(^{44}\) and may impose, as applicable, the conditions of probation described in [MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3)].” MCL 771.3(10).

Supervision fees for deferred adjudications in district court are authorized by MCL 771.3(5). According to MCL 771.3(5), “[i]f the court requires the probationer to pay costs under [MCL 771.3(2)], the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.”

**Parental kidnapping.** No mandatory terms or conditions of probation are required by the provision authorizing deferral for the offense listed in MCL 750.350a. Express language in MCL 750.350a(4) states only that the accused parent may be placed on probation “with lawful terms and conditions[ that] . . . may include participation in a drug treatment court[.]” The statute makes no reference to the imposition of costs or supervision fees. Therefore, because a violation of MCL 750.350a(1) is a felony offense, the provisions of MCL 771.3(9) apply. According to MCL 771.3(9), when a defendant’s adjudication is deferred in circuit court, the court must order the defendant to pay a supervision fee as designated in MCL 771.1(3). The court must also order the defendant to pay the minimum state costs prescribed by MCL 769.1j. \(^{45}\) In addition, and as applicable, MCL 771.3(9) authorizes the court to impose any condition of probation listed in MCL 771.3(1), MCL 771.3(2), and MCL 771.3(3).

**Prostitution offenses committed by human trafficking victims.** No mandatory terms or conditions of probation are required under MCL 750.451c; however, MCL 750.451c(4) sets out conditions of probation the court may include in the order of probation entered under MCL 750.451c(2):

> “An order of probation . . . may include any condition of probation authorized under . . . MCL 771.3, including, but not limited to, requiring the accused to participate in a mandatory counseling program. The court may order the accused to pay the reasonable costs of the mandatory counseling program. The court also may

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\(^{43}\) First-time violations of MCL 750.81 and MCL 750.81a are misdemeanor offenses for which deferred adjudication is available under MCL 769.4a. MCL 769.4a(1).

\(^{44}\) See for discussion of minimum state costs.

\(^{45}\) See for discussion of minimum state costs.
order the accused to participate in a drug treatment court under . . . MCL 600.1060 to [MCL] 600.1084. The court may order the defendant to be imprisoned for not more than 93 days at a time or at intervals, which may be consecutive or nonconsecutive and within the period of probation, as the court determines. However, the period of imprisonment must not exceed the maximum period of imprisonment authorized for the offense if the maximum period is less than 93 days. The court may permit day parole as authorized under . . . MCL 801.251 to [MCL] 801.258. The court may permit a work or school release from jail.”

F. Failure to Successfully Complete the Probationary Period

With the exceptions detailed below, the court generally has discretion to enter a judgment of guilt and proceed to sentencing when a defendant violates a term or condition of his or her probation.

§7411. The court has discretion to enter an adjudication of guilt and proceed to sentencing if a defendant violates a term or condition of probation. MCL 333.7411(1). Adjudication of guilt is not mandatory under §7411 under these circumstances. Id.

Minor in possession (“MIP”). The court has discretion to enter an adjudication of guilt or finding of responsibility if a defendant or a juvenile violates a term or condition of probation, or when the court finds that the defendant or juvenile is using MCL 436.1703(3) in another court. MCL 436.1703(3).

Impaired healthcare professional. If a defendant violates a term or condition of probation, the court has discretion to enter an adjudication of guilt and sentence the defendant to imprisonment for not more than 180 days or impose a fine of not more than $1,000, or both. MCL 750.430(8)(a); MCL 750.430(9).

Domestic violence/spousal abuse. Except as described below, a court has discretion to enter an adjudication of guilt and proceed to sentencing if a defendant violates a term or condition of probation. MCL 769.4a(2).

A court must enter an adjudication of guilt and proceed to sentencing if the defendant commits an assaultive crime during the period of his or her probation. MCL 769.4a(4)(a). An “assaultive crime” for purposes of this provision means the term as it is defined in MCL 770.9a(3), a violation of MCL 750.81 to MCL 750.90h, or a
violation of a law of another state or of a local ordinance of a political subdivision of this state or of another state that substantially corresponds to an offense found in MCL 770.9a(3) or MCL 750.81 to MCL 750.90h. MCL 769.4a(8)(a)-(iii).

Entry of an adjudication of guilt and proceeding to sentencing is also mandatory if the defendant violates a court order requiring that the defendant receive counseling for his or her violent behavior, MCL 769.4a(4)(b), or if the defendant violates a court order prohibiting contact with a named individual, MCL 769.4a(4)(c).

**Parental kidnapping.** The court has discretion to enter an adjudication of guilt and proceed to sentencing if the defendant violates a term or condition of probation. MCL 750.350a(4).

**Prostitution offenses committed by human trafficking victims.** The court may enter an adjudication of guilt upon a violation of a term or condition of probation. MCL 750.451c(3). Additionally, the court must enter an adjudication of guilt if the offender commits an enumerated offense or violates an order that he or she receive counseling for violent behavior or that he or she have no contact with a named individual. MCL 750.451c(5).

### G. Successful Completion of the Probationary Period

A court must discharge the defendant (or juvenile) and dismiss the proceedings against him or her when the defendant (or juvenile) has fulfilled the terms and conditions of his or her probationary period.

§7411. MCL 333.7411(1).

**Minor in possession (“MIP”).** MCL 436.1703(3).

**Impaired healthcare professional.** MCL 750.430(9).

**Domestic violence/spousal abuse.** MCL 769.4a(5).

**Parental kidnapping.** MCL 750.350a(4).

**Prostitution offenses committed by human trafficking victims.** MCL 750.451c(6).
H. Discharge and Dismissal Without Entry of an Adjudication of Guilt

§7411. Except as otherwise provided by law, a discharge and dismissal under §7411 is not a conviction for purposes of MCL 333.7411 or for purposes of disqualifications or disabilities imposed by law for criminal convictions. MCL 333.7411(1). Additionally, the discharge and dismissal is not a conviction for purposes of the penalties imposed for subsequent convictions under MCL 333.7413. MCL 333.7411(1).

When a defendant has successfully completed the term of probation imposed under MCL 333.7411, the felony charge is dismissed and is not a felony conviction for purposes of the concealed pistol licensing act (CPLA), MCL 28.421 et seq. Carr v Midland Co Concealed Weapons Licensing Bd, 259 Mich App 428, 438 (2003).

Minor in possession (“MIP”). Discharge and dismissal under MCL 436.1703 is without an adjudication of guilt or a determination of responsibility in a delinquency proceeding and is not a conviction or juvenile adjudication for purposes of disqualifications or disabilities imposed by law for criminal convictions. MCL 436.1703(3). However, a successful deferment is considered a prior judgment for purposes of a subsequent violation under MCL 436.1703(1)(c).

Impaired healthcare professional. A discharge and dismissal under MCL 750.430 is without adjudication of guilt and is not a conviction for purposes of MCL 750.430 or for purposes of disqualifications or disabilities imposed by law for conviction of a crime, including additional penalties imposed for second or subsequent convictions under MCL 750.430(8)(b). MCL 750.430(9).

Domestic violence/spousal abuse. A discharge and dismissal under MCL 769.4a is without adjudication of guilt and is not a conviction for purposes of MCL 769.4a or for purposes of disqualifications or disabilities imposed by law for conviction of a crime. MCL 769.4a(5). However, a discharge and dismissal does constitute a prior conviction for purposes of a prosecution under MCL 750.81(4) or MCL 750.81(5) (certain repeat offenses involving domestic assault or assault of a pregnant individual), or a prosecution under MCL

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46 See MCL 600.1076(4)(e).
47 Effective July 25, 2016, 2016 PA 87 amended MCL 750.81 (governing domestic assault) by adding new MCL 750.81(3) to prescribe an additional misdemeanor penalty for the assault or assault and battery of a pregnant individual, and to add this new offense to provisions prescribing enhanced penalties for subsequent convictions. Although the amendments resulted in the renumbering of former MCL 750.81(3) and MCL 750.81(4), MCL 769.4a(5) was not amended accordingly and still refers to the former subsections.
750.81a(3) for aggravated domestic assault with one or more previous domestic assault convictions. MCL 769.4a(5).

**Parental kidnapping.** A discharge and dismissal under MCL 750.350a is without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law for conviction of a crime, including any additional penalties imposed for second or subsequent convictions. MCL 750.350a(4). Unlike other deferred adjudication statutes, MCL 750.350a(4) does not include express language excepting a discharge and dismissal under this provision from being considered a conviction for purposes of MCL 750.350a. MCL 750.350a(4).

**Prostitution offenses committed by human trafficking victims.** Discharge and dismissal is without adjudication of guilt and “is not a conviction for purposes of [MCL 750.451c] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.” MCL 750.451c(6).

## I. Record of Deferred Adjudication

§7411. All court proceedings under MCL 333.7411 are open to the public. MCL 333.7411(2). “[I]f the record of proceedings . . . is deferred under [MCL 333.7411], the record of proceedings during the period of deferral shall be closed to public inspection.” MCL 333.7411(2). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 333.7411(3). This nonpublic record is open, for limited purposes as set out in MCL 333.7411(3)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 333.7411(3).

An offender whose adjudication of guilt is deferred under MCL 333.7411 and whose case is dismissed after successful completion of the terms of probation does not qualify as “not guilty” for purposes of MCL 28.243(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).48

A discharge and dismissal following a defendant’s successful fulfillment of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring prior record variable (PRV) 5. *People v James (Derrick)*, 267 Mich App 675, 678-680 (2005). MCL 333.7411(1)

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48*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).
specifically states that “[d]ischarge and dismissal under [MCL 333.7411] shall be without adjudication of guilt and . . . is not a conviction for purposes of [MCL 333.7411] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . .”

**Minor in possession (“MIP”).** During the period when proceedings are deferred and the individual is on probation, and if there is a discharge and dismissal, the court must maintain a nonpublic record of the matter. MCL 436.1703(3). The secretary of state must retain a nonpublic record of a plea and of the discharge and dismissal under MCL 436.1703(3). MCL 436.1703(3). See MCL 436.1703(3)(a)-(b) for circumstances under which, and people to whom, the record will be furnished.

**Impaired healthcare professional.** Unless the court enters a judgment of guilt, the state police records and identifications division must retain a nonpublic record of the arrest, court proceedings, and disposition under MCL 750.430(9). MCL 750.430(9). See MCL 750.430(9)(a)-(c) for circumstances under which, and people to whom, the record will be furnished.

**Domestic violence/spousal abuse.** All court proceedings under MCL 769.4a are open to the public. MCL 769.4a(6). “[I]f the record of proceedings . . . is deferred under [MCL 769.4a], the record of proceedings during the period of deferral shall be closed to public inspection.” MCL 769.4a(6). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 769.4a(7). This nonpublic record is open, for limited purposes as set out in MCL 769.4a(7)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 769.4a(7).

An offender whose adjudication of guilt was deferred under MCL 769.4a and whose case is dismissed after successful completion of a diversionary program does not qualify as “not guilty” and is not entitled to the destruction of his or her fingerprint card under MCL 28.243(10). *McElroy v Michigan State Police Criminal Justice Info Ctr*, 274 Mich App 32, 33 (2007).49

**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

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49 *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).
proceedings during the period of deferral shall be closed to public inspection.” MCL 750.350a(5). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 750.350a(6). This nonpublic record is open, for limited purposes as set out in MCL 750.350a(6)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 750.350a(6).

Prostitution offenses committed by human trafficking victims. All court proceedings under MCL 750.451c are open to the public. MCL 750.451c(7). “[I]f the record of proceedings . . . is deferred . . . , the record of proceedings during the period of deferral must be closed to public inspection.” MCL 750.451c(7). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record, which is open, for limited purposes as set out in MCL 750.451c(8)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Health and Human Services. MCL 750.451c(8).

J. Only One Discharge and Dismissal Available

An individual may obtain only one discharge and dismissal under each of the deferred adjudication statutes discussed in this section, with the exception of MCL 750.451c (prostitution offenses committed by human trafficking victims).50

§7411. MCL 333.7411(1).

Minor in possession (“MIP”). MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(9).

Domestic violence/spousal abuse. MCL 769.4a(5).

Parental kidnapping. MCL 750.350a(4).

50 Effective August 21, 2017, 2017 PA 34 amended MCL 750.451c to eliminate the requirement that an individual have no prior convictions for enumerated prostitution-related offenses in order to be eligible for discharge and dismissal of a prostitution-related offense committed as a direct result of being a victim of human trafficking, and to eliminate the restriction that an individual is eligible for only one discharge and dismissal under MCL 750.451c.
K. Fines, Costs, and Assessments

MCL 769.1k provides a court with general authority to impose fines, costs (including court costs), expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time entry of an adjudication of guilt is deferred. The court must order a defendant to pay the minimum state costs as prescribed by MCL 769.1j, MCL 769.1k(1)(a). In addition, a court may order a defendant to pay any additional costs incurred to compel his or her appearance. MCL 769.1k(2). The general authority to impose the monetary penalties listed in MCL 769.1k(1)-(2) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). MCL 769.1k(4) authorizes a court to order a defendant to pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of the penalties imposed pursuant to MCL 769.1k at any time. MCL 769.1k(5). Unless otherwise required by law, a court may apply any payments made in excess of the total amount imposed in one case to any amounts owed by the same defendant in any other case. MCL 769.1k(6).

Whenever adjudication is deferred for commission of a felony offense, the court must order the individual to pay a $130 crime victim assessment. MCL 780.905(1)(a). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2). A $75 crime victim assessment must be ordered in cases involving misdemeanors or ordinance violations. MCL 780.905(1)(b).54

L. 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: a drug treatment court, see MCL 600.1060 et seq.; a mental health court, see

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51 As amended, 2014 PA 352, effective October 17, 2014. See for discussion of costs.
52 See for additional discussion of minimum state costs.
53 Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
54 Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime victim assessment of $75.00 in cases involving a conviction of any misdemeanor or ordinance violation (rather than only a “serious” or “specified” misdemeanor). Related provisions were amended by 2011 PA 293, 2011 PA 295, and 2011 PA 296, also effective April 1, 2012.
55 See MCL 600.1088(2).
1. **Drug Treatment Courts**

   **a. Creation of and Admission to a Drug Treatment Court**

   MCL 600.1062(1)-(2) provide that a district court, circuit court, or Family Division of circuit court may adopt or institute a drug treatment court or juvenile drug treatment court. The State Court Administrative Office (SCAO) has published standards and best practices manuals for problem-solving courts, including Adult Drug Court; additionally, certain best practices are required for certification, see Adult Drug Court Required Best Practices.

   If a drug treatment court or juvenile drug treatment court will include in its program individuals who may be eligible for discharge or dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines, the court must “enter[] into a memorandum of understanding” with each participating prosecuting attorney in the district, a representative of the criminal defense bar (specializing in juvenile law, in the case of a juvenile drug treatment court), and a representative or representatives of community treatment providers. MCL 600.1062(1)-(2).

   MCL 600.1064 sets forth the general requirements an individual must meet in order to be admitted into a drug treatment court. No individual has a right to be admitted into a drug treatment court. MCL 600.1064(1). Instead, it is up to each individual drug court to determine whether an individual may be admitted. Id. Furthermore, an individual is not eligible for admission into a drug

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56 A fifth type of state-certified treatment court, DWI/sobriety court, is governed by MCL 600.1084. See the Michigan Judicial Institute’s Traffic Benchbook, Chapter 9, for more information.

57 See the Michigan Judicial Institute’s Controlled Substances Benchbook, Chapter 9, for a thorough discussion of drug treatment courts.
treatment court if he or she is a violent offender, as defined by MCL 600.1060(g). MCL 600.1064(1).

If preadmissions screening and other requirements are met, see MCL 600.1064(1); MCL 600.1064(3), individuals who have been assigned the status of youthful trainee under MCL 762.11, or who have been placed on probation pursuant to the deferred adjudication provisions of MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (specific domestic violence offenses), MCL 750.430 (impaired healthcare professionals), or MCL 750.350a (parental kidnapping), are eligible for admission into a drug treatment court. MCL 600.1064(2).

b. Jurisdiction Over Participant

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

c. Applicants Who Are Currently Charged With a Criminal Offense

MCL 600.1068 governs those cases where the applicant is charged with a crime. If the applicant is charged with a crime, or is a juvenile alleged to have engaged in activity that would constitute a criminal act if committed by an adult, his or her admission is subject to the following conditions:

- the offense(s) allegedly committed must be related to the abuse, illegal use, or possession of a controlled substance or alcohol. MCL 600.1068(1)(a).

- the individual, if an adult, must plead guilty to the charge(s) on the record, or if a juvenile, must admit responsibility for the
violation(s) that he or she is accused of having committed. MCL 600.1068(1)(b).

• the individual must waive, in writing, the right to a speedy trial, the right to representation by an attorney at drug treatment court review hearings, and, with the agreement of the prosecutor, the right to a preliminary examination. MCL 600.1068(1)(c).

• the individual must sign a written agreement to participate in the drug treatment court. MCL 600.1068(1)(d).

“In the case of an individual who will be eligible for discharge and dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines, the prosecutor must approve of the admission of the individual into the drug treatment court in conformity with the memorandum of understanding under [MCL 600.]1062.” MCL 600.1068(2). See also People v Baldes, 309 Mich App 651, 656-657 (2015) (holding that “courts may not admit a defendant into a drug treatment court program when doing so departs from the sentencing guidelines and the prosecutor has not approved[]”). Moreover, a “prosecuting attorney’s decision to sign [a] referral form” for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) “[does] not constitute a waiver [of the right to challenge the trial court’s decision to depart from the sentencing guidelines] or approval[ of the defendant’s admission into drug treatment court]” if the form “[does] not state that it constitute[s] approval of the individual’s admission into the drug treatment court program[;]” furthermore, “a prosecutor’s silence is not sufficient to constitute approval under [MCL 600.1068] and does not waive the prosecutor’s right to later demand enforcement of sentencing guidelines.” Baldes, 309 Mich App at 656-657.

An individual may not be admitted to, or remain in, a drug treatment court if his or her admission and participation would permit a discharge or dismissal of a traffic offense upon successful completion of the drug treatment court program. MCL 600.1068(3).
d. Post-Admission Procedures

MCL 600.1070(1) sets forth three separate dispositional rules, depending on the status of the case against the applicant at the time he or she is admitted to drug treatment court.

- **Criminal charges pending at time of admission.** When an individual is admitted to drug treatment court based on criminal charges that are still pending against him or her, the drug treatment court must accept the guilty plea or, in the case of a juvenile, the admission of responsibility. MCL 600.1070(1)(a).

- **Guilty plea or admission of responsibility entered prior to admission.** When an individual is admitted to drug treatment court based on criminal charges to which the individual has pleaded guilty or, in the case of a juvenile, has admitted responsibility, the drug treatment court has two dispositional options: (1) if the offense was not a traffic offense and the individual may be eligible for discharge and dismissal of the charge upon successful completion of the drug treatment court program, the court must not enter a judgment of guilt or adjudication of responsibility, MCL 600.1070(1)(b)(i); or (2) if the offense was a traffic offense, or where the individual may not be eligible for discharge and dismissal upon successful completion of the drug treatment court program, the court must enter a judgment of guilt or an adjudication of responsibility, MCL 600.1070(1)(b)(ii).

- **Deferred or immediate sentence.** When an individual is admitted to drug treatment court based on criminal charges for which the individual and the prosecuting attorney have reached an agreement, the court may either defer proceedings until completion of the drug treatment court program, or may proceed to sentencing and place the individual on probation or other court supervision with participation in drug treatment court as a term of the individual’s probation or supervision. MCL 600.1070(1)(c).
e. **Successful Completion of the Drug Court Treatment Program**

For participants who successfully complete probation or other supervision by the court and whose proceedings were deferred or who were sentenced pursuant to MCL 600.1070, “the court shall comply with the agreement made with the participant upon admission into the drug treatment court, or the agreement as it was altered after admission by the court with approval of the participant and the prosecutor for that jurisdiction as provided in [MCL 600.1076(3)-(8)].” MCL 600.1076(2).

- **Deferred adjudication.** If an individual who successfully completes drug treatment court is participating pursuant to MCL 762.11 (youthful trainee status), MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (domestic violence offenses), MCL 750.350a (parental kidnapping), or MCL 750.430 (impaired healthcare professionals), the court shall proceed pursuant to the applicable section of law. MCL 600.1076(3). Only one discharge or dismissal is permitted under MCL 600.1076(3).

- **Discharge and dismissal.** Subject to the memorandum of understanding under MCL 600.1062, and with the prosecutor’s consent, proceedings may be dismissed and discharged against a drug court participant who satisfies the requirements of MCL 600.1076(4)(a)-(e). Additional requirements apply to dismissal and discharge of proceedings against an individual charged with a domestic violence offense. MCL 600.1076(5). A discharge and dismissal under MCL 600.1076(4) is without adjudication of guilt or responsibility, and does not represent a conviction or finding of responsibility for purposes of MCL 600.1076 or for purposes of any disqualifications or disabilities imposed by law for conviction of a crime or a finding of responsibility. MCL 600.1076(6). An individual is only entitled to one discharge and dismissal under MCL 600.1076(4). MCL 600.1076(6).

- **Participants not entitled to dismissal and discharge.** Participants who successfully
complete a drug treatment court program but are not entitled to dismissal and discharge of the proceedings against them are subject to the provisions of MCL 600.1076(7).

f. Records

All court proceedings under MCL 600.1076 are open to the public. MCL 600.1076(9).

Unless a judgment of guilt or adjudication of responsibility is entered under MCL 600.1076, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 600.1076(10). This nonpublic record is open, for limited purposes as set out in MCL 600.1076(10)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 600.1076(10).

The following additional requirements apply, depending on the outcome of the proceedings under MCL 600.1076:

- **Deferred adjudication.** Except for the nonpublic record that must be maintained by the Department of State Police under MCL 600.1076(10), “if the record of proceedings...is deferred under MCL 600.1076, the record of proceedings during the period of deferral shall be closed to public inspection.” MCL 600.1076(9).

- **Discharge and dismissal.** Following a discharge and dismissal under MCL 600.1076(4), the court must send a record of the discharge and dismissal to the Department of State Police, which must “enter that information into the law enforcement information network with an indication of participation by the individual in a drug treatment court.” MCL 600.1076(6). All records of the drug treatment court proceedings under MCL 600.1076(4) are closed to public inspection and exempt from public disclosure under the Freedom of Information Act, MCL 15.231 et seq. MCL 600.1076(6).

- **Successful participants not entitled to dismissal and discharge.** If an adjudication
of guilt or responsibility and a sentence or disposition are entered following successful participation in the drug treatment court program, the court must “[s]end a record of the conviction and sentence or the finding or adjudication of responsibility and disposition” to the Department of State Police, which must then “enter that information into the law enforcement information network with an indication of successful participation by the individual in a drug treatment court.” MCL 600.1076(7)(c).

- **Unsuccessful participants.** Upon sentencing or disposition of an individual whose participation is terminated or who fails to successfully complete the drug treatment court program, the court must send a record of the sentence or disposition and the individual’s unsuccessful participation in the drug treatment court to the Department of State Police, which must “enter that information into the law enforcement information network, with an indication that the individual unsuccessfully participated in a drug treatment court.” MCL 600.1076(8).

2. **Veterans Treatment Courts**

   a. **Creation of and Admission to a Veterans Treatment Court**

      Circuit and district courts are authorized to adopt or institute a veterans treatment court. MCL 600.1201(2). The State Court Administrative Office (SCAO) has published standards and best practices manuals for problem-solving courts, including Veterans Treatment Court; additionally, certain best practices are required for certification, see Veterans Treatment Court Required Best Practices.

      MCL 600.1201(2) provides that “if the veterans treatment court [adopted or instituted by a circuit or district court under MCL 600.1201] will include in its program individuals who may be eligible for discharge and

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58 Effective October 16, 2012, 2012 PA 335 added MCL 600.1200 et seq. to the Revised Judicature Act to establish veterans treatment courts to provide treatment programs for veterans who are either substance abusers or mentally ill. See MCL 600.1201(2); MCL 600.1204(b).
dismissal of an offense, a delayed sentence, deferred entry of judgment, or a sentence involving deviation from the sentencing guidelines,” the circuit or district court must include the prosecuting attorney in the memorandum of understanding that must, in order to establish a veterans treatment court, be entered into with representatives of various entities specified in MCL 600.1201(2).

“An individual who may be eligible for discharge and dismissal of an offense, delayed sentence, deferred entry of judgment, or deviation from the sentencing guidelines shall not be admitted to a veterans treatment court unless the prosecutor first approves the admission of the individual into the veterans treatment court in conformity with the memorandum of understanding under [MCL 600.1201(2).] MCL 600.1205(2). See also People v Baldes, 309 Mich App 651, 656-657 (2015), applying MCL 600.1068(2) (a similar provision governing admission to drug treatment court) and noting that “courts may not admit a defendant into a drug treatment court program when doing so departs from the sentencing guidelines and the prosecutor has not approved.” Additionally, the Baldes Court held that a “prosecuting attorney’s decision to sign [a] referral form” for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) “[does] not constitute a waiver [of the right to challenge the trial court’s decision to depart from the sentencing guidelines] or approval[ of the defendant’s admission into drug treatment court]” if the form “[does] not state that it constitute[s] approval of the individual’s admission into the drug treatment court program[,]” and that “a prosecutor’s silence is not sufficient to constitute approval under [MCL 600.1068] and does not waive the prosecutor’s right to later demand enforcement of sentencing guidelines.” Baldes, 309 Mich App at 656-657.

Admission to a veterans treatment court is available to a veteran who is dependent on alcohol or drugs, a substance abuser, or mentally ill and who meets certain additional requirements, including that he or she is not a violent offender59 or an unwarranted or substantial risk to the safety of the public or an individual. MCL 600.1204.

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59 “Violent offender’ means an individual who is currently charged with or has pled guilty to an offense involving the death of, or a serious bodily injury to, any individual, whether or not any of these circumstances are an element of the offense, or an offense that is criminal sexual conduct in any degree.” MCL 600.1200(k).
In addition to individuals currently charged with a crime or other qualifying individuals, an eligible individual may be admitted to a veterans treatment court if he or she has been assigned youthful trainee status under MCL 762.11 or has had criminal proceedings against him or her deferred and has been placed on probation under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance), or an ordinance or law that is substantially similar to one of these provisions. MCL 600.1203(2).

An individual admitted to a veterans treatment court is entitled to certain services, including close monitoring, a mentorship relationship with another veteran, and substance abuse and mental health treatment services as appropriate and practicable. MCL 600.1207(1).

b. Jurisdiction Over Participant

A case may be completely transferred from a court of original jurisdiction to a veterans treatment court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). MCL 600.1088(1). Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the veterans treatment court participant until final disposition of the case, but not longer than the probation period established under MCL 771.2. MCL 600.1206(2).

c. Applicants Who Are Currently Charged With a Criminal Offense

If an individual seeking admission to a veterans treatment court is charged in a criminal case, the offenses must be generally related to his or her military service, including substance abuse or mental illness arising as a result of service; additionally, the individual must plead guilty, waive certain rights, and sign a written agreement to participate in the court. MCL 600.1205(1).
d. Post-Admission Procedures

• Criminal charges pending at time of admission. If a criminal charge was pending against the individual at the time of admission to a veterans treatment court, he or she must enter a plea of guilty. MCL 600.1205(1); MCL 600.1206(1)(a).

• Guilty plea entered prior to admission. “If the individual pled guilty to an offense that is not a traffic offense and may be eligible for discharge and dismissal under the agreement with the court and prosecutor upon successful completion of the veterans treatment court program, the court shall not enter a judgment of guilt[;]” otherwise, the court must enter a judgment of guilt. MCL 600.1206(1)(b)-(ii).

• Deferred or immediate sentence. “Under the agreement with the individual and the prosecutor, the court may delay or defer further proceedings as provided in . . . MCL 771.1, or proceed to sentencing, as applicable in that case under that agreement, and place the individual on probation or other court supervision in the veterans treatment court program[,]” MCL 600.1206(1)(c).

e. Successful Completion of the Veterans Treatment Court Program

Upon successful completion by an individual whose proceedings were deferred or who was sentenced under MCL 600.1206, the court must comply with the agreement made with the individual. MCL 600.1209(2).

• Deferred adjudication. If the individual is participating under MCL 762.11 (youthful trainee status) or has had criminal proceedings against him or her deferred and has been placed on probation under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance), or an
ordinance or law that is substantially similar to one of these provisions, “the court shall proceed under the applicable section of law[, and] there shall be not more than 1 discharge or dismissal” in such a case. MCL 600.1203(2); MCL 600.1209(3).

• **Discharge and dismissal.** With the exception of traffic offenses and certain domestic violence offenses, the court, with the agreement of the prosecutor, may discharge and dismiss the proceedings against a successful first-time veterans treatment court participant who is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty; the participant must not have previously been assigned youthful trainee status or had criminal proceedings dismissed under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance). MCL 600.1209(4). Discharge and dismissal of a domestic violence offense may be granted only if the individual has not previously had proceedings dismissed under MCL 769.4a (Spouse Abuse Act), the offense is eligible to be dismissed under the Act, and the individual fulfills the terms imposed under the Act. MCL 600.1209(5). A discharge and dismissal under MCL 600.1209(4) must “be without adjudication of guilt and is not a conviction for purposes of [MCL 600.1209] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.” MCL 600.1209(6). The court must send a record of

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60 MCL 600.1201(2) provides that “if the veterans treatment court [adopted or instituted by a circuit or district court under MCL 600.1201] will include in its program individuals who may be eligible for discharge and dismissal of an offense, a delayed sentence, deferred entry of judgment, or a sentence involving deviation from the sentencing guidelines[,]” the circuit or district court must include the prosecuting attorney in the memorandum of understanding that must, in order to establish a veterans treatment court, be entered into with representatives of various entities specified in MCL 600.1201(2). “An individual who may be eligible for discharge and dismissal of an offense, delayed sentence, deferred entry of judgment, or deviation from the sentencing guidelines shall not be admitted to a veterans treatment court unless the prosecutor first approves the admission of the individual into the veterans treatment court in conformity with the memorandum of understanding under [MCL 600.1201(2)].” MCL 600.1205(2).
the discharge and dismissal to the Department of State Police, which must enter this information into the law enforcement information network (LEIN) with an indication that the individual participated in a veterans treatment court. *Id.*

- **Successful completion without discharge or dismissal.** Except as provided in MCL 600.1209(3)-(5) (governing discharge and dismissal), “if an individual has successfully completed probation or other court supervision,” the court must enter an adjudication of guilt, if it has not already entered an adjudication of guilt or responsibility; proceed to sentencing, if it has not already sentenced the individual; and send a record of the conviction and sentence, or the finding or adjudication of responsibility and disposition, to the criminal justice information center of the Department of State Police, which must enter the information into the LEIN with an indication of successful participation by the individual in a veterans treatment court. MCL 600.1209(7).

**f. Failure to Successfully Complete Veterans Treatment Court Program**

MCL 600.1209(8) provides:

“For a participant whose participation is terminated or who fails to successfully complete the veterans treatment court program, the court shall enter an adjudication of guilt if the entering of guilt was deferred or sentencing was delayed under [MCL 600.1206] and shall then proceed to sentencing or disposition of the individual for the original charges to which the individual pled guilty prior to admission to the veterans treatment court. Upon sentencing or disposition of the individual, the court shall send a record of that sentence or disposition and the individual’s unsuccessful participation in the veterans treatment court to the criminal justice information center of the [D]epartment of [S]tate [P]olice, . . .
[which] shall enter that information into the [law enforcement information network (LEIN)], with an indication that the individual unsuccessfully participated in a veterans treatment court.”

g. Records

MCL 600.1209(6) provides, in relevant part:

“Unless the court enters a judgment of guilt, all records of the proceedings regarding the participation of the individual in the veterans treatment court under [MCL 600.1209(4)] are closed to public inspection and are exempt from public disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, but shall be open to the courts of this state, another state, or the United States, the [D]epartment of [C]orrections, law enforcement personnel, and prosecutors only for use in the performance of their duties or to determine whether an employee of the court, [D]epartment, law enforcement agency, or prosecutor’s office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, [D]epartment, law enforcement agency, or prosecutor’s office. The records and identifications division of the [D]epartment of [S]tate [P]olice shall retain a nonpublic record of an arrest and the discharge and dismissal under [MCL 600.1209(6)].”

3. Mental Health Courts

a. Adoption or Institution of a Mental Health Court

Circuit and district courts are authorized to adopt or institute a mental health court pursuant to statute or court

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61 Effective December 30, 2013, 2013 PA 274—2013 PA 277 added Chapter 10B, MCL 600.1090 et seq., to the Revised Judicature Act to establish mental health courts to provide “court-supervised treatment program[s] for individuals who are diagnosed by a mental health professional with having a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability,” or “[p]rograms designed to adhere to the 10 essential elements of a mental health court promulgated by the [B]ureau of [J]ustice [A]ssistance” that include certain defined characteristics. See MCL 600.1090(e); MCL 600.1091(1)-(2).
rules.\textsuperscript{62} MCL 600.1091(1). The State Court Administrative Office (SCAO) has published standards and best practices manuals for problem-solving courts, including \textit{Adult Mental Health Court}; additionally, certain best practices are required for certification, see \textit{Adult Mental Health Court Required Best Practices}.

MCL 600.1091(1) provides that “if [a] mental health court will include in its program individuals who may be eligible for discharge and dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines,” the circuit or district court must “enter[] into a memorandum of understanding with each participating prosecuting attorney in the circuit or district court district” and representatives of various specified entities.

“A mental health court may hire or contract with licensed or accredited treatment providers . . . to assist the mental health court in fulfilling its requirements under [Chapter 10B, MCL 600.1090 et seq.].” MCL 600.1092.

\textbf{b. Definition of “Mental Health Court”}

MCL 600.1090(e) defines mental health court as any of the following:

“(i) A court-supervised treatment program for individuals who are diagnosed by a mental health professional with having a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.\textsuperscript{63}

(ii) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the \textit{Bureau of \textit{J}ustice \textit{A}ssistance} that include all of the . . .

\textsuperscript{62} The Michigan Supreme Court “is responsible for the expenditure of state funds for the establishment and operation of mental health courts,” and a mental health court must provide quarterly reports to the State Court Administrative Office (SCAO) regarding the funds received and expended. MCL 600.1099a(1)-(2).

\textsuperscript{63} “[S]erious mental illness,” “serious emotional disturbance,” and “developmental disability[?]” mean those terms as defined in the Mental Health Code, MCL 330.1100 \textit{et seq.} MCL 600.1090(g); MCL 600.1090(h); see also MCL 330.1100a; MCL 330.1100d. “‘Co-occurring disorder’ means having [one] or more disorders relating to the use of alcohol or other controlled substances of abuse as well as any serious mental illness, serious emotional disturbance, or developmental disability. A diagnosis of co-occurring disorders occurs when at least [one] disorder of each type can be established independent of the other and is not simply a cluster of symptoms resulting from [one] disorder.” MCL 600.1090(a).
characteristics set out in MCL 600.1090(e)(ii)(A)-(J)."

c. Jurisdiction Over Participant

A case may be completely transferred from a court of original jurisdiction to a mental health court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). MCL 600.1088(1). Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the mental health court participant until final disposition of the case, but not longer than the probation period established under MCL 771.2. MCL 600.1095(2).

d. Eligibility

“Admission into a mental health court program is at the discretion of the court based on the individual’s legal or clinical eligibility.” MCL 600.1093(1). Prior participation in or completion of a mental health court program does not preclude admission; however, a violent offender may not be admitted. Id.

An eligible individual may also be admitted to a mental health court if he or she has been assigned youthful trainee status under MCL 762.11 or has had criminal proceedings against him or her deferred and has been placed on probation under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health

64 Required characteristics include “[e]ligibility criteria that address public safety and a community’s treatment capacity, in addition to the availability of alternatives to pretrial detention for defendants with mental illnesses, and that take into account the relationship between mental illness and a defendant’s offenses, while allowing the individual circumstances of each case to be considered[,]” MCL 600.1090(e)(ii)(B), and the provision of “legal counsel to indigent defendants [in accordance with the Michigan Indigent Defense Commission Act, MCL 780.981 et seq.,] to explain program requirements, including voluntary participation, and guide[] defendants in decisions about program involvement,” MCL 600.1090(e)(ii)(E).

65 “Violent offender’ means an individual who is currently charged with, or has been convicted of, an offense involving the death of, or a serious bodily injury to, any individual, whether or not any of these circumstances are an element of the offense, or with criminal sexual conduct in any degree.” MCL 600.1090(j).
care professional while under the influence of alcohol or controlled substance). MCL 600.1093(2).

The court may, but is not required to, “accept participants from any other jurisdiction in [the] state based upon the residence of the participant in the receiving jurisdiction, the nonavailability of a mental health court in the jurisdiction where the participant is charged, and the availability of financial resources for both operations of the mental health court program and treatment services.” MCL 600.1091(2).

e. Preadmission Screening and Evaluation Assessment

MCL 600.1093(3) provides:

“To be admitted to a mental health court, an individual shall cooperate with and complete a preadmission screening and evaluation assessment and shall submit to any future evaluation assessment as directed by the mental health court.[66] A preadmission screening and evaluation assessment must include all of the following:

(a) A review of the individual’s criminal history. A review of the law enforcement information network [(LEIN)] may be considered sufficient for purposes of [MCL 600.1093(3)(a)] unless a further review is warranted.[67] The court may accept other verifiable and reliable information from the prosecution or defense to complete its review and may require the individual to submit a statement as to whether or not he or she has previously been admitted to a mental health court and the results of his

66 “Except as otherwise permitted in [Chapter 10B, MCL 600.1090 et seq.], any statement or other information obtained as a result of participating in a preadmission screening and evaluation assessment under [MCL 600.1093(3)] is confidential and is exempt from disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, and must not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal drug use.” MCL 600.1093(4).

67 “The court may request that the [D]epartment of [S]tate [P]olice provide to the court information contained in the law enforcement information network [(LEIN)] pertaining to an individual applicant’s criminal history for the purposes of determining an individual’s eligibility for admission into the mental health court and general criminal history review.” MCL 600.1093(5).
or her participation in the prior program or programs.

(b) An assessment of the risk of danger or harm to the individual, others, or the community.

(c) A mental health assessment, clinical in nature, and using standardized instruments that have acceptable reliability and validity, meeting diagnostic criteria for a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.[68]

(d) A review of any special needs or circumstances of the individual that may potentially affect the individual’s ability to receive mental health or substance abuse treatment and follow the court’s orders.”

Any victim of a charged offense, or any victim of a prior offense of which the individual was convicted may, in addition to rights accorded under the Crime Victim’s Rights Act (CVRA), MCL 780.751 et seq., “submit a written statement to the court regarding the advisability of admitting the individual into the mental health court.” MCL 600.1094(4).

f. Conditions of Admission

MCL 600.1094(1) provides:

“If the individual is charged in a criminal case his or her admission to mental health court is subject to all of the following conditions:

(a) The individual pleads guilty, no contest, or be convicted [sic] of any criminal charge on the record.

[68] “[S]erious mental illness,” “serious emotional disturbance,” and “developmental disability[]” mean those terms as defined in the Mental Health Code, MCL 330.1100 et seq. MCL 600.1090(c); MCL 600.1090(g); MCL 600.1090(h); see also MCL 330.1100a; MCL 330.1100d. “‘Co-occurring disorder’ means having [one] or more disorders relating to the use of alcohol or other controlled substances of abuse as well as any serious mental illness, serious emotional disturbance, or developmental disability. A diagnosis of co-occurring disorders occurs when at least [one] disorder of each type can be established independent of the other and is not simply a cluster of symptoms resulting from [one] disorder.” MCL 600.1090(a).
(b) The individual waives, in writing, the right to a speedy trial and, with the agreement of the prosecutor, the right to a preliminary examination.

(c) The individual signs a written agreement to participate in the mental health court. If the individual is an individual who has been assigned a guardian, the legal guardian is required to sign all documents for the individual’s admission in the mental health court.”

69 “Nothing in [Chapter 10B, MCL 600.1090 et seq.,] shall be construed to preclude a court from providing mental health services to an individual before he or she enters a plea and is accepted into the mental health court.” MCL 600.1094(2).

g. Withdrawal of Plea If Not Admitted

“An individual who has waived his or her right to a preliminary examination, who has pled guilty or no contest and who is subsequently not admitted to a mental health court may withdraw his or her plea and is entitled to a preliminary examination.” MCL 600.1094(3).

h. Post-Admission Procedures

• Entry of plea. If an individual was admitted to mental health court based upon a pending criminal charge, the court must accept his or her plea of guilty or no contest if a plea has not already been entered. MCL 600.1095(1)(a); see also MCL 600.1094(1)(a).

• No entry of judgment of guilt if individual pled guilty or no contest to non-traffic offenses if individual may be eligible for discharge and dismissal. “In the case of an individual who pled guilty or no contest to criminal offenses that are not traffic offenses and who may be eligible for discharge and dismissal under the agreement for which he or she was admitted into mental health court upon successful completion of the mental health court program, the court shall not enter a judgment of guilt.” MCL 600.1095(1)(b)(i); see also MCL 600.1098(3)-(6).

• Entry of judgment of guilt if individual pled guilty to a traffic offense or if individual may not be eligible for discharge and dismissal. “In
the case of an individual who pled guilty to a traffic offense or who pled guilty to an offense but may not be eligible for discharge and dismissal pursuant to the agreement with the court and prosecutor upon successful completion of the mental health court program, the court shall enter a judgment of guilt.” MCL 600.1095(1)(b)(ii); see also MCL 600.1098(3)-(6).

• Delayed sentence or imposition of probation or other supervision for individual who pled guilty or no contest to criminal charges. If the individual pled guilty or no contest to criminal charges, “[p]ursuant to the agreement with the individual and the prosecutor, the court may either delay further proceedings as provided in . . . MCL 771.1, or proceed to sentencing, as applicable, and place the individual on probation or other court supervision in the mental health court program with terms and conditions according to the agreement and as considered necessary by the court.” MCL 600.1095(1)(b)(iii).

i. Mental Health Court Services

MCL 600.1096(1) requires a mental health court to provide a participant\(^{70}\) with all of the following:

“(a) Consistent and close monitoring of the participant and interaction among the court, treatment providers, probation, and the participant.

(b) If determined by the mental health court to be necessary or appropriate, periodic and random testing for the presence of any nonprescribed controlled substance or alcohol in a participant’s blood, urine, or breath, using to the extent practicable the best available, accepted, and scientifically valid methods.

(c) Periodic evaluation assessments of the participant’s circumstances and progress in the program.

\(^{70}\) A “[p]articipant’ [is] an individual who is admitted into a mental health court.” MCL 600.1090(f).
(d) A regimen or strategy of appropriate and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of incarceration or confinement.

(e) Mental health services, substance use disorder services, education, and vocational opportunities as appropriate and practicable.”

If a participant formally objects to an individual plan of services developed under section 712(2) of the Mental Health Code, MCL 330.1712, the responsible mental health agency must notify the court; “[h]owever, the court is not obligated to take any action in response to [this] notice.” MCL 600.1097(4).

j. Costs and Fees

• Mental health court fee. “The mental health court may require an individual admitted into the court to pay a reasonable mental health court fee that is reasonably related to the cost to the court for administering the mental health court program as provided in the memorandum of understanding. The clerk of the mental health court shall transmit the fees collected to the treasurer of the local funding unit at the end of each month.” MCL 600.1095(3).

• Required costs, fees, and restitution. “The court shall require that a participant pay all court fines, court costs, court fees, restitution, and assessments and pay all, or make substantial contributions toward payment of, the costs of the treatment and the mental health court program services provided to the participant, including, but not limited to, the costs of drug or alcohol testing or

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71 “Any statement or other information obtained as a result of participating in assessment, treatment, or testing while in a mental health court is confidential and is exempt from disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, and shall not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal controlled substance use.” MCL 600.1096(3).

“counseling.” MCL 600.1097(3). “However, except as otherwise provided by law, if the court determines that the payment of court fines, court fees, or drug or alcohol testing expenses under [MCL 600.1097(3)] would be a substantial hardship for the individual or would interfere with the individual’s treatment, the court may waive all or part of those court fines, court fees, or drug or alcohol testing expenses.” Id. 73

k. Successful Completion of Mental Health Court Program

• Compliance with court orders. “In order to continue to participate in and successfully complete a mental health court program, an individual shall comply with all court orders, violations of which may be sanctioned at the court’s discretion.” MCL 600.1097(1).

• Deferred adjudication. If the individual is participating in a mental health court under MCL 762.11 (youthful trainee status), MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance), “the court shall proceed under the applicable section of law.” MCL 600.1098(2). “There may only be [one] discharge or dismissal” in such a case. Id.

• Discharge and dismissal. Except as additionally provided in MCL 600.1098(4) for domestic violence offenses, “the court, with the agreement of the prosecutor and in conformity with the terms and conditions of the memorandum of understanding under [MCL 600.1091], may discharge and dismiss the proceedings” against a first-time mental

73 Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
health court participant who has successfully completed the terms and conditions of the program and who is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty; the participant must not have previously been assigned youthful trainee status under MCL 762.11 or had criminal proceedings dismissed under MCL 333.7411 (possession or use of specified controlled substances), MCL 769.4a (Spouse Abuse Act), MCL 750.350a (Parental Kidnapping Act), or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance). MCL 600.1098(3). Discharge and dismissal of a domestic violence offense74 may be ordered only if the individual has not previously had proceedings dismissed under MCL 769.4a (Spouse Abuse Act), the offense is eligible to be dismissed under the Act, the individual fulfills the terms and conditions imposed under the Act, and the discharge and dismissal is processed and reported under the Act. MCL 600.1098(4). A discharge and dismissal under MCL 600.1098(3) “is without adjudication of guilt and is not a conviction for purposes of [MCL 600.1098] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.” MCL 600.1098(5). “There may only be 1 discharge and dismissal under [MCL 600.1098(3)] for an individual.” MCL 600.1098(5). The court must send a record of the discharge and dismissal to the Department of State Police, which must enter this information into the law enforcement information network (LEIN) with an indication that the individual participated in a mental health court. Id.

- Successful completion without discharge or dismissal. Except as provided in MCL 600.1098(2)-(4) (governing discharge and

74 “Domestic violence offense’ means any crime alleged to have been committed by an individual against his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or an individual who resides or has resided in the same household.” MCL 600.1090(d).
dismissal), “if an individual has successfully completed probation or other court supervision,” the court, if it has not already done so, must enter an adjudication of guilt, proceed to sentencing according to the agreement under which he or she was admitted into the mental health court, and send a record of the conviction and sentence to the criminal justice information center of the Department of State Police. MCL 600.1098(6).

I. Failure to Successfully Complete Mental Health Court Program

“If the participant is accused of a new crime, the judge shall have the discretion to terminate the participant’s participation in the mental health court program.” MCL 600.1097(2).

MCL 600.1098(7) provides, in part:

“For a participant whose participation is terminated or who fails to successfully complete the mental health court program, the court shall enter an adjudication of guilt, if the entry of guilt was delayed or deferred under [MCL 600.1094], and shall then proceed to sentencing of the individual for the original charges to which the individual pled guilty prior to admission to the mental health court. Except for program termination due to the commission of a new crime, failure to complete a mental health court program must not be a prejudicial factor in sentencing.”

m. Record of Completion or Termination

“Upon completion or termination of the mental health court program, the court shall find on the record or place a written statement in the court file indicating whether the participant completed the program successfully or whether the individual’s participation in the program was terminated and, if it was terminated, the reason for the termination.” MCL 600.1098(1).
n. Exit Evaluation

“Upon an individual’s completion of the required mental health court program participation, an exit evaluation should be conducted in order to assess the individual’s continuing need for mental health, developmental disability, or substance abuse services.” MCL 600.1096(2).

o. Collection and Reporting of Data

MCL 600.1099(1)-(2) provides:

“(1) Each mental health court shall collect and provide data on each individual applicant and participant and the entire program as required by the state court administrative office[SCAO]. [SCAO] shall provide appropriate training to all courts entering data, as directed by the [S]upreme [C]ourt.

(2) Each mental health court shall maintain files or databases on each individual participant in the program for review and evaluation as well as treatment, as directed by [SCAO]. The information collected for evaluation purposes must include a minimum standard data set developed and specified by [SCAO].“\textsuperscript{75}

The information collected under MCL 600.1099 “regarding individual applicants to mental health court programs for the purpose of application to that program and participants who have successfully completed mental health courts is exempt from disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246.” MCL 600.1099(4).

p. Use of Statements or Information Obtained During Preadmission Screening or Participation in Mental Health Court

Any statement or other information obtained as a result of participating in a preadmission screening and evaluation assessment, or as a result of participating in

\textsuperscript{75} SCAO is required to provide standards for mental health courts; “[t]hese standards must provide comparability between programs and their outcomes.” MCL 600.1099(3). Additionally, SCAO, in conjunction with the Department of Community Health, must provide training and technical assistance to all mental health courts. MCL 600.1099a(4).
assessment, treatment, or testing while in a mental health court, is confidential and exempt from disclosure under the Freedom of Information Act, MCL 15.231 et seq. MCL 600.1093(4); MCL 600.1096(3).

Additionally, any such statement or information may not be used in a criminal prosecution unless it reveals criminal acts other than, or inconsistent with, personal use of drugs, MCL 600.1093(4), or controlled substances, MCL 600.1096(3).

q. Records of Proceedings in Mental Health Court

MCL 600.1098(5) provides, in relevant part:

“All records of the proceedings regarding the participation of the individual in the mental health court under [MCL 600.1098(3) (governing discharge and dismissal)] are closed to public inspection from the date of deferral and are exempt from public disclosure under the [F]reedom of [I]nformation [A]ct, . . . MCL 15.231 to [MCL] 15.246, but must be open to the courts of this state, another state, or the United States, the [D]epartment of [C]orrections, law enforcement personnel, and prosecutors only for use in the performance of their duties or to determine whether an employee of the court, [D]epartment, law enforcement agency, or prosecutor’s office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, [D]epartment, law enforcement agency, or prosecutor’s office. The records and identifications division of the [D]epartment of [S]tate [P]olice shall retain a nonpublic record of an arrest, court proceedings, and the discharge and dismissal under [MCL 600.1098(5)].”

“For a participant whose participation is terminated or who fails to successfully complete” the program, “[a]ll records of the proceedings regarding the participation of the individual in the mental health court must remain closed to public inspection and exempt from public disclosure as provided in [MCL 600.1098(5)].” MCL 600.1098(7).
4. **Juvenile Mental Health Court**\(^{76}\)

“A family division of circuit court in any judicial circuit may adopt or institute a juvenile mental health court pursuant to statute or court rules.” MCL 600.1099c(1).

Juvenile mental health court is defined to mean 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

\(^{76}\) Effective March 28, 2019, 2018 PA 590 added Chapter 10C, MCL 600.1099b et seq., to the Revised Judicature Act to establish juvenile mental health courts.
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 mental health courts operate similarly to adult mental health courts. See Chapter 10C of the Revised Judicature Act, MCL 600.1099b et seq. For a detailed discussion of juvenile mental health courts, see the Michigan Judicial Institute’s Juvenile Justice Benchbook, Chapter 1.

10.4 Holmes Youthful Trainee Act (HYTA)—Deferred Adjudication77

“The [Holmes Youthful Trainee Act (HYTA), MCL 762.11 et seq.,] provides a mechanism for individuals who commit certain crimes between the time of their seventeenth and [twenty-fourth] birthdays[78] to be excused from having a criminal record.” People v Rahilly, 247 Mich App 108, 113 (2001). Specifically, MCL 762.11(1) states that ”[ex]cept as provided in [MCL 762.11(2)] and [MCL 762.11(3)]79, if an individual pleads guilty to a criminal offense, committed on or after the individual’s seventeenth birthday but before his or her twenty-fourth birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee.”80 Additionally, an individual over 14 years of age whose

77 Individuals who have been granted youthful trainee status may be eligible to participate in a drug treatment court or a veterans treatment court. See Section 10.3(L) for discussion of these specialized courts.

78 Although HYTA previously applied to individuals who committed crimes between their seventeenth and twenty-first birthdays, MCL 762.11(1) was amended by 2015 PA 31, effective August 18, 2015, to raise the maximum eligible age.

79 See Section 10.4(A) for more information on these exceptions.
jurisdiction has been waived may be eligible for youthful trainee status. MCL 762.15.

Assignment of an individual to youthful trainee status under MCL 762.11 is discretionary. People v Gow, 203 Mich App 94, 96 (1994). MCL 762.11 is remedial “and should be construed liberally for the advancement of the remedy.” People v Bobek, 217 Mich App 524, 529 (1996). However, the trial court must “take into account the nature and severity of the crimes and the importance of public safety[]” when deciding whether to grant youthful trainee status. People v Khanani, 296 Mich App 175, 181-182 (2012) (“[g]iven the trial court’s description of [the] defendant as ‘frighten[ing]’ and its apparent agreement with the prosecutor’s description of [the] defendant as a serious predator,” the trial court abused its discretion in nevertheless granting the defendant youthful trainee status for first-degree home invasion and several additional offenses).

A. Certain Individuals Are Ineligible

An individual is not eligible for youthful trainee status if the offense for which he or she seeks deferral is any of the following:

- a felony punishable by life imprisonment. MCL 762.11(2)(a).
- a major controlled substance offense. MCL 762.11(2)(b).81
- a traffic offense. MCL 762.11(2)(c).
- “‘Traffic offense’ means a violation of the Michigan vehicle code, . . . MCL 257.1 to [MCL] 257.923, or a violation of a local ordinance substantially corresponding to that act, that involves the operation of a vehicle and, at the time of the violation, is a felony or a misdemeanor.” MCL 762.11(6)(b).
- a violation, attempted violation, or conspiracy to violate MCL 750.520b (first-degree criminal sexual conduct—CSC-I); MCL 750.520c (second-degree criminal sexual conduct—CSC-II); MCL 750.520d (third-degree criminal sexual conduct—CSC-III, other than MCL 750.520d(1)(a)); or MCL 750.520e (fourth-degree criminal sexual conduct—CSC-IV, other than MCL 750.520e(1)(a)). MCL 762.11(2)(d).

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81 Major controlled substance offenses are discussed in .
• a violation, attempted violation, or conspiracy to violate MCL 750.520g (assault with intent to commit CSC), with the intent to commit CSC-I, CSC-II, CSC-III (other than MCL 750.520d(1)(a)); or CSC-IV (other than MCL 750.520e(1)(a)). MCL 762.11(2)(e).

In addition, an individual is not eligible for youthful trainee status if any of the following apply:

• the individual was previously convicted of, or adjudicated for, a listed offense for which registration is required under the Sex Offenders Registration Act (SORA)82 (MCL 28.721 to MCL 28.736). MCL 762.11(3)(a).

  • “‘Listed offense’ means that term as defined in . . . MCL 28.722.” MCL 762.11(6)(a).

• the individual is charged with a listed offense for which registration is required under the SORA, and the individual fails to carry the burden of proving by clear and convincing evidence that he or she is not likely to engage in further listed offenses, MCL 762.11(3)(b).

• the court determines that the offense involved a factor set out MCL 750.520b(1)(a)-(h) (CSC-I), MCL 750.520c(1)(a)-(l) (CSC-II), MCL 750.520d(1)(b)-(e) (CSC-III), or MCL 750.520e(1)(b)-(f) (CSC-IV). MCL 762.11(3)(c).

A “defendant [i]s not ineligible for sentencing under the [youthful trainee act] solely because he [or she] was convicted of two criminal offenses.” People v Giovannini, 271 Mich App 409, 410 (2006). “Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act.” Giovannini, 271 Mich App at 417.

“[T]he sentencing guidelines have not been held to apply to the decision whether to grant youthful trainee status.” People v Khanani, 296 Mich App 175, 183 (2012).

When a “trial court place[s a] defendant on HYTA status[]” for committing felony-firearm under MCL 750.227b, the court is “not required to sentence him [or her] to two years’ imprisonment” as is otherwise mandatory under MCL 750.227b(1). People v Jaquery, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2014 (Docket No. 315065), slip op pp 4-5 (concluding that “[t]he defendant was not convicted under MCL 750.227b, because

82 see the Michigan Judicial Institute’s Sexual Assault Benchbook for a detailed discussion of the Sex Offenders Registration Act.
MCL 762.14 provides that an assignment to HYTA status is not a conviction[)].

B. Consent to Deferred Adjudication Must Be Obtained

An offender must consent to be assigned the status of a youthful trainee. MCL 762.11(1). Additionally, “[i]f the offense was committed on or after the individual’s twenty-first birthday but before his or her twenty-fourth birthday, the individual shall not be assigned to youthful trainee status without the consent of the prosecuting attorney.” Id.

C. Guilt Must Be Established by Guilty Plea

To be assigned the status of a youthful trainee, an individual must plead guilty to the criminal offense. MCL 762.11(1). A defendant found guilty as a result of a trial does not qualify for youthful trainee status because a guilty plea is required. People v Dash, 216 Mich App 412, 414 (1996). A nolo contendere plea precludes assignment to youthful trainee status because it is not a plea of “guilty.” People v Harns, 227 Mich App 573, 579-580 (1998), vacated in part on other grounds 459 Mich 895 (1998).

D. Proceedings Are Deferred

When the above requirements are satisfied with regard to an individual seeking deferral as a youthful trainee, no judgment of conviction is entered and adjudication is deferred. MCL 762.11(1).

E. Terms and Conditions Imposed Pursuant to Deferred Adjudication

Underlying charge punishable by more than one year of imprisonment. If the underlying charge is an offense punishable by imprisonment for a term of more than one year, and the individual
was assigned to HYTA status on or after August 18, 2015, the court must do one of the following:

- commit the individual, for not more than two years, to the Department of Corrections (DOC) for custodial supervision and training. (If the individual is less than 21 years of age, the institutional facility must be designated by the DOC for the purpose of custodial supervision and training.) MCL 762.13(1)(a).

- place the individual on probation for not more than three years, subject to the conditions in MCL 771.3. MCL 762.13(1)(b).

- commit the individual to the county jail for not more than one year. MCL 762.13(1)(c).

- commit the individual to the DOC for custodial supervision and training under MCL 762.13(1)(a) or to the county jail under MCL 762.13(1)(c), then place the individual on probation for not more than one year, subject to the conditions in MCL 771.3. MCL 762.13(1)(d).

If a youthful trainee is placed in the county jail under MCL 762.13(1)(c) or MCL 762.13(1)(d), or as a condition of probation, the court may authorize release for work or for educational purposes. MCL 762.13(5).

If a youthful trainee is placed on probation following a commitment to the DOC under MCL 762.13(1)(d), he or she shall be reassigned to the supervision of a probation officer. MCL 762.13(4).

Underlying charge punishable by one year or less of imprisonment. If the underlying charge is for an offense punishable
by imprisonment for one year or less, the court must place the
individual on probation for not more than two years, subject to the
conditions in MCL 771.3. MCL 762.13(3).

**Fees, fines, and costs, etc.** If the individual is placed on probation,
the court must order payment of a supervision fee for each month
during which the individual is on probation, up to 36 months. MCL
762.13(6).

MCL 769.1k\(^{87}\) provides a court with general authority to impose
fines, costs (including court costs), expenses of providing legal
assistance, assessments, and reimbursement under MCL 769.1f on a
defendant at the time entry of an adjudication of guilt is deferred.
The court must order a defendant to pay the minimum state costs as
prescribed by MCL 769.1j. MCL 769.1k(1)(a).\(^{88}\) In addition, a court
may order a defendant to pay any additional costs incurred to
compel his or her appearance. MCL 769.1k(2). The general authority
to impose the monetary penalties listed in MCL 769.1k(1) and (2)
also applies when a defendant is placed on probation, probation is
revoked, or a defendant is discharged from probation. MCL
769.1k(3). MCL 769.1k(4) authorizes a court to order a defendant to
pay those monetary penalties by wage assignment. In addition, a
court may provide for the collection of the penalties imposed
pursuant to MCL 769.1k at any time. MCL 769.1k(5).\(^{89}\) Unless
otherwise required by law, a court may apply any payments made
in excess of the total amount imposed in one case to any amounts
owed by the same defendant in any other case. MCL 769.1k(6).

Whenever an individual charged with a felony offense is assigned
to youthful trainee status, the court must order the individual to pay
a $130 crime victim assessment. MCL 780.905(1)(a). Only one crime
victim assessment per case may be ordered, even when the case
involves multiple offenses. MCL 780.905(2). A $75 crime victim
assessment must be ordered in cases involving misdemeanors or
ordinance violations. MCL 780.905(1)(b).\(^{90}\)

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\(^{87}\) As amended, 2014 PA 352, effective October 17, 2014. See for discussion of costs.

\(^{88}\) See for additional discussion of minimum state costs.

\(^{89}\) Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply
with an order to pay money, the court must make a finding that the defendant is able to comply with the
order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR
6.425(E)(3). See for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial
obligations.

\(^{90}\) Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime
victim assessment of $75.00 in cases involving a conviction of any misdemeanor or ordinance violation
(rather than only a “serious” or “specified” misdemeanor). Related provisions were amended by 2011 PA
293, 2011 PA 295, and 2011 PA 296, also effective April 1, 2012. See for additional discussion of crime
victim assessments.
Employment or school. The court may require an individual assigned to HYTA status “to maintain employment or to attend a high school, high school equivalency program, community college, college, university, or trade school[ ]” or “to actively seek employment or entry into a high school, high school equivalency program, community college, college, university, or trade school.” MCL 762.11(4).

Electronic monitoring. An individual assigned to HYTA status for an offense committed on or after his or her twenty-first birthday may be subject to electronic monitoring during his or her probationary term as provided under MCL 771.3. MCL 762.11(5).

F. Termination or Revocation of Youthful Trainee Status

1. Discretionary Revocation

Subject to MCL 762.12(2), a court may terminate its consideration of an individual for youthful trainee status at any time, or may revoke youthful trainee status already granted at any time before the individual’s final release. MCL 762.12(1). However, a youthful trainee is entitled to a hearing before his or her status is revoked. People v Webb (Homer), 89 Mich App 50, 53 (1979); People v Roberson, 22 Mich App 664, 668-669 (1970).

While “[t]here is no provision in the [youthful trainee act] that expressly prohibits modification of the probationary term or early dismissal of the charges[ ]” a court must not terminate youthful trainee status without “sufficient reason.” Bobek, 217 Mich App at 530-531 (“[t]he fact that the defendant’s [youthful trainee status] was discovered by the press was not a sufficient reason to discharge the defendant from probation after twenty-eight days.”).

2. Mandatory Revocation

Under MCL 762.12(2), a court must revoke HYTA status if the individual pleads guilty to or is convicted of any of the following offenses during the period of HYTA assignment:

- a felony for which the maximum penalty is imprisonment for life;
- a major controlled substance offense;

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91 MCL 762.12(2) requires revocation in some circumstances. See Section 3.46(F)(2).
• 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);

92 A firearm offense, for purposes of MCL 762.12(2)(e), is “a crime involving a firearm as that term is defined in . . . MCL 28.421, whether or not the possession, use, transportation, or concealment of a firearm is an element of the crime.” MCL 762.12(2)(e). MCL 28.421(1)(c) defines firearm as “any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive.”
• MCL 750.529a (carjacking);
• MCL 750.530 (unarmed robbery); or
• MCL 750.520g (assault with intent to commit criminal sexual conduct), *except* with intent to violate MCL 750.520d(1)(a) (victim at least 13 but under 16 years of age) or MCL 750.520e(1)(a) (victim at least 13 but under 16 years of age, and defendant 5 or more years older than the victim).

MCL 762.14(3) provides that “[a]n individual assigned to youthful trainee status before October 1, 2004 for a listed offense enumerated in . . . MCL 28.722[] is required to comply with the requirements of [the SORA],” and MCL 762.12(3) provides that if an individual who is required to be registered under the SORA willfully violates that act, the court is required to revoke the individual’s youthful trainee status. However, see *People v Temelkoski (Temelkoski II)*, 501 Mich 960, 961-962 (2018), rev’g *People v Temelkoski (Temelkoski I)*, 307 Mich App 241 (2014), and holding that retroactive application of SORA to a defendant who pleaded guilty under HYTA before SORA’s effective date “deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process.”

3. **Adjudication of Guilt and Imposition of Sentence**

If consideration of an individual for youthful trainee status is terminated, or if an individual’s youthful trainee status is revoked, the court may enter an adjudication of guilt. MCL 762.12(3). If a court revokes youthful trainee status, enters an adjudication of guilt, and imposes sentence, it must specifically grant credit against the individual’s sentence for time served as a youthful trainee in a DOC institutional facility or county jail. *Id.*

G. **Successful Completion of Probationary Period**

If the individual successfully completes the probationary period, the court is required to discharge the individual and dismiss the

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93In *Temelkoski II*, the Michigan Supreme Court held that because the “defendant 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,” and because “registration under SORA constitutes a civil disability,” retroactive application of SORA violated the defendant’s due process rights under *US Const, Am XIV* and *Const 1963, art 1, § 17. Temelkoski II*, 501 Mich at 961. For additional discussion of SORA, see the Michigan Judicial Institute’s *Sexual Assault Benchbook*, Chapter 10.
proceedings after the individual’s final release from youthful trainee status. MCL 762.14(1).

H. Assignment as Youthful Trainee Is Not a Conviction

With the exception of the three circumstances listed below, assignment of an individual to youthful trainee status is not a conviction for a crime, and “[an] individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee.” MCL 762.14(2).

- An assignment to youthful trainee status before October 1, 2004, constitutes a conviction for purposes of registering under the SORA unless “a petition was granted under [MCL 28.728c] at any time allowing the individual to discontinue registration under [the SORA], including a reduced registration period that extends to or past July 1, 2011, regardless of the tier designation that would apply on or after that date.” MCL 28.722(b)(ii)(A).94

- An assignment to youthful trainee status before October 1, 2004, constitutes a conviction for purposes of registering under the SORA if the individual is convicted of any other felony on or after July 1, 2011. MCL 28.722(b)(ii)(B).

- Assignment to youthful trainee status constitutes a conviction that is counted for purposes of scoring the prior record variables in the sentencing guidelines. MCL 777.50(4)(a)(i).

I. Record of Deferral

“Unless the court enters a judgment of conviction against the individual for the criminal offense under [MCL 762.12], all proceedings regarding the disposition of the criminal charge and the individual’s assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the [department of human services], law enforcement personnel, and . . . , prosecuting attorneys for use only in the performance of their duties.” MCL 762.14(4).

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94 However, see People v Temelkoski (Temelkoski II), 501 Mich 960, 961-962 (2018), rev’g People v Temelkoski (Temelkoski I), 307 Mich App 241 (2014), and holding that retroactive application of SORA to a defendant who pleaded guilty under HYTA before SORA’s effective date “deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process.” For additional discussion of SORA, see the Michigan Judicial Institute’s Sexual Assault Benchbook, Chapter 10.
When no conviction results from an individual’s youthful trainee status, the closed hearings established by MCL 762.14(4) are necessary to prevent the harm the youthful trainee act seeks to prevent—“public . . . access to information regarding the criminal charge[.]” Bobek, 217 Mich App at 530.

J. No Specified Limit on Use of Deferral Provision

The statute governing an individual’s assignment to the status of youthful trainee does not contain any language limiting the number of times an individual may utilize the provisions of the statute. See MCL 762.11 et seq.

See also Giovannini, 271 Mich App at 410, in which the Court of Appeals held that a “defendant was not ineligible for sentencing under the [youthful trainee act] solely because he was convicted of two criminal offenses.” The Court noted that “[i]nterpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act.” Giovannini, 271 Mich App at 417.

K. Review of Decision to Assign Youthful Trainee Status


The trial court abused its discretion in granting youthful trainee status to the defendant, who pleaded guilty in three separate cases to six offenses, including first-degree home invasion; the trial court’s decision fell outside the range of reasoned and principled outcomes in light of the defendant’s age and the seriousness and timing of the home invasion offense, which was committed shortly after he turned 19 while he was on bond awaiting sentencing for the other offenses. Khanani, 296 Mich App at 179-182.

10.5 Conditional Sentences

When a person is convicted of an offense punishable by a fine or imprisonment, or both, the court has the discretion to impose a conditional sentence and order the person to pay a fine (with or without the costs of prosecution), and restitution as indicated in MCL 769.1a(11)
or the Crime Victim Rights Act (MCL 780.751 to MCL 780.834), within a limited time stated in the sentence. MCL 769.3(1). If the person defaults on payment, the court may impose sentence. MCL 769.3(1).

If a court imposes a conditional sentence under MCL 769.3, restitution ordered under MCL 769.1a must be made a condition of the sentence. MCL 769.1a(11). The court may impose imprisonment under the conditional sentence if the offender fails to comply with the order of restitution and if he or she has failed to make a good faith effort at compliance with the order. Id. When determining whether to impose imprisonment, the court must consider the offender’s employment status, earning ability, financial resources, the willfulness of the offender’s noncompliance, and any other circumstances that may impact the offender’s ability to pay restitution. Id.95

With the exception of a person convicted of CSC-I or CSC-III, the court may also place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination, in installments within a limited time. MCL 769.3(2). If the offender defaults on any of the payments, the court may impose sentence. MCL 769.3(2).

10.6 Suspended Sentences

Absent statutory authority to do so, a court may not indefinitely suspend a defendant’s sentence, because to do so would effectively pardon a defendant for his or her crime. People v Morgan (Sillerton), 205 Mich App 432, 434 (1994). Certain statutes specifically authorize a court to suspend a defendant’s sentence. See MCL 750.165(4) (felony nonsupport statute specifically authorizes a court to suspend a defendant’s sentence if he or she posts a bond and any sureties required by the court).

A court may not suspend a defendant’s sentence once the defendant has started to serve it. Oakland Co Pros v 52nd Dist Judge, 172 Mich App 557, 560 (1988).

95 Before sentencing a defendant to a term of incarceration, or revoking probation, for failure to comply with an order to pay money, the court must make a finding that the defendant is able to comply with the order without manifest hardship and that he or she has not made a good-faith effort to comply. MCR 6.425(E)(3). See Section 9.2 for discussion of MCR 6.425(E)(3) and a defendant’s ability to pay court-ordered financial obligations.
10.7 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. Sentencing Juveniles to Life Imprisonment Without the Possibility of Parole

Certain homicide and nonhomicide crimes are generally punishable under Michigan law by mandatory life imprisonment without the possibility of parole. See MCL 791.234(6)(a)-(f). 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).

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96 However, see Section 10.7(B) for discussion of constitutional and statutory restrictions on sentencing a juvenile offender to life imprisonment without the possibility of parole.

97 MCL 791.234(6)(a)-(f) provides that prisoners who are sentenced to life imprisonment for certain enumerated offenses are not eligible for parole, and are instead subject to the provisions of MCL 791.244 (governing reprieves, commutations, and pardons). The enumerated offenses include first-degree murder, MCL 750.316; certain offenses involving the alteration, adulteration, misbranding, or mislabeling of a drug, medicine, or device with the intent to kill or to cause serious impairment of a body function of two or more individuals, resulting in death, MCL 333.17764(7); MCL 750.16(5); MCL 750.18(7); a violation of Chapter XXXIII of the Michigan Penal Code ("Explosives, Bombs, and Harmful Devices"), MCL 750.200—MCL 750.212a; first-degree criminal sexual conduct committed against an individual less than 13 years of age by a defendant 18 years of age or older, if the defendant was previously convicted of an enumerated sex crime against an individual less than 13 years of age, MCL 750.520b(2)(c); and any other violation for which parole eligibility is expressly denied under state law.

98 In determining an offender’s age at the time of the offense, “the birthday rule of age calculation applies in Michigan.” People v Woolfolk, 304 Mich App 450, 504 (2014), aff’d 497 Mich 23 (2014). Under the birthday rule, “a person attains a given age on the anniversary date of his or her birth.” Woolfolk, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which “one becomes of full age the first moment of the day before the anniversary of his or her birth[,]” is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant’s eighteenth birthday, “was not yet eighteen years of age when the shooting occurred[.]”) (emphasis supplied; citations omitted).
In order to comply with *Miller*, 567 US 460, MCL 769.25 and MCL 769.25a establish sentencing and resentencing procedures applicable to certain offenders under the age of 18 who are convicted of certain offenses carrying mandatory life-without-parole sentences.\(^{99}\) Under circumstances in which MCL 769.25 or MCL 769.25a applies to an offender,\(^{100}\) the prosecuting attorney must file a motion if he or she intends to seek imposition of a life sentence without the possibility of parole, MCL 769.25(3); MCL 769.25a(4)(b), and the sentencing court must conduct a hearing and consider the factors set out in *Miller*, 567 US 460,\(^{101}\) before imposing sentence, MCL 769.25(6); MCL 769.25a(4)(b). If a timely motion for a life-without-parole sentence is not filed by the prosecution, the court must impose a term-of-years sentence as specified in MCL 769.25(9) or MCL 769.25a(4)(c).

“[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, 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 130 (explaining that trial courts are not required to

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\(^{99}\)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.

\(^{100}\) 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. See MCL 769.25a(1).

\(^{101}\)“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.
“explicitly find that a defendant is ‘rare’ or ‘uncommon’ before it can impose life without parole”).

For discussion of juvenile sentencing under MCL 769.25 and MCL 769.25(a), see the Michigan Judicial Institute’s **Juvenile Justice Benchbook**, Chapter 19. Additionally, for a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute’s **Juvenile Life-Without-Parole Quick Reference Guide**.

### C. No Judicial Discretion to Deviate From Mandatory Sentence

Where a statute mandates the imposition of a sentence of imprisonment for an offense, the trial court may not sentence the defendant to an at-home electronic monitoring program “in lieu of the statutorily required . . . incarceration[]” *People v Pennebaker*, 298 Mich App 1, 4-9 (2012) (holding that because MCL 257.625(7)(a)(ii) “unequivocally [requires a] trial court [to] sentence a defendant to a minimum of 30 days in the county jail[]” for a second violation of MCL 257.625(7)(a), “the trial judge did not have discretion to sentence [the] defendant to less than 30 days in jail[]” furthermore, “[t]he placement of an electronic-monitoring device on [the] defendant [was] not ‘imprisonment in the county jail’ as required by the statute[]” and the statute did not authorize participation in a work-release program).

### 10.8 Special Alternative Incarceration (SAI) Units—“Boot Camp”

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

#### A. Prisoners

If a defendant is sentenced to an indeterminate prison term, the Department of Corrections (DOC) is required to consider placing him or her in an SAI program, unless the sentencing court prohibited that type of placement. MCL 791.234a(1); MCL 791.234a(2)(f); MCL 791.234a(4). The DOC must determine whether

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102 A defendant convicted of committing or attempting to commit any of the following crimes is not eligible for placement in an SAI program: MCL 750.72, MCL 750.73, MCL 750.75, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, and MCL 750.520g. MCL 771.3b(17)(a)-(c).
a defendant within its jurisdiction and sentenced to an indeterminate term is eligible for placement in an SAI program according to the requirements in MCL 791.234a(2) and MCL 791.234a(3).

To be eligible for placement in an SAI program, the prisoner must meet all of the following requirements set out in MCL 791.234a(2):

- The prisoner’s minimum sentence does not exceed either of the following: (1) 24 months or less for a violation of MCL 750.110 (breaking and entering) and MCL 750.110a (home invasion), if the violation involved any occupied dwelling house; or (2) 36 months or less for any other crime. MCL 791.234a(2)(a)(i)-(ii).

- The prisoner has never previously been placed in an SAI unit as a prisoner or a probationer, unless he or she was placed in an SAI unit and was removed from the unit for medical reasons as specified in MCL 791.234a(7). MCL 791.234a(2)(b).

- The prisoner is physically capable of participating in the SAI program. MCL 791.234a(2)(c).

- The prisoner does not appear to have any mental disability that would prevent him or her from participating in the program. MCL 791.234a(2)(d).

- The prisoner is serving his or her first prison sentence. MCL 791.234a(2)(e).

- The sentencing judge, in the judgment of sentence, did not prohibit the prisoner’s participation in the program. MCL 791.234a(2)(f).

- The DOC determines that the prisoner is otherwise suitable for the program. MCL 791.234a(2)(g).

- The prisoner is not serving a sentence for crimes expressly set out in MCL 791.234a(2)(h)(i)-(vii), and the prisoner was not sentenced as an habitual offender, MCL 791.234a(2)(h)(viii).

Additionally, a prisoner who is serving a sentence for violating MCL 333.7401 or MCL 333.7403, and who has previously been convicted of violating MCL 333.7401, MCL 333.7403(2)(a), MCL 333.7403(2)(b), or MCL 333.7403(2)(e), is not eligible for placement in an SAI unit until after he or she has served the equivalent of the

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103 MCL 791.234a(2)(h)(i)-(vii) lists more than 40 crimes for which a defendant would be ineligible for placement in an SAI unit.
mandatory minimum sentence prescribed by statute for that violation. MCL 791.234a(3).

If the sentencing judge permitted the prisoner’s participation in the SAI program in the judgment of sentence, that prisoner may be placed in an SAI unit if the DOC determines that the prisoner also meets the requirements of MCL 791.234a(2) and MCL 791.234a(3). MCL 791.234a(4).

If the sentencing judge neither prohibited nor permitted a prisoner’s participation in an SAI program in the judgment of sentence, and the DOC determines that the prisoner meets the eligibility requirements of MCL 791.234a(2) and MCL 791.234a(3), the DOC must notify the judge or successor judge, the prosecuting attorney for the county in which the prisoner was sentenced, and any crime victim who has requested notification, of the proposed placement in the SAI unit. MCL 791.234a(4). The notices must be sent no later than 30 days before placement is intended to occur. MCL 791.234a(4).

The DOC is not allowed to place a prisoner in an SAI unit unless the sentencing judge or successor judge notifies the DOC in writing that he or she does not object to the proposed placement. MCL 791.234a(4). In deciding whether to object, the judge or successor judge is required to review any victim impact statements submitted by the victim(s) of the crime for which the prisoner was convicted. MCL 791.234a(4).

The prosecution waives objection to a defendant’s placement in an SAI program if it does not raise the issue at sentencing. People v Krim, 220 Mich App 314, 320-321 (1997).

A prisoner must consent to placement in an SAI program. MCL 791.234a(5). The prisoner must also agree that “the [DOC] may suspend or restrict privileges generally afforded other prisoners including, but not limited to, the areas of visitation, property, mail, publications, commissary, library, and telephone access. However, the [DOC] may not suspend or restrict the prisoner's access to the prisoner grievance system.” MCL 791.234a(5).

Notwithstanding MCL 791.234a(4) and MCL 791.234a(5), a prisoner must not be placed in an SAI unit unless all of the following conditions are met:

- “Upon entry into the [SAI] unit, a validated risk and need assessment from which a prisoner-specific transition accountability plan and prisoner-specific programming during program enrollment are utilized.” MCL 791.234a(6)(a).
• “Interaction with community-based service providers through established prison in-reach services from the community to which the prisoner will return is utilized.” MCL 791.234a(6)(b).

• “Prisoner discharge planning is utilized.” MCL 791.234a(6)(c).

• “Community follow-up services are utilized.” MCL 791.234a(6)(d).

Placement in an SAI program must be for a period of not less than 90 days or more than 120 days. MCL 791.234a(7).

If, during the prisoner’s placement, the prisoner misses more than five days of participating in the program because of medical excuse for an illness or injury that occurred after placement, the period of placement must be increased by the number of days missed, beginning with the sixth day of excused participation, but for no more than 20 days. MCL 791.234a(7). The maximum number of days in a prisoner’s placement cannot exceed 120 days, including the days missed. Id. A prisoner who is unable to participate in the SAI program for more than 25 days must be returned to the appropriate correctional facility but may be readmitted to the program subject to the requirements for eligibility in MCL 791.234a(2) and MCL 791.234a(3). MCL 791.234a(7).

“A prisoner who fails to work diligently and productively at the [SAI unit program], or who fails to obey the rules of behavior established for the unit, shall be returned to a state correctional facility and shall no longer be eligible for placement in the program.” MCL 798.16(2). If a prisoner is removed from an SAI unit on this basis, the prisoner must be credited for time served in the unit, but all disciplinary credits accumulated in the unit may be forfeited. Id.

Once the prisoner’s completion of the SAI program is certified, the prisoner must be placed on parole. MCL 791.234a(8). The parole board must determine appropriate conditions of parole for a prisoner paroled under MCL 791.234a. MCL 791.234a(8). A prisoner paroled under MCL 791.234a must be placed on parole for not less than 18 months, or the remainder of the prisoner’s minimum sentence, whichever is greater. A prisoner paroled under MCL 791.234a must be under intensive supervision for the first 120 days. MCL 791.234a(8).

The parole board may suspend or revoke parole for any prisoner paroled under MCL 791.234a subject to MCL 791.239a (arrest for
alleged parole violation) and MCL 791.240a (parole revocation for cause). MCL 791.234a(9).

Each prisoner placed in the SAI program must fully participate in Michigan's prisoner reentry initiative. MCL 791.234a(12).

B. Probationers

In addition to any other term or condition of probation, the court may require an individual convicted of a crime for which he or she may be sentenced to a state correctional facility to satisfactorily complete an SAI program and to serve 120 days of probation under intense supervision. MCL 771.3b(1). This does not apply if the individual was convicted of a crime specified in MCL 771.3b(17).\footnote{MCL 771.3b(17)(a)-(c) prohibits offenders convicted of violating or attempting to violate MCL 750.72, MCL 750.73, MCL 750.75, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, and MCL 750.520g, from being placed in an SAI program.}

To be eligible for placement in an SAI program and placement on probation, the individual must meet all of the following requirements set out in MCL 771.3b(2):

- The individual has never served a sentence of imprisonment in a state correctional facility. MCL 771.3b(2)(a).
- The individual would likely be sentenced to imprisonment in a state correctional facility for conviction of the offense. MCL 771.3b(2)(b).
- The upper limit of the recommended minimum sentence under the sentencing guidelines for the individual's offense is 12 months or more, unless (1) the felony sentencing guidelines do not apply to the individual's offense, or (2) the reason the individual is being considered for placement is that he or she violated the conditions of his or her probation. MCL 771.3b(2)(c).
- The individual is physically capable of participating in the SAI program. MCL 771.3b(2)(d).
- The individual does not have any apparent mental disability that would prevent his or her participation in the SAI program. MCL 771.3b(2)(e).

An individual is ineligible for placement in an SAI program if:

- He or she has previously been incarcerated in an SAI unit, MCL 771.3b(15), except that an individual may be placed in
an SAI program for a second time if that individual had been placed in an SAI program but was removed from the program and returned to court for sentencing due to a medical condition existing at the time of the placement, and the medical condition has since then been corrected, MCL 771.3b(16).

• He or she has been convicted of any of the following crimes, or attempts to commit the following crimes: MCL 750.72, MCL 750.73, MCL 750.75, MCL 750.145c, MCL 750.520b, MCL 750.520c, MCL 750.520d, or MCL 750.520g. MCL 771.3b(17).

Before a court can place an individual in an SAI program, an initial investigation to establish that the person meets the requirements of MCL 771.3b(2)(a) and MCL 771.3b(2)(b) must be completed by a probation officer. MCL 771.3b(4).

After an individual is placed in an SAI program, the DOC must establish that the person meets the requirements in MCL 771.3b(2). If the person does not meet those requirements, the probation order is rescinded, and he or she must be returned to the court for sentencing. MCL 771.3b(5).

An individual must consent to his or her placement in an SAI program. MCL 771.3b(6).

Except as provided in MCL 771.3b(9) to MCL 771.3b(12), the maximum amount of time an individual may be placed in an SAI program is 120 days. MCL 771.3b(8); MCL 798.14(1). Participants are required to make up for days missed due to illness or injury. MCL 771.3b(8). If an individual misses more than five days of participation in the program because of an illness or injury that occurred after he or she was placed in the program, one day is added to the term of his or her placement for every day missed, beginning with the sixth day missed. MCL 771.3b(8). A maximum of 20 days may be added to an individual’s placement. Id. A copy of the individual’s verified medical excuse must be provided to the sentencing court. MCL 771.3b(8). If an individual is not able to participate for more than 25 days, he or she must return to the court for sentencing pursuant to MCL 771.3b(5). MCL 771.3b(8).

If the local unit of government has created a residential program providing vocational training, education, and substance abuse treatment designed for individuals who have completed an SAI program, a probationer may be required, immediately after successful completion of the SAI program, to successfully complete an additional period of up to 120 days in the local unit of government’s residential program. MCL 771.3b(9); MCL 798.14(1).
Section 10.9

A probationer who satisfactorily completes an SAI program must be placed on probation under intensive supervision for a minimum of 120 days following his or her completion of the SAI program. MCL 771.3b(12). If the probationer has been ordered to complete a program of residential treatment after completion of the SAI program, MCL 771.3b(9) or MCL 771.3b(10), the 120-day period of intensive supervision begins after the probationer completes the residential program. MCL 771.3b(12).

The court must authorize the release of the individual from confinement in the SAI unit after it receives a satisfactory report from the DOC of the individual’s performance in the program. MCL 771.3b(13). The court must revoke an individual’s probation after receiving an unsatisfactory report of the individual’s performance in the SAI program. Id.

“A probationer who fails to work diligently and productively [in an SAI program], or who fails to obey the rules of behavior established for the unit, may be reported to the sentencing court for possible revocation of probation[.]” MCL 798.16(1). While the probationer awaits a probation revocation hearing on his or her failure to satisfactorily perform in the SAI program, he or she may be incarcerated in a county jail as an alternative to remaining in the SAI program. Id.

A probationer is entitled to credit for time spent in an SAI program if his or her probation is later revoked and he or she is sentenced to a term of imprisonment on the underlying crime. People v Hite (After Remand), 200 Mich App 1, 2 (1993).

10.9 Additional Sentence Conditions Required for Criminal Sexual Conduct Offenders

“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).105

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