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monograph 8

Felony Sentencing

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Monograph 8: Felony Sentencing

Criminal Procedure Monograph Series 1–8

Michigan Judicial Institute

By **Phoenix Hummel, J.D.**

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The research done on this monograph is current through July 31, 2005. This monograph is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Acknowledgments

Monograph 8: Felony Sentencing is the final monograph in MJI's *Criminal Procedure Monograph* series. *Monograph 8* is a new publication that includes a comprehensive discussion of felony sentencing in Michigan and provides practical instruction on application of the statutory sentencing guidelines to listed felony offenses. *Monograph 8* includes the amendments to the court rules of criminal procedure that are effective on January 1, 2006. Where necessary or advisable, the monograph provides the text of the court rule as it appears before the effective date of a specific amendment.

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- **Monographs 1 and 2: *Issuance of Complaints & Arrest Warrants* and *Issuance of Search Warrants (Revised Editions)***
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MJI intends to revise the other monographs in this series in the near future.

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Felony Sentencing

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Part I—Introduction

8.1 Scope of This Monograph

The primary objective of this monograph is to present a comprehensive picture of the dynamic landscape of post-conviction proceedings in Michigan since the legislative sentencing guidelines were adopted in 1998. Placing the contemporary legislative guidelines in their proper context requires a discussion of the larger picture of felony sentencing in Michigan courtrooms—proceedings governed by constitutional and statutory law and established long before the advent of sentencing guidelines, judicial or legislative. To that end, the monograph will address various procedural and statutory components of post-conviction proceedings, including the respective rights and responsibilities of the court and the defendant. The monograph will further discuss several fundamental characteristics of felony sentences in Michigan, aspects such as proportionality, concurrent and consecutive prison terms, and the requirement that sentences be indeterminate. Also addressed in the monograph are the different types of sentences available and any limitations on a sentencing court's authority to impose certain types of sentences in specific situations.

Discussion of evidentiary or constitutional challenges to the criminal conviction underlying a specific sentence is beyond the scope of this monograph. Also beyond the scope of this monograph is a comprehensive discussion of the topics contained here as they may (or may not) apply to juveniles. At times, the monograph makes general references to the subject matter being discussed and its applicability to juveniles, but on none of those occasions will the monograph contain an exhaustive treatment of the topic as it relates to juveniles. For a detailed discussion of proceedings involving juveniles, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings—Revised Edition* (MJI, 2003).

With the exception of the following section where the history of sentencing guidelines in Michigan requires a discussion of the *judicial* sentencing guidelines, all references 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 monograph is not intended to replace the publication titled *Sentencing Guidelines Manual*,* a booklet published under varied cover and in various formats by MJI, West Publishing, the Michigan Bar Association, and other organizations. The format of the *Sentencing Guidelines Manual* more closely approaches that of a workbook, a format particularly suited for the business of scoring an offender's prior record variables and offense variables. Although this monograph duplicates much of the information found in that manual, this monograph is meant to serve as a companion to the workbook, a textbook that provides commentary, instruction, and detailed

*A complete and up-to-date version of this manual is available on MJI's website: www.courts.michigan.gov/mji/resources/publications.

analysis often unnecessary to an uncomplicated application of the guidelines to an offense and the offender.

8.2 History of Sentencing in Michigan

A. Indeterminate Sentencing

Since a 1902 amendment to the state constitution, the Michigan Legislature has been authorized to establish indeterminate sentences as punishment for criminal offenses. *People v Lorentzen*, 387 Mich 167, 179–181 (1972); Const 1850, art 4, §47; Const 1908, art 5, §45; Const 1963, art 5, §28. The sanctioning of indeterminate sentencing represents Michigan's recognition that criminal penalties should reflect the seriousness of the crime and the history of the offender, and where possible, criminal punishment should include some incentive to the convicted offender to change himself or herself. *Lorentzen*, *supra* at 180; *In re Manaca*, 146 Mich 697, 701 (1906). The indeterminate sentence act aims to provide greater protection to law-abiding members of society by "convert[ing] bad citizens into good citizens" and encouraging imprisoned offenders to reform themselves during incarceration. *Lorentzen*, *supra* at 180; *People v Cook*, 147 Mich 127, 132 (1907). The act, in part, provides:

> "When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence." MCL 769.8(1).

By adopting the constitutional amendment pertaining to indeterminate sentencing, Michigan citizens intended that the indeterminate sentence act permit trial courts some flexibility in tailoring a sentence to fit the individual offender and the particular circumstances of his or her offense. *Lorentzen*, *supra* at 180; *In re Southard*, 298 Mich 75, 82 (1941). In *Lorentzen*, the Court vacated a defendant's sentence because imposition of the 20-year sentence prescribed for conviction of a nonviolent offense by a nonviolent offender with no previous criminal record was "so excessive that it shock[ed] the conscience." *Lorentzen, supra* at 181. To determine the effectiveness of indeterminate sentencing requires "consideration of the modern policy factors underlying criminal penalties—rehabilitation of the individual offender, society's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society." *Id*. at 180.

B. Judicial Discretion and Appellate Review of Indeterminate Sentences

*The rule in *Tanner* is codified under the statutory sentencing guidelines at MCL 769.34 (2)(b). See Section 8.27 for more information.

Until 1972, the Michigan Supreme Court generally refused appellate review of a trial court's sentencing decisions wherever the length of the sentence imposed was within the maximum sentence length set by statute. In *People v Tanner*, 387 Mich 683 (1972), the Michigan Supreme Court limited the length of an offender's minimum sentence term to not more than two-thirds the statutory maximum sentence length for conviction of the offense.* This marked a significant decrease in the amount of discretion a sentencing judge could exercise at sentencing proceedings. Before the *Tanner* "two-thirds rule," judicial discretion in sentencing was nearly unfettered. In fact, before *Tanner* was decided, the only limit placed on a judge's sentencing discretion was the prohibition against exceeding the statutory maximum term of imprisonment designated for a particular felony conviction.

The *Tanner* rule was a response to the "plethora of cases involving sentences with a period of but 30 days between minimum and maximum" and those cases' disregard for the true intent of the indeterminate sentence act. *Tanner*, *supra* at 689. According to the Court, such a narrow window between the minimum and maximum terms of a sentence infringed on the corrections department's exercise of jurisdiction and judgment over prisoners and their conduct in prison. A difference of only thirty days between an offender's minimum and maximum terms eliminated the department's ability to effectively reward or penalize prisoners for their conduct. *Id*. at 689–690.

> "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." *Id*. at 690.

The Michigan Supreme Court unequivocally authorized appellate review of a trial court's sentencing discretion in *People v Coles*, 417 Mich 523, 550 (1983). At the time *Coles* was decided in 1983, no sentencing guidelines existed: subject only to the "two-thirds rule" in *Tanner*, trial courts could sentence an offender to any term within the statutory minimum and maximum set for the sentencing offense. *People v Babcock*, 469 Mich 247, 253 (2003). After *Coles* was decided, an appellate court could review and remedy a defendant's sentence if the trial court's exercise of its sentencing discretion "shocked the conscience" of the reviewing court. *Coles*, *supra* at 550; *Babcock*, *supra* at 253–254.

C. The Judicial Sentencing Guidelines

The first sentencing guidelines were designed by an advisory committee appointed by the Michigan Supreme Court in 1979. The committee's

guidelines—the first edition of the judicial sentencing guidelines—were distributed to circuit court and recorder's court judges in 1983.

> "The[judicial sentencing] guidelines were designed to reduce disparity in sentencing from county to county and region to region by mirroring the existing sentencing practices of judges across the state at the time the guidelines were implemented. They were developed using the results of research on sentencing patterns of judges throughout Michigan, and attempt to capture the typical sentence for similar types of offenses and offenders." House Legislative Analysis, SB 826, HB 5419, and HB 5398 (Revised Second Analysis), September 23, 1998, 2.

Pursuant to Administrative Order No. 1983-3, the judges were "invited, but not required, to use the guidelines for a period of one year, beginning May 1, 1983." 417 Mich cxxi (1983). Judges were "urged" to provide feedback to the judicial sentencing committee on their use of the guidelines. The initial guidelines were used by the courts on a voluntary basis until 1984, when the Supreme Court mandated statewide use of the judicial guidelines and began requiring trial courts to submit data to the advisory committee to facilitate review of the guidelines' effectiveness.*

*For a period of one year, beginning March 1, 1984, Administrative Order No. 1984-1 mandated use of the judicial guidelines and completion of a sentencing form. 418 Mich lxxx (1984).

Because the judicial guidelines were not backed by legislative action, sentencing courts were not obligated to constrain themselves to the sentence ranges recommended under the judicial guidelines. *Babcock*, *supra* at 254, citing *People v Hegwood*, 465 Mich 432, 438 (2001). Use of the judicial guidelines was "mandatory" to the extent that trial courts were required to follow a procedure outlined in the judicial guidelines to "score" a crime based on the circumstances surrounding the offense and the offender. *Babcock, supra* at 254. Trial courts were also required by Supreme Court administrative order to place on the record any reason for imposing a sentence that departed from the range recommended under the judicial guidelines. *Id*. A second edition of the judicial sentencing guidelines was released on October 1, 1988, and this second edition—without further modification—remained in effect until the Legislature enacted the statutory sentencing guidelines in December 1998. Administrative Order No. 1988-4, 430 Mich ci (1988).

After the statutory guidelines were enacted, the judicial sentencing guidelines were rescinded by Administrative Order No. 1998-4. However, the judicial sentencing guidelines remain in effect for offenses committed before January 1, 1999.

1. Appellate Review

After the judicial guidelines were promulgated and before the enabling legislation for the statutory sentencing commission was enacted, the *Coles* "shock the conscience" standard was replaced with the "principle of proportionality" standard adopted by the Michigan Supreme Court in *People v Milbourn*, 435 Mich 630, 636 (1990). *Babcock*, *supra* at 254. The "proportionality" test required that a trial court impose a sentence

"proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, *supra* at 636; *Babcock*, *supra* at 254.

2. Criticism of the Judicial Sentencing Guidelines

Revision of the judicial sentencing guidelines was prompted by criticism that the judicial guidelines were both "excessively lenien[t]" and "undu[ly] harsh[]." House Legislative Analysis, *supra* at 2. Critics of the judicial guidelines pointed out that rather than conducting a *fresh* examination of what a reasonable sentence might be for a particular crime, the judicial guidelines "essentially codified existing practices" without regard to the reasonableness of the sentence in light of the offense and the offender. *Id*. Regardless of any shortcomings in the judicial sentencing guidelines, the fact that the guidelines codified existing practices was precisely what the guidelines had purported to do; the guidelines were based on data gathered expressly for the purpose of determining what the standard sentencing practices were in Michigan trial courts.

Revision of the judicial sentencing guidelines was also prompted by the state's increasing prison census. The judicial guidelines did not consider possible consequences of their implementation on local correctional resources and budgets, and Michigan's prison overcrowding problem had worsened despite an extensive prison construction program. Making the best use of Michigan's limited prison and jail space propelled the decision that the Legislature should undertake "a comprehensive review" of the existing guidelines and develop statutory sentencing standards for imposing the penalties outlined in language first defined by the Legislature itself. *Id*.

D. The Statutory Sentencing Guidelines

With the enactment of 1994 PA 445, the Legislature established a nineteen-member Sentencing Guidelines Commission. The Commission began working in May 1995

> "with the goal of developing sentencing guidelines that would provide for the protection of the public, that considered offenses involving violence against a person as more severe than other offenses, and that were proportionate to the seriousness of the offense and the offender's prior criminal record." House Legislative Analysis, *supra* at 2.

The members of the Commission quickly agreed that the system on which the judicial sentencing guidelines was based represented a fundamentally sound approach to the issue and a basis from which the Commission would begin formulating the sentencing guidelines it would recommend to the Legislature. Maloney, *Sentencing law symposium: The Michigan sentencing guidelines*, 16 T M Cooley L Rev 13, 18–19 (1999). The Commission's challenge was to preserve the ideal of individualized sentencing without placing too stringent a constraint on the largely unfettered discretion that then existed in the sentencing courts. Maloney, *supra* at 21. In addition to its objective of

reducing disparity among criminal sentences, for the first time in Michigan's sentencing history, the Commission was further directed to address sentencing guidelines applicable to habitual offenders. Maloney, *supra* at 18–19.

1. Policy Objectives, Organization, and Content

The Commission's sentencing guidelines incorporated the policy initiatives enumerated by the Legislature:

- Violent offenses and violent offenders should be treated more severely than nonviolent offenses and nonviolent offenders.
- Sentences should be proportionate to both the seriousness of the offense and the offender's prior criminal record.
- There should exist a standard governing a trial court's imposition of a sentence that represents a departure from the sentence recommended under the sentencing guidelines (the "substantial and compelling reason" standard articulated in *People v Fields*, 448 Mich 58, 62–68 (1995)).
- To alleviate prison overcrowding, there should exist mandatory intermediate sanctions when the recommended guidelines range is less than 18 months. Absent a substantial and compelling reason to depart in those cases, a sentencing judge would be prohibited from sentencing an offender to prison when the recommended range called for intermediate sanctions. Maloney, *supra* at 18–19.

According to the Michigan Supreme Court, the statutory sentencing guidelines represented

> "a comprehensive sentencing reform. The evident purposes included reduction of sentencing disparity, elimination of certain inappropriate sentencing considerations, acceptance of this Court's *Tanner* rule, encouragement of the use of sanctions other than incarceration in the state prison system, and resolution of a potential conflict in the law." *People v Garza*, 469 Mich 431, 434–435 (2003) (footnotes omitted).

The statutory guidelines were enacted by 1998 PA 317 and are contained in chapter XVII of Michigan's Code of Criminal Procedure, MCL 777.1 *et seq*. The legislative sentencing guidelines divide more than 700 crimes into six "offense categories" or "crime groups" (e.g., crimes against a person, crimes against property, crimes involving a controlled substance, etc.). The crimes are further divided in order of descending severity into "crime classes," which are represented by the letters "A" through "H" and by "M2," a separate crime class designation reserved for second-degree murder.

General provisions applicable to the guidelines are contained in MCL 777.1 to 777.6; these provisions are discussed in Section 8.3. The specific felonies to which the sentencing guidelines apply are enumerated in MCL 777.11 to 777.19, and these offenses are listed both alphabetically and in order of MCL number in Appendix F. MCL 777.21 and 777.22 contain the general scoring instructions for the statutory sentencing guidelines and are discussed in Section 8.5. Scoring each offense variable is detailed in MCL 777.31 to 777.49a (discussed in Section 8.6), and scoring the prior record variables is found in MCL 777.50 to 777.57 (discussed in Section 8.5). Sentencing grids for each crime class are in MCL 777.61 to 777.69 and may be found in Appendix B.

2. Appellate Review

*Appellate review of a sentence imposed under the statutory guidelines is discussed in detail in Section 8.52.

Because the statutory sentencing guidelines are a product of legislative action, a sentencing court's discretion for departure from the guidelines is limited to the circumstances of departure contained in the statutory language. MCL 769.34(3); *Hegwood*, *supra* at 439; *Babcock*, *supra* at 255. Appellate review of sentences under the statutory guidelines* is governed by a two-part inquiry:

- whether the trial court's sentencing decision is within the appropriate guidelines range (if so, and absent an error in scoring or inaccurate information on which the court relied, the sentence is presumptively proportionate to the offense and the offender); or
- if the trial court's sentencing decision is not within the guidelines range, whether the trial court has articulated a "substantial and compelling reason" for the departure.* *Babcock*, *supra* at 261–270; MCL 769.34(3), (10), and (11).

*See Sections 8.48-8.51 for a comprehensive discussion of sentence departures.

*See Section 8.48(A).

A "substantial and compelling reason"* justifying a trial court's departure from the recommended minimum sentence under the sentencing guidelines must satisfy a three-part test:

- the reason must be based on factors that are objective and verifiable;
- the reason must "keenly" or "irresistibly" grab the reviewing court's attention; and
- the reason must be of "considerable worth" in deciding the length of the defendant's sentence. *Babcock*, *supra* at 257–258; *Fields*, *supra* at 58, 62, 67–68.

*See Section 8.48(B).

Departures may not be based on a defendant's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed or retained counsel, appearing in propria persona, or religion.* MCL 769.34(3)(a). In addition, departures may not be based on an offender's conduct or criminal history already taken into account by an offense variable or prior record variable unless the court

explains why the variable does not adequately account for the conduct or history. MCL 769.34(3)(b).

Although it is no longer an appellate court's primary consideration, proportionality* remains relevant to appellate review of a trial court's sentencing decision. When a trial court departs from the range recommended under the statutory guidelines, the departure must be proportionate to the circumstances of the offense and the offender. *Babcock*, *supra* at 255–256 n 10.

*See Section 8.29 for a detailed discussion of proportionality.

The legislative sentencing guidelines apply to offenses committed on or after January 1, 1999. MCL 769.34(2). The judicial guidelines continue to apply to offenses committed before January 1, 1999 (cases involving the judicial guidelines now occasionally arise in an appellate context).* MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 254 (2000).

*Pursuant to Administrative Order No. 1998-4, 459 Mich clxxv (1998).

Part II—Scoring the Statutory Sentencing Guidelines

8.3 Offenses to Which the Statutory Guidelines Apply

In general, the statutory sentencing guidelines apply only to felony offenses for which the penalty prescribed is an indeterminate sentence, and the sentencing court retains discretion in imposing an offender's sentence. That is, the guidelines are *not* applicable to offenses for which the applicable statute establishes a mandatory determinate penalty or a mandatory penalty of life imprisonment for conviction of the offense. MCL 769.34(5). Application of the guidelines with regard to habitual offenders, repeat drug offenders, controlled substance convictions before March 1, 2003, and probation violations are discussed in detail in later sections of the monograph.

Specifically, the statutory 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 statutory sections listing the felony offenses to which the guidelines apply contain brief descriptions of the felonies listed there "for assistance only." MCL 777.6; MCL 777.11 to 777.19. The language contained in the statute defining the felony offense itself governs application of the sentencing guidelines. MCL 777.6.

Application of the statutory sentencing guidelines is not affected by the date of conviction or the date of sentencing—the statutory language emphasizes only "the date the crime was committed." *People v Martin*, 257 Mich App 457, 459 (2003); *People v Gonzalez*, 256 Mich App 212, 227 (2003); *People v Reynolds*, 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), 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."

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

A. Offense Category (Crime Group)

*Crime classes are discussed in subsection (B), below.

All felony offenses to which the sentencing guidelines apply fall into one of six offense categories. (Appendix A contains separate lists of the felonies contained in each crime group in order of severity as designated by each offense's "crime class."*) The offense category, or "crime group," to which an offense belongs will determine 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").

B. Crime Class

*An offense's "crime class" determines which grid applies to the sentencing offense. MCL 777.21(1)(c). Sentence grids are included in Appendix B.

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" 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 a maximum term of imprisonment for offenses in the same class:

Class	Sentence
A	Life
B	20 years' imprisonment
C	15 years' imprisonment
D	10 years' imprisonment

E	5 years' imprisonment
F	4 years' imprisonment
G	2 years' imprisonment
H	Jail or other intermediate sanction

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

For example, MCL 750.145c(3) and MCL 409.122(3) are both "crimes against a person," and both are designated as class D felonies.* MCL 777.16g and 777.14b. According to the "crime class/maximum sentence" chart above, which corresponds to language found in legislative documents discussing the statutory guidelines, class D felonies are crimes for which a maximum sentence of ten years' imprisonment may be appropriate. House Legislative Analysis, SB 826, HB 5419, and HB 5398 (Revised Second Analysis), September 23, 1998, 3; Senate Fiscal Analysis, SB 826, HB 5398, and HB 5419, October 23, 1998, 5. However, the maximum term of imprisonment authorized by MCL 750.145c(3) is only seven years, while the maximum term authorized by MCL 409.122(3) is 20 years. In neither of the two statutes is the statutory maximum ten years as the designation "class D" suggests. While the "crime class" designation in most cases will correspond to the maximum sentences listed in the chart above, the two offenses discussed here exemplify the directive of MCL 777.6: the express language of the statute defining the offense itself governs application of the sentencing guidelines.

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

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).

8.4 Presentence Investigation Report (PSIR)

A court must use a presentence report 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*, 391 Mich 618, 635 (1974).

The presentence investigation report is a tool by which the sentencing court gathers information important to the court's ability to fashion a sentence appropriate to the criminal and to the circumstances under which the crime was committed. *Morales v Michigan Parole Bd*, 260 Mich App 29, 45–46 (2003). Long before the statutory sentencing guidelines were enacted, the PSIR was intended to ensure that criminal sentences were tailored both to the offense committed and the offender who committed it. *People v Miles*, 454 Mich 90, 97 (1997), citing *People v Triplett*, 407 Mich 510, 513–515 (1980).

A. PSIR Content Required for all Felony Offenses

*The Department of Corrections requires that an offender's PSIR comply with its operating procedures and policy directives. See Appendix H.

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)–(g) (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. Language found in the applicable court rule, however, contains very specific guidance about the information required in such a section. These court rule provisions are discussed in subsection (C), below.

MCL 771.14(2)(a)–(d) and equivalent provisions of MCR 6.425(A) 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)(10).
- A written victim impact statement if requested by a victim. MCL 771.14(2)(b); MCR 6.425(A)(7).

- A written recommendation for a specific disposition. The recommended disposition should be based on the evaluation referred to above. The PSIR should also contain "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)(11).

- 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)(9).

B. PSIR Content Required for Felony Offenses Under the Sentencing Guidelines

In addition to the information contained in the subsection above, the PSIR of an offender being sentenced for a felony offense under the statutory sentencing guidelines in chapter XVII (MCL 777.11 to 777.19) must include the specific sentence range recommended under the guidelines based on the offender's prior record variable and offense variable scores.

> **Note:** Until recently, an offender's scores were calculated on a 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).

After points are assessed for the prior record variables and the appropriate offense variables, the point totals—the "prior record variable level" and the "offense variable level"—determine the offender's placement on the appropriate sentence grid.

In addition to the scoring of an offender's prior record and offense variables, an offender's PSIR must also include:

- The appropriate sentence grid* showing the recommended minimum sentence range for each conviction that could be subject to imposition of a mandatory or discretionary consecutive sentence. MCL 771.14(2)(e)(*i*).

- Unless consecutive sentences are required or permitted for a conviction, the sentence grid showing the recommended minimum sentence range for the 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 that determined the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(*iii*).

*Sentence grids are found in part 6 of chapter XVII. They are attached to this monograph in Appendix B.

- A statement regarding the applicability of intermediate sanctions. MCL 771.14(2)(e)(*iv*).
- The recommended sentence. MCL 771.14(2)(e)(*v*).

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). The statute governing PSIR content states simply 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), a PSIR is a succinct and written report of the probation officer's investigation into the defendant's background and character. In other words, a PSIR is a succinct and written report of the probation officer's investigation into the defendant's "antecedents, character, and circumstances." Depending on the circumstances of the offense and the offender, a PSIR must include:

> "(1) a description of the defendant's prior criminal convictions and juvenile adjudications,
>
> "(2) a complete description of the offense and the circumstances surrounding it,
>
> "(3) a brief description of the defendant's vocational background and work history, including military record and present employment status,
>
> "(4) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,
>
> "(5) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,
>
> "(6) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,
>
> * * *
>
> "(8) any statement the defendant wishes to make,
>
> * * *
>
> "(12) any other information that may aid the court in sentencing." MCR 6.425(A).

D. PSIR Content Required in Limited Situations

Crimes involving alcohol or a controlled substance. If an offender is to be sentenced for a felony or a misdemeanor offense involving the illegal delivery, possession, or use of alcohol or a controlled substance, the PSIR must contain a statement, if applicable, about whether the offender is licensed or registered under the public health code (MCL 333.16101 to 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 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* or county juvenile agency must submit a report required by MCL 771.14a. See Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings—Revised Edition* (MJI, 2003), Section 21.3, for additional information.

*Formerly the Family Independence Agency.

E. PSIR Must Be "Reasonably Updated"

The PSIR on which a sentencing court relies must be "reasonably updated." *Hemphill*, *supra* at 580; *Triplett*, *supra* at 515.

A defendant may not waive the requirement that a presentence report be utilized at his or her sentencing hearing. *Hemphill*, *supra* 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 582. The prosecution may also waive completion of an updated PSIR at a *resentencing* hearing. 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 the 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*.

A PSIR that is "several years old" is not "reasonably updated." *Hemphill*, *supra* at 581; *People v McDonald*, 99 Mich App 150, 152–153 (1980); *People v Bruce*, 102 Mich App 573, 580 (1980). A PSIR that was completed "several months earlier" in connection with an offense unrelated to the sentencing offense is not "reasonably updated." *People v Anderson*, 107 Mich App 62, 66–67 (1981); *People v McKeever*, 123 Mich App 533, 539–541 (1983). Even a PSIR only five months old may not be adequately up-to-date "where there were significant allegations that the defendant's circumstances had changed during the interim." *Hemphill*, *supra* at 581, citing *People v Crook*, 123 Mich App 500, 503 (1983).

Updated PSIRs may not be necessary where a sentencing court has no discretion in the length of the sentence imposed. *Hemphill*, *supra* at 581; *People v Foy*, 124 Mich App 107, 110–112 (1983). The requirement that an

updated PSIR be utilized at a defendant's sentencing may be satisfied by the submission of a supplementary report. *Hemphill*, *supra* at 581; *People v Hart*, 129 Mich App 669, 674 (1983).

8.5 Scoring an Offender's Prior Record Variables (PRVs)

*Sentencing grids are found in MCL 777.61 to 777.69. Each grid is also included in Appendix B.

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. But *all seven 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). The total number of points assessed for the seven PRVs constitutes the offender's "PRV level," which is represented by the horizontal axis on each sentencing grid.*

Each PRV consists of several statements to which a specific number of points is assigned. The statements appearing in each of the seven PRVs 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.

*Specific "offender statuses" are discussed in Section 8.5(H).

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 780.624. MCL 777.50(4)(a).* Similarly, a "juvenile adjudication" for purposes of an offender's PRV scores includes an adjudication set aside under MCL 712A.18e or expunged. MCL 777.50(4)(c). See *People v Smith*, 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.

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 the conviction or adjudication occurred more than ten years before the sentencing offense. Specifically, MCL 777.50(1) provides:

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

*Discharge from the jurisdiction of the court or the department of corrections. MCL 777.50(4)(b).

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

If the offender's most recent conviction or adjudication must be counted in scoring his or her PRVs, and if the offender has additional prior convictions or juvenile adjudications, determine the length of time between the *commission date* of the prior conviction or adjudication first scored and the *discharge date* of the next earlier conviction or adjudication. If the time span equals or exceeds ten years, that conviction or adjudication may not be counted. If the time span is less than ten years, that conviction or adjudication may be counted in scoring the offender's PRVs. Use the process described above until a time span equal to or greater than ten years 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 were obtained without

the defendant having had the benefit of counsel. The constitutional validity of a defendant's prior convictions or adjudications as they relate to the defendant's PRV level is discussed in Section 8.21.

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 777.55. Where the commission date of the sentencing offense fell after the commission date of a previous offense but before the date on which the defendant entered a guilty plea to the previous offense, the conviction (plea) entered *after* the commission date of the sentencing offense is not a "prior conviction" for purposes of scoring PRV 5. *People v Hammond*, unpublished opinion per curiam of the Court of Appeals, decided September 18, 2003 (Docket No. 231540). See also *People v Reyna*, 184 Mich App 626, 633–634 (1990) (the date of conviction is independent of and unaffected by the date of sentencing for purposes of determining whether an offender's prior conviction qualifies in scoring an offender's PRVs).

*The range of dates was broad enough to have made the prior conviction countable if the evidence had established a commission date nearer to the earliest date indicated by the range of dates.

Despite the range of offense dates* listed in the complaint against the defendant, where the evidence at trial established that the earliest date on which the defendant committed the sentencing offense was more than ten years after the defendant's discharge from probation for an earlier offense, the earlier offense may not be counted as a "prior conviction" for purposes of scoring the defendant's prior record variables. *People v Ray*, unpublished opinion per curiam of the Court of Appeals, decided September 9, 2003 (Docket No. 240843).

Note: As of the publication date of this monograph, published appellate opinions discussing scoring issues under the legislative sentencing guidelines were limited. To provide guidance to users of this monograph, unpublished opinions discussing the legislative sentencing guidelines and published opinions discussing the prior judicial sentencing guidelines are included where relevant.

B. Assignment to "Youthful Trainee" Status Under the PRVs

*Youthful trainee status is discussed further in Section 8.43.

Under the express language of the statutory sentencing guidelines, a defendant's previous assignment to "youthful trainee" status* is a "prior conviction" for purposes of scoring a defendant's PRVs. MCL 777.50(4)(a)(*i*). The plain language in MCL 777.50(4)(a)(*i*) conflicts with the Court of Appeals' disposition of this issue in a case governed by the judicial sentencing guidelines. In *People v Garner*, 215 Mich App 218, 220 (1996), the Court ruled that the only express statutory language in effect at the time—MCL 762.14(2)—clearly prohibited using a defendant's previous youthful trainee status as a prior conviction for scoring purposes.

Although the youthful trainee act contained the same information then as it does now, the judicial sentencing guidelines defined "conviction" as "an adjudication of guilt in an adult criminal matter." *Garner*, *supra* at 220–221.

Because the statutory sentencing guidelines define "conviction" to include assignment to the status of "youthful trainee," a sentencing court must now count a defendant's previous assignment to the status of youthful trainee as a prior conviction for purposes of scoring the defendant's PRVs. However, the statutory sentencing guidelines preserve the *civil* protection provided by MCL 762.14(2) and substantiate the *conditional* protection provided in a subsequent provision of the youthful trainee act regarding disclosure of records involving the prior criminal charge. MCL 762.14(4).

C. PRV 1—Prior High Severity Felony Convictions

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,
- for a crime 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 in class M2, A, B, C, or D. MCL 777.51(2).

*A qualifying "prior high severity conviction" must satisfy the 10-year gap requirements of MCL 777.50, as discussed above in Section 8.5(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).

Points	PRV 1—Number of prior high severity convictions
75	The offender has 3 or more prior high severity convictions.
50	The offender has 2 prior high severity convictions.
25	The offender has 1 prior high severity conviction.
0	The offender has no prior high severity convictions.

1. Case Law Under the Statutory Guidelines

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 defendant's California second-degree robbery conviction is akin to an unarmed robbery 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*, unpublished opinion per curiam of the Court of Appeals, decided September 18, 2003 (Docket No. 240376).

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).

2. Relevant Case Law Under the Judicial Guidelines

More than one "prior high severity conviction" arising from the same judicial proceeding may be counted when scoring PRV 1. In a case decided 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. *People v Whitney*, 205 Mich App 435, 436 (1994). In refuting the defendant's argument that he should be assessed points under PRV 1 for only one of the multiple convictions resulting from a single judicial proceeding, the Court emphasized that the defendant's proposal would undermine the purpose of PRV 1, which is to accurately reflect an offender's previous criminal history. *Whitney*, *supra* at 436. 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." *Id*. at 436–437.

D. PRV 2—Prior Low Severity Felony Convictions

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

- a conviction entered before the commission date* of the sentencing offense,
- for a crime 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 in class E, F, G, or H. MCL 777.52(2).

*All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50, as discussed in Section 8.5(A), above.

If the defendant has previous convictions to which PRV 2 applies, determine which of the statements listed in the variable apply to those prior low severity

felony convictions and assign the point value corresponding to the applicable statement having the highest number of points. MCL 777.52(1).

Points	PRV 2—Number of prior low severity convictions
30	The offender has 4 or more prior low severity convictions.
20	The offender has 3 prior low severity convictions.
10	The offender has 2 prior low severity convictions.
5	The offender has 1 prior low severity conviction.
0	The offender has no prior low severity convictions.

1. Case Law Under the Statutory Guidelines

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*, unpublished opinion per curiam of the Court of Appeals, decided June 5, 2003 (Docket No. 238355). In *Wallace*, 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, supra*. 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 750.414 was expressly listed in MCL 771.16u as a felony offense to which the statutory guidelines applied. *Wallace, supra*. The Court further pointed to MCL 771.16u's characterization of MCL 750.414 as a class H offense, a crime class specifically identified among the convictions that qualify as "prior low severity felony convictions" under PRV 2. *Wallace, supra*; MCL 777.52.

2. Relevant Case Law Under the Judicial Guidelines

It is permissible to use the same previous conviction for purposes of scoring PRV 2 and PRV 6.* *People v Vonins (After Remand)*, 203 Mich App 173, 176 (1993). Although *Vonins* was decided under the judicial sentencing guidelines, the version of PRV 2 then in effect addressed the same prior conduct as does the version of PRV 2 now in effect under the statutory sentencing guidelines. *Vonins, supra* at 176; MCL 777.52. In addition, with the exception of the judicial guidelines' inclusion of *charges* pending against an offender at the time the sentencing offense was committed, the conduct addressed by the version of PRV 6 in effect at the time *Vonins* was decided is nearly equivalent to the conduct described in PRV 6 under the statutory guidelines. *Vonins, supra* at 176; MCL 777.56.

*PRV 6 deals with an offender's relationship to the criminal justice system at the time the sentencing offense was committed. See Section 8.5(H), below.

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. *Vonins, supra* 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:

> "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 involving bail, bond, pretrial diversion, or the Holmes Youthful Trainee Act.
>
> "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 occurred within six months of termination of probation or parole." *Vonins, supra* at 176–177.

Not all prior low severity convictions will qualify under more than one PRV as did the conviction in *Vonins*. A defendant's prior low severity conviction is appropriately counted under PRV 2 and PRV 6 only when the sentencing offense was committed before the defendant completed the term of probation or parole imposed as a result of the prior conviction, as was the situation in *Vonins*.

E. PRV 3—Prior High Severity Juvenile Adjudications

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

- for conduct that would be a crime 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 in class M2, A, B, C, or D if committed by an adult, and
- for which the order of disposition was entered before the commission date* of the sentencing offense. MCL 777.53(2).

*All "prior juvenile adjudications" must satisfy the 10-year gap requirements of MCL 777.50, as discussed above in Section 8.5(A).

As with the PRVs discussed above, determine which one or more of the statements addressed by PRV 3 apply to the offender and assign the point value indicated for the applicable statement with the highest number of points. MCL 777.53(1).

Points	PRV 3—Number of prior high severity juvenile adjudications
50	The offender has 3 or more prior high severity juvenile adjudications.
25	The offender has 2 prior high severity juvenile adjudications.

10	The offender has 1 prior high severity juvenile adjudication.
0	The offender has no prior high severity juvenile adjudications.

F. PRV 4—Prior Low Severity Juvenile Adjudications

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

- for conduct that would be a crime 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 in class E, F, G, or H if committed by an adult, and
- for which the order of disposition was entered before the commission date* of the sentencing offense. MCL 777.54(2).

*All "prior juvenile adjudications" must satisfy the 10-year gap requirements of MCL 777.50, as discussed in Section 8.5(A), above.

As with the PRVs already discussed, determine which one or more of the statements addressed by PRV 4 apply to the offender and assign the point value indicated for the applicable statement with the highest number of points. MCL 777.54(1).

Points	PRV 4—Number of prior low severity juvenile adjudications
20	The offender has 6 or more prior low severity juvenile adjudications.
15	The offender has 5 prior low severity juvenile adjudications.
10	The offender has 3 or 4 prior low severity juvenile adjudications.
5	The offender has 2 prior low severity juvenile adjudications.
2	The offender has 1 prior low severity juvenile adjudication.
0	The offender has no prior low severity juvenile adjudications.

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

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 the law of the United States,

*Subject to the 10-year gap requirements of MCL 777.50, as discussed in Section 8.5(A), above.

- if the conviction was entered before the commission date* of the sentencing offense. 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 the law of the United States,
- if the order of disposition for the juvenile adjudication was entered before the commission date of the sentencing offense. MCL 777.55(3)(b).

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

Points	PRV 5—Number of prior misdemeanor convictions or prior misdemeanor juvenile adjudications
20	The offender has 7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications.
15	The offender has 5 or 6 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.
10	The offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.
5	The offender has 2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.
2	The offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication.
0	The offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications.

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)(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:

- only those prior misdemeanor convictions or prior misdemeanor juvenile adjudications that are offenses against a person or property, weapons offenses, or offenses involving controlled substances, and
- all prior misdemeanor convictions and juvenile adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while 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).

A defendant's prior misdemeanor conviction for driving with a suspended license should not have been counted for purposes of scoring PRV 5 because it is not an offense listed in the categories of misdemeanors clearly enumerated in MCL 777.55(2). *People v Clayton*, unpublished opinion per curiam of the Court of Appeals, decided September 13, 2002 (Docket No. 230328).

However, a previous misdemeanor conviction for obstructing a police officer is properly included as a prior misdemeanor conviction for purposes of scoring PRV 5. *Clayton, supra*. Because resisting or obstructing a law enforcement officer is specifically designated as a crime against a person, a misdemeanor violation involving such conduct is appropriately included in calculating a defendant's PRV 5 score. *Clayton, supra*; MCL 777.16x.

A defendant's previous misdemeanor conviction for "allowing a fire to escape" was properly included as a prior misdemeanor conviction for purposes of scoring PRV 5. *People v Bryan*, unpublished opinion per curiam of the Court of Appeals, decided July 16, 2002 (Docket No. 227578). In *Bryan*, the defendant argued against the conviction's consideration under PRV 5 because similar offenses were classified as crimes against public safety under the legislative sentencing guidelines, a category of crimes not included by the statutory instructions governing PRV 5. *Bryan, supra*. The Court determined that the defendant's previous conviction was properly counted under PRV 5 for the following reasons:

> "The statutory sentencing guidelines do not define the phrase 'a crime against a person or property.' Moreover, neither the record nor the parties disclose the specific statute under which defendant was convicted, but it appears likely the conviction stemmed from a violation of MCL 320.25(b), which requires a person to take 'reasonable precautions to . . . prevent the escape' of any fire set. Failure to take such precautions was deemed a misdemeanor under MCL 320.34. The trial court, however, concluded that the violation of a statute prohibiting allowing a fire to escape was intended to protect property and is therefore 'a crime against property.' Because fire always damages or destroys property, we find that the trial court's interpretation and application of MCL 777.55(2)(a) is consistent with the plain, ordinary, and

> unambiguous meaning of the language of the statute and that, therefore, the trial court correctly counted defendant's misdemeanor conviction for 'allowing a fire to escape' when scoring PRV 5." *Bryan, supra* (footnote and internal citation omitted).

The *Bryan* Court also explained that the guidelines offense categories are irrelevant to scoring PRV 5:

> "[W]e reject defendant's claim that the guidelines offense categories established by the Legislature have any bearing on the scoring of misdemeanor and juvenile[] offense[s] under PRV 5. These categories apply only to those enumerated felonies to which the guidelines apply, and are used merely to determine which offense variables to score. The guidelines offense categories have no application to the scoring of prior record variables. While the Legislature could have established 'offense categories' for the purpose of specifying what prior misdemeanor convictions or juvenile adjudications should be counted to score PRV 5, it did not do so. Thus, whether a prior offense is to be counted for purposes of scoring PRV 5 is dependent on the nature of the crime for which the offender was convicted or adjudicated, not on the offense category of similar felonies, which are used for scoring sentence guidelines offense variables. The trial court correctly discerned and effectuated the intent of the Legislature in so concluding." *Bryan, supra*.

In *People v Cadwell*, unpublished memorandum opinion of the Court of Appeals, decided December 20, 2002 (Docket No. 236381), a case involving a similar challenge to the trial court's use of a prior misdemeanor conviction in scoring PRV 5, the appellate panel more succinctly addressed the issue raised in *Bryan, supra*:

> "For purposes of PRV 5 scoring, MCL 777.55(2)(a) instructs the court to count a prior misdemeanor conviction or juvenile adjudication only if it is an offense against a person or property, a controlled substances offense, or a weapon[s] offense. Unlike felonies, the Legislature did not place misdemeanors into categories. In the absence of more specific legislative guidance, it was for the trial court to determine whether 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, supra.*

See also *People v Dimovski*, unpublished opinion per curiam of the Court of Appeals, decided December 18, 2003 (Docket No. 242726) (the trial court

improperly considered the defendant's multiple prior misdemeanor traffic violations where the violations were not included in the plain language of the statute specifying the types of misdemeanors to be included under PRV 5).

H. PRV 6—Relationship to the Criminal Justice System

PRV 6 assesses points based on an offender's relationship to the criminal justice system at the time the sentencing offense was committed. MCL 777.56. As with the other prior record variables, 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). The scope of PRV 6 includes consideration of an offender's relationship with a criminal justice system outside the state of Michigan. The point values indicated by applicable statements in PRV 6 should be assessed against an offender who is involved with the criminal justice system of another state or the federal criminal justice system. MCL 777.56(2).

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

"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 750.350a (deferral under limited circumstances for parental kidnapping), MCL 762.11 to 762.15 (assignment to youthful trainee status), and MCL 769.4a (deferral under limited circumstances for domestic assault). MCL 777.56(3)(a). Effective January 1, 2005, 2004 PA 220 added to the list of offenses that may qualify for "delayed sentence status"; delayed sentence status is available to offenders assigned or deferred under MCL 600.1076 (deferral involving drug treatment courts), and MCL 750.430 (deferral for impaired healthcare professionals).*

*Specific statutes under which an offender's sentence may be delayed are discussed in detail in Sections 8.41–8.43.

1. Case Law Under the Statutory Guidelines

The defendant's probationary status following his conviction for the misdemeanor offense of driving with a suspended license was sufficient to support a score of five points under PRV 6. *People v Thornton*, unpublished opinion per curiam of the Court of Appeals, decided June 17,

2003 (Docket No. 237030). The *Thornton* Court specifically disagreed with the defendant's contention that a probationary period resulting from a conviction for driving with a suspended license was not the "type of offense" intended to be scored under PRV 6. *Thornton, supra*, citing *People v Kisielewicz*, 156 Mich App 724, 727 (1986), a case involving a defendant's probationary status for the same offense *and* a more serious motor vehicle violation involving OUIL.

Even where the statements addressed by PRV 6 do not accurately describe a defendant's circumstances at the time he committed the sentencing offense, a trial court may properly assess the number of points corresponding to the statement that most closely describes those circumstances. *People v Edwards*, unpublished opinion per curiam of the Court of Appeals, decided December 20, 2002 (Docket No. 233750). The defendant was assessed 15 points based on the trial court's reasoning that the defendant's failure to post bail for a misdemeanor charge meant that the defendant, had he not escaped during transport to the jail to await adjudication, was technically "incarcerated . . . awaiting adjudication," a status addressed by PRV 6 and for which 15 points were appropriate. *Edwards*, *supra*. Although the Court focused primarily on a discussion of the propriety of the trial court's sentence departure and whether PRV 6 adequately reflected the circumstances surrounding the offense, the Court's discussion implicitly approved of the trial court's reasoning:

> "While defendant's status as an escapee was a factor in assessing fifteen points under prior record variable six in that he was not regarded as being on bond, because he had not posted bond, and was, rather, regarded as being incarcerated, the factor did not account for the fact that the offense was committed during the course of an escape." *Edwards, supra*.

2. Relevant Case Law Under the Judicial Guidelines

In a case decided 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 other than the sentencing offense. *People v Lyons (After Remand)*, 222 Mich App 319, 322–323 (1997). The defendant in *Lyons* argued that he should not have been assessed any points for PRV 6 because none of the statements for the variable described his relationship to the criminal justice system. *Lyons, supra* at 322–323. Applying the rules of statutory interpretation to the judicial sentencing guidelines then in effect, the Court concluded 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*. at 322. According to the *Lyons* Court, an offender whose bond was revoked for failure to appear may not escape characterization as being "on bond" for purposes of scoring PRV 6. *Id*. at 322–323.

A defendant's score of five points under PRV 6 for being on bond for an offense other than the sentencing offense is appropriate even when the defendant is acquitted of the first charge. *People v Jarvi*, 216 Mich App 161, 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." *Jarvi, supra* at 165.

A single previous conviction may merit points under PRV 6 and another prior record variable when the variables are intended to fulfill different purposes. *People v Vonins (After Remand)*, 203 Mich App 173, 176 (1993). For example, it was not improper "double-counting" for a trial court to assess points against a defendant under PRV 2 (prior low severity felony conviction) and PRV 6 when the points were based on the same previous conviction. *Vonins, supra* at 176. According to the Court:

> "Each variable is directed toward a different purpose. PRV 2 provides for points for each prior conviction. PRV 6 provides for points when the instant offense is committed while the defendant is subject to the criminal justice system. The former is concerned with the number of the defendant's prior convictions, the latter with the defendant's status in relation to the criminal justice system when the instant offense occurred." *Id*. at 177.

I. PRV 7—Subsequent or Concurrent Felony Convictions

PRV 7 assesses points against an offender for a felony conviction obtained at the same time as the sentencing offense or a felony conviction obtained after the commission date 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. MCL 777.57(2)(c).

*Effective March 1, 2003. Therefore, the prohibition does not apply to offenses committed before March 1, 2003.

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

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

Points	PRV 7—Number of subsequent or concurrent felony convictions
20	The offender has 2 or more subsequent or concurrent felony convictions.
10	The offender has 1 subsequent or concurrent felony conviction.
0	The offender has no subsequent or concurrent felony convictions.

1. Case Law Under the Statutory Guidelines

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

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 provides 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. *People v Rapley*, unpublished opinion per curiam of the Court of Appeals, decided March 18, 2003 (Docket No. 238704). The Court explained:

> "MCL 777.57(2)(a) plainly provides that, in scoring PRV 7, the court is to score 'the appropriate point value if the offender was convicted of multiple felony counts.' We disagree with defendant that this statute is rendered ambiguous when considered in conjunction with other statutory provisions . . . . Indeed, if we were to credit defendant's argument, MCL 777.57 would be rendered surplusage, in that no concurrent or subsequent conviction could ever be scored for purposes of PRV 7." *Rapley, supra.*

PRV 7's instruction not to count a concurrent conviction if the conviction will result in the imposition of a mandatory consecutive sentence does not apply to consecutive sentences resulting from an offender's parole violation. *People v Clark*, unpublished opinion per curiam of the Court of Appeals, decided October 2, 2003 (Docket No. 240139). 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 where the concurrent or subsequent conviction will result in a mandatory consecutive sentence. PRV 7 does not apply to consecutive sentences that may result from a separate parole violation hearing. *Clark, supra*.

2. Relevant Case Law Under the Judicial Guidelines

It is proper to assess points under PRV 7 for the defendant's commission of a concurrent felony when the conduct that is the basis of the concurrent felony is also conduct scored under an *offense* variable. *People v Jarvi*, 216 Mich App 161, 164 (1996). In *Jarvi*, the defendant was assessed points under OV 5 for moving a victim to a place of greater danger or holding a victim captive for a time longer than necessary to commit the offense. *Jarvi, supra* at 163. The defendant argued that the points assessed against him in OV 5 precluded the trial court from assessing him points under PRV 7 because the acts that constituted the "concurrent felony" for purposes of PRV 7 (kidnapping) had already been used against him in OV 5. *Id*. at 163. The *Jarvi* Court disagreed and ruled that assessing points for both variables was proper where the variables were "two separate categories addressing two different situations." *Id*. at 164. Under the judicial guidelines in *Jarvi*, and under the statutory sentencing guidelines now in effect,* OV 5 accounts for the degree of danger in which a victim is placed, while PRV 7 addresses whether the offender committed multiple felony offenses at the same time. *Id*.

*OV 8 under the statutory guidelines assesses points for a victim's asportation or captivity. Under the judicial guidelines, OV 5 addressed this factor.

8.6 Scoring an Offender's Offense Variables (OVs)

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 "offense characteristics." MCL 769.31(d). "Offense characteristics" are measured by scoring the appropriate offense variables. 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. 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.

A. OVs According to Crime Group

MCL 777.21 details the method by which an offender's recommended minimum sentence range is determined using the offender's prior record variable (PRV) and OV scores. The offense category or "crime group" to which the sentencing offense belongs determines which OVs are scored. 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.*

*Sentencing grids are located at MCL 777.61 to 777.69. Each grid is also included in Appendix B.

1. Crimes Against a Person (Person)

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

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

OVs 5 and 6 must also be scored 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).

If the offense or attempted offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive, OVs 17 and 18 should also be scored. MCL 777.22(1).

2. Crimes Against Property (Property)

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

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

3. Crimes Involving a Controlled Substance (CS)

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

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

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

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

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

5. Crimes Against Public Safety (Pub Saf)

"Pub saf" is the designation used to identify crimes against public safety in the statutory lists of felony offenses 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. If the offense or attempted offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive, OV 18 must also be scored. MCL 777.22(5).

Conduct specific to one charged offense may be used in calculating the sentence guidelines for a separate but contemporaneous offense, even when the conduct being scored is not necessary to the offender's conviction of the separate offense. *People v Cook*, 254 Mich App 635, 638–641 (2003). In *Cook*, the trial court properly considered the defendant's conduct in fleeing from police officers* when calculating the sentence guidelines for the defendant's assault conviction, even though the defendant's flight was somewhat temporally removed from the assault. *Cook, supra* at 640–641. The Court stated:

*The Court in *Cook* did not address the propriety of using the defendant's conduct for the specific variable at issue in that case.

> "[W]here the Legislature has not precluded it, we find that where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense." *Id*. at 641.

If MCL 771.14(2)(e) requires scoring more than one offense, care must be taken to avoid scoring a variable for offenses arising from the continuum of conduct when the conduct-specific variable may not apply to all offenses being scored. For example, OV 5 is a variable scored only in very specific circumstances: 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). Therefore, OV 5 is properly scored for a second-degree murder conviction but should not be scored for an offender's contemporaneous arson conviction. See MCL 777.22(1); *People v Strouse*, unpublished opinion per curiam of the Court of Appeals, decided February 4, 2003 (Docket No. 234034). Although arson of a dwelling house is a crime against a person, arson is not one of the crimes enumerated in MCL 777.22(1) for which OV 5 should be scored. MCL 750.72; MCL 777.16c.

Unless the sentencing guidelines expressly prohibit it, a trial court may properly consider a factor in scoring a defendant's OVs when the factor was also an element of the offense.* *People v Gibson*, 219 Mich App 530, 534 (1996). In *Gibson*, the defendant objected to the trial court's score of 25 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" when the injury suffered by the victim formed the basis of the offense with which the defendant was charged—first-degree criminal sexual conduct. *Gibson, supra* at 534. The defendant argued that using the same conduct to charge him with a more serious crime *and* to increase the point total under a variable measuring the same conduct resulted in his being punished twice for the same conduct. *Id*. Because an offender's OV scores are not a form of "punishment" as contemplated by the prohibition against multiple punishments for the same crime, scoring an offender for conduct under the

*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.

OVs when that conduct also constituted an element of the crime charged did not violate the prohibition against double jeopardy. *Id*. at 535.

See also *People v Cotton*, 209 Mich App 82, 84 (1995) (it was proper to prosecute the defendant for first-degree criminal sexual conduct because the victim was younger than 13 years of age *and* to assess points against the defendant for exploiting a victim's vulnerability because the victim was younger than 13 years of age), and *People v Nantelle*, 215 Mich App 77, 84–85 (1996) (same result where the age of the victim and the defendant's position of authority were elements of second-degree criminal sexual conduct *and* were factors properly considered in scoring OV 7 under the judicial guidelines).

B. OV 1—Aggravated Use of a Weapon

OV 1 is scored for all offenses to which the sentencing guidelines apply, without regard to crime group designations. MCL 777.22(1)–(5). Determine which statements addressed by OV 1 apply to the offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.31(1).

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

1. Special Instructions and Definitions

- 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, if 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).
- 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).

- 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).
- "Harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," "harmful radioactive device," and "imitation harmful substance or device" are defined in MCL 750.200h. MCL 777.31(3)(a).
- "Incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.31(3)(b).

2. Case Law Under the Statutory Guidelines

The instructions for scoring OV 1 include specific directions in cases involving multiple offenders.* 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).

*OV 3 also has a multiple offender provision.

The multiple offender provision in OVs 1 and 3 requires that the score assessed the first offender sentenced for the crime, if uncontested, is the score that must be assessed all offenders involved in the offense. *People v Morson*, 471 Mich 248, 262 (2004) (the defendant and the codefendant robbed a woman at gunpoint and a third party was injured when the codefendant shot him). The Court explained that its conclusion did not eliminate the "highest number of points" requirement or sanction the repetition of inaccurate OV scores: the first offender assessed points should be assessed the highest number of points appropriate to the offense and unless contested, that same number of points should be assessed against all other offenders involved. *Morson, supra* at 260. Without evaluating the accuracy of OVs 1 and 3, the *Morson* Court stated:

> "On the facts before us, we agree with defendant that the plain language of subsection 2 requires that defendant, when scored on the armed robbery conviction, be assessed the same scores on OV 1 and OV 3 that [the codefendant] was previously assessed on those variables when she was scored for armed robbery.
>
> * * *
>
> "While we agree that the sentencing court should not be bound to apply an erroneous score in the multiple offender context, we note that the prosecution does not characterize [the codefendant's] scores on OV 1 and OV 3 of her armed robbery conviction as inaccurate or erroneous. In fact, the

> prosecution acknowledged in its brief that [the codefendant's] scores were not disputed by the prosecution at sentencing.
>
> * * *
>
> "[I]n the absence of any clear argument that the scores assessed to [the codefendant] under OV 1 and OV 3 were incorrect, the sentencing court should have assessed defendant the same number of points that were assessed to [the codefendant] for OV 1 and OV 3 . . . fifteen points and zero points." *Id*. at 259–261 (footnotes omitted).

Simply put, unless some objection is raised to the scores calculated for the first offender, the plain language of the multiple offender provision requires that all offenders receive the same number of points given to the first offender for that variable.

In *People v Libbett*, 251 Mich App 353, 366 (2002), the defendant argued that OV 1 was improperly scored because he received a higher score for the variable than did the other offender involved in the crime who had been sentenced pursuant to a plea agreement before the defendant's trial. According to the defendant, his OV 1 score was required to match the OV 1 score of the other offender because the other offender's score was recorded first. *Libbett, supra* at 365. The Court of Appeals disagreed. OV 1, as applied to multiple offender situations, does not, as the defendant in *Libbett* asserted, "require[] that all offenders in a multiple offender situation receive the same score [] regardless of whether the initial scoring was indisputably incorrect." *Id*. According to the Court, the Legislature clearly intended that a sentencing court first make an *accurate* determination of the number of points appropriate under OV 1, and then the sentencing court is to score each offender involved with the same number of points. *Id*. at 367.

> **Note:** In *Libbett*, the defendant's OVs were scored based on evidence established at his trial, while the other offender's scores were assessed without the benefit of this trial information. This procedural difference gave rise to the implication that the first offender's scores were less accurate than the defendant's, or at least that the first offender's scores were not supported by the amount of evidence in support of the defendant's scores. *Id*. at 367 n 8.

*Notwithstanding other means of challenging a court's ruling.

Although the parties did not dispute that the codefendant's OV score was inaccurate, no reference is made to whether either party objected to the scores received by the codefendant in *Libbett*. (With regard to OV 3, however, the record shows that both parties in *Libbett* agreed that the variable was inaccurately scored.) After *Morson, supra,* it appears that some challenge must be made to the accuracy of the scores received by the first offender in order to merit review of the second offender's scores.*

In the context of reviewing the defendant's claim that he was denied the effective assistance of counsel, the Court of Appeals examined the defendant's otherwise unpreserved and unreviewable argument that the trial court improperly assessed points against him under OV 1. *People v Wilson*, 252 Mich App 390, 394 (2002).* In *Wilson*, the defendant correctly noted that 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. *Wilson, supra* at 394–395. 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." *Wilson, supra* at 395.

*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, supra* at 395 n 1.

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." *Lange, supra* 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 in which the issue was addressed:

> "'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*.'" *Id*. at 256, quoting *People v Vaines*, 310 Mich 500, 505–506 (1945).

OV 1 was properly scored at 25 points where the trial court had "a sound evidentiary basis" for determining that the shooter discharged his gun "in the victim's general direction," and the evidence established neither that the shooter intended to *hit* the victim nor that he intentionally shot *away from* the victim. *People v Greyerbiehl*, unpublished opinion per curiam of the Court of Appeals, decided December 20, 2002 (Docket No. 233472).

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

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

3. Relevant Case Law Under the Judicial Guidelines

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

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

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

Points	OV 2—Lethal potential of the weapon possessed or used
15	The offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device. MCL 777.32(1)(a).
15	The offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon. MCL 777.32(1)(b).
10	The offender possessed or used a short-barreled rifle or a short-barreled shotgun. MCL 777.32(1)(c).
5	The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon. MCL 777.32(1)(d).
1	The offender possessed or used any other potentially lethal weapon. MCL 777.32(1)(e).
0	The offender possessed or used no weapon. MCL 777.32(1)(f).

1. Special Instructions and Definitions

- 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 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 "incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.32(3)(d).

2. Case Law Under the Statutory Guidelines

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

Five points were proper where the police discovered a lock-blade knife on top of a stove in which cocaine was stored. For purposes of OV 2, the defendant "possessed" the knife at the same time that he "possessed" the cocaine, even though the defendant was not inside the house when the items were discovered. The defendant's location did not eliminate the knife's lethal potential. *People v Harris*, unpublished opinion per curiam of the Court of Appeals, decided November 16, 2004 (Docket No. 250802), relying on *People v Burgenmeyer*, 461 Mich 431, 439–440 (2000).

A witness' 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*, unpublished opinion per curiam of the Court of Appeals, decided February 19, 2004 (Docket No. 242764).

D. OV 3—Physical Injury to a Victim

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).

Points	OV 3—Degree of physical injury sustained by a victim
100	A victim was killed. MCL 777.33(1)(a).
50	A victim was killed. MCL 777.33(1)(b). (35 points for offenses committed before September 30, 2003. 2003 PA 134.)

25	Life threatening or permanent incapacitating injury occurred to a victim. MCL 777.33(1)(c).
10	Bodily injury requiring medical treatment occurred to a victim. MCL 777.33(1)(d).
5	Bodily injury not requiring medical treatment occurred to a victim. MCL 777.33(1)(e).
0	No physical injury occurred to a victim. MCL 777.33(1)(f).

1. Special Instructions and Definitions

- 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(3)(a).

*See Appendix C for a list of these offenses.

- 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).

*See MCL 777.1 for definitions of "aircraft," "ORV," "snowmobile," "vehicle," and "vessel."

- Score 50 points under this variable if death results from an offense or attempted offense that involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive* and any of the following apply:
  - the offender was under the influence of or visibly impaired by the use of alcohol, a controlled substance, or a combination of alcohol and a controlled substance, MCL 777.33(2)(c)(*i*);
  - the offender had an alcohol content of 0.08 grams* 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*).

*Effective October 1, 2013, the alcohol content level increases to 0.10 grams or more.

- Do not score five points if "bodily injury" is an element of the sentencing offense. MCL 777.33(2)(d).
- "Requiring medical treatment" refers to an injury's need for treatment not whether a victim was successful in obtaining treatment. MCL 777.33(3).

2. Case Law Under the Statutory Guidelines

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. *Albers, supra* 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, supra* 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, supra* at 593. According to the Court, had the Legislature intended that OV 3 be limited in application to the victim of the charged offense, it could easily have expressed that intention in the statutory language governing OV 3. *Id*. 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*.

Like OV 1, the multiple offender provision in OV 3 requires that the score assessed the first offender sentenced for the crime, if uncontested, is the score that must be assessed all offenders involved in the offense. See *People v Morson*, 471 Mich 248, 262 (2004) (the defendant and the codefendant robbed a woman at gunpoint and a third party was injured when the codefendant shot him). The *Morson* Court explained that its conclusion did not eliminate the "highest number of points" requirement or sanction the repetition of inaccurate OV scores: the first offender assessed points should be assessed the highest number of points appropriate to the offense and unless contested, that same number of points should be assessed against all other offenders involved. *Morson, supra* at 260. Without evaluating the accuracy of OVs 1 and 3, the *Morson* Court stated:

> "On the facts before us, we agree with defendant that the plain language of subsection 2 requires that defendant, when scored on the armed robbery conviction, be assessed the same scores on OV 1 and OV 3 that [the codefendant] was previously assessed on those variables when she was scored for armed robbery.
>
> * * *
>
> "While we agree that the sentencing court should not be bound to apply an erroneous score in the multiple offender context, we note that the prosecution does not characterize [the codefendant's] scores on OV 1 and OV 3 of her armed robbery conviction as inaccurate or erroneous. In fact, the prosecution acknowledged in its brief that [the codefendant's] scores were not disputed by the prosecution at sentencing.
>
> * * *

> "[I]n the absence of any clear argument that the scores assessed to [the codefendant] under OV 1 and OV 3 were incorrect, the sentencing court should have assessed defendant the same number of points that were assessed to [the codefendant] for OV 1 and OV 3 . . . fifteen points and zero points." *Id*. at 259–261 (footnotes omitted).

In *People v Libbett*, 251 Mich App 353, 364 (2002), a case involving multiple offenders, the defendant argued that he was assessed an improper number of points under OV 3 because the other offender involved received zero points for OV 3. However, the *Libbett* Court reasoned that the defendant's argument that his OV 3 score was required to match the other offender's OV 3 score was irrelevant *because* the other offender received zero points under the variable. The plain language of the statute indicates that all offenders must receive the same number of points *when one offender is assessed points for the variable*. MCL 777.33(2)(a); *Libbett*, *supra* at 364 n 6. In *Libbett*, because the other offender had not been assessed points for death or physical injury under OV 3, the statutory mandate requiring that all offenders be assessed the same number of points was not triggered. *Libbett*, *supra* at 364 n 6. The statutory language does not state that where one offender receives *zero* points for OV 3, points must not be assessed against the other offenders. With regard to the defendant's argument about his OV 3 score, the *Libbett* Court relied on the statutory language in concluding that the "multiple offender clause" offered no scoring guarantee when an offender is assessed zero points. *Id*.

Twenty-five points are properly scored for OV 3 when a victim is killed as a result of the defendant's conduct and the sentencing offense is homicide. *People v Houston*, ___ Mich ___, ___ (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. *Houston*, *supra* at ___. 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 ___. 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 "life-threatening or incapacitating injury" for which 25 points were appropriately scored. *Id*. at ___.

Pregnancy resulting from sexual assault is "bodily injury" for purposes of scoring OV 3. *People v Cathey*, 261 Mich App 506, 513–514 (2004). *Cathey* approved the resolution of this issue in a case decided under the judicial guidelines—*People v Woods*, 204 Mich App 472, 474–475 (1994) (under the judicial guidelines then in effect, bodily injury was addressed by OV 2). *Woods* 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.
>
> "'Pregnancy can have one of three results—childbirth, abortion or miscarriage. Childbirth is an agonizing experience. An abortion by whatever method used constitutes a severe intrusion into a woman's body. A miscarriage speaks for itself. . . . We merely find that the facts in this case, i.e., a pregnancy followed by an abortion, clearly support a finding of great bodily injury.'" *Woods*, *supra,* 204 Mich App at 474–475, quoting *People v Sargent*, 86 Cal App 3d 148, 151–152; 150 Cal Rptr 113 (1978).

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).

Five points for bodily injury not requiring medical treatment are appropriate where the only injury alleged was that the victim experienced pain as a result of the defendant's assault. *People v Lancaster*, unpublished opinion per curiam of the Court of Appeals, decided February 19, 2004 (Docket No. 244818). According to the Court, "[P]ain, alone, is [] sufficient to constitute bodily injury [because p]ain . . . is a general indication that bodily injury of some type occurred." *Lancaster, supra.*

Absent any evidence that the victim was actually infected with HIV, life-threatening injury does not occur when a defendant with HIV has unprotected sex with an uninformed person. *People v Clayton*, unpublished opinion per curiam of the Court of Appeals, decided September 13, 2002 (Docket No. 230328).

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*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2003 (Docket No. 230566).

E. OV 4—Psychological Injury to a Victim

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).

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

1. Special Instructions and Definitions

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

2. Case Law Under the Statutory Guidelines

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), lv gtd on other grounds 472 Mich 881 (2005).

Serious psychological injury requiring treatment may not be presumed; points may be assessed under OV 4 only where there exists some evidence that a victim suffered serious psychological harm that required professional treatment. *People v Hicks*, 259 Mich App 518, 535 (2003). Ten points are improper when "the record does not reflect any evidence of serious psychological harm to the victim or give any indication that [the victim] needed psychological treatment." *Hicks, supra* at 535. See also *People v Kruithoff*, unpublished opinion per curiam of the Court of Appeals, decided December 16, 2003 (Docket No. 242739), where, despite a factual situation that "would be a traumatic event for most people, implicating the possible need of psychological treatment[,]" the trial court improperly scored OV 4 at ten points where "neither of defendant's parents [who witnessed the defendant's conduct] testified as to any resultant psychological harm."

Despite the clear mandate in *Hicks, supra*, other panels of the Court of Appeals have approved a ten-point score for OV 4 based primarily on the sentencing court's inference from facts in the case that psychological harm requiring professional treatment occurred. See e.g., *Apgar, supra* at 329, where the Court of Appeals affirmed a score of ten points for OV 4 where "the victim testified that she was fearful during the encounter with defendant," and *People v Bates*, unpublished opinion per curiam of the Court of Appeals, decided February 17, 2004 (Docket No. 244414), where the defendant was armed with a loaded revolver when he called his children into the bathroom to say goodbye to their mother, and the Court stated, "Given the facts of the case, the court could reasonably infer that the victims suffered serious psychological injuries that may require professional treatment."

See also *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2004 (Docket No. 240344), where the Court agreed that a change in a victim's personality and demeanor and her withdrawal from others after having been assaulted by the defendant was evidence of "serious psychological injury" for purposes of OV 4.

It appears that evidence substantiating a victim's psychological harm and receipt of professional treatment need not be introduced by the victim. See *People v Brown*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2004 (Docket No. 243961), where OV 4 was properly scored when the trial court was informed that the victim had undergone and would continue to undergo psychological counseling for the "tremendous amount of emotional pain and suffering" caused by the defendant's assault.

The statutory language governing OV 4 does not require proof that a victim has actually sought or received treatment for serious psychological injury caused by the offender's conduct. *People v Clayton*, unpublished opinion per curiam of the Court of Appeals, decided September 13, 2002 (Docket No. 230328). Where the victim testified that he "was frightened and nauseous" when he learned that the defendant was HIV-positive at the time he and the defendant engaged in unprotected sex and that he had been tested himself "about 40 times" since the incident, the evidence was sufficient to support the trial court's conclusion that "the victim appeared deeply traumatized . . . and needed to seek psychological help." *Clayton, supra*.

3. Relevant Case Law Under the Judicial Guidelines

The trial court properly scored points against a defendant convicted of robbery where the victim expressed a desire for counseling, exhibited symptoms of psychological distress, and had requested assistance from his employer in obtaining treatment. *People v Elliott*, 215 Mich App 259, 262–263 (1996). The defendant argued that points were improperly assessed against him under this variable* because the victim had not received psychological treatment following the robbery. *Elliott, supra* at 262–263. The Court of Appeals disagreed and stated, "The guidelines reference the necessity for treatment, not the success of obtaining it." *Id*. at 263. The Court further noted that the defendant should not benefit from

*OV 4 under the statutory guidelines is the equivalent of OV 13 under the judicial guidelines.

the victim's inability to afford treatment for the psychological problems caused by the robbery. *Id*.

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

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

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

1. Special Instructions and Definitions

- Assess 15 points if the 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).

*See Appendix C for a list of these offenses.

2. Case Law Under the Statutory Guidelines

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

The mother of a victim killed in a fire that burned over 45 percent of the victim's body "could have suffered the type of psychological injury that may require professional treatment." *People v Strouse*, unpublished opinion per curiam of the Court of Appeals, decided February 4, 2003 (Docket No. 234034). 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. *Strouse, supra*.

OV 5 was properly scored where the victim was survived by a young child who would grow up without a mother and where the victim's grandmother, grandfather, and uncle provided statements indicating a number of other "incomprehensible . . . concerns for the family" caused

by the loss. *People v Laury*, unpublished opinion per curiam of the Court of Appeals, decided September 23, 2003 (Docket No. 238490).

G. OV 6—Intent to Kill or Injure Another Individual

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

Points	OV 6—Intent to kill or injure another individual
50	The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer. MCL 777.36(1)(a).
25	The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result. MCL 777.36(1)(b).
10	The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life. MCL 777.36(1)(c).
0	The offender had no intent to kill or injure. MCL 777.36(1)(d).

1. Special Instructions and Definitions

- 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).

> **Note:** That a sentencing court may score OV 6 using information not presented to the jury may be affected when the Michigan Supreme Court decides *People v Drohan*, 472 Mich 881 (2005). The Court granted leave to appeal in *Drohan* to determine whether recent United States Supreme Court decisions applied to Michigan's sentencing scheme. In *People v Claypool*, 470 Mich 715, 730 n 14 (2004), the Michigan Supreme Court indicated that the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296 (2004), did not apply to Michigan's indeterminate sentencing scheme. *Blakely*, and later, *United States v Booker*, 543 US ___ (2005), concluded that a court could not engage in judicial factfinding for purposes of scoring a defendant's

sentencing guidelines when the outcome resulted in an increase in the defendant's sentence. According to *Blakely*, any facts used to increase a defendant's sentence must be proved to a jury beyond a reasonable doubt.

- 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).

*See Appendix C for a list of these offenses.

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

2. Case Law Under the Statutory Guidelines

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*, unpublished opinion per curiam of the Court of Appeals, decided July 22, 2003 (Docket No. 238557). In *Jones*, the defendant claimed OV 6 should have been scored at ten points rather than 25 because the victim died after attempting 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. *Jones, supra*.

*Conduct scored under OV 6 precludes scoring ten points against an offender under OV 17 (degree of negligence exhibited). MCL 777.47(2).

Where a defendant is convicted by jury of OUIL causing death, a maximum of ten points may be scored against the defendant under the statutory requirements governing OV 6.* MCL 777.36(1)(c), (2)(a); *People v Stanko*, unpublished opinion per curiam of the Court of Appeals, decided January 27, 2004 (Docket No. 242876). A maximum of ten points was proper in *Stanko* because OV 6 must be scored consistently with the jury's verdict unless the sentencing court has information that was not available to the jury. MCL 777.36(2)(a). Based on the record before the Court on appeal, and without evidence of malice rising to the level of intent required to prove second-degree murder, no more than ten points could be assessed against the defendant for OV 6. *Stanko, supra*.

H. OV 7—Aggravated Physical Abuse

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

Points	OV 7—Aggravated Physical Abuse
50	A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(a).
0	No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(b).

1. Special Instructions and Definitions

- 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).
- 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.

2. Case Law Under the Statutory Guidelines

The defendant was properly assessed 50 points for OV 7 where the evidence established that he "did more than simply produce a weapon and demand money." *People v Hornsby*, 251 Mich App 462, 469 (2002). *Hornsby* was decided before OV 20 dealt with "terrorism" and the language governing OV 7 still 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 exact same conduct to which "terrorism" then referred—in its present version, OV 7 addresses "sadism, torture, or excessive brutality, *or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense*." MCL 777.37(1)(a) (emphasis added).

The defendant's conduct in *Hornsby* was properly characterized as the type of conduct deserving of 50 points under either version of OV 7. 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. *Hornsby*, *supra* at 468. 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 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).

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*, 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*.

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*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2004 (Docket No. 240344). 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. MCL 777.37(1)(a), (3). Because the defendant performed sexual acts for his own gratification and those acts caused the victim to experience extreme humiliation, OV 7 was properly scored at 50 points. *Taylor, supra.*

See also *People v Hawkins*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2002 (Docket No. 226718) (before "terrorism" was eliminated from OV 7's statutory language). In *Hawkins*, the defendant committed the assault while wearing a mask and dark clothing. He covered the victim's head and drove her to an undisclosed location where he bound her hands and covered her eyes with duct tape and sexually assaulted her. The defendant's actions were sufficient to warrant points for engaging in conduct designed to substantially increase the fear and anxiety suffered by a victim during the offense. *Hawkins, supra*.

The statutory language governing OV 7 does not define "excessive brutality," but the dictionary definition of the phrase indicates that it contemplates conduct involving an unusual or unnecessary degree of cruelty or savagery. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, decided July 22, 2003 (Docket No. 238557), citing *Random House Webster's College Dictionary* (1992). According to the *Jones* Court, OV 7 reflects a clear legislative intent to vest "the trial courts of this state with discretion to assess guidelines points for such deaths along a continuum ranging from one blow resulting in an unanticipated death to the type of savage, relentless beating the evidence in this case established." *Jones, supra*. The Court continued:

> "[W]hether the entire incident was measured in minutes or seconds, the evidence at trial, which showed that defendant pursued the victim over a distance of 300 feet, and administered 'countless' blows to the victim's torso and head until the victim could not move, and ultimately bled to death from internal injuries, clearly supports the trial court's finding of 'excessive brutality.'" *Jones, supra* (citations omitted).

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*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2004 (Docket No. 243961).

3. Relevant Case Law Under the Judicial Guidelines

It was error to score points against the defendant for OV 2 under the judicial guidelines (the equivalent of OV 7 under the statutory guidelines) for "conduct designed to increase substantially the fear and anxiety a victim suffers during the offense" where the defendant "rather cruelly raised and carried [the three-year-old victim] by one or more of her limbs" to another room. *People v Dilling*, 222 Mich App 44, 55 (1997). The Court concluded that the defendant's conduct, while reprehensible and cruel, was not intended to cause the victim additional fear or anxiety. According to the Court, the defendant "did not care one way or another about the girl's feelings"—the conduct was merely the defendant's method of moving the girl from one room to the other. *Dilling, supra* at 55.

OV 2 under the judicial guidelines* was properly scored where a group of individuals first threatened to shoot the victim and then displayed several bullets and a cigarette lighter fashioned to look like a handgun. *People v Kreger*, 214 Mich App 549, 552 (1995). Said the *Kreger* Court:

*OV 7 under the statutory guidelines.

> "While defendant argues that the victims were not 'terrorized,' OV 2 is properly scored as twenty-five where conduct *designed* to substantially increase fear and anxiety exists. It does not appear necessary that the victims actually be terror-stricken." *Kreger, supra* at 552 (emphasis added).

I. OV 8—Victim Asportation or Captivity

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

Points	OV 8—Victim asportation or captivity
15	A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a).
0	No victim was asported or held captive. MCL 777.38(1)(b).

1. Special Instructions and Definitions

- 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).

2. Case Law Under the Statutory Guidelines

"Asportation" need not be forcible to merit a score under OV 8. *People v Spanke*, 254 Mich App 642, 647 (2003). In *Spanke*, the Court of Appeals noted that the sentencing guidelines do not define "asportation," but the language of OV 8 clearly intends that points be assessed against an offender if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a); *Spanke, supra* at 646–647. The Court further discussed "asportation" as the term is used in defining the offense of kidnapping. *Id*. at 647. According to MCL 750.349, "asportation" is an element of kidnapping, and "asportation" occurs when an offender effects "some movement of the victim [] in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime." *Spanke, supra* at 647, citing *People v Green*, 228 Mich App 684, 696–697 (1998).

The Court explained that "[w]hile asportation is an element of forcible kidnapping, there is no requirement that the movement itself be forcible. Rather, the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense." *Spanke, supra* at 647. In *Spanke*, no force was employed to move the victims to the defendant's home—in fact, there was evidence that the victims may have voluntarily accompanied the defendant to his home. *Id*. at 648. The *Spanke* Court stated that "the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others"; thus, the movement was more than merely incidental to the commission of the crime. *Id*.

Points are appropriately assessed for OV 8 when, although no force was used, "the victim was transported from her friend's house in Dearborn to an unfamiliar house in Hamtramck, where she was involved in sexual encounters with three men she barely knew." *Apgar*, *supra*, 264 Mich App at 330.

Points are appropriate under OV 8 where evidence established that the defendant and the victim were alone in the car that the defendant had driven "to what was described as a two-track road in an isolated area near a river," and the defendant parked the car so it faced away from the road. *People v Phillips*, 251 Mich App 100, 108 (2002).

The "confined and private environment inside the back room [where the defendant ordered the complainants to lay face down] was a place of greater danger than the main shopping area of the store." *People v Gholston*, unpublished opinion per curiam of the Court of Appeals, decided September 11, 2003 (Docket No. 240810).

3. Relevant Case Law Under the Judicial Guidelines

In *People v Hack*, 219 Mich App 299, 313 (1996), the trial court assessed points against a defendant under OV 5 (the equivalent of OV 8 under the

statutory guidelines) where the evidence established that the defendant moved the child-victims to a different area of the house and away from the mother of one victim. *Hack*, *supra* at 313. The child's mother testified that she could not see into the bedroom where the defendant had taken the victims and did not know what was happening during the time she was separated from the children. *Id*. The Court agreed with the trial court that the children were in greater danger when they were removed from the room occupied by one victim's mother; therefore, points were properly assessed against the defendant for OV 5. *Id*. See also *People v Dilling*, 222 Mich App 44, 54–55 (1997) (same result regarding OV 5 score for codefendant involved in the same offense for which the defendant in *Hack* was convicted).

OV 5 was properly scored under the judicial guidelines* where the defendant first forced the victim at knifepoint into a bathroom and later, again at knifepoint, forced the victim out of the bathroom and into a bedroom where the defendant bound and gagged the victim. *People v Piotrowski*, 211 Mich App 527, 529 (1995). In *Piotrowski*, the Court concluded that the defendant's actions in "removing the victim from the relative safety of the bathroom [where she was alone]" to a room in which the victim was bound and gagged constituted "moving a victim to a place of greater danger" for purposes of scoring OV 5. *Piotrowski*, *supra* at 529.

*OV 8 under the statutory guidelines.

J. OV 9—Number of Victims

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

Points	OV 9—Number of victims
100	Multiple deaths occurred. MCL 777.39(1)(a).
25	There were 10 or more victims. MCL 777.39(1)(b).
10	There were 2 to 9 victims. MCL 777.39(1)(c).
0	There were fewer than 2 victims. MCL 777.39(1)(d).

1. Special Instructions and Definitions

- Each person in danger of injury or loss of life is a victim for purposes of scoring OV 9. MCL 777.39(2)(a).
- 100 points are scored only in homicide cases. MCL 777.39(2)(b). Any crime in which a person's death is an element of the crime is a "homicide."* MCL 777.1(c).

*See Appendix C for a list of these offenses.

2. Case Law Under the Statutory Guidelines

OV 9 was properly scored at ten points (two to nine victims) where the defendant shot a bystander who attempted to aid the armed robbery victim. *People v Morson*, 471 Mich 248, 261–262 (2004).

OV 9 was correctly scored at ten points (two to nine victims) where the decedent, her fiance, and her child were with her in the car when the defendant fatally shot the decedent through the car's windshield. *People v Kimble*, 252 Mich App 269, 274 (2002), aff'd on other grounds 470 Mich 305 (2004).

A financial institution may be counted as a "victim" for purposes of scoring OV 9. *People v Knowles*, 256 Mich App 53, 61–63 (2003). In *Knowles*, because the credit union "was placed in danger of, and in fact suffered, financial injury in being wrongly deprived of $225 for a period of time as a direct result of defendant's crime," the trial court properly counted the credit union as a victim and scored OV 9 appropriately. *Knowles*, *supra* at 62.

*See e.g., MCL 777.44(2)(a)—OV 14, the offender's role—where the instructions clearly indicate that the variable is to be scored based on the entire criminal transaction.

Unless the instructions specifically direct that the number of victims under OV 9 is to be calculated in the aggregate for offenses other than the sentencing offense,* the victims counted should be only those in danger of injury or death as a result of the sentencing offense. *People v Holmes*, unpublished opinion per curiam of the Court of Appeals, decided March 11, 2003 (Docket No. 235213), citing *People v Chesebro*, 206 Mich App 468, 472–473 (1994) (discussed below). In *Holmes*, although the defendant was convicted of five counts of uttering and publishing, the number of victims under OV 9 should have been determined by the number of victims for each particular conviction—not the sum total of victims involved in all five convictions. *Holmes, supra.* Consequently, OV 9 should have been scored at ten points where the person to whom the defendant gave a forged check was one victim and the bank on which the check was drawn was the second victim. *Holmes, supra.*

Compare *Holmes*, above, to the following case where a defendant was properly scored ten points for OV 9 where he was convicted of one count of receiving and concealing stolen property but the items stolen came from three separate home invasions. *People v Clark*, unpublished opinion per curiam of the Court of Appeals, decided October 2, 2003 (Docket No. 240139). Based on the *Knowles* Court's ruling that "injury" included financial injury for purposes of determining the number of victims in danger of injury during an offense, the *Clark* Court concluded that property loss is also an "injury" appropriately considered under OV 9. *Clark, supra,* citing *Knowles*, *supra* at 61–63.

The three individuals who occupied a vehicle passed by the defendant's car before it struck the decedent were properly counted as victims for purposes of scoring OV 9. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, decided February 25, 2003 (Docket No. 229137). MCL 777.39(2)(a) clearly defines a "victim" as "each person who is placed in danger of injury or loss of life." In *Smith*, the trial court correctly concluded there were four victims—the decedent, the driver of

the second car, and the driver's two children. *Smith, supra.* The Court noted that "[the second driver] testified that defendant pulled up behind her out of nowhere, driving at a high rate of speed, swerved to her right, hit [the decedent], then cut back in front of her." *Smith, supra.*

OV 9 must not be construed so broadly that the mere possibility that other individuals might stumble into a dangerous situation qualifies those individuals as victims under this variable. *People v Shulick*, unpublished opinion per curiam of the Court of Appeals, decided November 4, 2003 (Docket No. 240343). In *Shulick*, the defendant killed the victim following an altercation involving the victim and three individuals with the victim on his boat. The trial court, however, scored OV 9 for ten or more victims because the victim's actual boating party consisted of ten people, all but three of whom had already retired to other boats at the time of the altercation. According to the trial court, OV 9 was properly scored because "any of the people on the four boats within the victim's party could have come out of their boats if they heard defendant approach." *Shulick, supra.* The Court of Appeals found that the trial court's explanation required too broad a reading of OV 9, a reading that "would warrant a finding that anyone in defendant's path from his apartment to the marina" could have qualified as a victim had they come out when they heard the defendant. *Shulick, supra.*

OV 9 was properly scored when 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. *People v Arney*, unpublished opinion per curiam of the Court of Appeals, decided March 20, 2003 (Docket No. 236875). In addition to the cashier's husband and one waitress, there were other restaurant patrons placed in danger of injury because of their physical proximity to the robbery and the defendant's weapon. *Arney, supra.*

A defendant's written threats to harm three men (and their wives and children) involved in his previous convictions unless the men met the defendant's demand for money, placed the three men and their families "in danger of injury or loss of life" for purposes of OV 9. *People v Morrison*, unpublished opinion per curiam of the Court of Appeals, decided March 18, 2003 (Docket No. 233455).

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 Williams*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2003 (Docket No. 230566).

3. Relevant Case Law Under the Judicial Guidelines

Under the judicial guidelines, OV 6 (the equivalent of OV 9 under the statutory guidelines) addressed the number of victims placed in danger during an offense, and this factor was addressed by the Court of Appeals in *Chesebro*, *supra* at 468. The *Chesebro* Court agreed with the

defendant's argument that the number of victims appropriately considered under this variable must be limited to the victims placed in danger by the sentencing offense alone. The Court explained:

> "[T]he offense variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise." *Id*. at 471.

According to the Court, any other application of the variable would lead to absurd results—an offender's prior conduct could be considered and scored under OVs without regard to the conduct's relevance to the sentencing offense. *Id*.

K. OV 10—Exploitation of a Vulnerable Victim

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

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

1. Special Instructions and Definitions

- 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).
- "Predatory conduct" is an offender's preoffense conduct directed at a victim for the primary purpose of victimization. MCL 777.40(3)(a).
- To "exploit" a victim is to manipulate a victim for the offender's selfish or unethical purposes. MCL 777.40(3)(b).

- A victim's "vulnerability" is the victim's readily apparent susceptibility to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c).

- "Abuse of authority status" means the offender used a victim's fear of or deference to an authority figure to exploit the victim. Examples of an authority figure include, but are not limited to, a teacher, parent, or physician. MCL 777.40(3)(d).

2. Case Law Under the Statutory Guidelines

Abuse of authority status. Where the defendant argued that OV 10 was improperly scored because no evidence was presented "to indicate any manipulation by 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 at the time he sexually assaulted her. *People v Phillips*, 251 Mich App 100, 109 (2002).

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). 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 (2005), reversing the unpublished opinion per curiam of the Court of Appeals, decided 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, supra*.

For purposes of OV 10, a "domestic relationship" is not satisfied by proof that the defendant and the victim shared "some kind" of relationship. In the context of scoring OV 10, the defendant and the victim must have a "familial or cohabitating relationship." *People v Counts*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2004 (Docket No. 246717). If *any* relationship could qualify under OV 10, the Legislature need not have specified "domestic." *Counts, supra*. Further, OV 10 requires not only the existence of the domestic relationship—points are appropriate only when the defendant exploits that relationship. *Counts, supra*.

OV 10 may be scored against a defendant who was "playing the uncle role" to his sister's children and was "invested with the authority to enforce [the children's mother's] directives regarding the disciplining of her children." *People v Loney*, unpublished opinion per curiam of the Court of Appeals, decided March 16, 2004 (Docket No. 243416).

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*, 248 Mich App 522, 531 (2001). The defendant relied on the statutory language contained in MCL 777.40(2), which provides that "[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." *Harmon, supra* 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.

Vulnerability—victim was asleep. Contrary to the defendant's argument that the victims would have been at greater risk of confrontation and possible injury—and therefore, more vulnerable for purposes of OV 10—had the victims been awake at the time the defendant broke into the victims' home, five points were properly scored against a defendant for exploitation of a victim's vulnerability when the crime was committed while the victim was asleep. *People v Markel*, unpublished opinion per curiam of the Court of Appeals, decided February 19, 2004 (Docket No. 245141). The Court explained:

> "Common knowledge dictates that a person becomes more vulnerable to a home invasion at night because the intruder is exploiting the fact that the homeowner is most likely asleep and will not hear the intrusion, thus increasing the chances that the home invasion will be successfully accomplished by the intruder." *Markel, supra*.

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*, *supra*, 252 Mich App at 274–275.

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 (After Remand),* 257 Mich App 329, 336 (2003). In *Witherspoon*, the third-grade victim testified that the defendant assaulted her when she was alone in the basement folding clothes. *Witherspoon*, *supra* at 336. Relying on *Kimble*, *supra*, 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*, *supra* at 336. The *Witherspoon* Court expressed its disapproval of the trial court's statement that "all sex

offenses are predatory"; however, the Court acknowledged that notwithstanding the court's erroneous reasoning, the trial court reached the right result. *Id*. at 335.

A defendant who made a concerted effort to befriend the victim and gain her trust before he sexually assaulted her engaged in "predatory conduct" for purposes of scoring OV 10. *People v Cornett*, unpublished opinion per curiam of the Court of Appeals, decided April 3, 2003 (Docket No. 233958). In *Cornett*, the defendant approached the victim when she appeared in court on a criminal charge in which the defendant had acted as one of the investigating officers. The defendant got the victim's attention as she drove away from the courthouse and motioned for her to pull into a nearby parking lot. *Cornett, supra*. He met her in the parking lot, asked questions about her criminal case, offered his assistance if she needed it, and gave her his pager number. *Cornett, supra*. On the day of the incident, the defendant was seen in uniform in a marked police vehicle outside the victim's house, and when the victim paged the defendant, he waited until he completed his work shift before responding. *Cornett, supra*.

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. *Drohan, supra,* 264 Mich App at 90–91. 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 the sexual assault. *Id*.

Fifteen points were not appropriate where the defendant's pre-offense conduct was not directed at a specific victim, and no evidence supported the idea that the defendant followed or waited for the victim. *People v Parnell*, unpublished opinion per curiam of the Court of Appeals, decided July 29, 2004 (Docket No. 248236).

But see *People v Hawkins*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2002 (Docket No. 226718), where the Court determined that points may be appropriate under OV 10 when a defendant engages in pre-offense conduct directed at an as-yet-unidentified victim; predatory conduct need not be directed exclusively at the victim involved in the sentencing offense. The language governing OV 10 "does not state that the pre-offense conduct be directed at a specific victim chosen before the offense occurs." *Hawkins, supra*; MCL 777.40.

Aggregate circumstances. Ten points were appropriate where the defendant took advantage of his minor victim's intoxication, and the defendant was the person who provided the minor with alcohol. *People v Krause*, unpublished opinion per curiam of the Court of Appeals, decided August 10, 2004 (Docket No. 246896).

Where the defendant "groomed" his 13-year-old victim with flattery, sexual comments, alcohol, and marijuana before exploiting her incapacitated state to sexually assault her, the defendant has engaged in

"predatory conduct" as contemplated by OV 10. *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2004 (Docket No. 240344).

3. Relevant Case Law Under the Judicial Guidelines

*The same point values are assigned to OV 10 under the statutory 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. *Piotrowski, supra* at 531. The Court disagreed and emphasized the point values corresponding to an offender's exploitation due to strength or size (5 points) and an offender's exploitation due to age (15 points).* *Id*. The Court further explained:

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

L. OV 11—Criminal Sexual Penetration

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

Points	OV 11—Criminal sexual penetration
50	Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a).
25	One criminal sexual penetration occurred. MCL 777.41(1)(b).
0	No criminal sexual penetrations occurred. MCL 777.41(1)(c).

1. Special Instructions and Definitions

- All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11. MCL 777.41(2)(a).
- Multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OVs 12 or 13.* MCL 777.41(2)(b). However, if any conduct is scored under this variable, that conduct must not be scored under OV 12 and may only be scored under OV 13 if the conduct is 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).

*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.

2. Case Law Under the Statutory Guidelines

Sexual penetrations that form the basis of a conviction separate from the sentencing offense are 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 first-degree criminal sexual conduct (CSC) convictions. *McLaughlin, supra* at 671. According to the defendant, the instructions for OV 11 prohibited scoring points for any penetration that formed the basis of a separate first- or third-degree CSC conviction. *Id*. at 672. Because the victim testified to three penetrations and the defendant was convicted of three counts of first-degree CSC, the defendant argued that each penetration was the basis of its own conviction and could not be used in scoring the other convictions. *Id*.

In reaching its conclusion, the *McLaughlin* Court acknowledged that the language within MCL 777.41(2)(c) was ambiguous and capable of more than one reasonable interpretation. *McLaughlin, supra* at 674–675. As the defendant suggested, MCL 777.41(2)(c) could be read to prohibit scoring

the penetration forming the basis of any first- or third-degree CSC conviction. *McLaughlin, supra* at 675. In that case, however, the Court of Appeals noted that OV 11 would be scored at zero in each case where all sexual penetrations arising out of the sentencing offense were themselves the basis of a separate conviction, a result that "would [] encourage departures from the statutory sentencing guidelines because no other variable accounts for multiple convictions involving criminal sexual penetrations that do not give rise to a continuing pattern of criminal behavior." *Id*. at 677.

Finally, the *McLaughlin* Court emphasized that the Legislature, had it intended that OV 11 count only those penetrations not resulting in a criminal charge or conviction, could have easily included the language necessary to express such a limit. *McLaughlin, supra* at 677. The Court specifically noted language in MCL 777.42(2)(a)(*ii*) limiting that provision's applicability to contemporaneous felonious acts that "ha[ve] not and will not result in a separate conviction." *McLaughlin, supra* at 677. See also *People v Matuszak*, 263 Mich App 42 (2004) (50 points were appropriate under OV 11 where there was evidence of five penetrations).

3. Relevant Case Law Under the Judicial Guidelines

Under the judicial sentencing guidelines, OV 12 accounted for the conduct now addressed by OV 11 under the statutory guidelines. In *People v Cotton*, 209 Mich App 82, 84 (1995), the defendant argued that the trial court improperly scored OV 12 at 25 points because both of the penetrations for which he was scored resulted in separate convictions. With the exception of the current statutory language specifying that points should not be scored under OV 11 "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense," the instructions for scoring this variable under the judicial guidelines mirrored the statutory instructions. *Cotton, supra* at 84; MCL 777.41(1)(c). The *Cotton* Court explained:

> "The sentencing guidelines instructions regarding the scoring of this variable do not prohibit a trial court from scoring a second penetration that arises from the same criminal transaction simply because the second penetration results in a separate conviction. The instructions for OV 12 indicate that all penetrations that arise out of the same criminal transaction, except the one penetration forming the basis of the conviction, are to be scored. Any other interpretation, including the one urged by defendant, could result in shorter concurrent sentences for defendants with multiple convictions arising out of the same transaction than for defendants who are convicted of only one penetration and have OV 12 increased by the other penetrations." *Cotton, supra* at 84–85.

M. OV 12—Contemporaneous Felonious Criminal Acts

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

Points	OV 12—Number of contemporaneous felonious criminal acts
25	Three or more contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(a).
10	Two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b).
10	Three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(c).
5	One contemporaneous felonious criminal act involving a crime against a person was committed. MCL 777.42(1)(d).
5	Two contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(e).
1	One contemporaneous felonious criminal act involving any other crime was committed. MCL 777.42(1)(f).
0	No contemporaneous felonious criminal acts were committed. MCL 777.42(1)(g).

1. Special Instructions and Definitions

- A felonious criminal act is contemporaneous if both of the following circumstances exist:
  - the criminal act occurred within 24 hours of the sentencing offense, MCL 777.42(2)(a)(*i*), and
  - the criminal act has not and will not result in a separate conviction, MCL 777.42(2)(a)(*ii*).
- Conduct scored in OV 11 must not be scored under this variable. MCL 777.42(2)(c).
- Violations of MCL 750.227b (possession of a firearm during the commission of a felony) should not be counted when scoring this variable. MCL 777.42(2)(b).

2. Case Law Under the Statutory Guidelines

Even when the crimes a defendant conspired to commit are characterized as crimes against a person, conspiracy is a crime against public safety. MCL 777.18; MCL 750.157a(a). Therefore, charges or convictions for conspiracy to commit a crime against a person may not be counted as

crimes against a person when scoring OV 12. *People v Miller*, unpublished opinion per curiam of the Court of Appeals, October 28, 2003 (Docket No. 240613). In *Miller*, the defendant was convicted by plea of armed robbery and felony-firearm. The defendant had also been charged with carjacking, conspiracy to commit carjacking, and conspiracy to commit armed robbery—three offenses that are appropriately counted for purposes of scoring OV 12. *Miller, supra*. However, the trial court erred in counting the three offenses as contemporaneous felonious acts involving crimes against a person for which 25 points would have been appropriate. MCL 777.42(1)(a); *Miller, supra*. Of the three offenses scored under OV 12, only carjacking qualified as a crime against a person. MCL 777.16y; MCL 750.529a; *Miller, supra*. Conspiracy to commit carjacking and conspiracy to commit armed robbery are crimes against public safety. MCL 777.18; MCL 750.157a(a); *Miller, supra*. Instead of 25 points, the defendant should have received an OV 12 score of ten points for three or more contemporaneous felonious criminal acts involving other crimes. MCL 777.42(1)(c); *Miller, supra*.

When determining the proper score for OV 12, a trial court may consider a contemporaneous felonious criminal act with which the defendant was charged at trial, even though the jury acquitted the defendant of that charge. *People v Cornett*, unpublished opinion per curiam of the Court of Appeals, decided April 3, 2003 (Docket No. 233958). See also *People v Minner*, unpublished opinion per curiam of the Court of Appeals, decided June 28, 2002 (Docket No. 227956) (where the defendant was convicted of one count of first-degree CSC and acquitted of five other felony charges, sufficient evidence may support use of those five charges in scoring the defendant's OVs).

> **Note:** The outcomes in *Cornett* and *Minner* may be affected when the Michigan Supreme Court decides *People v Drohan*, 472 Mich 881 (2005). The Court granted leave to appeal in *Drohan* to determine whether recent United States Supreme Court decisions applied to Michigan's sentencing scheme. In *People v Claypool*, 470 Mich 715, 730 n 14 (2004), the Michigan Supreme Court indicated that the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296 (2004), did not apply to Michigan's indeterminate sentencing scheme. *Blakely*, and later, *United States v Booker*, 543 US ___ (2005), concluded that a court could not engage in judicial factfinding for purposes of scoring a defendant's sentencing guidelines when the outcome resulted in an increase in the defendant's sentence. According to *Blakely*, any facts used to increase a defendant's sentence must be proved to a jury beyond a reasonable doubt.

N. OV 13—Continuing Pattern of Criminal Behavior

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).

Effective March 1, 2003, 2002 PA 666 amended the instructions for OV 13 to include references to specific controlled substance offenses. Language appearing in bold type in the chart below applies to offenses committed on or after March 1, 2003, pursuant to 2002 PA 666.

Points	OV 13—Continuing pattern of criminal behavior
50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a).
25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(b).
10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property **or a violation of MCL 333.7401(2)(a)(*i*) to (*iii*) or 333.7403(2)(a)(*i*) to (*iii*)**. MCL 777.43(1)(c).
10	The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. MCL 777.43(1)(d).
10	**The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of MCL 333.7401(2)(a)(*i*) to (*iii*) or 333.7403(2)(a)(*i*) to (*iii*)**. MCL 777.43(1)(e).
5	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. MCL 777.43(1)(f).
0	No pattern of felonious criminal activity existed. MCL 777.43(1)(g).

1. Special Instructions and Definitions

- 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 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. MCL 777.43(2)(c).

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

*Effective March 1, 2003. 2002 PA 666.

- Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring this variable.* MCL 777.43(2)(e).

*Effective March 1, 2003. 2002 PA 66.

- Only one crime involving the same controlled substance may be counted under this variable.* For example, conspiracy and a substantive offense involving the same amount of controlled substances cannot both be counted under OV 13. Similarly, possession and delivery of the same amount of controlled substances may not be counted as two crimes under OV 13. MCL 777.43(2)(f).

2. Case Law Under the Statutory Guidelines

The five-year period to which OV 13 refers is *any* period of five years in an offender's past and is not required to be the five years including and immediately preceding the offender's sentencing offense. *People v McDaniel*, 256 Mich App 165, 172–173 (2003).

OV 13 was properly scored at 25 points where the evidence established that the defendant was involved in three home invasions from which the sentencing offense stemmed, even though the defendant was not convicted of home invasion. *People v Clark*, unpublished opinion per curiam of the Court of Appeals, decided October 2, 2003 (Docket No. 240139). For purposes of OV 13, an offender's "continuing pattern of criminal behavior" includes the offender's involvement in the home invasions from which the offender acquired the stolen property on which the sentencing offense was based. *Clark, supra*. The instructions for OV 13 unambiguously mandate the inclusion of all crimes within a five-year period, regardless of whether convictions resulted. MCL 777.43(2)(a); *Clark, supra*.

OV 13's reference to an offender's "continuing pattern of criminal behavior" does not contemplate situations in which an offender's multiple concurrent convictions arise from a single incident, as opposed to a *series* of incidents that comprise a larger criminal transaction. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, decided February 25, 2003 (Docket No. 229137). In *Smith*, the defendant's convictions arose from the consequences of his operation of a motor vehicle while under the influence of alcohol. The Court discussed the decision reached in *People v Harmon*, 248 Mich App 522, 532 (2001), where an offender's OV 13 score was properly set at 25 points for four concurrent convictions arising from the defendant's conduct on a single day. But the *Smith* Court distinguished the circumstances present before it from the circumstances in *Harmon*. According to the *Smith* Court, although the defendant's convictions in *Harmon* arose from conduct that occurred on a single day, the defendant's conduct was easily divisible into four distinct actions—two photographs each of two different minor females—which established a "continuing pattern of criminal behavior" under OV 13. *Smith, supra*; *Harmon, supra* at 532. The defendant in *Smith*

was convicted of multiple concurrent offenses, but each offense largely overlapped the others and was not readily identifiable as a discrete part of the whole pattern. Thus, points were not appropriate under OV 13. *Smith, supra*. The Court stated:

> "The use of the term 'pattern' and the fact that the Legislature permitted consideration of all crimes within a five-year period evinces an intention that it is repeated felonious conduct that should be considered in scoring this offense variable." *Smith, supra*.

See also *People v Draper*, unpublished opinion per curiam of the Court of Appeals, decided March 23, 2004 (Docket No. 243021) (no pattern was established where the defendant was convicted of multiple offenses, all of which occurred within a short time period, but the defendant had no prior record).

Ten points were proper under OV 13 where evidence established that the defendant and at least two other individuals collaborated to manufacture methamphetamine at several different locations on at least ten occasions. *People v Streeter*, unpublished opinion per curiam of the Court of Appeals, decided September 16, 2004 (Docket No. 246479).

3. Relevant Case Law Under the Judicial Guidelines

OV 9 under the judicial sentencing guidelines addressed conduct similar to that addressed by OV 13 under the statutory guidelines. Under the judicial guidelines, a trial court could not assess points against a defendant for the defendant's implied participation in a larger criminal organization involved in drug dealing. *People v Reddish*, 181 Mich App 625, 629 (1989). In *Reddish*, the trial court scored the defendant for his part in organized crime on the basis that "[the] defendant must have obtained his drugs from a supplier." *Reddish, supra* at 629. The Court of Appeals ruled that the trial court erred in its point allocation where there was no evidence to support the court's determination that the defendant acted in concert with other offenders to commit the crimes for which he was convicted. *Id*.

O. OV 14—Offender's Role

OV 14 is scored for all felony offenses to which the guidelines apply. MCL 777.22(1)–(5). Determine which statement applies to the sentencing offense and assign the point value indicated by the applicable statement. MCL 777.44(1).

Points	OV 14—Offender's role
10	The offender was a leader in a multiple offender situation. MCL 777.44(1)(a).
0	The offender was not a leader in a multiple offender situation. MCL 777.44(1)(b).

1. Special Instructions and Definitions

- Consider the entire criminal transaction in which the sentencing offense occurred when determining the offender's role. MCL 777.44(2)(a).
- In cases involving three or more offenders, more than one offender may be considered a leader. MCL 777.44(2)(b).

2. Case Law Under the Statutory Guidelines

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. *People v Apgar*, 264 Mich App 321, 330–331 (2004).

OV 14 was improperly scored where evidence showed that the defendant was the sole offender involved in the sentencing offense; 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*, unpublished opinion per curiam of the Court of Appeals, decided October 19, 2004 (Docket No. 248613).

An undercover police informant acting as a buyer in purchasing cocaine from the defendant is not an "offender" for purposes of OV 14. *People v Rosenberg*, unpublished opinion per curiam of the Court of Appeals, decided January 25, 2005 (Docket No. 251930). A police informant acting in concert with law enforcement is not "committing a crime" when the informant's conduct is authorized by the police. 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. *Rosenberg, supra*.

OV 14 is properly scored at ten points when the defendant is one of two offenders (in a group of three offenders) taking an active role in the commission of the crime and neither one of the two primary participants establishes himself as the leader. *People v Brewer*, unpublished opinion per curiam of the Court of Appeals, decided February 19, 2004 (Docket No. 242764). In *Brewer*, 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." *Brewer, supra*.

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*,

unpublished opinion per curiam of the Court of Appeals, decided March 4, 2004 (Docket No. 243418).

P. OV 15—Aggravated Controlled Substance Offenses

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).

Effective March 1, 2003, 2002 PA 666 amended the statute governing point allocations for OV 15. Language appearing in the shaded areas of the chart below represents the variable as it applies to offenses that occurred before March 1, 2003. Unshaded areas contain the instructions for scoring OV 15 for offenses occurring on or after March 1, 2003, the amendment's effective date.

Pts	OV 15—Aggravated controlled substance offenses
100	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(a).
75	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 grams or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(b).
50	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*). MCL 777.45(1)(c).
25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender. MCL 777.45(1)(d).
25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender.
20	The offense involved the sale, delivery, or possession with intent to sell or deliver 225 grams or more of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2.
15	The offense involved the sale, delivery, or possession with intent to sell or deliver 50 or more grams but less than 225 grams of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2.
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants. MCL 777.45(1)(e).
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants.

10	The offense is a violation of MCL 333.7401(2)(a)(*i*) to (*iii*) pertaining to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7414(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)(f).
5	The offense involved the delivery or possession with the intent to deliver marijuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking. MCL 777.45(1)(g).
5	The offense involved the delivery or possession with the intent to deliver marijuana or any other controlled substance or counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking.
0	The offense was not an offense described in the categories above. MCL 777.45(1)(h).
0	The offense was not an offense described in the categories above.

1. Special Instructions and Definitions

- "Deliver" is the actual or constructive transfer of a controlled substance from one person to another person without regard to remuneration. MCL 777.45(2)(a).
- A "minor" is an individual 17 years of age or less. MCL 777.45(2)(b).
- "Trafficking" is the sale or delivery of actual or counterfeit controlled substances on a continuing basis to another person or persons for further distribution. MCL 777.45(2)(c).

2. Case Law Under the Statutory Guidelines

Five points were proper where the defendant was convicted of possession with intent to deliver less than 50 grams of cocaine. *People v Scott*, unpublished opinion per curiam of the Court of Appeals, decided October 26, 2004 (Docket No. 248764). 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, supra*; MCL 777.45(1)(g).

Q. OV 16—Property Obtained, Damaged, Lost, or Destroyed

OV 16 is scored for all felony offenses under the sentencing guidelines except those involving a controlled substance. MCL 777.22(2), (4), and (5). When the offense is a crime against a person, OV 16 is scored only for a violation or attempted violation of MCL 750.110a (home invasion). MCL 777.22(1). Score OV 16 by determining which statements addressed by the variable

apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.46(1).

Points	OV 16—Degree of property damage
10	Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged. MCL 777.46(1)(a).
10	The property had a value of more than $20,000.00 or had significant historical, social, or sentimental value. MCL 777.46(1)(b).
5	The property had a value of $1,000.00 or more but not more than $20,000.00. MCL 777.46(1)(c).
1	The property had a value of $200.00 or more but not more than $1,000.00. MCL 777.46(1)(d).
0	No property was obtained, damaged, lost, or destroyed or the property had a value of less than $200.00. MCL 777.46(1)(e).

1. Special Instructions and Definitions

- In cases involving multiple offenders or multiple victims, the appropriate point total may be determined by aggregating the value of property involved in the offense, including property involved in uncharged offenses or property involved in charges dismissed under a plea agreement. MCL 777.46(2)(a).

- Use the value of the property to score this variable in cases where the property was unlawfully obtained, lost to the lawful owner, or destroyed. If the property was damaged, use the amount of money necessary to restore the property to its pre-offense condition. MCL 777.46(2)(b).

- Money or property involved in admitted but uncharged offenses or in charges dismissed under a plea agreement may be considered in scoring this variable. MCL 777.46(2)(c).

2. Case Law Under the Statutory Guidelines

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*, unpublished opinion per curiam of the Court of Appeals, decided 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" to its victims. *People v Kruithoff*, unpublished opinion per curiam of the Court of Appeals, decided December 16, 2003 (Docket No. 242739).

The monetary amounts reflected in the statutory language governing OV 16 do not require submission of exacting or itemized proof of the property's value. See *People v Rosario*, unpublished opinion per curiam of the Court of Appeals, decided 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).

R. OV 17—Degree of Negligence Exhibited

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).

Points	OV 17—Degree of negligence exhibited
10	The offender showed a wanton or reckless disregard for the life or property of another person. MCL 777.47(1)(a).
5	The offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown. MCL 777.47(1)(b).
0	The offender was not negligent. MCL 777.47(1)(c).

1. Special Instructions and Definitions

- If points are assessed against the offender for OV 6, 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.

2. Case Law Under the Statutory Guidelines

Unlike OV 6 (intent to kill or injure another individual), OV 17 is not required to be consistent with a jury's verdict, but where an offender is assessed points under OV 6 and those points are consistent with the jury's verdict, ten points may not be assessed against the offender under OV 17. MCL 777.36(2)(a); MCL 777.47(2); *People v Stanko*, unpublished opinion per curiam of the Court of Appeals, decided January 27, 2004 (Docket No. 242876). **Note:** 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.

S. OV 18—Operator Ability Affected by Alcohol or Drugs

Like OV 17, 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).

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 below 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.

Pts	OV 18—Degree to which alcohol or drugs affected the offender
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(a).
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(b).
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender was under the influence of alcoholic or intoxicating liquor, a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance; or while the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(*iv*); or while the offender had an alcohol content of 0.08 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the offender had an alcohol content of 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(c).
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.
5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while he or she was visibly impaired by the use of alcoholic or intoxicating liquor or a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content. MCL 777.48(1)(d).

5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.07 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was visibly impaired by the use of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content.
0	The offender's ability to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive was not affected by an alcoholic or intoxicating liquor or a controlled substance or a combination of alcoholic or intoxicating liquor and a controlled substance. MCL 777.48(1)(e).
0	The offender's ability to operate a vehicle was not affected by an intoxicating liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance.

♦ **Special Instructions and Definitions**

- 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,* MCL 777.48(2)(a), or
  - 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.

*Beginning October 1, 2013, 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.

T. OV 19—Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice or Emergency Services

OV 19 is scored for all felony offenses to which the statutory sentencing guidelines apply. MCL 777.22(1)–(5). Determine which statements addressed by OV 19 apply to the sentencing offense and assign the point value indicated by the applicable statement having the highest number of points. MCL 777.49(1).

Points	OV 19—Threat to security or interference with administration of justice
25	The offender by his or her conduct threatened the security of a penal institution or court. MCL 777.49(a).
15	The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services. MCL 777.49(b).

10	The offender otherwise interfered with or attempted to interfere with the administration of justice. MCL 777.49(c).
0	The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or the threat of force. MCL 777.49(d).

♦ Case Law Under the Statutory Guidelines

A defendant's conduct before criminal charges are filed against him or her may form the basis of interfering or attempting to interfere with the administration of justice as contemplated by OV 19; the conduct constituting interference with the administration of justice under OV 19 includes giving a police officer a false name when asked for identification. *People v Barbee*, 470 Mich 283, 284, 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). The *Barbee* decision vacated the Court of Appeals decision in *People v Deline*, 254 Mich App 595, 597 (2002), lv gtd and held in abeyance 469 Mich 969 (2003), to the extent that it was inconsistent with the Supreme Court's decision in *Barbee*; that is, 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, supra* at 287. According to the *Barbee* Court, the phrase 'administration of justice' "encompasses more than just the actual judicial process." *Barbee, supra* 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." *Id*. at 286, 288 (footnote omitted).

Under *Barbee*, the defendant's conduct in *Deline* is the type of conduct properly scored under OV 19. In *Deline*, the defendant attempted to evade criminal charges by switching seats with his passenger and refusing consent to a test of his blood-alcohol content. *Deline*, *supra* at 597. See also *People v Cook*, 254 Mich App 635 (2003) (ten points were proper under OV 19 where police pursued the defendant by car and the defendant attempted to avoid police contact).

Twenty-five points were proper for threatening court security where the defendant—who was accused of an assaultive crime—ran from the courtroom and escaped custody. *People v Peoples*, unpublished opinion

per curiam of the Court of Appeals, decided August 17, 2004 (Docket No. 248155).

Ten points are appropriate when a defendant hides evidence from police officers after the evidence was discovered on the defendant's person in a search incident to arrest. *People v Scott*, unpublished opinion per curiam of the Court of Appeals, decided October 26, 2004 (Docket No. 248764).

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*, unpublished opinion per curiam of the Court of Appeals, decided October 21, 2003 (Docket No. 242731). In *Morgan*, the defendant assaulted and seriously injured his wife. While driving her to the hospital, the defendant told her to claim she had been jumped, beaten, and robbed, and at the hospital, the defendant himself reported the "story" to the investigating police officer. *Morgan, supra.*

OV 19 was properly scored where the defendant absconded and fled the jurisdiction during his trial. *People v Vallance*, unpublished opinion per curiam of the Court of Appeals, decided 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." *Vallance, supra*, quoting *Deline*, *supra* at 697–698.

Absent any evidence that the defendant deliberately attempted to prevent his identification by witnesses, a defendant's drastic weight loss and change in head and facial hair styles is not conduct contemplated by OV 19. *People v Arney*, unpublished opinion per curiam of the Court of Appeals, decided March 20, 2003 (Docket No. 236875).

U. OV 20—Terrorism

OV 20 is scored for all felony offenses to which the sentencing guidelines apply. MCL 777.22(1)–(5). Score OV 20 by determining which statements addressed by the variable apply to the sentencing offense and assigning the point value indicated by the applicable statement having the highest number of points. MCL 777.49a(1).

Points	OV 20—Terrorism
100	The offender committed an act of terrorism by using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(a).
50	The offender committed an act of terrorism without using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(b).

25	The offender supported an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(c).
0	The offender did not commit an act of terrorism or support an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(d).

1. Special Instructions and Definitions

- For purposes of scoring this variable, the terms "act of terrorism" and "terrorist" are defined in MCL 750.543b. MCL 777.49a(2)(a).
- "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).

2. Case Law Under the Statutory Guidelines

Fifty points for "terrorism" were appropriate where the defendant took the victim's identification as security for her silence about the robbery, implying that he knew who she was and where she lived and might exact revenge if she reported the crime. *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, decided May 25, 2004 (Docket No. 246263) (decided before the adoption of OV 20,* when "terrorism" was contained in OV 7).

*2002 PA 137, effective April 22, 2002.

Part III—Recommended Minimum Sentences for Offenders Not Sentenced as Habitual Offenders

Part III 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. The guidelines and grids as they apply to habitual offenders are discussed in Sections 8.12–8.15, below.

Part III does not address factors that may influence a court's discretion in fashioning the actual sentence imposed on an offender under the guidelines. The factors a sentencing court may consider when tailoring an offender's sentence are discussed in Section 8.30. A court's departure from the recommended minimum sentence and the statutory requirements of a valid departure from the guidelines are discussed in Section 8.48.

8.7 Sentencing Grids

Sentencing grids for all felony offenses to which the guidelines apply are located in MCL 777.61 to 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. Each sentencing grid is divided into "cells" corresponding to the number of OV and 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 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)–(c). In previously published sentencing manuals, the sentencing grids for first-time offenders and for habitual offenders were designed separately so that reference to one grid was limited to either habitual offender ranges or first-time offender ranges. The sentencing grids printed in Appendix B, 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." With the exception of cells indicating that an intermediate sanction is appropriate, the terms "straddle cell" and "prison cell" are not expressly used in statutes governing application of the sentencing guidelines. See MCL 769.34(4)(a) and *People v Stauffer*, 465 Mich 633, 636 n 8 (2002).

A. Prison Cells

*An example of a sentencing grid for class F offenses appears below.

"Prison cells" are those cells for which the minimum sentence recommended exceeds one year of imprisonment. In the sentencing grids that appear in existing guidelines manuals and in this monograph, "prison cells" are those cells that are unmarked, i.e., not shaded (as are "straddle cells"), and not asterisked (as are "intermediate sanction cells").* Use of the term "prison cell" arises from the statutory mandate that a person convicted of a crime for which the *maximum* term of imprisonment is one year or less must be sentenced to serve the term of imprisonment in the appropriate county jail. MCL 769.28. This statute prohibits a court from sentencing an offender to a state penal institution (to the jurisdiction of the department of corrections) for a term of one year or less.

Note: There is an exception to the one-year rule described above: when a defendant is convicted of a crime while incarcerated—as defined by the consecutive sentencing statute—the term imposed for the second offense may be served in the state prison without regard to its length. *People v Weatherholt*, 193 Mich App 115, 119 (1992).

B. Straddle Cells

"Straddle cells"* are those cells in which the lower limit of the recommended range is one year or less and the upper limit of the recommended range is more than 18 months. MCL 769.34(4)(c); *Stauffer*, *supra* at 636 n 8. "Straddle cells" appear shaded in the sentencing grids published in existing guidelines manuals and in the grids used in this monograph, as shown in the example below.

*See Section 8.26(B) for a comprehensive discussion.

Sentencing Grid for Class F Offenses—MCL 777.67

Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)–(c))

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	3*	0	6*	0	9*	2	17*	5	23	10	23	
		3*		7*		11*		21		28		28	HO2
		4*		9*		13*		25		34		34	HO3
		6*		12*		18*		34		46		46	HO4
II 10-34 Points	0	6*	0	9*	0	17*	5	23	10	23	12	24	
		7*		11*		21		28		28		30	HO2
		9*		13*		25		34		34		36	HO3
		12*		18*		34		46		46		48	HO4
III 35-74 Points	0	9*	0	17*	2	17*	10	23	12	24	14	29	
		11*		21		21		28		30		36	HO2
		13*		25		25		34		36		43	HO3
		18*		34		34		46		48		58	HO4
IV 75+ Points	0	17*	2	17*	5	23	12	24	14	29	17	30	
		21		21		28		30		36		37	HO2
		25		25		34		36		43		45	HO3
		34		34		46		48		58		60	HO4

Intermediate sanction cells are marked with asterisks, straddle cells are shaded, and prison cells are unmarked.

C. Intermediate Sanction Cells

"Intermediate sanction cells"* are those cells in which the upper limit recommended by the guidelines is 18 months or less. MCL 769.34(4)(a). These cells are marked with an asterisk in published guidelines manuals and in this monograph, as shown in the example above.

*See Section 8.26(A) for a comprehensive discussion.

8.8 Felony Offenses Enumerated in MCL 777.11 to MCL 777.17g

*Section 8.6, above, details the statutory instructions used to score each OV.

The felony offenses enumerated in MCL 777.11 to 777.17g require no special application of the statutory sentencing guidelines. For offenses listed in MCL 777.11 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.* 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.

*Section 8.5, above, discusses in detail the statutory instructions pertaining to each PRV.

All seven PRVs are scored for felony offenses subject to the statutory sentencing guidelines. MCL 777.21(1)(b).* 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 least number of points and PRV level F represents the column with the highest number of points. As with the OV level values, the severity of penalty increases with an offender's transit from PRV level A up to PRV level F. The point values corresponding with PRV levels A through F are the same for all nine sentencing grids so that an offender's criminal history is equally weighted no matter what the severity of the sentencing offense.

*The "empty box" refers to the top box in each series of boxes down the right side of each grid—or the box in which HO2, HO3, or HO4 does not appear.

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 sentence 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.*

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

For example, in the sentencing grid above, the recommended minimum ranges for an individual being sentenced as a first-time offender are (in

months): for level A-I, 0 to 3; for level B-I, 0 to 6; for level C-I, 0 to 9; for level D-I, 2 to 17; for level E-I, 5 to 23; and for level F-I, 10 to 23.

8.9 Felony Offenses Enumerated in MCL 777.18 (Offenses Predicated on an Underlying Felony)

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 777.11 to 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 section 18 of this chapter, determine the offense class, offense variable level, and prior record variable level *based on the underlying offense*." (Emphasis added.)

Each offense listed in MCL 777.18 is given a crime group designation applicable to that specific offense without regard to the crime group designation of the underlying offense on which the MCL 777.18 conviction is based. That crime group designation will determine which OVs must be scored for an offender convicted of an offense under MCL 777.18. However, 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.

For example, MCL 777.18 includes an offense identified as MCL 750.157c, which is designated as a crime against a person. This crime group designation under MCL 777.18—"person"—remains the same no matter what felony offense forms the basis for charging an offender with violating MCL 750.157c. MCL 750.157c prohibits an individual from recruiting or inducing a minor to commit a felony and provides the penalty for an offender convicted of violating the statute. According to MCL 750.157c, the penalty imposed for a violation of the statute must not exceed the maximum penalty permitted for conviction of the underlying felony.

Suppose an offender is convicted under MCL 750.157c of inducing a minor to commit arson of real property. Arson of real property, MCL 750.73, is a

class D crime against property, MCL 777.16c, for which the statutory maximum penalty is ten years in prison. However, MCL 750.157c, the felony statute under which the offender was convicted, is designated as a crime against a person, and the designation found in MCL 777.18 trumps the crime group designation of the underlying felony. Therefore, to score an offender convicted of inducing a minor to commit arson of real property, only those OVs appropriate to crimes against a person should be scored.

In the same example, the offender's recommended minimum sentence range is determined by locating the cell at which the offender's OV and PRV levels intersect on the sentencing grid for class D felonies because the underlying offense—arson of real property—is a class D felony. According to MCL 750.157c, an offender convicted of inducing a minor to commit arson may not receive a penalty greater than the statutory maximum permitted for conviction of the crime the offender induced the minor to commit, or, for arson of real property under MCL 750.73, ten years in prison.

> **Note:** A problem arises in application of this method when a defendant is convicted of violating MCL 333.7410(4) based on an underlying violation of MCL 333.7403(2)(d). MCL 333.7403(2)(d) is expressly listed as a qualifying underlying offense by language in MCL 333.7410(4), and the statutory sentencing guidelines are expressly made applicable to violations of MCL 333.7410 by MCL 777.18. The problem arises when attempting to determine the recommended minimum sentence range for the violation according to the proper sentencing grid. For offenses under MCL 333.7410, the proper sentencing grid is determined by the crime class of the underlying offense. MCL 777.21(4). However, in this case the underlying offense—MCL 333.7403(2)(d)—is a misdemeanor offense not independently listed in the statutory sections* containing the offenses to which the guidelines apply, and therefore, for which no crime class exists.

*Compare to MCL 752.861 and MCL 752.881, misdemeanor offenses punishable by not more than two years in prison but which are independently listed in MCL 777.17d as class G "felonies" to which the statutory guidelines apply. The crime class and crime group designations necessary to scoring an offense under the statutory guidelines are found only in the independent lists in MCL 777.11 to 777.17g. See also MCL 752.881.

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 a felony offense described in the statutory language of the eight respective felony offenses. Each of the eight offenses is discussed below.

A. Controlled Substance Violations Involving Minors or Near School Property—MCL 333.7410

MCL 333.7410 addresses several felony violations to which the sentencing guidelines apply.

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 $25,000.00 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.

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;* 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; or
- both.

*The fine amounts and maximum terms of imprisonment vary according to the controlled substance involved.

Delivery of cocaine or a narcotic drug listed in schedule 1 or 2 within 1,000 feet of school property. 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. Conviction of violating MCL 333.7410(2) subjects an offender to:

- mandatory imprisonment for not less than two years* 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 $25,000.00 fine permitted under MCL 333.7401(2)(a)(*iv*).

*The trial court may depart from the mandatory minimum term for substantial and compelling reasons. MCL 333.7410(5).

Possession with intent to deliver cocaine or a narcotic drug listed in schedule 1 or 2 within 1,000 feet of school property. 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 the intent to

deliver a controlled substance described in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine and related substances) on or within 1,000 feet of school property. An offender convicted of violating MCL 333.7410(3) is subject to:

*The trial court may depart from the mandatory minimum term for substantial and compelling reasons. MCL 333.7410(5).

- mandatory imprisonment for not less than two years* 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 $25,000.00 fine permitted under MCL 333.7401(2)(a)(*iv*).

Possession of GBL or other controlled substance on school property. MCL 333.7410(4) provides the penalty for persons aged 18 years of age 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 school property. An offender convicted of violating MCL 333.7410(4) is subject to:

*The terms of imprisonment and the amounts of the fines vary with the controlled substance involved in each of these statutes.

- 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 333.7403(2)(a)(*v*), (b), (c), or (d).*

B. Subsequent Controlled Substance Violations—MCL 333.7413(2) or (3)

MCL 333.7413(2) provides the penalties possible for a person convicted of a second or subsequent offense under article 7 of the Public Health Code, MCL 333.7101 to 333.7545 (controlled substances offenses). MCL 333.7413(2) applies to "general" controlled substance offenses not otherwise addressed by the specific sentencing provisions of MCL 333.7413(1) and (3). Offenders convicted under MCL 333.7413(2) may be sentenced to a term of imprisonment up to twice the term authorized by the statute governing the specific offense, or may be fined up to two times the amount permitted for a violation of the specific offense, or both. MCL 333.7413(2).

*Discussed above in subsection (A).

MCL 333.7413(3) provides the penalty for a person convicted of a second or subsequent violation of MCL 333.7410(2) or (3).* All of the following apply to an offender convicted under MCL 333.7413(3):

*The trial court may depart from the mandatory minimum for substantial and compelling reasons. MCL 333.7413(4).

- The offender must be sentenced to a mandatory minimum term of imprisonment of five years* but may not be sentenced to more than two times the term authorized in MCL 333.7410(2) and (3).
- The offender may be fined up to three times the amount authorized by MCL 333.7410(2) and (3).
- The offender is not eligible for probation or suspension of his or her sentence.

Note: The concurrent (or exclusive) application of the general habitual offender statutes and the penalties prescribed by the Public Health Code for subsequent controlled substance offenses are discussed in Section 8.16, below.

C. Recruiting or Inducing a Minor to Commit a Controlled Substance Felony—MCL 333.7416(1)(a)

MCL 333.7416(1)(a) provides the penalty for a person aged 17 years or older 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:

- to a mandatory minimum term* 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;
- 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).

*The court may depart from the minimum term for substantial and compelling reasons. MCL 333.7416(3).

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)

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 $10,000.00 fine on an offender convicted of conspiracy.

E. Recruiting or Inducing a Minor to Commit a Felony—MCL 750.157c

MCL 750.157c provides the penalty for a person aged 17 years or older 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. In addition to the mandatory term of imprisonment, the court may impose a fine on the offender of not more than three times the amount authorized by law for conviction of the act committed or attempted.

F. Voluntarily Allowing a Prisoner to Escape—MCL 750.188

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

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");
- 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 (carrying a firearm or other dangerous weapon with unlawful intent);
- MCL 750.227 (carrying a concealed weapon);
- MCL 750.227a (carrying a licensed firearm outside the scope authorized by the license);

- 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 toward an occupied dwelling); 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 30 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

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. MCL 750.367a.

8.10 Felony Offenses Enumerated in MCL 777.19 (Attempts)

*Intermediate sanctions apply to attempted class H felonies punishable by more than one year of imprisonment. MCL 769.34(4)(b). See Section 8.26(A), below, for more information.

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.* 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 777.21(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 as follows:

- 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).

Part IV—Habitual Offender Provisions

8.11 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 MCL 769.10, 769.11, and 769.12 and operate to raise the *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 recommended *minimum* sentence range under the statutory 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 8.12, 8.13, 8.14, and 8.15, below.

A. Notice of Intent to Seek Enhancement

In cases where the prosecuting attorney intends to seek enhancement of a defendant's sentence on the basis that the defendant is a habitual offender, the prosecuting attorney must file written notice with the court of this intent within 21 days after the defendant's arraignment on the information. MCR 6.112(F); MCL 769.13(1). If arraignment is waived, the notice of enhancement must be filed within 21 days after the information is filed. MCL 769.13(1). If a defendant's trial on the felony charge begins within the 21-day period, the notice of enhancement must be filed with the court before the beginning of trial. MCR 6.112(F).

> **Note:** Amendments effective January 1, 2006, remove the reference to a defendant's trial from the time limits discussed in MCR 6.112(F). As amended, MCR 6.112(F) states:
>
> > "(F) *Notice of Intent to Seek Enhanced Sentence*. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense."

If a defendant pleads guilty or nolo contendere at arraignment on the information to the offense charged or to a lesser offense, the prosecuting attorney may file the notice of enhancement after the defendant's conviction by plea or within the 21-day period after the arraignment. MCL 769.13(3).

The 21-day filing requirement prevents a prosecutor's amendment of the notice of enhancement where the prospective amendment would elevate the offender's habitual offender status or otherwise increase the offender's potential sentencing consequences. *People v Hornsby*, 251 Mich App 462, 469, 472 (2002). A prosecutor was denied permission to make an untimely amendment to a timely filed notice of enhancement where the amendment sought to add two additional prior convictions and to elevate the defendant's status from second habitual to fourth habitual. *People v Ellis*, 224 Mich App 752, 755 (1997).

An untimely amendment to correct a technical defect in the contents of a timely filed enhancement notice is not subject to the 21-day requirement. The untimely correction of erroneous information in a timely filed notice did not impact the fact that the defendant was provided with proper notice of the prosecutor's intent to seek sentence enhancement on the basis of the defendant's habitual offender status. *Hornsby, supra* at 470.

The unambiguous language governing the 21-day period in which the enhancement notice must be filed "does not include any exception for undiscovered out-of-state convictions[.]" *People v Morales*, 240 Mich App 571, 576 (2000); *People v Fountain*, 407 Mich 96, 99 (1979).

Note: The Supreme Court has required strict adherence to the 21-day limit. Allowing the prosecution to amend or file a notice after the 21 days has expired will significantly alter the potential consequences to the defendant (enhanced sentence due to habitual offender status). See *People v Williams*, 462 Mich 882 (2000), and *People v Cobley*, 463 Mich 893 (2000). In both cases, the Court summarily reversed the Court of Appeals, vacated the defendants' habitual offender sentences, and remanded for resentencing.

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 the same time period as the notice itself—within 21 days of the defendant's arraignment on the information, or if arraignment is waived, within 21 days after the information is filed. MCL 769.13(2).

C. Establishing the Existence of a Prior Conviction

*See Section 8.21, below, for a detailed discussion of the procedure by which a defendant's collateral attack on the constitutional validity of prior convictions is resolved.

A defendant charged as a habitual offender may challenge the 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*, 228 Mich App 684, 700 (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) Information contained in a presentence report.

"(d) 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 PSIR, which contained details of the defendant's prior felony conviction. MCL 769.13(5)(c); *Green, supra* at 700.

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 subsection (4) at sentencing or at a separate hearing scheduled for that purpose before sentencing. The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose. The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. If the defendant establishes a prima facie showing that information or evidence concerning an alleged prior conviction is inaccurate, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the information or evidence is accurate. If the defendant establishes a prima facie showing that an alleged prior conviction is constitutionally invalid, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the prior conviction is constitutionally valid."

1. Classification of the Prior Conviction

A "felony" is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). For purposes of the habitual offender statutory provisions, a "prior felony conviction" is a conviction for conduct or attempted conduct that would be a felony if committed in Michigan no matter where the crime was actually committed. MCL 769.10–769.12. Therefore, whether obtained in Michigan or in another jurisdiction, a defendant's previous convictions for conduct punishable under Michigan law by imprisonment for more than one year or for conduct expressly designated by Michigan law as felonious conduct are "prior felony convictions" for purposes of determining a defendant's habitual offender status.

A prior felony conviction obtained in another state that, by offense title alone, would qualify only as a misdemeanor offense in Michigan, was not necessarily invalid for purposes of establishing a defendant's habitual

offender status. *People v Quintanilla*, 225 Mich App 477, 478–479 (1997). According to the Court,

> "The act requires 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." *Quintanilla, supra* at 479.

Prior convictions for offenses that were felonies at the time they were committed may be used to establish a defendant's habitual offender status even when the prior offenses have been reclassified as misdemeanors. *People v Odendahl*, 200 Mich App 539, 543–544 (1993), overruled in part on other grounds 450 Mich 1025 (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, supra* at 543, quoting *In re Jerry*, 294 Mich 689, 692 (1940).

An out-of-state conviction classified as a misdemeanor may constitute a felony under Michigan law depending on the facts of the case and the penalty imposed. *People v Southward*, unpublished opinion per curiam of the Court of Appeals, decided August 19, 2004 (Docket No. 249293). In *Southward*, the defendant's prior conviction in North Carolina was classified as a misdemeanor, but the defendant was sentenced to two years of imprisonment (suspended) and three years of supervised probation. Under Michigan law, a crime may be labeled a misdemeanor under the Penal Code *and* be punishable by more than one year of imprisonment. For purposes of the general habitual offender statutes, any offense punishable by more than one year of imprisonment is a felony. *Southward, supra*.

2. Double Jeopardy Challenges

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*, 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 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, supra* at 163.

The habitual offender statutes do expressly prohibit the use of a conviction to enhance a sentence "if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under [the habitual offender statutes]."* MCL 769.10(3), 769.11(3), and 769.12(3).

*See Section 8.17 for detailed discussion of concurrent/ exclusive application of sentencing enhancement schemes contained in the habitual offender statutes and those in other statutory penalty provisions.

The same prior felonies may be used to establish a defendant's habitual offender status for more than one subsequent felony conviction when the subsequent felonies were committed at different times. *People v Anderson*, 210 Mich App 295, 298 (1995). Because the habitual offender sentencing provisions do not create substantive offenses separate from the underlying prior convictions, a defendant's double jeopardy protection is not implicated. *Anderson, supra* at 298.

3. Multiple Convictions From the Same Judicial Proceeding

Multiple convictions resulting from the same judicial proceedings may be characterized as separate convictions for purposes of establishing a defendant's habitual offender status only if the convictions arose from separate criminal transactions. *People v Preuss*, 436 Mich 714, 717, 738 (1990); *People v Whitney*, 205 Mich App 435, 437 (1994). A defendant's habitual offender status does not depend on the particular sequence of the defendant's previous convictions, sentences on the previous convictions, or the dates on which any of the previous offenses resulting in convictions occurred. *Preuss*, *supra* at 717. "The [habitual offender] statute requires only that the [subsequent] offense be preceded by [the appropriate number of] convictions of felony offenses, and that each of those [] predicate felonies arise from separate criminal incidents." *Id*. at 717. Multiple felony convictions arising from a single criminal episode may not be used to enhance a defendant's sentence under the habitual offender statutes. *Id*. at 738; *Whitney, supra* at 437.

4. Convictions Older Than Ten Years

There is no rule prohibiting use of a defendant's prior convictions from more than ten years before the date of the sentencing conviction for purposes of establishing the 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.*

*See Section 8.5(A).

8.12 Determining a Habitual Offender's Recommended Minimum Sentence Range Under the Statutory Sentencing Guidelines

*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.

The nine sentencing grids in MCL 777.61 to 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).* The statutory method of calculating the minimum range recommended for habitual offenders is found in MCL 777.21, which provides in part:

*The "general" habitual offender statutory provisions.

> "(3) If the offender is being sentenced under [MCL 769.10, 769.11, or 769.12],* 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 part 6 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%."

*See Section 8.11(C), above, for further discussion of establishing prior felony convictions.

Statutory law defines a "felony" as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). For purposes of the habitual offender statutory provisions, a "prior felony conviction" is a conviction for conduct or attempted conduct that would be a felony if committed in Michigan no matter where the crime was actually committed. MCL 769.10–769.12. 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.*

In previously published sentencing manuals, the sentencing grids for first-time offenders and the grids for habitual offenders were designed separately so that reference to one grid was limited to either habitual offender ranges or first-time offender ranges. The sentencing grids printed in Appendix B, and as shown in the example below, combine the ranges recommended under the guidelines for *all* offenders—first-time *and* habitual.* Locating the appropriate cell for a habitual offender in any of the nine sentencing grids is addressed in the subsections below.

*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.

Note: The "general" habitual offender provisions contained in MCL 769.10, 769.11, and 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, 769.11, and 769.12 and the sentence enhancements authorized by MCL 777.21. MCL 769.10, 769.11, and 769.12 relate to the maximum penalty authorized by the statute under which the defendant's conduct was prohibited. These habitual offender enhancement provisions permit a sentencing court to impose on a *habitual* offender a sentence greater than the maximum sentence permitted by statute for a *first* conviction of the sentencing offense. The maximum term of imprisonment permitted for a habitual offender's felony conviction (as authorized under MCL 769.10, 769.11, and 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. These increased minimum ranges are reflected in each of the nine sentencing grids because the ranges vary only as a result of the defendant's habitual offender status as applied to his or her placement in the appropriate sentencing grid.

8.13 Second Habitual Offender Status (HO2)

A person who commits a felony in Michigan and who has been previously convicted of a felony or attempted felony (whether or not the previous conviction occurred in Michigan as long as the violation would have been a felony violation if it had been obtained in Michigan) is a second habitual offender subject to the following penalties:

- If the subsequent felony is punishable on first conviction by a term less than life imprisonment, the court may place the person on probation or sentence the person to imprisonment for a term of not more than 1–1/2 times the maximum term authorized for a first conviction, 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).

*Sentences for subsequent "major controlled substance offenses" are discussed in Section 8.16, below.

- If the subsequent felony is a major controlled substance offense,* the court must sentence the person as provided by MCL 333.7401 to 333.7461. MCL 769.10(1)(c).

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). The sentence enhancement authorized by MCL 769.10 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 example below, the ranges recommended for a second habitual offender 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.

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

MCL 769.10(1)(a) and (b), the provisions discussed above, 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 (b) and limits the court's use of probation to specific circumstances:

> "In all prosecutions for felonies or misdemeanors 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."

8.14 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 a term of imprisonment of not more than two times the maximum term permitted by law for a first conviction of the offense, or to 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 333.7461. MCL 769.11(1)(c).

*Sentences for subsequent "major controlled substance offenses" are discussed in Section 8.16, below.

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 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.

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

8.15 Fourth Habitual Offender Status (HO4)

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:

- 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)(a).
- 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)(b).
- If the subsequent felony is a major controlled substance offense,* the court must sentence the person as provided by MCL 333.7401 to 333.7461. MCL 769.12(1)(c).

*Sentences for subsequent "major controlled substance offenses" are discussed in Section 8.16, below.

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 ranges recommended for a person being sentenced as a fourth habitual offender are (in months): for level A-I, 0 to 6; for level B-I, 0 to 12; for level C-I, 0 to 18; for level D-I, 2 to 34; for level E-I, 5 to 46; and for level F-I, 10 to 46.

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

8.16 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), 769.11(1)(c), and 769.12(1)(c) mandate application of the sentencing provisions in part 74 of the Public Health Code (MCL 333.7401–333.7461). However, as discussed below, the 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.

A "major controlled substance offense" is limited to convictions for the commission of one of nine crimes described in MCL 761.2(a)–(c):

- a violation of MCL 333.7401(2)(a)(*i*)–(*iv*).
- a violation of MCL 333.7403(2)(a)(*i*)–(*iv*).
- conspiracy to commit an offense under MCL 333.7401(2)(a)(*i*)–(*iv*) or 333.7403(2)(a)(*i*)–(*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 $1,000,000.00, 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' imprisonment, a fine of not more than $500,000.00, 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' imprisonment, a fine of not more than $250,000.00, 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' imprisonment, a fine of not more than $25,000.00, or both. MCL 333.7401(2)(a)(*iv*).

Note: Ameliorative changes made to sentencing for major controlled substance offenses are not retroactive. *People v Thomas*, 260 Mich App 450, 459 (2004). In *Thomas*, the defendant was sentenced to 10 to 20 years of imprisonment when MCL 333.7401(2)(a)(*iii*) had a mandatory minimum of ten years. The Legislature plainly provided relief for defendants convicted and sentenced before March 1, 2003, the date on which 2002 PA 665 eliminated the mandatory minimum sentence for the *Thomas* defendant's offense. *Thomas, supra* at 459. Defendants convicted and sentenced before March 1, 2003, are entitled to early parole

> eligibility "'after serving the minimum sentence of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.'" MCL 791.234(12); *Thomas*, *supra* at 458–459.

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 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 $1,000,000.00, 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' imprisonment, a fine of not more than $500,000.00, 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' imprisonment, a fine of not more than $250,000.00, 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' imprisonment, a fine of not more than $25,000.00, or both. MCL 333.7403(2)(a)(*iv*).

A. Mandatory Sentence Enhancement—MCL 333.7413(1) and (3)

MCL 333.7413(1) and (3) contain mandatory sentence enhancement provisions for offenders who have multiple convictions of specific controlled substance offenses. Those statutory provisions state:

> "(1) An individual who was convicted previously for a violation of any of the following offenses and is thereafter convicted of a second or subsequent violation of any of the following offenses shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term:
>
> "(a) A violation of section 7401(2)(a)(*ii*) or (*iii*).

"(b) A violation of section 7403(2)(a)(*ii*) or (*iii*).

"(c) Conspiracy to commit an offense proscribed by section 7401(2)(a)(*ii*) or (*iii*) or section 7403(2)(a)(*ii*) or (*iii*).

* * *

"(3) An individual convicted of a second or subsequent offense under section 7410(2) or (3) shall be punished, subject to subsection (4),* by a term of imprisonment of not less than 5 years nor more than twice that authorized under section 7410(2) or (3) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7410(2) or (3); and shall not be eligible for probation or suspension of sentence during the term of imprisonment."

*Subsection (4) deals with a court's departure from the minimum term of imprisonment.

These mandatory enhancement provisions apply *only* to offenders who have been convicted of two or more of the drug-related offenses very specifically enumerated in MCL 333.7413(1) and (3). Note that not all of the "major controlled substance offenses," as defined in MCL 761.2, are included within the mandatory enhancement provisions of MCL 333.7413(1) and (3). In particular, MCL 333.7401(2)(a)(*i*) and (*iv*) and MCL 333.7403(2)(a)(*i*) and (*iv*) are not included in MCL 333.7413(1). The offenses addressed by MCL 333.7413(3) are predicated on the offender's violation of MCL 333.7401(2)(a)(*iv*) within 1,000 feet of school property.*

*See Section 8.9(A), above.

Where a defendant commits an eligible second offense before he or she is convicted of the first offense, and is subsequently convicted of the second offense, MCL 333.7413(1) must be applied to the offender. The language of MCL 333.7413(1) unambiguously requires that a defendant who has been "convicted previously" of an enumerated offense and is "thereafter convicted" of a second enumerated offense be sentenced according to the provisions of 7413(1). *People v Poole*, 218 Mich App 702, 710–711 (1996). There is no requirement under the Public Health Code's enhancement provisions that a conviction for an offender's first offense be obtained before the commission date of the offender's second offense.

Whether to sentence an offender convicted of a subsequent "major controlled substance offense" under the habitual offender statutes or the provisions of the Public Health Code turns on the identity of the subsequent conviction and the precise language used in the statutory schemes. 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."* The plain language of the general habitual offender statutes directs a sentencing court to impose the sentence contained in the Public Health Code on an offender convicted of a "major controlled substance offense" without regard to whether the "major controlled substance offense" is the offender's second or tenth career felony conviction or even whether the subsequent "major controlled substance

offense" is the offender's second or tenth career *drug*-related felony conviction. This application of the statutory language allows for cases in which an offender convicted of his or her *tenth* felony conviction but *first* "major controlled substance offense" is sentenced to a term that reflects the same statutory penalty possible for an offender whose *first* and *only* felony conviction is for a "major controlled substance offense."

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*, *supra* at 135 n 1.

In *People v Fetterley*, 229 Mich App 511, 540–541 (1998), the 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. *Fetterley, supra* at 525. The Court of Appeals held that such "double enhancement" was improper. *Id*. at 540.

In *People v Franklin*, 102 Mich App 591 (1980), a defendant with prior felony convictions, none of which was drug-related, was convicted of a "major controlled substance offense." The Court concluded that because the defendant had no previous drug-related convictions, the Public Health Code's enhancement provisions (MCL 333.7413) were "inapplicable by [their] own terms." *Franklin*, *supra* at 593–594. Having concluded that section 7413 did

not apply to the defendant's subsequent "major controlled substance offense," the Court held that the general habitual offender statutes could be used to impose an enhanced sentence on the defendant based on the defendant's multiple prior felony convictions. *Id*. at 594.

C. Discretionary Sentence Enhancement—MCL 333.7413(2)

Unlike the provisions in MCL 333.7413(1) and (3), MCL 333.7413(2) *permits*, but does *not require*, a sentencing court to double the term of imprisonment authorized by the applicable statute for a first conviction of the offense. Where an offender is convicted of a second or subsequent controlled substance offense—"major" *or* "non-major"—MCL 333.7413(2) authorizes a trial court to impose a term of imprisonment not more than twice the term permitted for a first conviction of the offense. MCL 333.7413(2) states:

> "Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term authorized or fined in an amount not more than twice that otherwise authorized, or both."

MCL 333.7413(5) defines "second or subsequent offense":

> "[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."

Like the outcome of the defendant's challenge in *Poole*, *supra* at 710–711, with regard to sentence enhancement under MCL 333.7413(1), an offender's *convictions* for purposes of MCL 333.7413(2) 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).

8.17 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).

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, 760–762 (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 contains discussion of the following:

- criminal sexual conduct offenses;
- OUIL offenses;
- retail fraud offenses; and
- fleeing and eluding offenses.

A number of statutes expressly prohibit 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 the internal escalation scheme. Appendix D contains a table of these offenses.

A. Subsequent Criminal Sexual Conduct (CSC) Convictions

MCL 750.520f provides the penalties for offenders convicted of more than one CSC offense. 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, a "prior conviction" may be a conviction under MCL 750.520b, 750.520c, 750.520d, or a conviction "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). The mandatory minimum term of at least five years applies to an offender with a "prior conviction" as defined above (under Michigan law, federal law, or the law of another state) when that offender's second or subsequent conviction is for conduct prohibited by MCL 750.520b, 750.520c, or 750.520d.

> **Note:** CSC-I, CSC-II, and CSC-III are felony convictions whether the conviction is a defendant's first or fifth. 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, it is a "felony" for purposes of the Code of Criminal Procedure. MCL 761.1(g). Thus, CSC-IV may be used as a prior felony conviction to enhance an offender's sentence under the general habitual offender provisions.

Because the habitual offender statutes address a defendant's *maximum* possible sentence and the subsequent offense provisions of MCL 750.520f address a defendant's *minimum* possible sentence, concurrent application of the statutes is permitted. *People v VanderMel*, 156 Mich App 231, 234–235 (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*, 191 Mich App 480, 482 (1991). In contrast to the habitual offender statutes, MCL 769.10 *et seq*., no additional notice need be filed to proceed against defendants charged as subsequent offenders under MCL 750.520f. *People v Bailey*, 103 Mich App 619, 627–628 (1981).

B. Subsequent OUIL-3d Convictions

A defendant who has two or more prior "drunk driving" convictions within ten years of a third or subsequent OUIL violation is guilty of a felony. MCL 257.625(9)(c). For purposes of OUIL offenses, a prior conviction may be a misdemeanor conviction. A defendant's conviction of OUIL-3d is a felony conviction that may be used to establish a defendant's habitual offender status under the habitual offender sentencing statutes. *People v Bewersdorf*, 438 Mich 55, 69–71 (1991); *People v Stewart (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).

A defendant convicted of his or her first OUIL-3d offense who has no previous felony convictions is not subject to sentence enhancement under the habitual offender statutes. However, if a defendant has previous felony convictions, the defendant's first OUIL-3d is a felony that may be used to enhance his or her sentence under the general habitual offender statutes. For example, a defendant convicted of OUIL-3d (the sentencing offense) who had two prior felony convictions could be sentenced as a third habitual offender to a maximum of ten years.

C. Subsequent First-Degree Retail Fraud Convictions

The retail fraud statutes are similar to the OUIL 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 . . . MCL 769.10, 769.11, and 769.12."

The corresponding language in the habitual offender statutes is included in subparagraph (3) of each habitual offender statute:

> "A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section." MCL 769.10(3), 769.11(3), and 769.12(3).

*See Section 8.11(A).

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) and are listed in a table in Appendix D. 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 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. 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.

D. Subsequent Fleeing and Eluding Convictions

*CSC-I/II/III are designated as felonies without regard to possible penalty. CSC-IV is a felony because it is punishable by more than one year of imprisonment. MCL 761.2.

Both MCL 257.602a and MCL 750.479a prohibit fleeing and eluding a law enforcement officer. Like felony-firearm and criminal sexual conduct convictions, any fleeing and eluding conviction is a felony offense whether it is a defendant's first or fifth such conviction.* 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 Supreme Court's decision in *Bewersdorf, supra*, 438 Mich 55, the Michigan Court of Appeals concluded that the general habitual offender statutes could be used to enhance an offender's sentence for fleeing and eluding where the offender's prior fleeing and eluding conviction was also used to elevate the severity of the subsequent offense. *People v Lynch*, 199 Mich App 422, 424 (1993). At the time *Lynch* was decided, a person could be convicted of misdemeanor fleeing and eluding and any subsequent fleeing and eluding violation within five years of the misdemeanor conviction constituted a felony fleeing and eluding offense. In *Lynch*, the defendant's sentencing offense was

his second fleeing and eluding offense within five years—a felony under the existing statutory scheme. Because the defendant had two previous unrelated felonies, he was properly sentenced as a third habitual offender. *Id*.

The following table illustrates the interaction of the general habitual offender statutory provisions with the statutory penalty provisions contained in each statutory context discussed above (OUIL, CSC, fleeing and eluding, and retail fraud). Felony-firearm offenses are included as an example of a statutory scheme in which the mandatory penalty escalates with the number of convictions so that application of the general habitual offender statutes is not permitted.

Offense	# of conviction	Misd'r or Felony	Statutory Penalty	Habitual Offender (HO) Penalty
Felony-firearm Habitual offender provisions do **not** apply. Determinate penalty increases w/ # of convictions.	1	F	2 yr mandatory	NA
	2	F	5 yr mandatory	NA
	3	F	10 yr mandatory	NA
CSC-I Habitual offender provisions apply. Mandatory minimum for second/subsequent convictions but severity of penalty possible does not escalate under CSC scheme.	1	F	Life/any term of yrs	NA
	2+	F	5 yr minimum, maximum of life/any term of yrs.	5 yr minimum, maximum of life/ any term of yrs for HO2, HO3, or HO4.
CSC-II Habitual offender provisions apply. Mandatory minimum for second/subsequent convictions but severity of penalty possible does not escalate under CSC scheme.	1	F	Not more than 15 yrs	NA
	2+	F	5 yr minimum, maximum of 15 yrs.	5 yr minimum, maximum of 22.5 yrs (HO2), 30 yrs (HO3), life/lesser term of yrs (HO4).
CSC-III Habitual offender provisions apply. Mandatory minimum for second/subsequent convictions but severity of penalty possible does not escalate under CSC scheme.	1	F	Not more than 15 yrs	NA
	2+	F	5 yr minimum, maximum of 15 yrs	5 yr minimum, maximum of 22.5 yrs (HO2), 30 yrs (HO3), life/lesser term of yrs (HO4).
CSC-IV Habitual offender provisions apply. Severity of penalty possible does not escalate. *CSC-IV is a felony for purposes of HO statutes/ sentencing guidelines because first offense is punishable by more than 1 yr. See MCL 761.1(g).	1	F*	Not more than 2 yrs	NA
	2+	F*	Not more than 2 yrs	Not more than 3 yrs (HO2), 4 yrs (HO3), or 15 yrs (HO4).
Fleeing/Eluding (F/E) - 1st degree (1st degree is F/E violation causing death) Habitual offender provisions apply. Severity of penalty possible does not escalate under F/E scheme.	1	F	Not more than 15 yrs	NA
	2+	F	Not more than 15 yrs	Not more than 22.5 yrs (HO2), 30 yrs (HO3), life/lesser term of yrs (HO4).

Fleeing/Eluding - 2nd degree (current conviction + 1/more prior 1st/2nd/3rd F/Es OR current + 2/more prior 4th degree F/Es) Habitual offender provisions apply. Prior convictions are used to increase severity of offense but severity of penalty possible does not escalate under F/E scheme.	1	F	Not more than 10 yrs	NA
	2+	F	Not more than 10 yrs	Not more than 15 yrs (HO2), 20 yrs (HO3), life/lesser term of yrs (HO4).
Fleeing/Eluding - 3rd degree (current conviction + prior 4th degree F/E) Habitual offender provisions apply. Prior convictions used to increase severity of offense but severity of penalty possible does not escalate under F/E scheme.	1	F	Not more than 5 yrs	NA
	2+	F	Not more than 5 yrs	Not more than 7.5 yrs (HO2), 10 yrs (HO3), life/lesser term of yrs (HO4).
Fleeing/Eluding - 4th degree Habitual offender provisions apply. Severity of penalty possible does not escalate under F/E scheme.	1	F	Not more than 2 yrs	NA
	2+	F	Not more than 2 yrs	Not more than 3 yrs (HO2), 4 yrs (HO3), 15 yrs (HO4).
OUIL	1	M	Not more than 93 days	NA
(within 7 yrs of 1/more prior convictions)	2	M	Minimum of 5 days, maximum up to 1 yr.	NA
(within 10 yrs of 2/more prior convictions)	3	F	Minimum of 1 yr, maximum up to 5 yrs.	HO provisions do **not** apply unless defendant has prior felony convictions in addition to current OUIL-3d.
Habitual offender provisions apply. Each OUIL conviction following first OUIL-3d is subsequent felony for purposes of HO status. Severity of penalty does not escalate under OUIL scheme once offense reaches felony status.	4+	F	1 yr minimum, maximum up to 5 yrs.	1 yr minimum, not more than 7.5 yrs (HO2), 10 yrs (HO3), life/lesser term of yrs (HO4).
Retail Fraud (RF) - 1st degree (property valued at $1000+ OR 2nd degree RF + specified prior conviction) Habitual offender provisions **may** apply. Prior convictions may be used to increase severity of offense under RF scheme. Any prior conviction used to escalate offense severity under RF statute cannot be used to enhance possible penalty under HO statutes.	1	F	Not more than 5 yrs	NA
	2+	F	Not more than 5 yrs	If prior conviction(s) not excluded, not more than 7.5 yrs (HO2), 10 yrs (HO3), life/lesser term of yrs (HO4).
Retail fraud - 2nd degree (property valued at $200 to $1000 OR 3rd deg RF + specified prior conviction)	1	M	Not more than 1 yr	NA
	2	M	Not more than 1 yr	NA
Retail fraud - 3rd degree (property valued at less than $200)	1	M	Not more than 93 days	NA

Part V—The Sentencing Hearing

8.18 Requirements and Rights

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).

*See Sections 8.41 and 8.42 for more information on delayed sentences and other alternatives.

A sentence based on inaccurate information implicates a defendant's constitutional right to due process. US Const, Am XIV; Const 1963, art I, § 17; *Townsend v Burke*, 334 US 736, 740–741 (1948); *People v Fleming*, 428 Mich 408, 431 (1987); *People v Hoyt*, 185 Mich App 531, 533 (1990). 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 MCR 6.425(E)(1)(a)–(f),* which are discussed below.

*Formerly MCR 6.425(D)(2)(a)–(f). Effective July 13, 2005, substantive changes were made and are indicated where relevant.

With the exception of rules involving privilege, the rules of evidence do not apply to sentencing proceedings. MRE 1101(b)(3); *People v Fisher*, 442 Mich 560, 576–577 (1993); *People v Potrafka*, 140 Mich App 749, 752 (1985). Moreover, even if testimony presented at a defendant's sentencing hearing is genuinely characterized as hearsay, the defendant is not deprived of any constitutional right as long as he or she is given the opportunity to rebut any information the defendant claims is inaccurate. *People v Beard*, 171 Mich App 538, 548 (1988).

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); *People v Johnson*, 386 Mich 305, 317 (1971). Even when the 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).

Note: Effective January 1, 2006, the following provision will be included in MCR 6.005(E):

> "The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."

A defendant's right to counsel extends to certain ex parte presentence conferences affecting the defendant:

- A trial court's conference with a probation officer is a critical stage of the proceedings at which the defendant has a right to be represented by counsel. *People v Oliver*, 90 Mich App 144, 149–150 (1979), rev'd on other grounds 407 Mich 857 (1979).
- A defendant has the right to be represented by counsel at a presentence conference between the trial judge and a prosecutor. *People v Von Everett*, 110 Mich App 393, 396–397 (1981).
- A defendant has the right to representation at a presentence conference between the trial judge and a police officer. *People v Vroman*, 148 Mich App 291, 295–296 (1985), overruled in part on other grounds 431 Mich 282, 298 (1988).
- A defendant does *not* have a right to be represented by counsel at a trial court's presentence interview with the victim of the defendant's conduct. *People v Rodriquez*, 124 Mich App 773, 777 (1983).

8.19 Review of the PSIR

*See Section 8.4 for detailed information about the content required in a PSIR.

At the sentencing hearing, the court must determine that all parties (prosecutor, defendant, and defense attorney) have had an opportunity to read and discuss the PSIR.* MCR 6.425(E)(1)(a).

Effective July 13, 2005, MCR 6.425(B) requires the court to provide copies of the presentence report to the parties at a reasonable time before the day of sentencing. Former subrule (B) did not require the court to provide copies of the PSIR to the parties before sentencing. Formerly, the court was required to allow the prosecutor, the defense attorney, and the defendant to *review* the presentence investigation report at *a reasonable time* before the date of sentencing. MCL 771.14(5) still contains this requirement.

The Michigan Supreme Court recognized, but did not quantify for purposes of future application, the vagueness of the phrase, "a reasonable time before the day of sentencing." *People v Hernandez*, 443 Mich 1, 13 (1993). The *Hernandez* Court stated:

> "As the amici curiae observed, however, not all judges have the same notion of what is a reasonable time. While some courts provide the defendant a copy of the presentence report several days before sentencing, other courts provide a copy the day of sentencing, sometimes shortly before sentencing. Some defendants are not given a reasonable time to review the report." *Hernandez, supra* at 13.

Even though the *Hernandez* Court did not establish a minimum amount of time to satisfy the "reasonable time" requirement, MCL 771.14(6) authorizes the sentencing court to adjourn the hearing so that the parties may "prepare a challenge or a response to a challenge" should any party claim that it was not given adequate time before sentencing to review the PSIR.

8.20 Objections to Accuracy or Content of the PSIR

Due process requires that a defendant's sentence be based on accurate information and that the defendant be given an opportunity at sentencing to challenge the accuracy of the information on which the trial court bases the defendant's sentence. *People v Eason*, 435 Mich 228, 233 (1990); *People v Zinn*, 217 Mich App 340, 347–348 (1996). A sentence is invalid if it is based on inaccurate information. *People v Miles*, 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 PSIR. MCR 6.425(E)(1)(b); MCL 771.14(6). When a defendant alleges inaccuracies in his or her PSIR, the trial court must respond to those allegations. *People v McAllister*, 241 Mich App 466, 473 (2000). However, unless a defendant establishes an effective challenge to its contents, the defendant's PSIR is presumed accurate and may be relied on by the sentencing court. *People v Callon*, 256 Mich App 312, 334 (2003).

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.*

*These provisions are detailed below in Section 8.22.

Challenges to the accuracy or relevancy of information in the PSIR must be made on the record. MCL 771.14(6). The court may adjourn the sentencing hearing to permit the parties to prepare a challenge or a response to a challenge. *Id*. 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. MCL 771.14(6); MCR 6.425(E)(1)(b) and (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 8.52, below.

8.21 Challenges to the Constitutional Validity of a Prior Conviction or Adjudication

A defendant's prior counseless convictions 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 PRV level. *People v Daoust*, 228 Mich App 1, 18 (1998); *People v Richert (After Remand)*, 216 Mich App 186, 195 (1996). Similarly, a juvenile adjudication obtained in violation of the juvenile's right to counsel is constitutionally infirm and cannot be used to enhance a criminal sentence. *People v Ristich*, 169 Mich App 754, 758 (1988). When a defendant challenges the constitutional validity of a prior conviction used to establish habitual offender status or to score the defendant's PRVs, the trial court is obligated to address and resolve the challenge. MCR 6.425(E)(1)(b).

*See Section 8.5(A) for a detailed discussion of this rule.

> **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 a defendant's prior convictions used to establish habitual offender status. That issue is discussed fully in Section 8.11.

A. Prima Facie Showing Required

A defendant who raises a challenge to a previous conviction allegedly obtained in violation of the defendant's 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*, *supra* at 31–32. 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, supra* at 31, quoting *People v Moore*, 391 Mich 426, 440–441 (1974).

A defendant makes a prima facie case that a previous conviction was obtained in violation of his or her right to counsel when the defendant presents a docket entry showing that a conviction was obtained against the defendant while the defendant was not represented by counsel. *People v Zinn*, 217 Mich App 340, 343–344 (1996). The defendant has met the burden under the second approach when the defendant presents evidence that he or she requested records of the previous convictions and the trial court from which the records were requested either failed to reply to the defendant's request or refused to supply the defendant with the records. *Id*.

A defendant may establish a prima facie case where a notation on the defendant's PSIR supports the claim that one of the defendant's two prior juvenile adjudications was obtained in the absence of counsel. *People v Alexander*, 207 Mich App 227, 230 (1994). In *Alexander*, the Court concluded that the notation in the defendant's PSIR was sufficient to shift the burden of proof to the prosecution to prove that the disputed juvenile adjudication was constitutional. *Id*.

Docket entries that are merely silent with regard to the defendant's representation do not provide the prima facie proof required to shift the burden to the prosecution to show that the defendant's previous conviction did not violate his or her constitutional right to counsel. *Zinn, supra* at 344. Similarly, that a defendant simply "ha[s] not received" the requested records is insufficient to satisfy the defendant's burden of proof. *Carpentier, supra* 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, supra* at 33.

In *Carpentier*, the defendant's request was met with neither of the two qualifying responses detailed in *Moore*. 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, supra* at 33–34. Further, the sentencing court did not refuse to furnish records in its possession because the court no longer possessed expunged court records. *Id*.

at 34. The absence or unavailability of a defendant's records does not satisfy the defendant's initial burden. *Id*. at 34 n 9.

B. Burden-Shifting Analysis

If a defendant makes a prima facie showing the burden shifts to the prosecution, and the court must hold a *Tucker* hearing where the prosecution has the burden of establishing that the prior conviction was constitutionally valid. *Carpentier, supra* at 31, citing *Tucker*, *supra*, 404 US 443.

In *Alexander*, where the defendant's PSIR contained a notation that one of his prior juvenile adjudications was obtained in the absence of counsel, the burden shifted to the prosecution to show that the adjudication was not unconstitutional. *Alexander, supra* 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;
- producing evidence that the defendant effected a valid waiver of the right to counsel at the prior conviction or adjudication; or
- producing evidence that no right to counsel existed at the prior conviction or adjudication.

Because the record did not indicate whether the prior juvenile adjudication was for an offense punishable by imprisonment, the *Alexander* Court remanded the case for the trial court to determine whether the disputed adjudication had been obtained in violation of the defendant's right to counsel. *Alexander, supra* at 230. See also *Daoust, supra* at 19 (the defendant's juvenile adjudications were properly considered because even though the adjudications were obtained in the absence of counsel, the record did not show that any of the adjudications resulted in incarceration).

There is no federal or state constitutional right to *appointed* counsel when a defendant is charged with a misdemeanor and no sentence of imprisonment is imposed. *Richert*, *supra* at 192–194. Thus, a prior counseless conviction or adjudication is properly considered by the sentencing court for the purposes of scoring the defendant's PRVs when no right to counsel existed.

Absent any other constitutional infirmity (and presumably subject to the 10-year gap requirement for PRV scoring), a defendant's expunged juvenile records are properly considered when imposing sentence. *People v Smith*, 437 Mich 293, 301–302 (1991).

8.22 Sentencing Court's Duty to Remedy Errors

If a party challenges the accuracy or relevance of any information in the PSIR, the court must allow the parties to be heard and resolve the challenges. MCR 6.425(E)(2).

MCR 6.425(E)(2) requires the trial court to do one of the following:

- make a finding about the challenged information; that is, the court must determine whether the information is accurate or relevant, or
- determine that a finding is not necessary because the challenged information will not be considered by the court in fashioning the defendant's sentence.

A sentencing court has "wide latitude" in fulfilling its duty under MCR 6.425(E)(2) to respond to claims of inaccuracy in a presentence report. *People v Spanke*, 254 Mich App 642, 648–649 (2003). Regardless of the method chosen by the court, a sentencing court must resolve a party's properly raised challenge to the accuracy or relevance of information on which the sentencing court bases its sentencing decision. See e.g., *People v Garvie*, 148 Mich App 444, 454–455 (1986) (a judge must do more than acknowledge the defendant's claims; the judge must express an opinion as to their merit), *People v Harrison*, 119 Mich App 491, 496 (1982) ("even though what the judge does is discretionary, it is clear that the judge must do something"), and *People v Major*, 106 Mich App 226, 230 (1981) (a court's failure to exercise discretion when obligated to do so is error). MCR 6.425(E)(2), discussed below, outlines the court's obligations in resolving any challenges to the information used at sentencing.

A. Determining the Information's Accuracy or Relevance

If the sentencing court determines that the challenged information is inaccurate or irrelevant, the information must either be stricken from or corrected in a defendant's PSIR before the report is sent to the Department of Corrections. *Spanke, supra* at 649; MCL 771.14(6); MCR 6.425(E)(2)(a); *People v Russell*, 254 Mich App 11, 22 (2002), rev'd on other grounds 471 Mich 182 (2004); *People v Paquette*, 214 Mich App 336, 346–347 (1995). Remand is necessary to correct factual inaccuracies in a defendant's PSIR. *Spanke, supra* 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, supra* at 649. Similarly, a trial court need not resolve or correct a claimed inaccuracy in a defendant's PSIR where the defendant's objection to the information "was not to an alleged factual inaccuracy in the report but to a conclusion

drawn from the undisputed facts." *People v Wybrecht*, 222 Mich App 160, 173 (1997), quoting *People v Greene*, 116 Mich App 205, 210 (1982), rev'd on other grounds 414 Mich 896 (1982).

B. Ignoring the Disputed Information

If the sentencing court decides to ignore disputed information in the PSIR when imposing sentence, "it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence." *Spanke, supra* at 649. Where the sentencing court's response to a defendant's allegation of inaccuracy is ambiguous, remand is necessary. *People v Brooks*, 169 Mich App 360, 364–365 (1988).

*Formerly MCR 6.425(D)(3)(a).

A trial court's decision that it will not consider information in a defendant's PSIR that the defendant claims is inaccurate does not conclude the trial court's responsibility regarding the challenged information. MCR 6.425(E)(2)(a)* expressly requires the court to order that the defendant's PSIR be amended in accordance with the trial court's finding. *People v Britt*, 202 Mich App 714, 718 (1993).

In addition to the record indicating that the sentencing court did not consider the challenged information at sentencing, the information must be deleted from the defendant's PSIR, and the defendant's attorney must be given an opportunity to review the amended PSIR before it is forwarded to the Department of Corrections. *People v Harmon*, 248 Mich App 522, 533 (2001); MCR 6.425(E)(2)(b).

C. Harmless Error

A trial court's failure to respond to a defendant's challenge to information contained in his or her PSIR or introduced at his or her sentencing hearing may be harmless error if the inaccuracies alleged by the defendant would have no effect on the sentence imposed. *McAllister*, *supra* at 473–474 (although the defendant was employed part-time, his PSIR indicated he was unemployed).

*See Section 8.52 for a detailed discussion of appellate review and issue preservation requirements.

Where the defendant failed to preserve the issue for appeal,* the 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*, the defendant's PSIR indicated he was convicted of first-degree premeditated murder when, in fact, the jury had convicted him of felony-murder. *McCrady, supra* at 32. The Court of Appeals acknowledged that the PSIR's misstatement was plain error but the Court noted that the error did not affect the defendant's substantial rights and remand was unnecessary. *Id*.

*Formerly MCR 6.425(D)(3).

Note: The Michigan Supreme Court has required strict adherence to the mandate in MCR 6.425(E)(2)* when the accuracy of information contained in a defendant's PSIR is disputed. In lieu of granting leave to appeal in two cases decided under the statutory

sentencing guidelines, the Court remanded the cases to the appropriate circuit court

> "for determination whether the presentence report contains information which is inaccurate . . . . If it is determined by the circuit court that inaccurate information is included in the presentence report, the report is to be corrected or the information deleted in accordance with MCR 6.425(D)(3) and the corrected report is to be forwarded to the Department of Corrections." *People v Hart*, 469 Mich 853 (2003) (failure of the defendant's PSIR to specify a date certain relating to the defendant's prior criminal history); and *People v McGee*, 469 Mich 853 (2003) (information relating to the defendant's trafficking in marijuana and the date that the defendant began using alcohol).

See also *People v Carino*, 456 Mich 865 (1997) and *People v Krist*, 413 Mich 937 (1982).

8.23 Allocution

The defendant, the defendant's lawyer, the prosecutor, and the victim must be given the opportunity to allocute—"to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(E)(1)(c).*

*Formerly MCR 6.425(D)(2)(c).

> "'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.

Generally, a trial court's failure to permit a defendant the opportunity to allocute at sentencing entitles the defendant to resentencing. *People v Wells*, 238 Mich App 383, 392 (1999).

MCR 6.425(E)(1)(c) is "straightforward" in its requirement that a defendant must be given the "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, 628–629 (2002). In *Petit*, the sentencing court complied with the mandate of the court rule by "generally asking if there was 'anything further.'" *Petit, supra* at 629, 636. The *Petit* Court explained:

> "Although we conclude that the trial court here did comply with the court rule, we note 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 has anything to say.
>
> "The dissent emphasizes that to require a specific inquiry would establish a bright line rule that would be easy to understand and easy to apply. While this is unquestionably true, we do not agree that such a specific inquiry is necessarily required by the court rule." *Id*. at 629 n 3 (internal citation omitted).

The *Petit* 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, supra* at 631–633.

Resentencing is not required where after realizing it had neglected to give the defendant an opportunity to address the court, a trial court afforded the defendant an opportunity to allocute, even though the trial court had already imposed sentence and stated that the defendant's allocution was not likely to change the court's sentencing decision. *Wells, supra* at 392.

Where no record evidence indicated that the trial court had decided on a particular sentence before the defendant's allocution, a defendant's right to allocute at his or her sentencing hearing is not rendered meaningless simply because the sentencing judge has prepared a written statement of reasons for departing from the sentencing guidelines before the sentence is actually imposed. *People v Grady*, 204 Mich App 314, 316 (1994).

"[T]he mandatory nature of a sentence does not *ipso facto* render the common-law right to allocute inapposite." *People v Petty*, 469 Mich 108, 120 (2003). Even where a defendant's statement will not affect the sentence imposed—as in a mandatory term or the penalty outlined in a sentence agreement—a defendant must be given the opportunity to allocute. *People v Smith*, 96 Mich App 346, 348–349 (1980).

A juvenile's right to allocution. A juvenile defendant who is convicted in a designated case proceeding and who receives an adult sentence must be given an opportunity to allocute at his or her sentencing hearing. *Petty*, *supra* at 121. In *Petty*, the Michigan Supreme Court remanded a juvenile's case to the trial court for resentencing where a juvenile defendant was not permitted to allocute before the court imposed an adult sentence. *Id*. at 122–123. The Court stated:

> "To deny a juvenile a meaningful opportunity to allocute at the only discretionary stage of a combined dispositional and sentencing proceeding would seriously affect the fairness and integrity of the judicial proceeding, particularly when the juvenile is subject to an adult criminal proceeding." *Id*. at 121.

The *Petty* Court's ruling prompted an immediate amendment to MCR 3.955(A). In addition to the prosecutor, the victim, and the defendant's attorney, the court rule requires that a juvenile defendant be given "an opportunity to advise the court of any circumstances [the defendant] believe[s] the court should consider" before imposing sentence. MCR 3.955(A); *Petty, supra* at 121–122 n 9.

8.24 Crime Victim's Impact Statement

A crime victim has a constitutional right "to make a statement to the court at sentencing." Const 1963, art 1, §24. The Crime Victim's Rights Act (CVRA) entitles a victim to the opportunity to make a statement about the impact of the offense at the defendant's sentencing hearing.* MCL 780.765; *People v Williams*, 244 Mich App 249, 253–254 (2001); *People v Cobbs*, 443 Mich 276, 285 (1993). Additionally, a crime victim may have submitted a written impact statement for consideration in preparing the defendant's PSIR. MCL 780.764; *Cobbs, supra* 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); MCR 6.425(B). When information is exempted from disclosure, the court must state on the record its reasons for the exemption, inform the parties of the nondisclosure, and include a notation in the PSIR indicating the exemption. MCL 771.14(3); MCR 6.425(B). If a crime victim requests that his or her written impact statement be included in the defendant's PSIR, the statement must be included. MCL 771.14(2); MCL 780.764.

*See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), Chapter 9.

For purposes of the crime victim's written and oral impact statements, "victim" is broadly defined in the CVRA as follows:

- A person* who suffers direct or threatened physical, financial, or emotional harm as the result of the commission of a crime. MCL 780.752(1)(j)(*i*).
- If the victim is deceased, one of the following (other than the defendant or the juvenile offender) in descending order of priority:
  - the spouse of the deceased victim (if any), MCL 780.752(1)(j)(*ii*)(A);
  - a child of the deceased victim if the child is 18 years old or older (if any), MCL 780.752(1)(j)(*ii*)(B);
  - a parent of the deceased victim (if any), MCL 780.752(1)(j)(*ii*)(C);
  - the guardian or custodian of a child of the deceased victim if the child is younger than 18 years of age (if any), MCL 780.752(1)(j)(*ii*)(D);

*"Person" includes both individuals and business or governmental entities. MCL 780.752(1)(g).

- a sibling of the deceased victim (if any), MCL 780.752(1)(j)(*ii*)(E); or
- a grandparent of the deceased victim (if any), MCL 780.752(1)(j)(*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 18 years of age if the parent, guardian, or custodian so chooses. MCL 780.752(1)(j)(*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)(j)(*iv*).

*See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), Section 9.2.

A crime victim has the right to make an oral impact statement at the defendant's sentencing hearing.* MCL 780.765. 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. *Id*.

The *possible* 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*.

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, supra* at 418–419. Even where the defendant was acquitted of the offense detailed in the victim's impact statement, the statement was properly included in the defendant's PSIR where there was no evidence that the defendant was denied an opportunity to refute the victim's statement. *People v Pureifoy*, 128 Mich App 531, 536 (1983).

In addition to the specified or "statutory" victim's statement, a sentencing court has broad discretion over the type and source of information permitted at the hearing and on which the court may rely in imposing the defendant's sentence. *People v Albert*, 207 Mich App 73, 74–75 (1994). In *Albert*, the trial court permitted the attorney representing one of the victims in a civil case against the defendant to address the court at sentencing. *Albert, supra* at 74. Because the Court of Appeals could "perceive no bias or prejudice on the part of the sentencing court" as a result of the attorney's statements about the defendant, the court did not abuse its discretion in permitting the attorney to speak. *Id*.

Where a defendant has reviewed the PSIR and its attachments and is given an opportunity to raise any objection to their content, there is no error. *People v Kisielewicz*, 156 Mich App 724, 728 (1986). Consistent with the purpose expressed in the applicable statutes and court rule that a PSIR "should contain a broad range of information so that the sentence can be tailored to fit the circumstances of the individual defendant," the trial court properly considered several letters received from individuals other than the "statutory" victims because each letter "concerned society's perceived need for protection from the offender." *Kisielewicz, supra* at 729.

Absent any evidence that the information presented at sentencing caused the court to act with bias or prejudice toward the defendant, the court may consider any information about the defendant's life and characteristics provided the information is relevant to the court's sentence determination. *Albert, supra* at 74–75; *McAllister, supra* at 476. However, letters and other communication from the victim, the victim's family members, and other individuals must be disclosed to the defendant if the court will rely on information contained in the letters when it sentences the defendant. *McAllister, supra* at 474–476. Disclosure preserves the defendant's right to respond to the information on which his or her sentence is based. *Id*. at 476.

> **Note:** A sentencing court's authority to consider information presented at the sentencing hearing in determining the sentence to impose on a defendant may be affected when the Michigan Supreme Court decides *People v Drohan*, 472 Mich 881 (2005). The Court granted leave to appeal in *Drohan* to determine whether recent United States Supreme Court decisions applied to Michigan's sentencing scheme. In *People v Claypool*, 470 Mich

715, 730 n 14 (2004), the Michigan Supreme Court indicated that the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296 (2004), did not apply to Michigan's indeterminate sentencing scheme. *Blakely*, and later, *United States v Booker*, 543 US ___ (2005), concluded that a court could not engage in judicial factfinding for purposes of scoring a defendant's sentencing guidelines when the outcome resulted in an increase in the defendant's sentence. According to *Blakely*, any facts used to increase a defendant's sentence must be proved to a jury beyond a reasonable doubt.

*Formerly MCR 6.425(D)(3)(a).

In *People v Grove*, 455 Mich 439 (1997), the defendant objected at sentencing to "inadmissible information attached to the presentence report." *Grove, supra* at 452. The information to which the defendant objected consisted of two letters written by a law enforcement official asserting that the "defendant was a sexual predator" and including details of "unrelated and unsubstantiated allegations of sexual misconduct by defendant." *Id*. The sentencing court indicated it would not consider the disputed information but failed to delete the information from the defendant's PSIR before it was forwarded to the Department of Corrections. *Id*. The Michigan Supreme Court agreed with the *Grove* defendant and remanded the case for correction of the defendant's PSIR as required by MCR 6.425(E)(2)(a).* *Grove, supra* at 452, 477.

In a case consolidated with *Grove*, the Court remanded a case for deletion of a letter attached to the defendant's PSIR after the Court of Appeals had reviewed the defendant's claim and "f[ou]nd this error harmless in light of the trial court's express statement on the record that the information was not considered in passing sentence." *People v Austin*, 209 Mich App 564, 571 (1995), aff'd in part, rev'd in part, and remanded sub nom *Grove, supra*, 455 Mich 439.

8.25 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:

*See Section 8.31 for discussion of sentence credit.

- 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).

*See Section 8.30 for proper and improper considerations.

- "[I]f the sentence imposed is not within the guidelines range, [the court must] articulate the substantial and compelling reasons* justifying that specific departure[.]" MCR 6.425(E)(1)(e).

*Restitution is discussed in Section 8.37.

- The court must "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).

Part VI—Fashioning an Appropriate Sentence

8.26 Scope and Objectives

The trial court's objective in sentencing a defendant is to tailor a penalty that is appropriate to the seriousness of the offense and the criminal history of the offender. *People v Rice*, 235 Mich App 429, 445 (1999), citing *People v Milbourn*, 435 Mich 630, 636 (1990). 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.

Rice, supra at 446; *People v Adams*, 430 Mich 679, 686 (1988); *People v Snow*, 386 Mich 586, 592 (1972).

> "[A] sentencing judge does not have unfettered discretion. Numerous checks shield the defendant from an arbitrary sentence and help to insure that the objective of personalized disposition is achieved. In addition to the compilation of a presentence report and scoring under the sentencing guidelines, other decisions of this 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." *Adams*, *supra* at 687 (footnotes omitted).

Court rule and statutory provisions require the court to use the sentencing guidelines as provided by law when determining the length of a defendant's sentence. MCR 6.425(D); MCL 769.34(2). "Proposed scoring of the guidelines shall accompany the presentence report." MCR 6.425(D).

Even when evidence is not admissible at the defendant's trial, a sentencing court may properly consider it in determining an appropriate sentence. *People v Watkins*, 209 Mich App 1, 5–6 (1995).

> **Note:** A sentencing court's authority to consider information not admissible at a defendant's trial in determining the sentence to impose on a defendant may be affected when the Michigan Supreme Court decides *People v Drohan*, 472 Mich 881 (2005). The Court granted leave to appeal in *Drohan* to determine whether recent United States Supreme Court decisions applied to Michigan's sentencing scheme. In *People v Claypool*, 470 Mich 715, 730 n 14 (2004), the Michigan Supreme Court indicated that the United States Supreme Court's decision in *Blakely v*

Washington, 542 US 296 (2004), did not apply to Michigan's indeterminate sentencing scheme. *Blakely*, and later, *United States v Booker*, 543 US ___ (2005), concluded that a court could not engage in judicial factfinding for purposes of scoring a defendant's sentencing guidelines when the outcome resulted in an increase in the defendant's sentence. According to *Blakely*, any facts used to increase a defendant's sentence must be proved to a jury beyond a reasonable doubt.

A. Intermediate Sanctions

In addition to the sentencing considerations listed above, fashioning an appropriate sentence under the statutory guidelines requires the court's attention to the offender's PRV and OV scores and the specific cell in which those scores place the offender in the appropriate sentencing grid.

"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 monograph and in the State of Michigan Sentencing Guidelines Manual.

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

*Departure from the recommended minimum sentence is discussed in Sections 8.48–8.51, below.

Absent a departure from the guidelines,* a trial court must impose an intermediate sanction when the offender's PRV and OV scores place him or her in an intermediate sanction cell. MCL 769.34(4)(a). 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). Where a specific cell in a sentencing grid requires a court to impose an intermediate sanction, the court must comply with the mandate or articulate for the record a substantial and compelling reason for departure. *People v Stauffer*, 465 Mich 633, 636 (2002).

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

- inpatient or outpatient drug treatment or participation in a drug treatment court (MCL 600.1060 to 600.1082);

- probation* with conditions required or authorized by law;
- residential probation;
- probation with jail or 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 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*).

*See Section 8.40 for a detailed discussion of probation.

*See Section 8.47.

*See Section 8.33.

Absent a departure from the guidelines, the court may *not* sentence an offender to prison when the offender's recommended minimum sentence falls within an intermediate sanction cell. MCL 769.34(4)(a). "An 'intermediate sanction' can mean a number of things, but it does not include a prison sentence." *Stauffer, supra* at 635. However, an offender may be incarcerated in a county jail as part of an intermediate sanction. An offender may be sentenced to a term of incarceration in the county jail as long as the term does not exceed the upper limit indicated in the intermediate sanction cell* or 12 months, whichever is less. MCL 769.34(4)(a). Intermediate sanctions also include a sentence of five years' probation for a felony conviction. MCL 769.31(b)(*ii*); MCL 769.34(4)(d)(*ii*); MCL 771.2(1).

*Unless otherwise specified in the applicable statutory provisions. See the discussion of *People v Hendrix,* below.

In *Stauffer*, 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.* Ordinarily, the defendant's sentence would have been unremarkable because on its face, the sentence was "within the guidelines." *Stauffer, supra* at 634–635. Pursuant to the plain language of MCL 769.34(4)(a), however, the trial court was required to impose an intermediate sanction on the defendant because the upper limit of the range in the defendant's cell was less than 18 months. 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, supra* at 636.

*The minimum term was reduced to 16 months to comply with the two-thirds rule.

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

For a defendant sentenced for violating MCL 257.625(9)(c),* 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* involved MCL 257.625(9)(c), a statute expressly noted in MCL 769.34(2)(a). *Hendrix, supra* at 20. 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. In *Hendrix*, one sentencing alternative under MCL 257.625(9)(c) authorized the court to sentence a defendant to prison for a minimum of one year, and this one-year mandatory minimum applied *only if* the defendant was sentenced to prison. *Hendrix, supra* at 21.

The *Hendrix* case illustrates the operation of MCL 769.34(2)(a). MCL 769.34(2)(a), as applied to the facts in *Hendrix*, is as follows:

> "If the Michigan vehicle code . . . mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections [*if a defendant is sentenced under the option in MCL 257.625(9)(c)(i), a mandatory minimum of one year applies*] and the Michigan vehicle code . . . authorizes the sentencing judge to impose a sentence that is less than that minimum sentence [*MCL 257.625(9)(c)(ii) authorizes a court to sentence a defendant to probation and community service with a maximum of one year in a county jail, a lesser sentence than the one-year minimum in prison*], imposing a sentence that exceeds the recommended sentence range [*in Hendrix, the range was 0 to 11 months] but is less than the mandatory minimum sentence [one year in prison if the defendant is sentenced to prison*] is not a departure under this section." *Hendrix, supra* at 21–22; MCL 769.34(2)(a).

In addition to the sentence appropriate for an offender whose guidelines scores place him or her in an intermediate sanction cell, intermediate sanctions are authorized and sometimes required under other provisions of the statutory sentencing guidelines. For example, 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. MCL 769.34(4)(b). Unless the trial court expresses a substantial and compelling reason for departure or some other departure applies, the court may not sentence an offender to prison for conviction of a class H felony attempt. MCL 769.34(4)(b).

*"Contraband" includes alcohol, poison, prescription drugs, and other controlled substances.

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. 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.

B. Straddle Cells

Generally, "straddle cells" are those cells that "straddle" the division between prison and jail. "Straddle cells" are those cells in which the lower limit of the recommended range is one year or less and the upper limit of the recommended range is more than 18 months. MCL 769.34(4)(c); *Stauffer*, *supra* at 636 n 8. "Straddle cells" appear shaded in the sentencing grids published in existing guidelines manuals and in the grids used in this monograph, as shown in the example above.

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

*Departure from the recommended minimum sentence is discussed in Sections 8.48–8.51, below.

- 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*).

*Discussed in subsection (A) above.

In *People v Martin*, 257 Mich App 457 (2003), pursuant to a *Cobbs* agreement,* the defendant pleaded guilty to larceny from a person, MCL 750.357, 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 the state prison. *Martin, supra* at 458. The defendant was sentenced as a second habitual offender, MCL 769.10, to ten months' imprisonment 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, supra* at 458.

*See Section 8.32 for more information.

The *Martin* defendant's PRV and OV scores placed him in a straddle cell, 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' imprisonment. *Martin, supra* at 459.

*Determinate and indeterminate sentencing are discussed in detail in Section 8.27, below.

MCL 769.8 prohibits determinate sentencing* where the penalty for a felony offense may be imprisonment in a state prison. The *Martin* Court 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, supra* at 461. This legislative intent, according to the *Martin* Court, would be frustrated by application of MCL 769.8 to the situation in *Martin*:

> "[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, supra* at 461.

MCL 769.31(b)(*viii*) expressly indicates that "jail" is an appropriate "intermediate sanction." *Martin, supra* at 462.

The trial court's imposition of a determinate jail sentence was appropriate in *Martin* because the indeterminate sentencing requirement did not apply to the situation there. Indeterminate sentencing is mandated where a defendant is sentenced to a "term of years"—but where the trial court opts not to impose a *prison* sentence, as in *Martin*, the guidelines mandated that the defendant be sentenced to an intermediate sanction for which a jail sentence could not exceed 12 months. *Id*. at 462–466 (Murray, J., concurring).

8.27 Indeterminate Sentences

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 maximum penalty authorized by law for conviction of the sentencing offense, unless otherwise provided by Chapter 9 of the Code of Criminal Procedure. *Id*.

Indeterminate sentencing does not apply to offenses for which the only punishment prescribed by law is life imprisonment. MCL 769.9(1). Where mandatory life imprisonment is the penalty for an offense, the sentencing guidelines do not apply to that offense.

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. 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. MCL 769.9(2). 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*. In other words, a sentence of "30 years to life" is invalid.

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. The *Tanner* Court ruled that where an indeterminate sentence is imposed, the minimum sentence must not exceed two-thirds of the maximum sentence. In other words, any minimum term of imprisonment that exceeded two-thirds of the maximum term imposed was not an indeterminate sentence. *People v Tanner*, 387 Mich 683, 689–690 (1972).

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

B. The *Tanner* Rule Extended to Habitual Offenders

Although the indeterminate sentence act 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*, 432 Mich 84, 93–94 (1989). In *Wright*, the trial court sentenced the defendant to a term of 28 to 30 years, and the Court of Appeals modified the sentence to conform with the two-thirds rule of *Tanner*, resulting in a 20- to 30-year term of imprisonment. *Wright, supra* at 88. 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 [MCL 769.10]." *Wright, supra* at 89. According to the *Wright* Court:

> "In *People v Tanner*, 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 Court [in *Tanner*] stated:
>
> * * *
>
> > "'Convinced as we are, that a sentence with too short an interval between minimum and maximum is not indeterminate, we hold that any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act.'" *Wright, supra* at 89–90, quoting *Tanner*, *supra* at 689–690 (citation and footnote omitted).

The *Wright* Court noted that similar policy considerations existed in the process of sentencing habitual offenders, and the Legislature incorporated the policy in amendments to the habitual offender sentencing act by eliminating determinate sentences. *Wright, supra* at 90–91; MCL 769.10(2). Before the 1978 amendment to MCL 769.10, the statute required only that a habitual offender's sentence bear a specific relationship to the term prescribed for a first-time offender convicted of the same offense. *Wright, supra* at 91.

MCL 777.21(3) provides the method of determining a habitual offender's sentence with reference to the upper limit of the range recommended by the statutory guidelines; the two-thirds rule as codified in MCL 769.34(2)(b) applies to sentences imposed under MCL 777.21.

C. The *Tanner* Rule Codified

The Legislature codified the *Tanner* rule in MCL 769.34(2)(b). The statutory language provides:

> "The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."

*The defendant's sentence for the third crime—home invasion—is not discussed because it did not violate the two-thirds rule.

Where life imprisonment or a term of years is the statutory maximum authorized for a conviction, a trial court electing to sentence a defendant to a term of years does not violate the two-thirds ratio of *Tanner* when the minimum sentence exceeds two-thirds of the maximum sentence actually imposed. *People v Powe (Powe II)*, 469 Mich 1024 (2004). In *Powe*, the defendant was convicted of three crimes for which the maximum sentence was life imprisonment or any term of years. In an unpublished opinion, the Michigan Court of Appeals concluded that the trial court had violated the two-thirds rule of *Tanner* by imposing sentences of 18 years and 9 months to 25 years for the defendant's convictions of armed robbery and carjacking.* *People v Powe (Powe I)*, unpublished opinion per curiam of the Court of Appeals, decided September 16, 2003 (Docket No. 240584). The Court vacated the defendant's sentences and remanded the case to the trial court to resentence the defendant to an indeterminate term in compliance with *Tanner*. *Powe I, supra*.

In lieu of granting the defendant's application for leave to appeal, the Michigan Supreme Court reversed the Court of Appeals and ordered that the defendant's sentences be reinstated as they were imposed by the sentencing court. *Powe II, supra*. According to the Court:

> "A minimum sentence that falls within the properly-scored sentencing guidelines range must be affirmed. MCL 769.34(10). MCL 769.34(2)(b) provides that a 'court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the *statutory* maximum sentence.' (Emphasis added.) Since the statutory maximums for the offenses for which the defendant was convicted are 'life or any term of years[,'] the circuit court did not

impose sentences that violated MCL 769.34(2)(b)." *Powe II, supra*.

Note: *Powe II*'s outcome is inconsistent with the Supreme Court's disposition of two cases involving similar minimum-maximum sentence ratios. In *People v Irving*, 465 Mich 965 (2002), the Court remanded the case for resentencing because the minimum sentences imposed exceeded two-thirds of the maximum sentence. Like *Powe II*, one of the underlying offenses was punishable by life imprisonment. Unlike *Powe II*, however, the *Irving* Court concluded that the two-thirds rule remained applicable to the ratio between the minimum and maximum sentences if a sentence other than life was imposed. See also *People v Reid*, 465 Mich 969 (2002). In both cases, the Court instructed the trial court to reduce the defendants' minimum sentence so it would comply with *Tanner* and the *Tanner* rule as codified in MCL 769.34(2)(b).

8.28 Concurrent and Consecutive Sentences

Sentences run concurrently unless otherwise indicated; consecutive sentences may not be imposed unless expressly authorized by law. *People v Gonzalez*, 256 Mich App 212, 229 (2003). Where consecutive sentencing is authorized, the statutory language will indicate whether the consecutive nature of the sentence is mandatory or discretionary. A defendant's 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). Any party—the prosecutor, the defendant, or the defense 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*) plainly requires 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, 127 (2005). 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*); *Mack, supra* at 127–128.

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), aff'd 469 Mich 898 (2003). In affirming the Court of Appeals, the Michigan Supreme Court, in *Spann*, *supra* at 898, noted that the Court of Appeals had wrongly stated that the statutory use of the term "imprisonment" was ambiguous; according to the Supreme Court, the Legislature uses the

term "imprisonment" to refer both to confinement in prison and confinement in jail. See e.g., MCL 769.28; MCL 35.403; MCL 66.8; MCL 430.55.

For purposes of the Code of Criminal Procedure, misdemeanors punishable by more than one year ("two-year misdemeanors") are felonies for purposes of consecutive sentencing. *People v Smith*, 423 Mich 427, 434 (1985). See also *People v Daniel*, 207 Mich App 47, 54–55 (1994) (misdemeanor offense under the controlled substance act constituted a felony for purposes of consecutive sentencing under the same act, MCL 333.7401(3)), and *People v Wyrick*, 265 Mich App 483, 489 (2005) (misdemeanor possession of marijuana, second offense, constituted a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)).

Offenses specified as misdemeanors in the Penal Code, even if punishable by more than one year, may not be classified as felonies for purposes of establishing the underlying felony on which, for example, the crime of felony-firearm is based. *People v Baker*, 207 Mich App 224, 225 (1994). See also *People v Williams*, 243 Mich App 333, 335 (2000) (resisting arrest is defined as a misdemeanor under the Penal Code and does not qualify as a felony for purposes of establishing that the defendant absconded on felony bond).

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); *People v Dailey*, 469 Mich 1019 (2004). *Doxey* specifically dealt with 2002 PA 665, the amendment to the controlled substance sentencing provisions that eliminated the mandatory nature of sentences under MCL 333.7401(3) and gave the trial court discretion whether such a sentence was to be concurrent or consecutive to other sentences.

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 (discussed below), if a judgment of sentence does not specify whether a sentence is to run concurrently or consecutively to an offender's other sentences, the sentence must be computed as if it is to be served concurrently. MCL 791.264(3).

Where the conviction is for a violation of MCL 750.193 (breaking prison), MCL 750.195(2) (breaking jail when jailed for felony), MCL 750.197(2) (breaking jail while awaiting court proceeding), MCL 750.227b (felony-firearm), or 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, 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).

B. Mandatory Consecutive Sentences

Felony or misdemeanor punishable by imprisonment committed while the offender was incarcerated or had escaped. 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*, 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, 118–119 (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 offense. *Id*.

Felony offense committed when the offender was on 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. The term for the subsequent offense "shall begin to run at the expiration of the remaining portion of the term imposed for the previous offense." MCL 768.7a(2).

> "[T]he '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 County Pros v Dep't of Corr*, 451 Mich 569, 584 (1996).

The consecutive sentencing mandate may result in "stacked" sentences involving more than one consecutive sentence. In *People v Piper*, 181 Mich App 583 (1989), the defendant escaped from prison where he was serving a life sentence that was imposed in 1966. The defendant committed several felony offenses while he was on escape in 1983, 1984, and 1985. The defendant was convicted of the offenses that occurred during his escape and sentences for these convictions were imposed in 1986. Pursuant to MCL 768.7a(1), the sentences were made consecutive to the defendant's 1966 life sentence. *Piper*, *supra* at 584–585. In 1988 the defendant pleaded guilty to second-degree murder, an offense he committed while an escapee, and the sentence imposed on the defendant for murder was made consecutive to the terms of imprisonment already imposed on him in 1966 and 1986. *Id*. at 584. That the defendant's sentence was made consecutive to a term of imprisonment already consecutive to a prior term did not result in impermissible stacking. *Id*. at 585–586.

Major controlled substance offense when a previous felony offense 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 the defendant has notice that the authorities are seeking him 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 for the subsequent offense). See also *People v Henry*, 107 Mich App 632, 637 (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*, 450 Mich 316, 330–331 (1995). A felony charge is no longer pending if probation is imposed following conviction of the charge. *People v Malone*, 177 Mich App 393, 401–402 (1989); *People v Leal*, 71 Mich App 319, 321 (1976).

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.

The consecutive sentencing required for felony-firearm offenses, MCL 750.227b, is discussed in subsection (D), below.

C. Discretionary Consecutive Sentences

Controlled substance offenses. Effective March 1, 2003, 2002 PA 665 eliminated mandatory consecutive sentencing for offenses under MCL 333.7401(3) and made it discretionary. *Gonzalez, supra* at 229–230; *Morris*, *supra* at 320. A sentence imposed for a controlled substance offense under MCL 333.7401(2)(a)* may be made consecutive to any sentence imposed for the commission of *any* other felony. MCL 333.7401(3).

*See Section 8.16 for a description of these offenses.

For the following offenses, consecutive sentencing is discretionary for violations "arising out of the same transaction as the sentencing offense."

- MCL 333.7401c, possession of equipment or buildings for the purpose of manufacturing controlled substances in violation of MCL 333.7401 or counterfeit controlled substances in violation of MCL 333.7402. MCL 333.7401c(5).
- MCL 750.81d, assaulting or obstructing a law enforcement officer, firefighter, or emergency medical personnel 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, 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 any of the statutes listed. MCL 769.36(1).

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 750.119, corruption with the intent to bias the opinion or influence the outcome of any matter pending before the court or other decision-maker. MCL 750.119(3).

- MCL 750.120a(2) and (4), willfully attempting to influence a juror by intimidation, or retaliating or threatening to retaliate against a juror for performing his or her duties. MCL 750.120a(6).
- MCL 750.122, giving or offering anything of value to encourage, discourage, or influence a witness, or retaliating against a person for having been a witness. MCL 750.122(11).
- MCL 750.483a, withholding information ordered by the court or retaliating against an individual for reporting a crime. MCL 750.483a(10).

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 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 752.797, 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).

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, 230–231 (1988).

Medicaid fraud. A trial court may impose consecutive sentences for an offender's "conviction of separate offenses under [the Medicaid False Claim Act]." Violation of MCL 400.609, fourth offense, is subject to the sentencing guidelines (MCL 777.14a) and is punishable by not more than ten years of imprisonment.

Identity theft. A sentence imposed for a violation of MCL 445.65 or MCL 445.67 (identity theft) 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).

D. Felony-Firearm Convictions

The sentence imposed for a felony-firearm conviction must be consecutive to the sentence imposed for the felony or attempted felony on which the felony-firearm conviction is based. MCL 750.227b(2). A sentence for felony-firearm is a determinate number of years depending on the number of the defendant's previous felony-firearm convictions. MCL 750.227b(1).

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). This provision lists four weapons offenses on which a felony-firearm conviction cannot be based:

- unlicensed sale of firearms and sales to convicted felons and minors, MCL 750.223;
- carrying a concealed weapon (CCW), MCL 750.227;
- carrying a licensed pistol beyond the scope of the license, MCL 750.227a; and
- alteration, removal, or obliteration of a firearm's identification mark, MCL 750.230.

With the exception of the four offenses listed above, a felony-firearm sentence is to be consecutive only to the sentence imposed for the felony on which the felony-firearm conviction is based. MCL 750.227b(2); *People v Clark*, 463 Mich 459, 463–464 (2000). If a felony-firearm conviction is based on a qualifying underlying felony (i.e., not MCL 750.223, .227, .227a, or .230), the defendant may also be convicted of any of the four offenses but the sentence imposed for the conviction must be concurrent to the felony-firearm sentence. *People v Cortez*, 206 Mich App 204, 207 (1994).

The consecutive sentencing requirement applies only when the penalty imposed for the underlying felony is a term of imprisonment. *People v Brown*, 220 Mich App 680, 682–683 (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. *Brown, supra* at 682–684.

8.29 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 guidelines sentences were regularly 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. *Milbourn*, *supra* at 635–636; *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, supra* at 661; *People v Hadley*, 199 Mich App 96, 105 (1993).

> **Note:** Although the judicial 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, 415–416 (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*, 454 Mich 90, 94–95 (1997); *Kennebrew, supra* 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 (After Remand)*, 250 Mich App 59, 64 (2002).

B. Statutory Sentencing Guidelines

The concept of proportionality is somewhat different under the statutory sentencing guidelines. An offender's OV and 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, supra* at 263–264.

Unless a trial court relied on inaccurate information or on guidelines that were erroneously scored, a sentence within the appropriate guidelines range is presumptively proportionate and must be affirmed on appeal. *Id*. at 261, 263–264. A sentence imposed under the statutory guidelines is reviewed for its proportionality only if it represents a departure* from the range recommended under the guidelines. *Id*. at 262.

*See Sections 8.48–8.51 for more information on departures.

C. When No Guidelines Apply to the Sentencing Offense

In cases where the statutory guidelines were not applicable to an offense at the time it was committed but were made applicable before sentencing, a sentencing court is authorized to impose any sentence proportionate to the circumstances of the offender and the offense and within the statutory maximum set by the Legislature. *People v Calabrese*, unpublished opinion per curiam of the Court of Appeals, decided June 17, 2004 (Docket No. 246795).

In *Calabrese*, the defendant was convicted of driving with a suspended license and causing death, MCL 257.904(4). The statutory sentencing guidelines were applicable to this offense at the time of the defendant's sentencing but the guidelines were not yet applicable to the offense at the time it was committed. The *Calabrese* Court concluded that it would be improper to apply to the instant offense the sentencing guidelines for a similar crime because those guidelines were in effect at the time the defendant was sentenced. The Court concluded that where no guidelines apply to a felony offense, the sentencing court should be guided by the sound decisions reached in *Milbourn*, *supra* at 636 (principle of proportionality); *People v Tanner*, 387 Mich 683, 690 (1972) (minimum sentence must not exceed two-thirds of the maximum sentence); and *People v Shipley*, 256 Mich App 367, 378 (2003) (a sentence in excess of statutory limits is invalid). *Calabrese, supra.*

8.30 Additional Information to Consider Before Imposing Sentence

Before the statutory sentencing guidelines were established, the Supreme Court refused 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*, 430 Mich 679, 687 (1988). According to the *Adams* Court:

> "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." *Adams, supra* at 687 (internal citation omitted).

A. Proper Considerations

In *People v Oliver*, 242 Mich App 92, 98 (2000), the Court of Appeals stated that factors proper for consideration by a sentencing court when fashioning a defendant's sentence include:

- the severity and nature of the crime committed;
- the circumstances surrounding the criminal conduct;
- the defendant's attitude toward his or her criminal behavior;
- the defendant's social and personal history; and
- the defendant's criminal history, including subsequent offenses.

Perjury may be considered under specific circumstances; a defendant's false testimony does not vest the court with uncontrolled discretion in imposing the defendant's sentence. A trial court must not give improper weight to this factor or ignore evidence that the defendant's testimony was not wilful or flagrant. *Adams*, *supra* at 693. Perjury is properly considered by a sentencing court in fashioning a defendant's sentence

> "when the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to wilful, material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation . . . ." *Id*. at 693.

*Under the statutory guidelines, PRV 7 accounts for any subsequent *offenses* committed by a defendant, not a defendant's conduct while incarcerated.

A defendant's post-arrest conduct* 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*, 448 Mich 312, 318 (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." *Houston, supra* at 323.

Evidence of a defendant's lack of remorse may be properly considered in determining the defendant's potential for rehabilitation. *People v Spanke*, 254 Mich App 642, 650 (2003).

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 not arbitrarily lengthen an offender's prison sentence for the expressed purpose of incarcerating the offender "beyond the age of violence." *People v Fisher*, 176 Mich App 316, 318 (1989), aff'd in part, rev'd in part 442 Mich 560 (1993). 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, it is 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). According to the *McKernan* Court:

> "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 on by a court." *McKernan*, *supra* at 783.

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*, 437 Mich 293, 301–303 (1991). In deciding that a defendant's juvenile court history may be used at sentencing, the Michigan Supreme Court amended the court rules to require that defendants receive a copy of their PSIRs before sentencing; the amendment was intended to provide a defendant with sufficient notice of the juvenile history contained in his or her PSIR so that the defendant would have an opportunity to refute the information at sentencing. *People v McFarlin*, 389 Mich 557, 575–576 (1973).

As long as the information is accurate and the defendant has an opportunity to refute it, a court may consider a defendant's alleged criminal conduct even when the conduct does not result in conviction. *People v Wiggins*, 151 Mich App 622, 625 (1986). 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*, 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)* 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

*See Sections 8.5 and 8.6 for detailed information on scoring a defendant's PRVs and OVs.

or subsequent felony convictions accumulated by the defendant at the time of sentencing for the scored offense (PRV 7). Similarly, the offense variables (OVs) account for the circumstances surrounding the defendant's commission of the sentencing offense. For example, OVs 1 and 2 assign points for the defendant's use of a weapon during the offense.

B. Improper Considerations

It is improper to consider the following factors when fashioning an offender's sentence:

- A defendant's refusal to provide authorities with information about other criminal conduct. *People v Peques*, 104 Mich App 45, 46 (1981), aff'd 412 Mich 851 (1981).
- Good-time credits, disciplinary credits, or the effect of prison overcrowding. *People v Fleming*, 428 Mich 408, 428 (1987).
- A defendant's assertion of innocence. *People v Wesley*, 428 Mich 708, 718–719 (1987).
- An independent finding of guilt with regard to other offenses with which a defendant is charged. *People v Grimmett*, 388 Mich 590, 608 (1972).

  But see *People v Granderson*, 212 Mich App 673, 679 (1995) (a trial court may properly consider facts underlying a defendant's previous acquittal of other charges), and *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).

Note: Principles involving the scope of information properly considered by a trial court at sentencing may be clearly defined when the Michigan Supreme Court decides *People v Drohan*, 472 Mich 881 (2005). The Court granted leave to appeal in *Drohan* to determine whether recent United States Supreme Court decisions applied to Michigan's sentencing scheme. In *People v Claypool*, 470 Mich 715, 730 n 14 (2004), the Michigan Supreme Court indicated that the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296 (2004), did not apply to Michigan's indeterminate sentencing scheme. *Blakely*, and later, *United States v Booker*, 543 US ___ (2005), concluded that a court could not engage in judicial factfinding for purposes of scoring a defendant's sentencing guidelines when the outcome resulted in an increase in the defendant's sentence. According to *Blakely*, any facts used to increase a defendant's sentence must be proved to a jury beyond a reasonable doubt.

- A defendant's last-minute plea or waiver of the right to a jury trial. *People v Earegood*, 383 Mich 82, 85 (1976).
- A defendant's exercise of his or her constitutional right to trial by jury or a defendant's waiver of a jury trial. *People v Godbold,* 230 Mich App 508, 517–520 (1998).
- A defendant's polygraph results. *Adams*, *supra* at 687 n 6; *People v Towns*, 69 Mich App 475, 479 (1976).
- A defendant's eligibility for parole. *People v Wybrecht*, 222 Mich App 160, 173 (1997).
- The possibility that a defendant may be granted early release or community placement. *People v Miller*, 206 Mich App 638, 642 (1994); *People v McCracken*, 172 Mich App 94, 101–103 (1988).
- Local sentencing policy, to the extent that it prevents an individualized sentence tailored to the circumstances of the offense and the offender. *People v Chapa*, 407 Mich 309, 311 (1979); *People v Catanzarite*, 211 Mich App 573, 583–584 (1995).
- The length of any consecutive or concurrent sentences to which the defendant may also be subject. *People v Miles*, 454 Mich 90, 95, 101 (1997).

8.31 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; *People v Preiskorn*, 424 Mich 327, 334, 344 (1985). 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 Heim*, 206 Mich App 439, 442 (1994).

When a defendant is entitled to credit for time served, the trial court must grant the credit at the defendant's sentencing. MCL 769.11b, the sentencing credit statute, provides:

> "Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing."

Presentence incarceration must be for sentencing offense. 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 (1997); *People v Alexander (After Remand)*, 207 Mich App 227, 229 (1994).

Similarly, 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." *Connor, supra* 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*, 203 Mich App 432, 433 (1994).

Presentence incarceration must be due to denial or inability to furnish bond. 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 that time because it did not result from a denial or inability to post bond).

When a defendant's participation in a tether program did not result from a denial of bond or an inability to post bond, the time spent in the program does not qualify for credit under MCL 769.11b. *People v Reynolds*, 195 Mich App 182, 183 (1992).

The sentencing credit statute does not entitle a defendant to sentence 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. *People v Whiteside*, 437 Mich 188, 196 (1991).

MCL 769.11b does not authorize credit for time served at a treatment or rehabilitation center where the trial court delayed the defendant's sentencing "to give [the defendant] the opportunity to prove to the court his eligibility for probation or other leniency compatible with his rehabilitation." *People v Scott*, 216 Mich App 196, 200 (1996).

Where a defendant's placement in a treatment or rehabilitation facility is not the equivalent of serving time "in jail" and was not occasioned by the court's denial of bond or the defendant's inability to post bond, MCL 769.11b does not apply. *Scott, supra* at 199.

A defendant is not entitled to credit for time served against his or her Michigan sentence when the defendant is held as a parole detainee from a foreign jurisdiction. *People v Seiders*, 262 Mich App 702, 705 (2004). The plain language of MCL 769.11b dictates the outcome in such cases:

> "MCL 769.11b does not . . . entitle a defendant to credit for time served prior to sentencing if he is incarcerated for an offense other than that for which he is ultimately convicted, or for other, unrelated reasons. . . . [B]ond is neither set nor denied when a defendant is held in jail on a parole detainer. Apparently, the *Johnson* Court did not consider the fact that the defendant was incarcerated due to a parole detainer. Because defendant was held on a parole detainer, the question of bond is not an issue, and MCL 769.11b does not apply [internal citations omitted]." *Seiders, supra* at 706–707.

Seiders, supra, resolved the question of sentence credit against a defendant's Michigan sentence when the defendant is sentenced for a crime committed in Michigan while he or she was on parole from a foreign jurisdiction. "Given the clear and unambiguous language of the relevant statutory provisions, the *Seiders* [] Court's holding . . . was not unexpected or indefensible[;]" therefore, the *Seiders* rule is fully retroactive. *People v Meshell*, 265 Mich App 616, 640–641 (2005).

Special alternative incarceration units. When a defendant is ordered to participate in a special alternative incarceration (SAI) unit* as a condition of probation, double jeopardy considerations demand that the time spent there must be credited against the sentence imposed after the defendant's probation violation if placement in the SAI unit is the equivalent of being "in jail." *People v Hite (After Remand)*, 200 Mich App 1, 2 (1993) (the boot camp was enclosed by an eighteen-foot high fence topped with barbed wire).

*Sentences involving SAI units are discussed in detail in Section 8.47, below.

Double jeopardy considerations when presentence time served is the equivalent of being "in jail." Whether credit for time served as a condition of probation is required by double jeopardy considerations depends on the meaning of the phrase "in jail" for purposes of both the sentencing credit statute (MCL 769.11b) and the probation revocation statute (MCL 771.4). *Whiteside, supra* at 201. According to the *Whiteside* Court, typical rehabilitation programs are not jails as the term is commonly understood, and rehabilitation programs generally emphasize treatment rather than incarceration. *Id*. at 202.

Neither MCL 769.11b nor the state and federal prohibitions against double jeopardy require that a defendant be given sentence credit for time spent in a private rehabilitation program as a condition of probation. *Whiteside, supra* at 202.

For purposes of the state and federal double jeopardy clauses, sentence credit is required only when the time a defendant was "confined" to a boot camp

program is the equivalent of being "in jail." US Const, Am V; Const 1963, art 1, § 15; *People v Wagner*, 193 Mich App 679, 682 (1992); *People v Reynolds*, 195 Mich App 182, 184 (1992).

Double jeopardy considerations demand that a defendant be given credit for time spent incarcerated as a condition of probation when the defendant is later sentenced for violating probation (e.g., a defendant is sentenced to five years' probation with the first six months to be served in the county jail). *People v Sturdivant*, 412 Mich 92, 97 (1981); *Hite, supra* at 4–5.

Sheriff's good-time credits. A probation violator who is sentenced to prison is entitled to credit for time he or she actually served in jail and for any days of good-time credit awarded to him or her by the sheriff. MCL 51.282(2); *People v Resler*, 210 Mich App 24, 25 (1995). Statutory authority provides for the revocation of good-time credit in cases involving parole but no such authority exists in the context of conditional probation. *Resler, supra* at 27.

> "[A]lthough there is no constitutional right to good-time credit, once a good-time credit provision is adopted and a prisoner earns that credit, the deprivation of good-time credit constitutes a substantial sanction, and a prisoner may claim that a deprivation of good-time credit is a denial of a protected liberty interest without due process of law." *People v Cannon*, 206 Mich App 653, 656 (1994).

A trial court cannot deny a defendant the good-time credit opportunities provided in MCL 51.282(2). 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. *Cannon, supra* at 657.

8.32 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*, *sentence agreement*, and *sentence bargain* 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,* the trial court must determine whether the parties have made a plea agreement. MCR 6.302(C)(1). If a sentence bargain or plea agreement has been made, the court must ask the parties what the terms of the agreement are and confirm those terms with all parties, including the defendant. MCR 6.302(C)(2).

*A comprehensive discussion of the requirements of a plea hearing is beyond the scope of this monograph. See Hummel, *Criminal Procedure Monograph 3: Misdemeanor Arraignments & Pleas—Revised Edition* (MJI, 2004), for information relevant to both felony and misdemeanor plea proceedings.

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 specific sentence disposition 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 the sentence agreed to or recommended by the prosecutor; 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 the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement."

Negotiating a plea agreement or sentence bargain. The extent to which a trial court may involve itself in sentence negotiations is defined by the Michigan Supreme Court's decisions in *People v Killebrew*, 416 Mich 189 (1982), and *People v Cobbs*, 443 Mich 276 (1993). Another Supreme Court decision, *People v Williams*, 464 Mich 174 (2001), discusses the distinction between a trial court's role in sentence negotiations occurring under *Cobbs* and *Killebrew*.

People v Killebrew. *Killebrew* limits a trial court's involvement to the approval or disapproval of an existing agreement between the prosecutor and the defendant in which the defendant's plea is linked to the prosecutor's non-binding sentence recommendation. *Killebrew, supra* at 209. 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 it has decided not to accept the prosecutorial recommendation *and* the court

must advise the defendant of the sentence it has determined is appropriate to the circumstances of the offense and the offender. *Killebrew*, *supra* at 209; *People v Scott*, 197 Mich App 28, 32 (1992). Following the court's rejection of the prosecutorial recommendation and its announcement of the intended sentence, the defendant must be given the opportunity to affirm or withdraw his or her guilty plea based on the court's expressed disposition. *Killebrew, supra* at 210; *Scott, supra* at 32. See also *People v Shuler*, 188 Mich App 548, 551–552 (1991) (where the sentencing court expressly informed the defendant that it would exceed the sentence recommended by the prosecutor, named the specific sentence it intended to impose, and permitted the defendant to withdraw or affirm his guilty plea in light of the court's announcement).

- **Characteristics of negotiations under *Killebrew***
  - a defendant's plea is linked to a non-binding 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.
  - the defendant may affirm or withdraw his or her plea based on the trial court's expressed disposition.

People v Cobbs. *Cobbs* involves a trial court's participation in sentence negotiations in the absence of any agreement between the defendant and the prosecution. *Cobbs, supra* at 282–284. *Cobbs* authorizes the trial court to make a preliminary evaluation of the sentence appropriate to the offense and the offender *if requested by the prosecution or the defendant*. Either party may ask the court to indicate on the record the sentence that appears appropriate for the charged offense, based on the information then available to the court. *Id*. at 283. Even when a defendant pleads guilty or no contest to the charged offense in reliance on the court's preliminary determination—a *Cobbs* agreement—the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id*. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id*.

When a sentencing court decides not to follow the sentence in the plea agreement, *Killebrew* requires the court to indicate what sentence it intends to impose; if the stated sentence is unacceptable to the prosecutor in light of the lesser offense to which the defendant was permitted to plead, the prosecutor must have the opportunity to withdraw from the agreement. *People v Siebert*, 450 Mich 500, 510 (1995).

> "[T]he trial court's exclusive authority to impose sentence does not allow it to enforce only parts of a bargain. A court may not keep the prosecutor's concession by accepting a guilty plea to

reduced charges, and yet impose a lower sentence than the one for which the prosecutor and the defendant bargained. Accepting a plea to a lesser charge over the prosecutor's objection impermissibly invades the constitutional authority of the prosecutor. When a court receives information that in its judgment dictates a lower sentence, it must alert the prosecutor of the sentence it intends to impose and allow the prosecutor to withdraw from the plea. *Siebert, supra* at 510–511 (internal citations and footnote omitted).

- **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.

People v Williams. In *People v Williams*, 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* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge." *Williams, supra* at 177. However, the *Williams* Court ruled that the requirement of *Killebrew*—when the court rejects a prosecutorial recommendation it must indicate the sentence it considers appropriate—does not apply to a *Cobbs* agreement rejected by the same court from which the preliminary sentence evaluation issued. *Williams*, *supra* 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.

Simply put, a sentencing court is limited to making only one sentence evaluation as part of the negotiation process. In *Killebrew*, the court's one evaluation occurs after the court has decided not to follow an agreement between the prosecution and the defendant. In *Cobbs*, the court's one evaluation is the first one in the negotiation process if either party requests it. *Williams* reiterates the rule that a sentencing judge may not offer more than one sentence evaluation in any negotiation process; that is, if the court has made the first evaluation under *Cobbs* and later finds that it cannot comply

with that evaluation, *Killebrew* does not authorize the court to indicate the sentence it believes is appropriate.

> "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, 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*, *supra* at 179–180.

- **The impact of *Williams* on negotiations**
  - the *Williams* decision is implicated only when there exists a *Cobbs* agreement (the defendant has agreed to plead guilty based on the trial court's preliminary sentence evaluation), and the trial court determines it will not adhere to the *Cobbs* agreement.
  - the defendant must be given an opportunity to withdraw his or her guilty plea after the court informs the defendant it will not abide by the sentence first announced.
  - unlike the requirement in *Killebrew* that arises when the court refuses to follow a prosecutorial sentence recommendation, when the trial court decides against imposing the sentence first articulated by the court itself (the *Cobbs* agreement), it may *not* inform the defendant of the sentence the court has since decided is appropriate (because to do so would involve the court in the

sentence negotiation process to an extent carefully avoided in *Killebrew* and *Cobbs*).

Failure of a plea agreement. Fundamental fairness requires that promises made during plea negotiations should be respected, provided that the person making the promise was authorized to do so and the defendant relied on the promise to his or her detriment. *People v Ryan*, 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, 665–667 (2000). Such remedies include specific performance of the agreement or withdrawal of the plea. *Guilty Plea Cases*, 395 Mich 96, 127 (1975).

Plea agreements involving probation. A trial court may impose additional conditions on a defendant's sentence of probation, even when the sentence is part of the defendant's plea agreement and did not contain the additional conditions.* *People v Johnson*, 210 Mich App 630, 633–634 (1995). In *Johnson*, 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. According to the defendant, because the additional conditions imposed by the court were not conditions to which he agreed, he did not knowingly or voluntarily agree to the sentence imposed. *Johnson, supra* at 632.

*See Section 8.40 for more information on probation.

Based in large part on the "unique features of probation," the Court of Appeals affirmed the *Johnson* defendant's sentence as imposed by the trial court. *Johnson*, *supra* at 634. Noting that an order of probation may be altered or amended, in form and substance, without providing the defendant with notice of the change or an opportunity to be heard about it, the Court concluded "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.

Plea withdrawals. A defendant is entitled to withdraw his or her plea at any time before the court accepts the plea on the record. MCR 6.310(A).

> **Note:** The rules articulated in *Williams, Cobbs,* and *Killebrew*, have been added to MCR 6.310 by amendments that will be effective January 1, 2006.
>
> MCR 6.310(B), as amended, governs a defendant's plea withdrawal after acceptance, but before the defendant is sentenced:
>
>> "(B) *Withdrawal After Acceptance but Before Sentence*. 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 subrule (C).

"(2) the defendant is entitled to withdraw the plea if

"(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; 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."

*Formerly MCR 6.310(C).

A plea may be vacated on the prosecution's motion if the defendant has failed to comply with the terms of his or her plea agreement. MCR 6.310(E).* As amended, MCR 6.310(E) states:

"(E) *Vacation of Plea on Prosecutor's Motion*. On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement."

Part VII—Fines, Costs, Assessments, and Restitution

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. MCR 1.110; MCL 600.4803(1). An individual who fails to satisfy in full a penalty, fee, or costs imposed by the court within 56 days after the amount was due is subject to a late penalty equal to 20 percent of the amount 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*.

8.33 Fines

Whether a fine may be imposed for conviction of a criminal offense will be indicated in the statutory language defining the offense. Generally, the maximum amount of the fine allowed for conviction of an offense is included in 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, the offender may be assessed a fine of not more than $10,000.00.* 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 $5,000.00. MCL 750.503.

*In addition to any term of imprisonment up to the statutory maximum of 20 years as determined by proper scoring of the sentencing guidelines.

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. A defendant may be sentenced to imprisonment until he or she satisfies the amount of the fine and costs imposed by the court. However, a defendant may not be imprisoned for nonpayment beyond the time indicated in his or her sentence. *Id*.

Excessive fines are prohibited by Michigan's Constitution. Const 1963, art 1, § 16. A fine must be proportionate to the offense; a fine may be excessive even when it falls within the amount authorized by statute. *People v Antolovich*, 207 Mich App 714, 718 (1995). In *Antolovich,* the trial court ordered the defendant to pay the maximum fine permitted by law for the crime he committed.* On appeal, the Court recognized that although *People v Milbourn*, 435 Mich 630 (1990), did not directly address the issue of proportionality with regard to monetary penalties, *Milbourn's* rationale was appropriate in reviewing the proportionality of the fine in relation to the crime committed. *Antolovich*, *supra* at 719. Even though the fine imposed did not exceed the statutory limit, the *Antolovich* Court concluded that the defendant's fine was excessive where the "[d]efendant was fined the maximum amount allowed by the statute for delivering one of the least amounts necessary to violate the statute." *Id*. at 719–720.

*A violation of MCL 333.7401 (2)(a)(*iv*).

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*.

8.34 Costs

A sentencing court may not order a defendant to pay costs unless those costs are expressly authorized by a penal or procedural statute. *People v Jones*, 182 Mich App 125, 126 (1990) (the penal statute under which the defendant was sentenced, MCL 333.7401(2)(c), provided for punishment by imprisonment or fine or both, but did not expressly authorize the imposition of costs).

MCL 769.3 and MCL 769.1f are procedural statutes in which 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 authorizes a sentencing court to impose the costs of prosecution (among other monetary penalties) when a defendant is convicted of the offenses listed in the statute. The offenses for which costs are authorized under MCL 769.1f are discussed in subsection (B), below.

*See Section 8.40 for a comprehensive discussion of probation conditions.

As a condition of probation. Costs as a condition of probation are authorized by MCL 771.3(2)(c).* Any costs awarded under the statute must comply with the requirements of MCL 771.3(5):

> "[T]he costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer."

Any costs imposed under MCL 771.3(5) "must bear a reasonable relationship to the expenses of prosecution." *People v Blachura*, 81 Mich App 399, 403 (1978), citing *People v Teasdale*, 335 Mich 1, 5 (1952).

When determining the appropriate amount of costs to order and the method by which a probationer will make payment, a trial court is obligated to consider a probationer's financial resources and the burden that costs will have on the probationer's other financial obligations. MCL 771.3(6)(a). A sentencing court has discretion over the means by which a probationer makes payment for the costs ordered and may require that payment be made immediately or within a specific period of time or by specified installments. MCL 771.3(7). A court is prohibited from ordering costs that the probationer cannot and will not be able to pay during his or her term of probation. MCL 771.3(6)(a).

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 family. *Id*.

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 a fine, costs, damages, restitution, or any combination of these penalties. 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*.

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* is authorized where the probationer fails to comply with the order and has failed to make a good faith effort at compliance. *Id*. To determine whether an individual's probation should be revoked on the basis of unpaid costs, the court must consider the following:

*See Section 8.53 for more information on probation revocation.

- 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).

When a defendant's probation is revoked, the trial court's authority to order fines and costs is limited by the terms of the statute violated. *People v Krieger*, 202 Mich App 245, 247 (1993). This is because when an individual's probation is revoked, the trial court may sentence the defendant as if the probation order had never been made. *Krieger, supra* at 247; MCL 771.4. Therefore, any costs or fines ordered as a condition of probation under MCL 771.3(2) do not automatically carry over when a defendant is sentenced as a result of probation revocation. *Krieger, supra* at 248. When a defendant is sentenced as if the probation order had never entered, the sentencing court is sentencing the defendant for the underlying conviction and may order costs or fines only if the underlying statute expressly authorizes them. *Id*. at 247. According to the *Krieger* Court:

> "[T]he trial court can[not] revoke only a portion of the probation order. In this case, the fines and costs had been assessed as a condition of probation. Once probation was revoked, no outstanding conditions existed. Therefore, . . . the trial court was without authority to retain the imposition of court costs and fines." *Id*. at 248.

A. Costs of Prosecution Authorized by Penal Statutes

A few penal statutes 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 that may be permitted pursuant to another statute, e.g., overtime wages for law enforcement personnel, etc.*

*See subsection (B), below.

*Other statutes authorizing these costs for conviction of a *misdemeanor* offense are not discussed.

The following statutes authorize a trial court to order a defendant to pay the costs of prosecution if the defendant is convicted of a felony* described in these statutes:

- **MCL 205.28(2),** *prohibiting authorized treasury personnel from unlawful conduct involving state administration of taxes.* This statute indicates that the costs of prosecution *must* be made part of a defendant's sentence *if* the court imposes a fine, imprisonment, or a combination of both for the conviction. The statutory language states: a violator "is guilty of a felony, punishable by a fine of not more than $5,000.00, or imprisonment for not more than 5 years, or both, *together with* the costs of prosecution."

- **MCL 257.625k(7),** *providing false information with regard to an ignition interlock device.* Statutory language authorizes imprisonment, a fine, or both, "together with the costs of prosecution" as the penalty for a violation. Like the statute above, this one indicates that costs of prosecution *must* be ordered for a conviction under this statute when the court imposes a fine, imprisonment, or a combination of both.

- **MCL 750.49(5),** *fighting, baiting, or shooting an animal, or breeding an animal for those purposes.* A court is permitted, but not mandated, to order an offender convicted under this statute to pay the costs of prosecution.

- **MCL 750.50(4),** *failing to adequately care for an animal.* A court must order an offender convicted of a third or subsequent violation of this statute to pay the costs of prosecution.

B. Costs of Emergency Response and Prosecution Under MCL 769.1f

MCL 769.1f authorizes or requires the court to order the defendant to reimburse 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). Allowable expenses include:

- the salaries or wages, including overtime pay, of law enforcement personnel for the time spent responding to the incident, arresting and processing the defendant, investigating the incident and preparing reports, and collecting and analyzing evidence (including procedures to determine the alcohol/drug content of an offender's blood, breath, or urine). MCL 769.1f(2)(a).

- the salaries or wages, including overtime pay, of fire department and emergency medical service personnel, including volunteer personnel, for the time spent responding to the incident and in providing services. MCL 769.1f(2)(b).

- the cost of medical supplies lost or used by the fire department and emergency medical services personnel, including volunteers. MCL 769.1f(2)(c).

- the salaries, wages, or other compensation, including overtime pay, for the time spent by prosecution personnel to investigate and prosecute the offense. MCL 769.1f(2)(d).

- the costs of extraditing a defendant from another state, including, but not limited to:

  — transportation costs, and

  — the salaries or wages, including overtime pay, for time spent by authorized personnel processing the extradition and returning the offender to Michigan. 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 above, 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).

1. Offenses That Allow a Court To Order Reimbursement of Costs

In cases involving a conviction for violating or attempting to violate any of the following statutes, a sentencing court has discretion to order a defendant to pay the expenses listed above. MCL 769.1f(1)(a)–(i). Costs listed here are *not* mandatory, and unless otherwise noted, the following statutes describe felony offenses to which the statutory sentencing guidelines apply.

- **MCL 257.625(1),** operating a motor vehicle while under the influence of alcoholic liquor and/or a controlled substance, or violating a local ordinance substantially corresponding to this section. MCL 769.1f(1)(a).

- **MCL 257.625(3),** operating a motor vehicle while visibly impaired, or violating a local ordinance substantially corresponding to this section. MCL 769.1f(1)(a).

*MCL 769.1f has not been amended since September 30, 2003, when MCL 257.625 (8) was added to the list of §625 offenses.

- **MCL 257.625(4),** operating a motor vehicle in violation of §625(1), (3), or (8) (operating a motor vehicle with the presence of any controlled substance)* causing death. MCL 769.1f(1)(a).
- **MCL 257.625(5),** operating a motor vehicle in violation of §625(1), (3), or (8) causing serious impairment of a body function. MCL 769.1f(1)(a).
- **MCL 257.625(6),** "zero tolerance" violations (a minor operating a motor vehicle with any bodily alcohol content), or violating a local ordinance substantially corresponding to this section. MCL 769.1f(1)(a).
- **MCL 257.625(7),** child endangerment (operating a motor vehicle in violation of §625(1), (3), (4), (5), (6), or (8) when a passenger under the age of 16 is an occupant of the vehicle). MCL 769.1f(1)(a).
- **MCL 257.625m,** operating a commercial vehicle while intoxicated, or violating a local ordinance substantially corresponding to this section. MCL 769.1f(1)(a).
- **MCL 257.626c,** felonious driving (as a result of operating a motor vehicle, snowmobile, ORV, aircraft, vessel, or locomotive while under the influence of alcohol and/or drugs). MCL 769.1f(1)(b).
- **MCL 257.324,** negligent homicide (as a result of operating a motor vehicle, snowmobile, ORV, aircraft, vessel, or locomotive while under the influence of alcohol and/or drugs). MCL 769.1f(1)(b).
- **MCL 750.321,** manslaughter (as a result of operating a motor vehicle, snowmobile, ORV, aircraft, vessel, or locomotive while under the influence of alcohol and/or drugs). MCL 769.1f(1)(b).
- **MCL 750.316,** first-degree murder (as a result of operating a motor vehicle, snowmobile, ORV, aircraft, vessel, or locomotive while under the influence of alcohol and/or drugs). MCL 769.1f(1)(b).
- **MCL 750.317,** second-degree murder (as a result of operating a motor vehicle, snowmobile, ORV, aircraft, vessel, or locomotive while under the influence of alcohol and/or drugs). MCL 769.1f(1)(b).
- **MCL 324.82127(4),** operating a snowmobile under the influence of alcohol and/or drugs causing death. MCL 769.1f(1)(c).
- **MCL 324.82127(5),** operating a snowmobile under the influence of alcohol and/or drugs causing serious impairment of a body function. MCL 769.1f(1)(c).
- **MCL 324.81134(6),** third or subsequent conviction for operating an ORV while under the influence of alcohol and/or drugs. MCL 769.1f(1)(d).

- **MCL 324.81134(7),** operating an ORV while under the influence of alcohol and/or drugs causing death. MCL 769.1f(1)(d).
- **MCL 324.81134(8),** operating an ORV while under the influence of alcohol and/or drugs causing serious impairment of a body function. MCL 769.1f(1)(d).
- **MCL 324.81135,** operating an ORV while visibly impaired.* MCL 769.1f(1)(d).
- **MCL 259.185(4),** operating or serving as a crewmember of an aircraft while under the influence of alcohol and/or drugs causing death. MCL 769.1f(1)(e).
- **MCL 259.185(5),** operating or serving as a crewmember of an aircraft while under the influence of alcohol and/or drugs causing serious impairment of a body function. MCL 769.1f(1)(e).
- **MCL 259.185(8),** third or subsequent conviction for operating or serving as a crewmember of an aircraft while under the influence of alcohol and/or drugs. MCL 769.1f(1)(e).
- **MCL 324.80176(1) and (3),*** general prohibition against operating a vessel while under the influence of alcohol and/or drugs, or while visibly impaired, or violating a local ordinance substantially corresponding to either of these sections. MCL 769.1f(1)(f).
- **MCL 324.80176(4),** operating a vessel while under the influence of alcohol and/or drugs causing death. MCL 769.1f(1)(f).
- **MCL 324.80176(5),** operating a vessel while under the influence of alcohol and/or drugs causing serious impairment of a body function. MCL 769.1f(1)(f).
- **MCL 462.353(5),** third or subsequent conviction for operating a locomotive while under the influence of alcohol and/or drugs. MCL 769.1f(1)(g).
- **MCL 462.353(6),** operating a locomotive while under the influence of, or visibly impaired by, alcohol and/or drugs causing death. MCL 769.1f(1)(g).
- **MCL 462.353(7),** operating a locomotive while under the influence of, or visibly impaired by, alcohol and/or drugs causing serious impairment of a body function. MCL 769.1f(1)(g).
- **MCL 462.355** (repealed by 2002 PA 658, effective April 1, 2003).*
- **MCL 750.411a(2)(a),** making and communicating to another person a false report about a violation of chapter XXXIII (MCL 750.200 *et seq*., explosives, bombs and harmful devices) or about a violation of MCL 750.327 (death by explosives on a vehicle or vessel), MCL 750.328 (death by explosives in or near a building), MCL 750.397a

*Misdemeanor offense to which the statutory guidelines do not apply.

*Sentencing guidelines do not apply to these offenses.

*MCL 769.1f(1) has not yet been amended to reflect this change.

(placing harmful objects in food), or MCL 750.436 (poisoning food, drink, medicine, or water supply). MCL 769.1f(1)(h).

- **MCL 750.411a(2)(b),** threatening to violate chapter XXXIII (MCL 750.200 *et seq*., explosives, bombs and harmful devices) or MCL 750.327 (death by explosives on a vehicle or vessel), MCL 750.328 (death by explosives in or near a building), MCL 750.397a (placing harmful objects in food), or MCL 750.436 (poisoning food, drink, medicine, or water supply) and communicating the threat to any other person. MCL 769.1f(1)(h).

*Sentencing guidelines do not apply.

- **MCL 600.2950(23),** criminal contempt involving a personal protection order against certain individuals known personally by the petitioner as specified in the statute.* MCL 769.1f(1)(i).

*Sentencing guidelines do not apply.

- **MCL 600.2950a(20),** criminal contempt involving a personal protection order against an individual not specified in MCL 600.2950(1).* MCL 769.1f(1)(i).

*Sentencing guidelines do not apply.

- **MCL 600.2950i,** criminal contempt involving a valid foreign protection order.* MCL 769.1f(1)(i).

2. Offenses That Require a Court To Order Reimbursement of Costs

Expenses must be ordered against an offender for a conviction arising from any violation or attempted violation of the following statutes. MCL 769.1f(9). Costs listed here are *not* discretionary, and unless otherwise noted, the statutes below describe felony offenses to which the statutory sentencing guidelines apply.

- **MCL 750.200,** transporting explosives by common carrier.
- **MCL 750.200i,** manufacturing, delivering, possessing, etc. a harmful device causing property damage, physical injury, serious impairment of a body function, or death.
- **MCL 750.200j,** manufacturing, delivering, possessing, etc. an irritant device causing property damage, physical injury, serious impairment of a body function, or death.
- **MCL 750.200*l*,** falsely exposing a person to a harmful substance or device.
- **MCL 750.201,** transporting certain types of explosives.
- **MCL 750.202,** shipping an explosive with false markings.
- **MCL 750.204,** sending an explosive with malicious intent, or sending an explosive causing property damage, physical injury, or serious impairment of a body function.

- **MCL 750.204a,** sending or transporting an imitation explosive device with malicious intent.
- **MCL 750.207,** placing explosives with malicious intent, or placing explosives causing property damage, physical injury, or serious impairment of a body function.
- **MCL 750.209,** placing an offensive/injurious substance with the intent to injure, or causing property damage, physical injury, or serious impairment to a body function, or to alarm or annoy.
- **MCL 750.209a,** possessing an explosive device in a public place.
- **MCL 750.210,** possessing/carrying an explosive or combustible substance with malicious intent, or causing property damage, physical injury, or serious impairment of a body function.
- **MCL 750.210a,** sale of valerium.
- **MCL 750.211a,** manufacturing/possessing an explosive or incendiary device with malicious intent, or causing property damage, physical injury, or serious impairment of a body function.
- **MCL 750.212a,** explosives violation involving a vulnerable target and causing death or injury.
- **MCL 750.327,** death by explosives on a vehicle or vessel.
- **MCL 750.327a,** sale of explosives to minor.*
- **MCL 750.328,** death by explosives in or near a building.
- **MCL 750.436,** various felony violations involving poisoning food, drink, medicine, or the water supply causing property damage, physical injury, or serious impairment of a body function, or falsely reporting that food, drink, medicine, or the water supply was poisoned.
- **MCL 750.543f,** terrorism.
- **MCL 750.543h,** hindering prosecution of terrorism or certain terrorist acts.
- **MCL 750.543k,** soliciting or providing material support for terrorism or terrorist acts.
- **MCL 750.543m,** threatening or making a false report of terrorism.
- **MCL 750.543p,** use of the internet/telecommunications to commit certain terrorist acts.
- **MCL 750.543r,** possession of vulnerable target information with the intent to commit certain terrorist acts.

*A misdemeanor offense to which the guidelines do not apply.

C. Costs of a Court-Appointed Attorney

Where a defendant has claimed indigence and the financial inability to retain an attorney, the defendant may not be required to pay any portion of the cost of court-appointed counsel as a condition of receiving the assistance of counsel. *People v Nowicki*, 213 Mich App 383, 387 (1995). As long as the assistance of counsel is not conditioned on the defendant's payment, a defendant may be required to reimburse the county for the costs of his or her representation if the defendant is determined to be partially indigent and able to contribute to his or her legal costs. *Id*.; MCR 6.005(C).

When a sentencing court orders a defendant to reimburse the county for costs related to his or her representation, the court is obligated to consider the defendant's financial ability to pay those costs. *People v Dunbar*, 264 Mich App 240, 254–255 (2004).

**Fuller v Oregon*, 417 US 40 (1974); *James v Strange*, 407 US 128 (1972); *Bearden v Georgia*, 461 US 600 (1983).

The *Dunbar* Court recounted the Fourth Circuit's recitation of United States Supreme Court precedent* in which five fundamental characteristics of a constitutional reimbursement program were approved. *Dunbar, supra,* 264 Mich App at 252–254. As explained by the Fourth Circuit in *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984), a constitutional reimbursement program must meet the following five standards:

- An indigent defendant must be guaranteed the assistance of counsel under all circumstances, and determining the indigent defendant's eligibility for court-appointed counsel may not contain any "cumbersome procedural obstacles."
- The defendant must not be ordered to repay the cost of court-appointed counsel unless he or she has been provided with "notice of the contemplated action and a meaningful opportunity to be heard."
- Because payment should not be required as long as the defendant is indigent, the court that determines whether repayment should be ordered must consider the defendant's resources, the demands on his or her finances, and any hardships repayment would cause the defendant or the defendant's family.
- A defendant that accepts the assistance of a court-appointed attorney must not be subject "to more severe collection practices than the ordinary civil debtor."
- An indigent defendant whose order to reimburse the county for his or her attorney's fees is a condition of work-release, parole, or probation "cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy."

In *Dunbar*, the defendant's primary assertion of error involved the sentencing court's failure to "ma[k]e a specific finding on the record regarding his ability to pay." *Dunbar, supra* at 254. The Court concluded that the sentencing court's obligation to consider a defendant's ability to pay did not require it to make a formal finding on the record. *Id*. at 254–255. The Court explained that "although such a finding would provide a definitive record of the court's consideration," no such finding was required in the absence of a specific objection based on the defendant's ability to repay the amount ordered. *Id*. at 254. The Court further noted that

> "the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id*. at 254–255.

In addition to the factors already discussed, the amount a sentencing court orders a defendant to repay the county for the cost of his or her court-appointed counsel must reasonably reflect the defendant's foreseeable ability to pay. *Id*. at 255.

> **Note:** The *Dunbar* Court noted that no statutory provision exists to govern the procedure of ordering a defendant to repay the costs of his or her legal representation and encouraged the Legislature to codify such a procedure using the restitution statute, MCL 769.1a, as a model. *Dunbar, supra* at 254 n 12.

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 (5)–(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 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 family. *Id*.

8.35 Minimum State Costs

If a defendant is ordered to pay any combination of a fine, costs, or applicable assessments, the court must order the defendant to pay a minimum state cost of $60.00 for each felony conviction.* MCL 769.1j(1)(a).

*Effective October 1, 2003. 2003 PA 70.

> **Note:** The statutory language only clearly requires a court to impose the minimum state cost *if other costs, fines, or assessments are ordered*. There is no express prohibition against, or authority for, ordering the minimum state cost in cases where other costs, fines, or assessments are *not* also imposed.

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*.

8.36 Crime Victim Assessment

*See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), Section 2.8, for more information about crime victim assessments.

Adult offenders must pay a $60.00 crime victim assessment when convicted of a felony offense.* MCL 780.905(1). In contrast to the minimum state cost, which must be ordered for each felony conviction arising from a single case, only one crime victim fee per case may be ordered, even where there are multiple convictions. *Id*.

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).

8.37 Restitution

*See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), Chapter 10, for a more complete discussion of restitution.

Restitution in Michigan is a crime victim's constitutional and statutory right.* Const 1963, art 1, § 24; MCL 780.766(2).

Restitution is mandatory for an offender convicted of a felony offense. MCL 769.1a(2); MCL 780.766(2). Except for restitution payments made to certain entities—service providers or the victim services commission, for example—the court must order the convicted felon to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." *Id*.

A sentencing court has the authority to order a defendant to pay restitution to compensate all victims harmed by the defendant's course of criminal conduct, even though the defendant was not convicted of some of the specific criminal acts committed against some of the victims. *People v Gahan*, 456 Mich 264, 265 (1997). The plain language of the Crime Victim's Rights Act (CVRA) "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." *Gahan, supra* at 270; MCL 780.766(2). In deciding *Gahan*, the Court determined that the Legislature's unqualified use of the phrase "course of conduct" indicated that the phrase should be given the broad meaning it enjoyed at common law; "[t]hus, the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *Gahan, supra* at 272.

"In determining the amount of restitution to order . . . , the court shall consider the amount of loss sustained by any victim as a result of the offense." MCL 780.767(1). A defendant's ability to pay is not a factor properly considered when determining the appropriate amount of restitution due a crime victim. MCL 780.767; *People v Crigler*, 244 Mich App 420, 428 (2001).

For the purposes of restitution only, "victim" is defined the same way in the Code of Criminal Procedure and in the CVRA:

> "[V]ictim means 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).

*For example, legal entities are not victims for purposes of MCL 780.766(4) (physical or psychological injury), or MCL 780.766(5) (bodily injury resulting in death or serious impairment of a body function).

See also *People v McEvoy*, ___ Mich App ___, ___ (2005) (a school district is a victim entitled to restitution under MCL 780.794(1)(b) and MCL 712A.30(1)(b)).

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). 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. *Newton, supra* at 69; *Crigler, supra* at 424, 427. 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. *Crigler, supra* at 427.

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. *People v Lueth*, 253 Mich App 670, 692 (2002). See also *People v Dewald*, ___ Mich App ___, ___ (2005) (restitution order was appropriate even though the defendant did not benefit to the extent of the amount ordered).

Restitution hearings. 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. *People v Grant*, 455 Mich 221, 233–234 (1997); *People v Hart*, 211 Mich App 703, 706 (1995).

A sentencing court is not required to hold a hearing when determining the type or amount of restitution appropriate to a case. "Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence." *Grant, supra* at 243; MCL 780.767(4).

If a restitution hearing is necessary, MCL 780.767(4) specifies the burdens of proof and production:

> "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."

A defendant is foreclosed from challenging a court's restitution order in all plea agreements negotiated after restitution was made mandatory (May 1, 1994) because a defendant is presumed to know that restitution will be ordered when he or she pleads guilty to an offense to which restitution applies. *People v Ronowski*, 222 Mich App 58, 60–61 (1997).

The rules of evidence, with the exception of those relating to privilege, do not apply to restitution hearings. MRE 1101(b)(3).

As a condition of probation. Restitution must be a condition of probation. MCL 771.3(1)(e).

8.38 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 ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court *must* order that payment be made from a defendant's personally deposited cash bond or bail after it has been discharged. *Id*.

Allocation of the funds available under MCL 765.15, and of payments made by a defendant toward the total amount owed, is governed by MCL 775.22.*

*Provisions in the Crime Victim's Rights Act concerning the allocation of funds mirror those in MCL 775.22. See MCL 780.766a, MCL 780.794a, and MCL 780.826a.

- Fifty percent of the amount available or received must be applied to victim payments (without regard to the underlying violation). MCL 775.22(2); 780.766a(2); 780.794a(2); and 780.826a(2).

> "'Victim payment' means restitution paid to a victim or a victim's estate but not to reimburse a person who paid the victim for loss or to pay a crime victim assessment." 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.
- Payment of other costs.
- Payment of fines.
- Payment of probation or parole supervision fees.
- Payment of assessments and other payments.

MCL 775.22(3); 780.766a(3); 780.794a(3); and 780.826a(3).

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.
- Payment of fines and other costs.
- Payment of assessments and other payments.

MCL 775.22(4); 780.766a(4); 780.794a(4); and 780.826a(4).

8.39 Probation Supervision Fee

Offenders must pay a probation supervision fee when sentenced in circuit court.* MCL 771.3(1)(d). A table of probation supervision fees as determined by an offender's income is included in MCL 771.3c.

*See Section 8.40 for a detailed discussion of probation.

"[T]he court shall consider the probationer's projected income and financial resources" when determining the appropriate amount of that probationer's supervision fee. MCL 771.3c(1). In any event, the monthly supervision fee may not exceed $135.00 and may not continue for more than 60 months. *Id*.

If a supervision fee is ordered for months in which a probationer is already subject to a supervision fee, the court must waive the fee having the shortest duration. *Id*.

Part VIII—Specific Types of Sentences

8.40 Probation

MCL 771.1(1) details the offenses for which a defendant may be sentenced to probation:

> "In all prosecutions for felonies or misdemeanors 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."

*See Appendix G for a list of these offenses.

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

Attempted offenses and orders of probation. The Legislature's omission of attempted felonies from the crimes for which probation may not be ordered is evidence of its intent that probation be an alternative to other sentences authorized for convictions under the attempt statute (MCL 750.92). *People v McKeown*, 228 Mich App 542, 545 (1998).

Order of probation. When a court sentences a defendant to probation, the court must, in a court order filed with the case and made part of the record, set the length of the probationary period and determine the terms on which the probation is conditioned. MCL 771.2(2).

Length of probation. Except as provided in MCL 771.2a, which deals with probation periods for stalking offenses, the term of probation imposed on a defendant convicted of a felony offense must not exceed five years. MCL 771.2(1). "Felony" includes two-year misdemeanors. MCL 761.1(g); *People v Smith*, 423 Mich 427, 434 (1985).

> **Note:** Effective March 1, 2003, 2002 PA 666 eliminated the "lifetime probation" provision in MCL 771.1(4). Prior to 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. Although the amendment eliminated lifetime probation, it did not affect the lifetime probation sentences imposed before the amendment's effective date—March 1, 2003. MCL 771.2(3) continues to prohibit any reduction in the probation period imposed under former MCL 771.1(4) "other than by a revocation that results in imprisonment or as otherwise provided by law."

Mandatory terms and conditions of probation. A sentence of probation contains a number of conditions, some of which are mandatory. During the term of an individual's probation, the probationer must comply with the mandatory conditions of probation listed in MCL 771.3(1)(a)–(h):

- the probationer must not violate any criminal law (Michigan, federal, or any other state, or any ordinance of any municipality located in Michigan or another state);
- the probationer must not leave the state without the court's consent;
- the probationer must report (in writing or in person) to his or her probation officer monthly, or as frequently as the probation officer requires;
- if the probationer is sentenced in circuit court, he or she must pay a probation supervision fee pursuant to 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 pursuant to MCL 780.905;
- the probationer must pay the minimum state cost as provided in MCL 769.1j; and
- if required, the probationer must be registered under the sex offenders registration act (MCL 28.721 to 28.732).

If a defendant is placed on probation for an offense listed in MCL 28.722 in the sex offenders registration act (SORA), the defendant's probation officer must register the defendant or must accept the defendant's registration. MCL 771.2(4).

Discretionary terms and conditions. Discretionary conditions of probation are found in MCL 771.3(2)(a)–(q) and (3). In addition to the mandatory conditions listed above, a trial court is permitted to order the probationer to:

– be incarcerated 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;

> **Note:** A period of incarceration may be served at one time or at consecutive or nonconsecutive intervals. The probationer may be allowed day parole or a work or school release from jail.

– pay immediately, or within the period of his or her probation, any fine imposed when the probationer was placed on probation;

> **Note:** A fine imposed as a condition of probation is not limited to the maximum fine authorized by the criminal statute under which a defendant was convicted and is being sentenced. MCL 771.3(2)(b); *People v Oswald*, 208 Mich App 444, 445–446 (1995) ($1,500 fine imposed as a condition of probation was valid where underlying statute permitted a maximum fine of $1,000 for conviction).

– pay any costs warranted by the circumstances of the case or costs that the court deems proper;

> **Note:** Costs ordered 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, 451–452 (1997). A court cannot order a defendant to reimburse the county (state, municipality, or other unit of government, depending on the circumstances of the prosecution) for the costs of his or her pretrial confinement. *People v Houston*, 237 Mich App 707, 718–719 (2000).

– pay an assessment ordered by the court other than the crime victim assessment;

– perform community service;

– agree to pay any restitution, assessment, fine, or cost imposed by wage assignment;

– participate in inpatient or outpatient drug treatment or a drug treatment court;*

*Effective January 1, 2005. 2004 PA 219.

– 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 in a special alternative incarceration unit* pursuant to 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 pursuant to MCL 801.81 *et seq*.;
- complete his or her high school education or the equivalent by completing a general education development (GED) certificate;* or
- be subject to other lawful conditions deemed proper by the court or warranted by the circumstances of the case.

*See Section 8.47, below, for more information.

*Effective May 26, 2004. 2004 PA 116.

> **Note:** Discretionary conditions imposed under MCL 771.3(3)—"other lawful conditions of probation as the circumstances of the case require or warrant, or as in [the court's] judgment are proper"—should be "lawfully and logically related to the defendant's rehabilitation." *People v Johnson*, 210 Mich App 630, 634 (1995).

Amending an order of probation. A sentencing court has discretion to alter the form or substance of an order of probation at any time during the probationary term. MCL 771.2(2). An order of probation may be amended without providing the probationer with notice of the amendment and an opportunity to be heard. MCL 771.2(2); *People v Britt*, 202 Mich App 714, 716 (1993). A probationer's due process rights are implicated when amendment of the conditions of his or her probation would "result[] in a fundamental change in the defendant's liberty interest." *Britt, supra* at 716.

Placement in an electronic tether program is not the equivalent of confinement and does not constitute a change in liberty interests sufficient to require that a defendant be given notice and an opportunity to be heard before his or her probation order is amended to include such a placement. *Id*. at 717.

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 that were not included in the plea agreement. *Johnson, supra* at 634–635.

Stalking offenses and orders of probation. 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 individual during the term of probation;
- refrain from any contact with the victim of the offense for which the defendant is placed on probation;
- be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; and
- if the court determines it is appropriate, receive the indicated counseling at the defendant's own expense. MCL 750.411h(3)(a)–(c).

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 individual during the term of probation;
- refrain from any contact with the victim of the offense for which the defendant is placed on probation;
- be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; and
- if the court determines it is appropriate, receive the indicated counseling at the defendant's own expense. MCL 750.411i(4)(a)–(c).

Termination of the probation period. When a probationer's term of probation terminates, the probationer officer must report to the court that the probation period has ended. MCL 771.5. The officer must also inform the court of the probationer's conduct during the probation period. *Id*. After receiving the report, the court may discharge the probationer and enter judgment of a suspended sentence, or the court may extend the probationer's supervision period up to the maximum period of probation permitted. *Id*.

8.41 Delayed Sentencing

Delayed sentencing and deferred sentencing are often used interchangeably to refer to the statutory process described in this subsection. In fact, the dictionary definitions for "delay" and "defer" are nearly identical—"put off, postpone" and "put off, delay," respectively. *Merriam-Webster's Collegiate Dictionary*, 10th ed (1999). Unlike deferred adjudication, which is discussed in Section 8.42, below, in a case involving a delayed or deferred sentence, the defendant's guilt is adjudicated and the resulting conviction remains on record without regard to the outcome of the period of delay. In delayed sentencing, the defendant is not placed on probation; that is, no sentence is imposed. Rather, the period of delay is provided to the defendant so that he or she may demonstrate to the court that probation is an appropriate sentence for the defendant's conviction. *People v Saylor,* 88 Mich App 270, 274–275 (1979). The court may require the defendant to comply with any of the applicable terms and conditions associated with a sentence of probation. MCL 771.3(9).

In an action in which the defendant could be placed on probation, the court may elect to delay imposing sentence on the defendant for up to one year to allow the defendant to show that he or she is a good candidate for probation or leniency. MCL 771.1(2) states:

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

Length of the delay. A court is not deprived of jurisdiction over a defendant whose delay in sentencing exceeds one year, as long as there is good cause for the delay. *People v Dubis*, 158 Mich App 504, 506 (1987). Where a delay exceeding one year is not justified, the sentence imposed must be vacated because the court lacked the authority to impose it. *Dubis, supra* at 507. Even when a defendant's sentence is vacated, the defendant's conviction remains, and therefore, the defendant remains subject to any collateral consequences that result from a criminal conviction. *Id*. Where no good cause was shown for a delay of only two days, the Michigan Court of Appeals ruled that the trial court was without jurisdiction to sentence the defendant. *People v Boynton*, 185 Mich App 669, 671 (1990). But see also *People v McLott*, 70 Mich App 524, 529 (1976) (delay of 13 days past the one-year deadline was not fatal to the court's jurisdiction where the delay was explained by illness and unavailability on the part of the trial judge and counsel), and *People v Richards*, 205 Mich App 438, 443 (1994) (14-month delay was acceptable

because statute does not preclude a defendant from waiving the one-year limitation or consenting to a lengthier delay).

*See Section 8.40, above.

Permissible conditions or terms of the delay. A trial court is authorized to impose on a defendant whose sentencing is delayed any applicable condition of probation outlined in MCL 771.3(1), (2), or (3).* MCL 771.3(9). However, jail time may not be imposed as part of the delayed sentencing process because "[t]here is nothing about the ability to remain in jail [] that is of assistance to a trial judge in determining whether or not a defendant should be placed on probation." *People v Cannon*, 145 Mich App 100, 104 (1985).

Failure to comply with conditions of delay. Because a defendant has a due process right to a sentencing hearing at which he or she can challenge any inaccuracies in the PSIR, it follows that a defendant is entitled to explain to the court any mitigating circumstances that prevented him or her from compliance with the conditions of delay. *People v Fisher*, 106 Mich App 616, 618–619 (1981). According to the *Fisher* Court:

> "We believe that principles of fairness mandate that, where, as here, the trial court gives a defendant an opportunity to demonstrate eligibility for lenient treatment, defendant is entitled to a hearing as to whether failure to comply with conditions imposed on defendant was in fact due to circumstances beyond defendant's control." *Fisher, supra* at 619.

However, a defendant sentenced for failure to comply with the conditions of a delayed sentencing order is not entitled to the same type of hearing as is a defendant whose probation is revoked. *Saylor*, *supra* at 274–275; *People v Salgat*, 173 Mich App 742, 746 n 8 (1988). The due process rights of a defendant sentenced after failing to comply with the terms of delay are satisfied when the defendant is afforded the opportunity to challenge any inaccuracies in his or her PSIR at sentencing, and the defendant's attorney is provided with a copy of the defendant's PSIR. *Saylor, supra* at 275.

Supervision fees. Supervision fees are authorized under two different statutes in cases involving delayed sentencing—MCL 771.1(3) and MCL 771.3(9).

MCL 771.1(3) states in part:

> "If a defendant is before the circuit court and the court delays imposing sentence under subsection (2), the court shall include in the delayed sentence order that the department of corrections shall collect a supervision fee . . . ."

MCL 771.3(9) states in part:

> "If sentencing 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)] . . . ."

*Use of "deferred" and "delayed" in this statutory provision is a distinction without a difference. "Deferred" and "delayed" are synonymous in this context. See *Saylor, supra,* 88 Mich App at 274-275.

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. *Id*. 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 $135.00, and a defendant cannot be subject to more than one supervision fee at a time. *Id*.

Other costs. In addition to a supervision fee, a defendant whose sentence is delayed must pay the minimum state costs detailed in MCL 769.1j. MCL 771.3(9). Because MCL 771.3(9) also authorizes a trial court to impose any applicable conditions of probation listed in MCL 771.3(1), (2), and (3), a defendant may be ordered to pay any of the costs, assessments, etc. found there, including, for example, restitution under MCL 771.3(1)(e), or a crime victim assessment under MCL 771.3(1)(f).

8.42 Deferred Adjudication of Guilt

Delayed or deferred sentencing is not the same as a deferred adjudication of guilt. In cases involving deferred adjudication, the defendant pleads or is found guilty of the offense charged, but the adjudication is not immediately entered. Instead, the court places the defendant on probation and if the terms and conditions of probation are completed successfully, the court must discharge the defendant and dismiss the proceedings against him or her. Having successfully completed the term of probation imposed for the offense, no judgment of guilt is entered against the defendant.

If an individual violates a term or condition of probation imposed during the probation period, the court is not required to enter a judgment of guilt. When a defendant fails to comply with the terms or conditions of his or her probation, the court may exercise its discretion in determining whether to continue the probation or enter an adjudication of guilt and proceed to sentence the defendant as otherwise authorized.

A court may defer adjudication of guilt and place an individual on probation under certain conditions involving offenses in the following areas:

- controlled substances, MCL 333.7411;

- minor in possession, MCL 436.1703;
- impaired healthcare professional, MCL 750.430;
- domestic violence/spouse abuse, MCL 769.4a;
- youthful trainee status, MCL 762.11; and
- parental kidnapping, MCL 750.350a.

The procedure involved in deferred adjudication cases is similar for all six of the areas listed above. However, because deferral under the youthful trainee act, MCL 762.11 *et seq*., requires attention to circumstances not shared by the other five statutes, this area is discussed separately in Section 8.43, below. The steps of the process for deferral under the remaining five areas—controlled substances, minor in possession, impaired healthcare professional, domestic violence/spouse abuse, and parental kidnapping—are discussed in general below, and provisions unique to any of the five areas in which a deferred adjudication of guilt is available will be noted within the discussion itself.

A. Defendant Must Have No Previous Convictions for Offenses Specified in Statute

To qualify for deferral, a defendant must not have a previous conviction for any of the offenses specified by the applicable statute.

Controlled substances ("§7411"). To qualify for deferral under MCL 333.7411, 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, stimulants, depressants, hallucinogenic drugs, cocaine, or marijuana. MCL 333.7411(1).

A conviction entered simultaneously with the charge to which a defendant seeks deferment under §7411 is not a "previous conviction" for purposes of §7411 and so does not render the defendant ineligible for §7411 status. *People v Ware*, 239 Mich App 437, 442 (2000).

Minor in possession. An individual must not have a previous conviction or a juvenile adjudication for violating MCL 436.1703(1), which prohibits a minor from purchasing/attempting to purchase, consuming/attempting to consume, possessing/attempting to possess alcoholic liquor or having any bodily alcohol content. MCL 436.1703(3).

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 certain bodily alcohol content or while under the influence of a controlled substance that visibly impairs the individual's ability to practice safely). 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. MCL 750.430(8)(a).

Domestic violence/spouse abuse. A defendant must have no previous convictions for violating MCL 750.81 (domestic assault and battery) or MCL 750.81a (domestic assault causing serious injury) or a local ordinance substantially corresponding to MCL 750.81. MCL 769.4a(1).

Parental kidnapping. A defendant must not have a previous conviction for violating 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), MCL 750.349 (kidnapping), MCL 750.350 (taking a child under age 14 from the child's parent, adoptive parent, or legal guardian), 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 listed in the statute. These offenses are possession of a controlled substance under MCL 333.7403(2)(a)(*v*), MCL 333.7403(2)(b), (c), or (d); or 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. Under this statutory provision, the individual must plead guilty to or offer a plea of admission in a juvenile delinquency proceeding for a violation of MCL 436.1703(1). MCL 436.1703(3).

Impaired healthcare professional. The statutory provision contains no language requiring a plea or other finding of guilt. See MCL 750.430(8)(a). 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/spouse abuse. An individual must plead guilty to or be found guilty of a violation of MCL 750.81 or MCL 750.81a. 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 or who has resided in the same household as the defendant. MCL 769.4a(1).

Parental kidnapping. An individual must plead guilty to or be found guilty of a violation of MCL 750.350a. MCL 750.350a(4).

C. Defendant Must Consent to a Deferral of Adjudication

§7411. Deferred adjudication requires the defendant's consent. MCL 333.7411(1).

Minor in possession. Deferred adjudication requires the defendant's 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(8)(a).

Domestic violence/spouse abuse. In addition to the defendant, the prosecuting attorney in consultation with the victim must consent to a defendant's deferred adjudication. MCL 769.4a(1).

Parental kidnapping. The defendant must consent to deferred adjudication. MCL 750.350a(4).

D. Defendant Placed on Probation and Proceedings Deferred

When all of the above requirements are satisfied, the court places the defendant on probation, further proceedings are deferred, and no judgment or adjudication of guilt is entered.

§7411. MCL 333.7411(1).

Minor in possession. MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(8)(a).

Domestic violence/spouse abuse. The statutory language specifically conditions the deferral of proceedings on the court's obligation to first contact the department of state police to determine, according to police records, that the defendant has not been previously convicted of violating MCL 750.81 or MCL 750.81a, or a local ordinance substantially corresponding to MCL 750.81, and that the defendant has not 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 under any of the above statutory provisions 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).

E. Terms and Conditions of Probation Imposed Pursuant to Deferred Adjudication Provisions

When a court defers a defendant's judgment of guilt and places the defendant on probation, the court generally has discretion to impose any lawful term or condition on the defendant. These conditions are defined in MCL 771.3 and MCL 771.3c and are discussed in Section 8.40, above. Any mandatory terms or conditions of probation imposed under each of the areas discussed in this subsection are included 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 the court is authorized to impose any other term or condition it deems appropriate to the offense and the offender.

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*)*) 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(4). The defendant may be required to pay a fee for the program, and failure to complete a court-ordered program is a violation of the terms and conditions of the defendant's probation. *Id*.

*"Major controlled substance offenses" are discussed in detail in Section 8.16.

If a defendant is twice convicted of violating MCL 333.7341(4),* the court must order the defendant to undergo substance abuse screening and assessment before the court imposes a sentence under MCL 333.7411(1). MCL 333.7411(5). 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. MCL 333.7411(5). The defendant must pay the costs of screening, assessment, and rehabilitative services, and failure to complete a court-ordered drug program is a violation of the defendant's probation. *Id*.

*Prohibits use/possession with intent to use an imitation controlled substance.

Minor in possession. The minor must comply with the sanctions outlined in MCL 436.1703(1)(a):

- a fine of not more than $100.00;
- participation in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in MCL 333.6107(4) and (5);
- community service; and
- payment for and participation in substance abuse screening and assessment pursuant to MCL 436.1703(4).

The minor must also pay costs including the minimum state cost described in MCL 712A.18m and MCL 769.1j and probation costs required by MCL 771.3. MCL 436.1703(3). Probation costs in MCL 771.3 include the mandatory supervision fee in MCL 771.3c. MCL 771.3(1)(d).

Impaired healthcare professionals. The defendant must participate in the health professional recovery program established by MCL 333.16167. The statutory provision expressly mentions only that a defendant may be ordered to participate in a drug treatment court, but the court may impose any other term or condition it deems appropriate. There is no mention of a supervision fee in the statutory provisions governing deferred adjudication for healthcare professionals under MCL 750.430(8)(a).

Domestic violence/spouse 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 expressly mentions only that a defendant may be required to participate both in a mandatory counseling program and a drug treatment court, but the court may impose any lawful term or condition deemed appropriate to the offense and the offender. MCL 769.4a(3). The defendant may be required to pay the reasonable costs of the counseling program. *Id*. No mention of a supervision fee is made in the provisions governing deferral under this statute. MCL 769.4a.

Parental kidnapping. No mandatory terms or conditions of probation are required by the provision authorizing deferral for the offenses listed in this statute. The accused parent may be placed on probation "with lawful terms and conditions . . . includ[ing] participation in a drug treatment court[.]" MCL 750.350a(4). The statutory language does not mention a supervision fee. MCL 750.350a.

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 a judgment of guilt and proceed to sentencing when a defendant violates a term or condition of probation or otherwise fails to successfully complete a probationary period imposed under the deferral provisions of §7411. MCL 333.7411(1). Adjudication of guilt is not mandatory under §7411 under these circumstances.

Minor in possession. The court has discretion to enter a judgment of guilt or finding of responsibility when a defendant or 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. MCL 750.430(8)(a).

Domestic violence/spouse abuse. Except as described below, a court has discretion to enter an adjudication of guilt and proceed to sentencing when a defendant violates a term or condition of his or her 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). An "assaultive crime" for purposes of this provision means an offense defined in MCL 770.9a(3) or a violation of MCL 750.81 to MCL 750.90g. MCL 769.4a(4)(a)(*i*) and (*ii*).* There are more than 50 offenses that constitute an "assaultive crime" as described in this subsection. For a comprehensive list of these offenses, see Appendix E.

*Use of "commits" and "violates" indicates that *conviction* is not necessary to trigger the mandatory entry of an adjudication of guilt under this subsection.

Entry of an adjudication of guilt (and proceeding as otherwise provided by the appropriate statutory provision) is also mandatory if the defendant violates a court order requiring that the defendant receive counseling for his or her violent behavior or the defendant violates a court order prohibiting contact with a named individual. MCL 769.4a(4)(b) and (c).

Parental kidnapping. MCL 750.350a(4).

G. Successful Completion of the Probationary Period

Generally, a court must discharge the individual and dismiss the proceedings against him or her when the individual has fulfilled the terms and conditions of his or her probationary period.

§7411. MCL 333.7411(1).

Minor in possession. MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(8)(a).

Domestic violence/spouse abuse. MCL 769.4a(5).

Parental kidnapping. MCL 750.350a(4).

H. Discharge and Dismissal Without Entry of an Adjudication of Guilt

§7411. With the exception of determining an individual's eligibility for discharge and dismissal from a drug treatment court (MCL 600.1076), discharge and dismissal under §7411 is not a conviction for purposes of the statute under which the individual was granted a deferred adjudication of guilt (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. *Id*.

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 County Concealed Weapons Licensing Bd*, 259 Mich App 428, 438 (2003).

Minor in possession. Discharge and dismissal under MCL 436.1703 is without an adjudication of guilt or a determination of responsibility in a delinquency proceeding and is not a conviction or juvenile adjudication for purposes of MCL 436.1703 or for purposes of disqualifications or disabilities imposed by law for criminal convictions (including additional penalties imposed under this section for subsequent convictions or juvenile adjudications). MCL 436.1703(3).

Impaired healthcare professional. A discharge and dismissal under MCL 750.430(8)(a) is without entry of a judgment of guilt. A discharge and dismissal under this statute is not a conviction for purposes of MCL 750.430(8)(a) and is not a conviction for purposes of disqualifications or disabilities imposed by law for criminal convictions, including the additional penalties imposed for subsequent convictions under this statute. MCL 750.430(8)(a).

Domestic violence/spouse abuse. The statutory language used in this provision indicates that a discharge and dismissal under this statute is not a conviction for purposes of the statute or for purposes of disqualifications and disabilities imposed by law. MCL 769.4a(5). However, the statutory provision does not expressly state that a discharge and dismissal is not a conviction for purposes of subsequent convictions subject to additional penalties. *Id*.

Parental kidnapping. Unlike other deferred adjudication statutes, this statute does not include language excepting a discharge and dismissal under this provision from being considered a conviction for purposes of this section. MCL 750.350a(4) states only that a "[d]ischarge and dismissal under this subsection . . . is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including any additional penalties imposed for second or subsequent convictions."

I. Record of Deferred Adjudication

§7411. The state police record and identification division must retain a nonpublic record of an arrest and discharge and dismissal under §7411. MCL 333.7411(2). See MCL 333.7411(2)(a)–(c) for circumstances under which, and people to whom, the record will be furnished.

Minor in possession. During the period when proceedings are deferred and the individual is on probation, 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 discharge and dismissal under this section. *Id*. See MCL

436.1703(3)(a)–(b) for circumstances under which, and people to whom, the record will be furnished.

Impaired healthcare professional. The state police record and identification division must retain a nonpublic record of an arrest and discharge and dismissal under this section. MCL 750.430(8)(a). If requested, the record shall be furnished to a court or police agency to determine whether a person accused of violating this section has already utilized the deferral provision, and to a court, police agency, or prosecutor to determine whether a defendant is eligible for discharge and dismissal from a drug treatment court pursuant to MCL 600.1076. MCL 750.430(8)(a)(*i*)–(*ii*).

Domestic violence/spouse abuse. The state police record and identification division must retain a nonpublic record of an arrest and discharge and dismissal under this section. MCL 769.4a(6). The record shall be furnished, if requested, to a court or a policy agency or a prosecuting attorney to determine whether a person accused of violating MCL 750.81 or MCL 750.81a has already utilized the deferral provision in this section or to determine whether a defendant is eligible for discharge and dismissal from a drug treatment court pursuant to MCL 600.1076. MCL 769.4a(6).

Parental kidnapping. The state police record and identification division must retain a nonpublic record of an arrest and discharge and dismissal under this section. MCL 750.350a(4). Records shall be furnished, if requested, to a court or police agency to determine whether a criminal defendant has already used the deferral provision in this section and, if requested, to a court, police agency, or prosecutor to determine whether a defendant is eligible for discharge and dismissal from a drug treatment court under MCL 600.1076. MCL 750.350a(4)(a) and (b).

J. Only One Discharge and Dismissal Available

Generally, an individual may obtain only one discharge and dismissal under each of the areas discussed in this section.

§7411. MCL 333.7411(1).

Minor in possession. MCL 436.1703(3).

Impaired healthcare professional. MCL 750.430(8)(a).

Domestic violence/spouse abuse. MCL 769.4a(6).

Parental kidnapping. The statute governing deferred adjudication in this area does not contain any language limiting a defendant to only one discharge and dismissal. However, because the language does not except a discharge and dismissal under this section from being considered a conviction for purposes of this statute, an individual who has once utilized the deferral provisions of the parental kidnapping statute is ineligible to use them again by

virtue of his or her previous "conviction." MCL 750.350a(4). In addition, MCL 750.350a(4)(a) contains a disclosure provision similar to those used in other areas that imply a limit of one discharge and dismissal.

8.43 Youthful Trainee Act—Deferred Adjudication

The youthful trainee act establishes an opportunity for individuals who commit crimes after the age of 17 but before the age of 21 to avoid having a criminal record. *People v Rahilly*, 247 Mich App 108, 113 (2001). The *Rahilly* Court aptly summarizes the purpose of, and procedure involved in, disposing of cases under the act:

> "Pursuant to [the youthful trainee act], an individual within the restricted age range may plead guilty of a specified offense, and the court having jurisdiction may assign the individual to the status of youthful trainee. Once having assigned the individual to the status of youthful trainee, the court may commit the individual to custodial supervision for not more than three years in a specially designated Department of Corrections facility, place the individual on probation for not more than three years, or commit the individual to the county jail for not more than one year. MCL 762.13. Thus, the individual assigned to youthful trainee status is nonetheless punished for the crime committed. The individual assigned to youthful trainee status derives a benefit from the status if he successfully completes the punishment imposed." *Rahilly, supra* at 113.

No previous convictions for offenses listed. To qualify for deferral under the youthful trainee act, the offense for which the individual seeks deferral must not be one of the offenses listed in MCL 762.11(2) or (3) and must not have involved any of the circumstances described in those subsections.

An individual is not eligible for deferral as a youthful trainee if the offense for which the individual seeks deferral is any of the following:

- a felony punishable by life imprisonment;
- a major controlled substance offense;*
- a traffic offense;

> A "traffic offense" is a violation of the Michigan vehicle code, MCL 257.1 to 257.923, or a violation of a local ordinance substantially corresponding to the vehicle code that involves the operation of a vehicle and is a felony or misdemeanor offense at the time of the violation. MCL 762.11(4)(b).

*Major controlled substance offenses are discussed in Section 8.16.

- a violation, attempted violation, or conspiracy to violate MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), with the exception of §520d(1)(a), MCL 750.520d (CSC-III), and with the exception of §520e(1)(a), MCL 750.520e (CSC-IV); or
- a violation, attempted violation, or conspiracy to violate MCL 750.520g (assault) with the intent to commit CSC-I, CSC-II, CSC-III (with the exception of MCL 750.520d(1)(a)), or CSC-IV (with the exception of MCL 750.520e(1)(a)).

MCL 762.11(2)(a)–(e).

An individual is not eligible for deferral as a youthful trainee if any of the following apply to the offender or to the offense for which the individual seeks deferral:

- the individual has a previous conviction or adjudication for an offense listed* in MCL 28.721 to 28.732 requiring registration under the sex offenders registration act (SORA);
- the individual is charged with an offense listed in MCL 28.721 to 28.732 requiring registration under SORA, unless the individual proves by clear and convincing evidence that he or she is unlikely to engage in further conduct subject to the requirements of SORA;
- the court determines that the offense involved a factor contained in MCL 750.520b(1)(a) to (h), MCL 750.520c(1)(a) to (*l*), MCL 750.520d(1)(b) to (e), or MCL 750.520e(1)(b) to (f).

*A "listed offense" means the term as it is defined in MCL 28.722. MCL 762.11(4)(a).

MCL 762.11(3)(a)–(c).

Individual must consent to deferred adjudication. MCL 762.11(1). An individual must petition the court for consideration under MCL 762.11 prior to his or her guilty plea. *People v Hardesty*, 67 Mich App 376, 379 (1976).

Guilt is established by plea. An individual must plead guilty to an eligible criminal offense committed on or after his or her 17th birthday but before his or her 21st birthday. MCL 762.11(1). An individual over the age of 14 may be assigned to youthful trainee status if jurisdiction over that individual has been waived under MCL 764.27. MCL 762.15.

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 further proceedings are deferred. MCL 762.11(1).

Terms and conditions imposed pursuant to deferred adjudication provisions. Disposition of cases involving an individual assigned to the status of youthful trainee depends first on the punishment permitted for conviction of the crime committed by the individual. If the underlying offense is

punishable by more than one year of imprisonment, the court must do one of three things:

- commit the individual for not more than three years to the Department of Corrections for custodial supervision and training in a facility designed for that purpose; or
- subject to the conditions contained in MCL 771.3,* including participation in a drug treatment court, place the individual on probation for not more than three years; or
- commit the individual to the county jail for not more than one year. MCL 762.13(1)(a)–(c).

*See Section 8.40, above.

> If a youthful trainee is committed to the county jail, the court may permit work release or release for educational purposes. MCL 762.13(4).

If the underlying offense is punishable by one year or less of imprisonment, the court must place the individual on probation for not more than two years, subject to the conditions contained in MCL 771.3. MCL 762.13(2).

If a youthful trainee is placed on probation under either MCL 762.13(1) or (2), the court must order the individual to pay a supervision fee for each month during which the individual is on probation, up to 36 months. MCL 762.13(5).

Court's discretion over a youthful trainee's status. "[T]he court . . . may, at any time, terminate its consideration of the individual as a youthful trainee or, once having assigned the individual to the status of a youthful trainee, may at its discretion revoke that status any time before the individual's final release." MCL 762.12. However, it appears that a youthful trainee is entitled to a hearing before his or her status is revoked. *People v Roberson*, 22 Mich App 664, 668–669 (1970); *People v Webb*, 89 Mich App 50, 53 (1979).

No provision in the youthful trainee act prohibits a court from modification of an individual's probation or early dismissal of the criminal charges against an individual assigned to the status of youthful trainee. *People v Bobek*, 217 Mich App 524, 530 (1996). However, a court must not terminate a term of probation without sufficient reason. *Bobek, supra* at 531 (early dismissal was improper because media exposure generated by the individual's role in competitive ice skating was unrelated to the individual's rehabilitation).

Adjudication of guilt and sentencing on the underlying offense is not mandatory when an individual's youthful trainee status is revoked or consideration is terminated. Whether to enter a judgment of guilt and proceed to sentencing under these circumstances is within the court's discretion. MCL 762.12. However, an individual's youthful trainee status must be revoked if the individual violates the requirements of the sex offender registration act. *Id*.

If an individual's youthful trainee status is revoked and he or she is sentenced, the court must specifically credit the individual's sentence with any time served as a youthful trainee in an institutional facility or in a county jail. *Id*.

Successful completion of the probationary period. When an individual's youthful trainee status was not revoked or consideration of the individual for youthful trainee status was not terminated and the individual's release from youthful trainee status is final, the court must discharge the individual and dismiss the proceedings against him or her. MCL 762.14(1).

Discharge and dismissal is without adjudication of guilt. With the exception of two circumstances found in SORA, assignment of an individual to the status of youthful trainee is not a conviction, and after release, the individual shall not be subject to a civil disability or loss of right or privilege because of his or her past status as a youthful trainee. MCL 762.14(2). For purposes of SORA, an individual's youthful trainee status may be a "conviction" if the individual was assigned the status of youthful trainee before October 1, 2004, or if the individual was assigned the status of youthful trainee on or after October 1, 2004, the individual's status was revoked and an adjudication of guilt was entered. MCL 28.722(a)(*ii*)(A)–(B).

> **Note:** A youthful trainee assigned before October 1, 2004, for an offense listed in MCL 28.722 of SORA must comply with the requirements of that act. MCL 762.14(3).

Nonpublic record of deferral retained. Unless a conviction is entered, all proceedings related to the disposition of the criminal charge and the individual's assignment to youthful trainee status shall be closed to public inspection. MCL 762.14(4). However, those records are open to Michigan courts, the Department of Corrections, the Department of Human Services (formerly the Family Independence Agency), law enforcement personnel, and prosecuting attorneys* for the limited purpose of performing their job duties. *Id*.

*Effective January 1, 2005. 2004 PA 226.

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 knowledge of the criminal proceedings pending against a youthful trainee. *Bobek*, *supra* at 530.

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*.

8.44 Conditional Sentences

A court may impose a conditional sentence when sentencing a defendant whose offense falls within the circumstances clearly defined in MCL 769.3:

- **The conviction must be for an offense punishable by fine or imprisonment or both.**

  When a defendant's conviction is punishable by a fine, by imprisonment, or both, and the court imposes a conditional sentence, any incarceration to which the defendant may be subject is conditioned on the defendant's payment of the fine imposed. MCL 769.3(1).

- **A conditional sentence requires the court to order that the defendant pay restitution in addition to the fine imposed.**

  In addition to the fine imposed, the statutory language expressly instructs the court to order the defendant to pay restitution if a conditional sentence is imposed. MCL 769.3(1).

- **A defendant may avoid imprisonment if he or she pays both the fine and restitution within the time limit set by the court.**

  The court must sentence a defendant as provided by law (according to the term of imprisonment indicated by the statute under which the defendant was convicted) if the defendant fails to pay the amounts ordered. MCL 769.3(1). A conditional sentence must express the time limit by which the fine ordered must be paid. *Id.*; *People v Tims*, 127 Mich App 564, 566 (1983).

- **A court may order the defendant to pay the costs of prosecution in addition to the fine imposed and restitution due.**

  The court has discretion to order a defendant to pay the costs of prosecution when a defendant is given a conditional sentence that includes payment of a fine. The costs of prosecution may not be ordered in the absence of a fine. MCL 769.3(1). Because a defendant may be ordered to pay the costs of prosecution only if the court imposes a fine, a conditional sentence of incarceration or payment of costs is invalid under the plain language of the statute. *Tims, supra* at 565–566.

- **With the exception of defendants convicted of CSC-I or CSC-III, the court may place a defendant on probation conditioned on his or her payment of a fine, costs, damages, or restitution.**

  A defendant not convicted of CSC-I or CSC-III may avoid imprisonment and be placed on probation on the condition that the defendant pay any combination of fines, costs, damages, or restitution ordered by the court. The fines, costs, damages, or restitution must be paid in installments within the time indicated by the court in its conditional sentence. MCL 769.3(2).

- **A defendant who fails to make the payments ordered in a conditional sentence of probation may be sentenced as provided by law.**

  The court has discretion to sentence a defendant as provided by law (according to the term of imprisonment indicated by the statute under which the defendant was convicted) if the defendant defaults on any of the payments ordered. MCL 769.3(2).

8.45 Suspended Sentences

No statute expressly confers on a sentencing court the general authority to impose and then suspend all or a portion of a defendant's sentence.* However, the power to suspend sentences "'has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution.'" *People v Cordell*, 309 Mich 585, 594 (1944), quoting *People v Stickle*, 156 Mich 557, 563 (1909). The power of suspension is an inherent, but not unlimited, judicial function; it is subject to any applicable statutory provisions and circumscribed by the executive branch's exclusive power to commute sentences and grant pardons. *Cordell, supra* at 594–595; *Oakland County Pros v 52nd District Judge*, 172 Mich App 557, 560 (1988).

*MCL 750.165(4) (felony non-support) specifically authorizes a court to suspend a defendant's sentence if the defendant posts a bond and any sureties required by the court.

A court may not suspend a defendant's sentence once the defendant has begun serving it; a suspension in that case would be the practical equivalent of a commutation, and only the governor possesses the constitutional authority to commute a criminal sentence. *Oakland County Pros, supra* at 559–560.

A sentence that is suspended indefinitely infringes on the powers granted to the executive and legislative branches of government. *People v Morgan*, 205 Mich App 432, 434 (1994). An indefinite suspension is not a valid sentence where a defendant's conviction was punishable by fine, prison, or probation, because the sentence is not within the sentencing alternatives defined by the Legislature in the governing statute. *Morgan, supra* at 433. Similarly, an indefinite suspension encroaches on the executive branch's exclusive power to pardon because an indefinite suspension has the practical effect of permitting a defendant to commit a crime and avoid punishment. *Id*. at 434.

8.46 Mandatory Sentences

Where a mandatory determinate term of incarceration is prescribed by the statute governing a specific offense, the sentencing guidelines do not apply to that offense, and the court must impose the sentence specified by statute. MCL 769.34(5). Probation is not authorized for conviction of any offense for which a mandatory prison sentence is prescribed. Offenses that require mandatory incarceration should be included in the "exception" expressed in MCL 771.1(2) (offenses for which probation is not authorized). Appendix G contains a list of these offenses.

8.47 Special Alternative Incarceration (SAI) Units—"Boot Camp"

When a defendant is convicted of an offense punishable by incarceration in a state prison (with the exception of the specific crimes listed in MCL 771.3b(17) and discussed below), a sentencing court may order as a condition of the defendant's probation that he or she satisfactorily complete a program of incarceration in a special alternative incarceration (SAI) unit. MCL 771.3b(1). SAI units are established and operated by the Department of Corrections (DOC); among other programming included by the DOC, SAI units are required to demand of the participants "physically strenuous work and exercise, patterned after military basic training[.]" MCL 771.3b; MCL 798.13(1); MCL 798.14(1).

A. Eligibility Requirements

Convictions that preclude placement in an SAI unit. Individuals convicted of committing or attempting to commit any of the offenses listed in MCL 771.3b(17) are not eligible for placement in an SAI program. The listed offenses are:

- MCL 750.145c, child sexually abusive activity;
- MCL 750.520b, first-degree criminal sexual conduct;
- MCL 750.520c, second-degree criminal sexual conduct;
- MCL 750.520d, third-degree criminal sexual conduct;
- MCL 750.520g, assault with intent to commit criminal sexual conduct;
- MCL 750.72, arson of a dwelling house;
- MCL 750.73, arson of other real property; and
- MCL 750.75, arson of insured property with intent to defraud insurer.

Previous participation in an SAI unit generally precludes placement. With one exception, no person shall be incarcerated in an SAI unit more than once. MCL 771.3b(15). The single exception to the rule concerns an individual who is removed from an SAI program and returned to court for sentencing due to a medical condition that existed at the time the person was placed in the SAI unit. MCL 771.3b(16). That individual, removed for medical reasons, may again be placed in an SAI program after the individual's medical condition is corrected. *Id*.

General requirements for placement. MCL 771.3b sets forth the general eligibility requirements for a defendant's placement in an SAI program:

- The defendant has never served a prison sentence in a state correctional facility. MCL 771.3b(2)(a).
- The defendant would likely be sentenced to prison. MCL 771.3b(2)(b).
- The sentencing guidelines as scored for the defendant's offense result in an upper limit of the recommended minimum sentence of 12 months or more (this section does not apply if the offense is not covered by the felony sentencing guidelines or if the person is being considered for SAI placement because he or she violated conditions of probation). MCL 771.3b(2)(c). When the upper limit of a defendant's recommended minimum sentence range is not 12 months or more and MCL 771.3b(2)(c) applies, a sentencing court lacks the statutory authority to sentence the defendant to placement in a SAI program. *People v Cooper*, 252 Mich App 515, 517 (2002).
- The defendant is physically able to participate in the SAI program. MCL 771.3b(2)(d).
- The defendant has no apparent mental disability that would prevent participation in the program. MCL 771.3b(2)(e).

An individual's eligibility under MCL 771.3b(2)(a) and (b) must be preliminarily determined by a probation officer. MCL 771.3b(4). Once placed in an SAI unit, the DOC must determine that the individual satisfies all the requirements in MCL 771.3b(2). If the DOC finds that the individual is not eligible for placement, he or she will be returned to court for sentencing. MCL 771.3b(5). If a person is ineligible for placement, the court must rescind that person's probation order and sentence him or her as provided by law. *Id*.

Consent required. A probationer must consent to placement in an SAI program. MCL 771.3b(6).

B. Post-Placement Considerations

Length of placement. The maximum amount of time a person 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 in the program because of illness or injury. Should a person miss more than five days of participation in the program because of an illness or injury that occurred after the individual was placed in the unit, one day is added to the term of his or her placement, beginning with the sixth day missed. A maximum of 20 days may be added to an individual's placement. MCL 771.3b(8).

Residential program. A court may also require an individual placed in an SAI unit to satisfactorily complete a local residential program offering vocational training, education, and substance abuse treatment. MCL 771.3b(1). The length of any additional residential treatment program

required by the court shall not exceed 120 days. MCL 771.3b(9); MCL 798.14(1).

Probation under intensive supervision. An individual who satisfactorily completes an SAI program must be placed on probation, under intensive supervision, for a minimum of 120 days following completion of the SAI program. MCL 771.3b(12); MCL 798.14(1).

*DOC must certify its report to the sentencing court not less than five days before the expected date of release. MCL 798.15(1).

DOC report. The court must authorize the probationer's release from incarceration in an SAI program when it receives notice from the DOC* indicating the probationer's satisfactory performance in the program. MCL 771.3b(13). An unsatisfactory report is a violation of the terms and conditions of an individual's probation and shall be grounds for revocation of probation. *Id*.

Probationer's conduct during placement. The DOC has discretion to report to the sentencing court a probationer's failure to obey the rules of behavior or to work diligently and productively at the SAI program. MCL 798.16(1). Rather than remaining in the SAI unit, a probationer may be incarcerated in a county jail while he or she awaits a probation revocation hearing on his or her failure to perform satisfactorily in the SAI program. *Id*.

A probationer is entitled to credit for time spent in an SAI program if later his or her probation is 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).

C. Placement in an SAI Program After a Sentence of Imprisonment

Once a defendant is sentenced to prison and under the DOC's jurisdiction, the DOC is required to consider placing a prisoner serving an indeterminate sentence in an SAI program unless the sentencing court prohibited such a placement. MCL 791.234a(1), (2)(f), and (4). The DOC must determine whether a defendant within its jurisdiction and sentenced to an indeterminate term is eligible for placement in an SAI program according to the requirements in MCL 791.234a(2) and (3).

A defendant is not eligible for placement in an SAI program if, in the judgment of sentence, the sentencing judge prohibited the defendant's participation in such a program. MCL 791.234a(2)(f) and (4). When a judgment of sentence does not indicate the sentencing court's intention with regard to a defendant's placement in an SAI unit, the defendant may not be placed in such a program until the DOC complies with the requirements in MCL 791.234a(4):

- The DOC determines that the prisoner meets eligibility requirements in MCL 791.234a(2) and (3).

- The DOC notifies the judge (or the judge's successor), the prosecuting attorney in the county where the defendant was sentenced, and any victim of the crime committed who has requested notification of the proposed placement not later than 30 days before the placement would occur.
- The sentencing judge (or the judge's successor) notifies the DOC in writing that he or she has no objection to the defendant's placement in an SAI program.*
- The prosecution's approval is not necessary for a defendant's placement in an SAI program. The prosecution waives any objection to a defendant's placement in an SAI unit if it does not raise the issue at the defendant's sentencing hearing. *People v Krim*, 220 Mich App 314, 320–321 (1997).

*The judge must review any victim impact statements submitted by victims of the crime before making this decision.

Part IX—Sentence Departures

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 impose a minimum sentence within the appropriate sentence range, as calculated 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 minimum sentence range calculated under the guidelines. MCL 769.31(a). Notably, the Legislature made no distinction between upward and downward departures. *People v Hegwood*, 465 Mich 432, 440 n 16 (2001). Sections 8.49 and 8.50, below, 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. A court's discretion with regard to departures is limited by the provisions in MCL 769.34(3)(a) and (b), which are discussed in Section 8.48, below.

8.48 Requirements of a Sentence Departure

Sentence departures are governed by the language in MCL 769.34(3), which permits a court to depart from the range recommended by the guidelines if there is a substantial and compelling reason for that departure, and the court articulates that reason on the record. *People v Babcock*, 469 Mich 247, 271 (2003). Of critical importance is the trial court's statement (on the record) concerning how the substantial and compelling reason justifies the degree of departure chosen by the court. *Babcock, supra* at 258–259; *People v Claypool*, 470 Mich 715, 726–727 (2004); *People v Johnigan*, 265 Mich App 463, 468–469 (2005); *People v Hornsby*, 251 Mich App 462, 474 (2002).

A. Substantial and Compelling Reason

According to the Michigan Supreme Court, the phrase "substantial and compelling" has acquired a "peculiar and appropriate meaning in the law" and must be construed in a manner that is consistent with that meaning. *Babcock*, *supra* at 257. A reason is substantial and compelling if it is "objective and verifiable," if it "keenly" or "irresistibly" grabs a court's attention, if it is "of considerable worth" in deciding the length of a sentence, and if it arises only in "exceptional" cases. *Id*. at 257–258.

A reason is objective and verifiable if it is based on facts or events that are external to the minds of the parties involved, particularly the mind of the trial judge. *People v Abramski*, 257 Mich App 71, 74 (2003). An objective and verifiable statement or factor is a statement or factor capable of confirmation. *Abramski, supra* at 74. In *People v Thompson*, unpublished opinion per curiam of the Court of Appeals, decided January 20, 2005 (Docket No. 251322), the trial court improperly departed from the guidelines on the basis of the court's conclusion that the defendant found the case "terribly amusing," as evidenced by the defendant's laughter and gestures at trial. Said the Court of Appeals, "The determination of whether a person finds something amusing is not external to the mind of the trial judge. It is an internal evaluation not capable of external proof." *Thompson, supra*.

That a defendant presents a danger to him- or herself and the public is not an objective and verifiable factor and cannot itself be a trial court's substantial and compelling reason for departure. *People v Solmonson*, 261 Mich App 657, 670 (2004).

*See Section 8.29 for a detailed discussion of proportionality.

"Proportionality"* is still a component of sentencing under the statutory guidelines. *Babcock, supra* at 262. When deciding whether and to what degree to depart from the recommended sentence, a trial court "must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his [or her] criminal history[.]" *Id*. at 264. A departure that is disproportionate to the circumstances of the offense or the offender cannot be justified no matter what "reasons" are advanced in support of the departure. *Id*.

There is likely no single correct outcome in cases where a departure from the guidelines is considered and imposed. However, a departure must fall within "the principled range of outcomes." *Babcock, supra* at 269; *People v Reincke (On Remand)*, 261 Mich App 264, 268 (2004). As long as the trial court chooses a sentence departure within that principled range of outcomes, the court has properly exercised its discretion. *Reincke, supra* at 268. In *Reincke*, 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. *Id*. at 265. The *Reincke* Court concluded that the trial court's extreme departure from the range recommended under the guidelines 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 and required major reconstructive surgery).

An upward departure requires that the trial court, at sentencing,* advise the defendant of his or her appellate rights regarding the sentence departure. MCR 6.425(F)(4) states:

*Sentencing hearings are discussed in detail in Sections 8.18–8.25.

> "When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 *et seq*.[parallel citation omitted], 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."

B. Statutory Prohibitions

In addition to the requirement that the trial court articulate a substantial and compelling reason for departing from the guidelines, the statutory sentencing guidelines expressly prohibit a sentencing court from basing a departure on specific characteristics of the 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 concludes that a factor has been given disproportionate or inadequate weight, the guidelines also expressly prohibit a court from basing a sentence departure on a characteristic of the offense or the offender addressed by the variables (OVs and PRVs). MCL 769.34(3)(b) states:

> "The court shall not base a departure on an offense characteristic [OV] or offender characteristic [PRV] already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight."

Because points are assessed in each OV and PRV according to the applicable statement having the highest number of points and because each variable consists of a finite number of somewhat "generic" statements, the guidelines necessarily cannot account for the unique circumstances of specific offenses

and offenders. The "all or nothing" characteristic of some of the variables further limits the guidelines from accurately accounting for circumstances of an offense not precisely described by the choices available under each variable. For example, OV 7 addresses the aggravated physical abuse component of an offense and allows for only two choices. MCL 777.37. Fifty points must be scored if a victim was subject to treatment characterized as aggravated physical abuse under OV 7, or zero points must be scored if a victim was not subject to such abuse. MCL 777.37(1). OV 7 cannot account for a victim's treatment that falls somewhere in between, or well beyond, the two choices offered by OV 7.

The *Babcock* Court provided this 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 stabbed his victim, see MCL 777.31, that the defendant stabbed his 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 victim and the courts must abide by this determination. However, if the defendant stabbed his 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, supra* at 258 n 12.

A trial court's upward departure based on the defendant's extensive criminal history was appropriate even where the PRVs "partially accounted for" the defendant's prior convictions. *People v Deline*, 254 Mich App 595, 598 (2003), vacated in part on other grounds 470 Mich 895 (2004).* The *Deline* Court explained:

> "[The defendant's PRV] scoring did not account for the number or extent of [the defendant's prior] offenses. Other factors not accounted for in the guidelines scoring indicate that defendant is unwilling or unable to accept responsibility for his actions or make the changes needed to protect the public from further driving offenses by him. For example, he was on probation for drunken driving at the time of his offense, he had a blood-alcohol level far in excess of the legal limit, he was driving although his license had been suspended, and he has been sentenced to jail for numerous drunken driving offenses." *Deline, supra* at 598–599.

*Conduct scored under OV 19 was also at issue, and the *Deline* Court's interpretation of OV 19 was disapproved in *People v Barbee*, 470 Mich 283, 287-288 (2004). See Section 8.6(T) for discussion of OV 19.

A trial court's determination that the guidelines gave inadequate or disproportionate weight to a factor need not be expressly stated—the court's determination may be implied from the record. *People v Lowery*, 258 Mich App 167, 170 (2003). In *People v Tolbert*, unpublished opinion per curiam of

the Court of Appeals, decided February 12, 2004 (Docket No. 243039), the Court cited *Lowery* and upheld a trial court's departure where the trial court did not directly explain how the guidelines failed to adequately account for the circumstances of the offense that prompted the court's departure. The Court affirmed the defendant's sentence and found that at least three of the trial court's statements constituted its implicit declaration that it departed because the guidelines failed to adequately measure the circumstances of the defendant's offense. The trial court noted that: (1) the defendant's conduct was "one of the most heinous crimes" the court had seen during its judicial tenure; (2) the defendant's assault on the victim was "merciless"—the defendant ignored the victim's pleas to stop, continued hitting and kicking her, and her injuries required a two-week hospitalization; and (3) the victim was the defendant's own mother and the guidelines did not anticipate the familial relationship present in this particular violent crime. *Tolbert, supra*. Said the *Tolbert* Court:

> "After describing the salient features of the assault, the [trial] court stated that 'the guidelines don't justify your punishment in this particular case.' We find this statement sufficient to indicate that the court found that the statutory factors were given inadequate weight." *Tolbert, supra*.

8.49 Downward Departures

Factors appropriately considered in determining whether to depart downward from the range recommended by the guidelines include: (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*, 462 Mich 1, 7 (2000), relying on *People v Fields*, 448 Mich 58 (1995).

Work history. A defendant's stable and long-term work history may constitute a substantial and compelling reason for a trial court's downward departure; work history may be a predictor of a defendant's rehabilitative potential. *Daniel*, *supra* at 7 n 8; *People v Shinholster*, 196 Mich App 531, 535 (1992). Employment at a job less than two years is not considered long-term employment. *People v Claypool*, 470 Mich 715, 727 (2004).

Education. Pursuit of a post-secondary education may also be a factor considered in a trial court's departure from the sentencing guidelines. *People v Perry*, 216 Mich App 277, 280, 282 (1996).

Guidelines range versus mandatory minimum. If a crime is scored under the guidelines and results in a lesser minimum sentence than the mandatory minimum term contained in the penal statute under which a defendant was convicted, the guidelines range does 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 exists may 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. *Izarraras-Placante, supra* at 498–499.

Family support. The supportive presence of a defendant's family during the proceedings against the defendant is an objective and verifiable fact that may support a departure. *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, decided March 15, 2005 (Docket No. 251635). See also *Fields*, *supra* at 78, and *People v Harvey*, 203 Mich App 445, 448 (1994).

Minimal criminal history. The fact that the defendant at the age of 26 had only one previous misdemeanor conviction is not a substantial and compelling reason for departure. *Claypool, supra* at 727.

8.50 Upward Departures

The following factors have been addressed by Michigan's appellate courts when reviewing a trial court's departure from the guidelines:

A. Factors Related to a Victim of the Offense

Identity of the victim. A defendant's "complete disregard" for a law enforcement officer's life is not adequately accounted for by the guidelines and may constitute a substantial and compelling reason for departure. *People v Thomas*, 263 Mich App 70, 79 (2004).

Identity of the victims involved in a defendant's repeated criminal conduct. A "defendant's past criminal history of sex crimes with children, his admitted sexual attraction to children, and his repeated failure to rehabilitate himself when given the opportunity" are objective and verifiable factors in support of a trial court's substantial and compelling reason to depart from the guidelines. *People v Geno*, 261 Mich App 624, 636 (2004).

Effect of the offense on the victim. A departure may be justified where the guidelines "do 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*, 247 Mich App 423, 425–426 (2001).

Relationship to the defendant and the severity of the victim's physical injury. The degree of physical injury sustained by a victim may constitute a substantial and compelling reason for departure when the degree of brutality was not adequately accounted for by the guidelines. "Where a defendant's

actions [we]re so egregious that standard guidelines scoring methods simply fail[ed] to reflect their severity," the Court of Appeals affirmed a trial court's upward departure from the sentence recommended under the judicial guidelines then in effect. *People v Granderson*, 212 Mich App 673, 680 (1995). The Court explained:

> "Defendant severely beat an elderly woman who was a near invalid, breaking her nose and arm, and then repeatedly stabbed and shot her. His actions are rendered more appalling by the fact that he committed these acts against a woman who trusted him and who had previously hired him to perform odd jobs around her house. Must a reasonable court conclude that these circumstances are adequately accounted for by the relevant robbery offense variables, such as offense variable (OV) 1, 'A firearm is discharged by offender during commission of the offense,' or OV 2, 'Victim killed'? The answer is obvious. We wholeheartedly agree with the sentencing court in finding that the circumstances of the present crime were not adequately reflected in the offense variables." *Granderson, supra* at 680–681.

See also *People v Reincke (On Remand),* 261 Mich App 264, 269–270 (2004).

Ethnicity of the victim. The ethnicity of a defendant's victims is not a factor already taken into account by the guidelines and may provide a sufficient substantial and compelling reason for departure under specific circumstances. *People v Phung*, unpublished opinion per curiam of the Court of Appeals, decided June 12, 2003 (Docket No. 239098), affirmed by *Phung v Bell*, ___ F Supp ___ (ED Mich, 2005). In *Phung*, the trial court departed from the guidelines "because of the ethnic nature of th[e] crime and the selection of victims due to ethnicity." *Id*.

Age and identity of victims. A departure may be justified where OV 9 does not adequately reflect the egregious circumstances of the offense. OV 9 reflects only the number of victims; "[i]t does not consider the age of the victims or the fact that defendant was willing to forego the lives of his own children in this plot." *People v Keane*, unpublished opinion per curiam of the Court of Appeals, decided October 21, 2004 (Docket No. 248541).

See also *People v Lalone*, unpublished opinion per curiam of the Court of Appeals, decided May 5, 2005 (Docket No. 251326) (the Court commented on the fact that for first-degree CSC, the guidelines do not distinguish between a five-year-old victim and a 12-year-old victim).

Unusual consequences to a victim of the offense. The Court of Appeals held that a 35-month departure from the guidelines was justified where the trial court based its departure on the victim's—and the victim's family's—exposure to the defendant's sexually transmitted 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, decided April 6, 2004 (Docket No. 242134).

B. Factors Involving the Offender

Repeat violent offenders and community protection. A trial court's upward departure 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*, 259 Mich App 518, 535–536 (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. *Hicks, supra* at 535–536.

Credible prediction of the defendant's future conduct. It appears that a departure may be based on a trial court's prediction of the defendant's future conduct when credible evidence of the defendant's past conduct supports such a prediction. In *People v Castillo*, unpublished opinion per curiam of the Court of Appeals, decided February 17, 2004 (Docket No. 243330), the trial court explained its departure was prompted by the conclusion that "societal protection necessitated a longer sentence because defendant would continue to commit violent crimes given his ongoing drinking problem." The trial court emphasized that the defendant had nine prior felonies including two homicides and two assaults with the intent to cause great bodily harm and that the defendant's PRV score was 50 points more than the 75-point maximum. *Castillo, supra.* Although mere speculation about a defendant's propensity for future criminal conduct is insufficient to support a departure, the Court concluded that the trial court's prediction of the defendant's future behavior was based on objective and verifiable factors that constituted a substantial and compelling reason for departure. *Castillo, supra*.

See also *People v Solmonson,* 261 Mich App 657, 671 (2004), where the trial court properly based its departure on the defendant's continued criminal conduct despite multiple prior sentences for the same conduct (probation, jail, and prison for drinking and driving offenses).

Failure to admit guilt or show remorse. A trial court cannot impose a longer sentence on a defendant based on the defendant's failure to admit his or her guilt. The Fifth Amendment protects a criminal defendant from compelled self-incrimination at all judicial proceedings, including sentencing hearings. *Ketchings v Jackson*, 365 F3d 509, 512 (CA 6, 2004).

Pattern of previous convictions. A pattern of recidivist behavior is a factor not accounted for by the sentencing guidelines and is an objective and verifiable consideration capable of confirmation by a defendant's prior criminal record. *People v Brown*, unpublished opinion per curiam of the Court of Appeals, decided December 28, 2004 (Docket No. 249863). In *Brown*, the defendant's sentencing offense was his fifth drunk driving violation and the

seventh time he was convicted of driving while his license was suspended. The Court of Appeals stated, "[W]hile the guidelines designate points for prior misdemeanors that impact the statutory minimum sentence range, the guidelines do not delve deeper to consider whether the misdemeanors fit a pattern of recidivist behavior." *Brown, supra*.

See also *People v Wade*, unpublished opinion per curiam of the Court of Appeals, decided January 25, 2005 (Docket No. 249269) (departure was justified where the court determined that the defendant was not amenable to rehabilitation; the defendant committed two assaults within three months of his release from a 15-year prison sentence, and within one month of his release from prison for those two assaults, the defendant committed the two assaults for which he was being sentenced).

Excessive prior convictions and adjudications. An upward departure may be justified where a defendant's prior felonies and felony juvenile adjudications greatly exceed the maximum number scored under the guidelines. *People v Annabel*, unpublished opinion per curiam of the Court of Appeals, decided September 30, 2004 (Docket No. 249238) (the defendant had eight previous adult felonies—the guidelines account for "4 or more," the defendant had ten previous felony juvenile adjudications—the guidelines account for "3 or more," the defendant's felony convictions occurred in four different states, and the defendant was only 22 years of age).

See also *Lalone*, *supra*, where the three victims described "'a dozen or more' incidents of sexual abuse" and OV 13 accounts for only three or more.

Type and severity of prior convictions not accounted for by PRVs. A 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. *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, decided October 12, 2004 (Docket No. 248097). For example, although PRV 7 accounted for the defendant's subsequent felony conviction, it did not reflect that the felony was for first-degree murder, and while PRV 1 accounted for the defendant's previous conviction in which a death occurred, it did not reflect the defendant's history of shooting offenses. *Thomas*, *supra*.

Parole absconder status. That a defendant has absconded from parole is not reflected in the guidelines and may be a factor used to justify a departure. *People v Nichols*, unpublished opinion per curiam of the Court of Appeals, decided September 16, 2004 (Docket No. 246973).

Absconding on bond. A trial court's departure from the guidelines for a defendant convicted by plea of attempted absconding or forfeiting bond (MCL 750.199a) was justified because the "defendant's flight to another state and assumption of a new identity . . . went beyond that of the average absconder." *People v Kohns*, unpublished opinion per curiam of the Court of Appeals, decided April 12, 2005 (Docket No. 251327).

Other relevant information about a defendant's status at the time of the offense. Departure may be justified where the trial court determined that PRV 6 was given inadequate weight because, although PRV 6 accounted for the defendant's probationary status at the time of the offense, it did not reflect "the short time [the defendant] was on probation before lapsing back into criminal activity." *People v Ossowski*, unpublished opinion per curiam of the Court of Appeals, decided October 12, 2004 (Docket No. 246667).

C. Factors Involving the Sentencing Offense

Dismissed or uncharged criminal conduct. A trial court may depart from the guidelines 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 never charged) in exchange for the defendant's plea to a lesser charge. *Armstrong, supra* at 426.

Specific method and cause of a victim's injury. A departure may be supported by the guidelines' failure to account for a very specific consequence of criminal conduct not precisely described in the individual OVs or PRVs. In *People v Lowery*, 258 Mich App 167 (2003), the Court approved of the trial court's upward departure from the recommended minimum 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. *Lowery, supra* at 171.

See also *People v Castillo*, 230 Mich App 442, 448 (1998), a case decided under the judicial guidelines, where a trial court's departure was appropriate where OV 7 did not adequately address "the attack-from-behind nature of the crime." In *Castillo*, OV 7 assessed the offender's exploitation of a victim's vulnerability, but the trial court properly concluded that OV 7 did not include the "launching of a surprise attack" in its list of applicable statements for which points could be assessed against an offender. *Castillo, supra* at 448–449.

Police misconduct. Police misconduct, alone, is generally not a factor appropriate for consideration at sentencing primarily because it does not educate a court about the *defendant*, a component of the sentencing process that is central to the goal of individualized sentencing. *People v Claypool*, 470 Mich 715, 718, 725–726 (2004). Under certain circumstances, however, police conduct may factor into a court's sentencing decision. In light of its decision in *Babcock, supra*, the *Claypool* Court explained:

> "[I]f it can be objectively and verifiably shown that police conduct or some other precipitating cause altered a defendant's intent, that altered intent can be considered by the sentencing judge as a ground for a downward sentence departure." *Claypool, supra* at 718.

In any case, where a trial court concludes that a departure is warranted because of police misconduct, the court must articulate how that misconduct (escalation of the crime, for example) constitutes a substantial and compelling reason justifying the departure. *Id*. at 726–727.

Peculiar circumstances of the offense or the offender. In *People v Evans*, unpublished opinion per curiam of the Court of Appeals, decided March 18, 2004 (Docket No. 240357), the Court concluded that even though PRV 7 and OV 13 reflected the defendant's subsequent or concurrent convictions and pattern of criminal conduct, the trial court's departure was justified because the guidelines failed to

> "take into consideration that this is the second time he's done it, under similar circumstances, with the same shotgun. The fact that defendant committed two murders, under similar circumstances, i.e., in both cases the evidence established that defendant shot multiple times from a shotgun at close range and that he killed two people he did not know, is such a situation which 'keenly' or 'irresistibly' grabs our attention." *Evans, supra*.

OVs cannot measure the context of the offense in its entirety. The guidelines were inadequate when, although the guidelines accounted for the number of victims injured or killed as a consequence of the defendant's conduct, they 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, decided March 23, 2004 (Docket No. 244516). In *Staffney*, the defendant lost control of his car, ran up on a lawn, and struck three people, two of whom died, but the guidelines could 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." *Staffney, supra*. See also *People v Jackson*, unpublished opinion per curiam of the Court of Appeals, decided March 15, 2005 (Docket No. 253115).

Aggregating specific factors of an offense. In a case where the defendant repeatedly accelerated as he drove toward a crowd of people, stopped and backed the vehicle up, and then sped toward the crowd again, ultimately striking and killing one individual, the Court of Appeals affirmed the trial court's departure based on the offense characteristics just described. *People v Brunas*, unpublished opinion per curiam of the Court of Appeals, decided January 25, 2005 (Docket No. 252926). The trial court explained the reasons for its departure as the numerous assaults with which the defendant was never charged (the repeated speedy approaches toward the crowd of people), the defendant's repeated and reckless use of his motor vehicle that resulted in a person's death, the defendant's use of a motor vehicle as a lethal weapon, and the defendant's failure to improve his driving conduct after several past traffic transgressions. *Brunas, supra*.

8.51 Exceptions: When a Departure Is Not a Departure

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.

Mandatory minimum sentences. Where a statute requires a court to impose a mandatory minimum sentence, the court must impose that sentence without regard to the guidelines recommendation. MCL 769.34(2)(a). Imposing the mandatory minimum under those circumstances is not a departure. *Id*.

Where a statute requires a sentencing court to impose a mandatory minimum sentence and also authorizes the court to depart from that mandatory minimum, it is not a departure if the court imposes a sentence that exceeds the range recommended under the guidelines but falls below the statutory minimum. *Id*.

Similarly, the statutory guidelines expressly provide for a court's discretion with regard to offenses under the Michigan vehicle code. *Id*. For vehicle code offenses, if a statute both mandates a minimum sentence and authorizes departure from that minimum, it is not a departure under the guidelines if the court imposes a sentence in excess of the guidelines range but below the mandatory minimum. *Id*.

*Now MCL 257.625(9)(c).

In *People v Hendrix*, 263 Mich App 18, 19–20 (2004), modified in part by 471 Mich 926 (2004), the court sentenced the defendant to one year of probation to be served in the county jail although the range recommended by the guidelines for the defendant's conviction was 0 to 11 months. Contrary to the prosecution's argument, MCL 257.625(8)(c)* did not require the court to impose a mandatory minimum sentence—the provision required only that if the court chose to sentence the defendant to prison (one of the two alternatives available), the minimum term must be one year. *Hendrix, supra* at 22. Accordingly,

> "the sentence imposed was not in violation of the statute or otherwise an abuse of discretion. Further, even though defendant's sentencing guidelines range was only 11 months, the imposition of the one year sentence, equal to the mandatory minimum of Department of Corrections imprisonment specified in MCL 257.625(8)(c)(*i*), was 'not a departure' under MCL 769.34(2)(a)." *Id*.

Mandatory determinate sentences. When a statute mandates a determinate penalty or the penalty for an offense is mandatory life imprisonment, the court must impose that sentence. MCL 769.34(5). The sentencing guidelines do not apply to sentences imposed for those crimes. *Id*.

Sentences pursuant to valid plea agreements. A trial court need not articulate a substantial and compelling reason for a sentence exceeding the

recommended minimum under the guidelines when the sentence is the result of a valid plea agreement. *People v Wiley*, 472 Mich 153, 154 (2005).

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

In addition to other relevant and applicable preservation requirements, a copy of the defendant's 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 a]ny other reports or documents the sentencing court used in imposing sentence." MCL 769.34(8)(a) and (c).

*See Section 8.4 for information on PSIRs.

A trial court may correct an invalid sentence, but unless the law permits such a change, a trial court cannot modify a valid sentence once the sentence is imposed. MCR 6.429(A); *People v Moore*, 468 Mich 573, 579 (2003). Either party (defendant or prosecutor) may file a motion to correct an invalid sentence. MCR 6.429(A).* Prosecutorial appeals are governed by MCL 770.12. A criminal defendant's right to appeal is governed by Const 1963, art 1, §20, MCL 770.3, and MCR 7.203(A)–(B).

*As amended, effective January 1, 2006.

A sentence must be tailored to the individual offense and offender; at the same time, a sentence "must satisfy society's need for protection and interest in maximizing the offender's rehabilitative potential." *People v Harris*, 224 Mich App 597, 600 (1997), citing *People v Miles*, 454 Mich 90, 98 (1997). Because of a sentence's dual obligations, a sentence may be invalid without regard to which party benefits from the error. *Harris, supra* at 600.

Pursuant to MCR 6.429(B),* the time requirements for filing a motion to correct an invalid sentence are as follows:

*As amended, effective January 1, 2006.

> "(1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.
>
> "(2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
>
> "(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.

"(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500."

Note: Until January 1, 2006, the text of MCR 6.429(A) and (B) states:

> "(A) Authority to Modify Sentence. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.
>
> "(B) Time for Filing Motion.
>
> > "(1) A motion for resentencing may be filed within 42 days after entry of the judgment.
> >
> > "(2) If a claim of appeal has been filed, a motion for resentencing may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
> >
> > "(3) If the defendant fails to file a timely claim of appeal, the defendant may file a motion for resentencing within the time for filing an application for leave to appeal.
> >
> > "(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500."

A. Invalid Sentences

A sentence is invalid under the following circumstances:

- When it violates the "two-thirds rule" in *People v Tanner** and MCL 769.34(2)(b).

*387 Mich 683, 689-690 (1972). See Section 8.27 for more information.

- When it exceeds statutory limits. *People v Shipley*, 256 Mich App 367, 378 (2003). A sentence in excess of the statutory limit is only invalid to the extent it exceeds the statutory limit. MCL 769.24; *People v Thomas*, 447 Mich 390, 393 (1994).
- When concurrent sentences were imposed and consecutive sentencing was mandatory.* *People v Thomas*, 223 Mich App 9, 11 (1997). The due process afforded by a resentencing hearing is required when a defendant is exposed to a greater possible penalty or when a defendant's original sentence would be "drastically increased" by the modified sentence. *Thomas, supra* at 15–16.

*See Section 8.28 for more information on concurrent and consecutive sentencing.

- When, even if it is within the statutory limits, the sentence is based on constitutionally impermissible grounds or on any constitutionally infirm prior convictions.* *People v Wyrick*, 265 Mich App 483, 492 (2005); *Miles, supra* at 96.

  There exists no presumption that a court considered an unconstitutional prior conviction simply because the conviction was included in the information before the court at the time of sentencing. *People v Alexander*, 234 Mich App 665, 672 (1999). For such an issue to merit review, there must be some affirmative evidence that a sentencing court actually considered the conviction in question. *Alexander, supra* at 672.

- When it is influenced by the court's improper assumption of the defendant's guilt on a charge yet to be tried. *Wyrick, supra* at 492; *Miles, supra* at 96.

- When the court mistakenly imposes consecutive sentences without statutory authority to do so. *Alexander, supra* at 677–678. Resentencing in such a case is not required because unlike the situation in *Thomas, supra* at 9, the *Alexander* defendant's due process rights were not implicated. *Alexander, supra* at 678. In *Thomas*, resentencing made the defendant vulnerable to an increased total term of incarceration, and under the circumstances present in the case, the sentencing court may have sentenced the defendant to shorter individual terms. *Id*. In *Alexander,* a resentencing hearing was unnecessary because correction of the invalid sentence would result in a decrease in the *Alexander* defendant's overall prison term, and the circumstances of the case did not suggest that absent the sentencing error, the court would have imposed shorter sentences. *Id*.

- When it is based on local sentencing policy instead of reflecting a sentence tailored to the individual defendant. *Wyrick, supra* at 492; *Miles, supra* at 96; *People v Chapa*, 407 Mich 309, 311 (1997).

- When, due to its mistaken belief in the law or its misunderstanding of a sentencing statute, the trial court believed it had no discretion over a defendant's sentence. *People v Sexton*, 250 Mich App 211, 228 (2002).

  A sentence was invalid when a sentencing court failed to recognize that it had discretion and imposed consecutive sentences under the mistaken belief that consecutive sentencing was mandatory. *People v Daniels*, 69 Mich App 345, 349–350 (1976). See also *People v Mauch*, 23 Mich App 723, 730–731 (1970) (sentencing court erroneously believed the applicable habitual offender statute required it to impose a maximum sentence equal to twice the term permitted for a first offense when the statute merely allowed the court to impose a maximum term of *up to* twice the term for a first offense).

*See Section 8.21 for more information on unconstitutional prior convictions.

A trial court is not required to establish for the record that, when applicable, the court recognizes its sentencing discretion and is exercising that discretion with regard to a sentence it imposes. *People v Knapp*, 244 Mich App 361, 389 (2001). In the absence of record evidence that a court wrongly believed it had no discretion, a court is presumed to know the law and the judicial discretion the law authorizes. *Knapp, supra* at 389; *Alexander*, *supra* at 674–675.

*See Section 8.4(E) for more information.

- When a court fails to utilize a reasonably updated PSIR when imposing the sentence.* *People v Hemphill*, 439 Mich 576, 580 (1992).

*See Section 8.23 for information on allocution.

- When the defendant and the defendant's counsel are not given the opportunity to address the court before the sentence is imposed. MCR 6.425(E)(1)(c); *People v Wells*, 238 Mich App 383, 392 (1999).*

- When it is based on inaccurate information. *Miles, supra* at 96. Resentencing was required where the trial court sentenced the defendant to a lesser consecutive sentence based on an error in the defendant's PSIR; because the PSIR did not show the defendant's previous felony-firearm conviction, the court erroneously sentenced the defendant to a consecutive term of two years instead of five years. *Miles, supra* at 98.

B. Correcting Invalid Sentences

*Decided under the judicial guidelines.

Even when a court imposes a sentence within the guidelines,* the court must "articulate a basis for the sentence." *People v Triplett*, 432 Mich 568, 570 (1989), citing *People v Coles*, 417 Mich 523, 549 (1983). When a court imposes a minimum sentence that falls within the range recommended by the guidelines, the court may satisfy the articulation requirement by making reference to the guidelines and to the defendant's sentence. *Triplett, supra* at 570, citing *People v Broden*, 428 Mich 343, 354–355 (1987). Where no explanation is offered, the case must be remanded to the sentencing court to provide such an explanation, but resentencing is not required. *Triplett, supra* at 573. See Part V for detailed information about sentencing hearings.

Effective July 13, 2005, MCR 6.425(E)(1)(e) no longer contains a requirement that a court articulate its reasons for imposing the sentence given. In the amended rule, a court's articulation of its reasons for imposing the sentence given is conditioned on the court's imposing a sentence outside the guidelines range. As amended, MCR 6.425(E)(1)(e) states that "if the sentence imposed is not within the guidelines range [the court must] articulate the substantial and compelling reasons justifying that specific departure[.]"

A sentencing court's failure to respond to a defendant's presentation of evidence in support of a downward departure may result in a remand to the court "to consider properly presented factors and [to provide] further clarification of what role, if any, th[o]se potential factors played in the

ultimate sentencing decision." *People v Michielutti*, 266 Mich App 223, 228 (2005), citing *Triplett, supra* at 571–573.

Resentencing is not required where correction of the invalid sentence is ministerial. *Miles*, *supra* at 98–99. However, a court must provide notice to all parties of any change made to a sentence. MCL 769.27 states:

> "If the court changes any sentence imposed under this act in any respect, the clerk of the court shall give written notice of the change to the prosecuting attorney, the defendant, and the defendant's counsel. The prosecuting attorney, the defendant's counsel, or the defendant may file an objection to the change. The court shall promptly hold a hearing on any objection filed."

Remand to correct errors in a defendant's SIR or PSIR is mandatory. *People v Spanke*, 254 Mich App 642, 650 (2003). Remand is necessary where an error in the defendant's PSIR results in "a real and substantial likelihood that the inaccurate information will affect [the defendant's] chances for parole," even if the court did not rely on the erroneous information in sentencing the defendant. *People v Cato*, unpublished opinion per curiam of the Court of Appeals, decided June 3, 2004 (Docket No. 246619) (codefendant admitted shooting the decedent but defendant's PSIR indicated he was the shooter).

A sentence need not be wholly invalid to merit correction. *Wyrick, supra* at 492. A trial court's mistaken belief that it was required to report the defendant's convictions to the Secretary of State "constituted an invalid aspect of the sentence" for which the defendant was entitled to relief. *Id*.

C. No Remedy Available, Permitted, or Necessary

Even where the circumstances seemed to justify the trial court's decision to vacate a defendant's sentences, the court was without authority to modify the sentences because they were valid. *People v Whalen*, 412 Mich 166, 168–169 (1981) (the FBI's promises to the defendant in exchange for his acting as an informant were unenforceable in the defendant's state prosecutions).

A trial court's uncertainty about the parolable life sentence it imposed on a defendant does not entitle the defendant to later be resentenced when the law ultimately did not accommodate the court's intention. *People v Moore*, 468 Mich 573, 580 (2003). In *Moore*, the trial court clearly expressed its intention that—despite imposing a sentence of life imprisonment—the defendant be considered for parole under MCL 791.234. *Moore, supra* at 580. The *Moore* Court emphasized that "the sentencing judge did not express any intention that defendant *actually be paroled*, but only that the Parole Board consider whether to parole him." *Id*. The Parole Board did consider the defendant for parole and expressed "no interest" in pursuing the matter; therefore, the trial court's expectations were satisfied. The fact that the Parole Board did not take action on the defendant's parole did not offend the trial court's intentions at the defendant's initial sentencing. In fact, the "misapprehension or

misunderstanding" claimed by the court was simply the court's ignorance of "the infrequency with which the Parole Board would grant parole to defendants sentenced to life terms." *Id*.

When a scoring change advanced by the defendant would not change the defendant's placement in the appropriate sentencing grid, remand for resentencing is not required. *People v Houston*, 261 Mich App 463, 473 (2004).

A court may not modify a defendant's sentence once the defendant has begun serving it. *In re Parole of Bivings*, 242 Mich App 363, 371 (2000). A defendant on parole after serving a portion of his or her sentence is "still in the 'legal custody and control' of the [Department of Corrections]," and a court is not authorized to revisit the defendant's sentence. *Id*.

Absent a clear legal or procedural error, once a defendant has begun serving a sentence imposed by the trial court, that court no longer has jurisdiction over the defendant or the defendant's sentence. *People v Wybrecht*, 222 Mich App 160, 166–167 (1997). Where "the trial court did not declare defendant's prior sentences invalid on any established ground," the court was prohibited from revisiting the sentence it imposed on the defendant. *Wybrecht*, *supra* at 167. A trial court is without authority to modify a defendant's sentence "on the basis of post hoc discretionary sentencing criteria"—or the court's "change of heart." *Id*. at 168. Review of a sentence's proportionality is limited to the appellate courts or to other forums as directed by an appellate court. *Id*. at 162, 168–170.

A defendant may not impeach the validity of his or her sentence by submitting additional information to the sentencing court after sentence has been imposed. *Id*. at 171–172. If the information sought to be admitted was discoverable before sentencing, the defendant waived the right to have the court consider it. *Id*. at 172.

Where there is adequate record evidence in support of the trial court's scoring, the appellate court may fairly decipher scoring issues and a remand for rescoring is unnecessary. *People v Hernandez*, 443 Mich 1, 16–18 (1993); *People v Hornsby*, 251 Mich App 462, 468 (2002).

A trial court may—after the defendant has left the courtroom but before he or she has left the building and before entry of a written order—impose a different sentence than the sentence first ordered. *People v Dansby*, unpublished opinion per curiam of the Court of Appeals, decided February 17, 2005 (Docket No. 251732). In *Dansby*, the trial court sentenced the defendant to a sentence within the guidelines. After sentencing,

> "defendant left the courtroom but had not left the building when the trial court realized it mispoke, called the parties back, and imposed the higher sentence, which was also within the guidelines."

According to the Court of Appeals,

> "Because the trial court never entered an order based on the original sentence that it stated during the sentencing hearing, there was no judgment of sentence to modify. The trial court, therefore, did not exceed its authority in recalling defendant to the courtroom five minutes later to correct its previous misstatement." *Dansby, supra* (citation omitted).

D. Sentences Imposed Under the Statutory Guidelines

1. Sentences Within the Guidelines Range

Provided that the defendant's PRVs and OVs were correctly scored and the trial court did not rely on inaccurate information in determining the sentence, the Court of Appeals must affirm any sentence imposed when the sentence is within the minimum range recommended under the guidelines. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348 (2000). (The legislative mandate to affirm sentences within the guidelines does not violate the state or federal separation of powers doctrine. *People v Garza*, 469 Mich 431, 435 (2003).) Notwithstanding the mandate in MCL 769.34(10), and under certain circumstances, a defendant may appeal a sentence when the sentence is within the guidelines.

The requirements for appealing a sentence within the guidelines are found in MCL 769.34(10) and MCR 6.429(C). By an amendment effective June 29, 2004, the language in the court rule was made identical to the language used in MCL 769.34(10):

> "A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals."

In other words, a sentence within the guidelines is appealable

- if there is a scoring error or if the court relied on inaccurate information in determining the defendant's sentence, and
- if the scoring error or the inaccurate information was raised at the sentencing hearing, in a motion for resentencing, or in a motion to remand.

> **Note:** Effective January 1, 2006, references in MCR 6.429(B) to "a motion for resentencing" will be replaced with the phrase "a motion to correct an invalid sentence." However, the reference in MCR 6.429(C) to "a motion for

> resentencing" was unchanged by these amendments so that subsection (C) will be the only provision in MCR 6.429 where the phrase "a motion for resentencing" appears.

*The plain error standard of review is discussed in subsection (E), below.

Objections to scoring accuracy. Where a defendant's sentence is within the guidelines and the defendant first challenges the accuracy of his or her scores on appeal, the defendant has not properly presented the issue for appeal, and the appellate court need not review the issue. MCL 769.34(10); MCR 6.429(C); *People v Harmon*, 248 Mich App 522, 530 (2002). An unpreserved sentencing error may, however, be reviewed for plain error pursuant to *People v Carines*, 460 Mich 750, 763–764 (1999).* *People v McLaughlin*, 258 Mich App 635, 670 (2003); *Callon*, *supra* at 332.

Proportionality. There is no statutory authority for an appellate court to consider a defendant's challenge to the proportionality of his or her sentence if the sentence is within the guidelines range. MCL 769.34(10); *People v Pratt*, 254 Mich App 425, 429–430 (2003). In fact, a sentence within the guidelines is presumptively proportionate. *People v Babcock*, 469 Mich 247, 263–264 (2003). See also *People v Greaux*, 461 Mich 339, 342 (2000) (same ruling under the judicial sentencing guidelines).

2. Sentences Outside the Guidelines Range

*A sentence "outside the guidelines range" is a departure. Departures are discussed in detail in Sections 8.48–8.50, above.

MCL 769.34(7) and MCR 6.425(F)(4) authorize defendants to appeal a sentence outside the guidelines range* on that basis alone. However, unlike MCL 769.34(10) and MCR 6.429(C) (provisions applicable to sentences within the guidelines), MCL 769.34(7) and MCR 6.425(F)(4), the provisions governing sentences outside the guidelines, make no mention of preservation requirements. Even though the language used in MCL 769.34(7) and MCR 6.425(F)(4) is not identical, there is no conflict between the two provisions and neither one requires something the other does not. The language in MCR 6.425(F)(4) is as follows:

> "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."

MCL 769.34(7) states:

> "If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall

> advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range."

According to *People v Kimble*, 470 Mich 305 (2004), the preservation conditions placed on a defendant's ability to appeal a sentence within the guidelines do not apply to a defendant's appeal of a sentence that is not within the range indicated by the guidelines. The *Kimble* Court stated:

> "[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *Kimble, supra* at 310.

E. Standards of Review

- Scoring errors and other challenges to guidelines scoring are reviewed for an abuse of discretion. *People v Drohan*, 264 Mich App 77, 89 (2004), lv gtd on other grounds 472 Mich 881 (2005).
- In cases involving a sentence departure, whether a particular factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for an abuse of discretion. *Babcock, supra* at 265.
- Unpreserved errors involving sentencing are reviewed for plain error. *McLaughlin, supra* at 670. The plain error standard requires a defendant to show that an obvious error occurred in the sentencing process and that the error affected the defendant's substantial rights. *Kimble, supra* at 312, citing *Carines, supra* at 763. The defendant must also show that the error prejudiced him or her, i.e., that it affected the outcome of the proceedings, and had a serious effect on "the fairness, integrity or public reputation of judicial proceedings[.]" *Id*.
- Whether the statutory sentencing guidelines were properly applied is an issue that is reviewed de novo. *People v Hegwood*, 465 Mich 432, 436 (2001).
- Whether a trial court's understanding of the law constitutes a misapprehension of the law is a question of law, and questions of law are reviewed de novo. *People v Moore*, 468 Mich 573, 579 (2003).

8.53 Probation Revocation

This section discusses probation revocation only to the extent necessary to adequately address the procedure involved in a sentencing court's disposition

of a matter involving revocation of probation. For a complete discussion of probation revocation proceedings (including automatic waiver cases involving juveniles), see Miller, *Criminal Procedure Monograph 7: Probation Revocation—Revised Edition* (MJI, 2002). For additional information on juvenile probation and revocation, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings—Revised Edition* (MJI, 2003).

A probation violation is not a crime, and a ruling that a defendant has violated probation is not a new conviction. *People v Perks (On Remand)*, 259 Mich App 100, 108–109 (2003), citing *People v Kaczmarek*, 464 Mich 478 (2001). Therefore, where a probationer's probation is revoked for a probation violation, the sentence imposed after revocation relates to the offense for which the probationer was granted probation. In other words, revocation of an offender's probation permits the court to resentence the offender on the original offense. MCL 771.4; *Kaczmarek, supra* at 483.

MCR 6.445(G) addresses the scope of a trial court's authority after finding that a probationer has violated a condition of probation. MCR 6.445(G) states, in part:

> "(G) *Sentencing*. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration."

*MCR 6.425(E), as amended, effective July 13, 2005, contains information formerly found in MCR 6.425 (D)(2) and (3).

If the court, after a contested hearing or following the probationer's plea, determines that revocation of probation is appropriate, the subsequent sentencing is subject to requirements outlined in MCR 6.425(B) and (E),* which are discussed briefly, below. See Part V, "The Sentencing Hearing," for a comprehensive examination of a sentencing hearing's requirements.

When a sentence of incarceration is imposed following the revocation of probation, MCL 771.4 authorizes the sentencing court to sentence the defendant to the same penalty that could have been imposed if probation had not been granted. The legislative sentencing guidelines apply to a 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. *People v Hendrick*, 472 Mich 555, 560 (2005); MCL 769.34(2).

An offender sentenced to prison after probation revocation must be afforded the same rights and procedure as is an offender sentenced to prison immediately after conviction. An offender must be represented by counsel at his or her sentencing hearing unless the defendant has validly waived the assistance of counsel. *People v Johnson*, 386 Mich 305, 317 (1971).

After an offender's probation is revoked, MCR 6.445(G) requires that a court "hav[e] considered a current presentence report" before it can sentence an

offender to prison. MCR 6.445(G) also requires that the court comply with MCR 6.425(B), which states that "[t]he 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 before the day of sentencing."

MCR 6.445(G), the court rule that specifically addresses sentencing after probation revocation, does not expressly refer to MCR 6.425(D) as a provision to which the court must adhere when sentencing an offender after probation revocation. MCR 6.445(G) requires the sentencing court to review a current presentence report before sentencing a defendant to prison after probation revocation. MCR 6.425(D) requires that a defendant's presentence report be accompanied by proposed scoring of the sentencing guidelines. Because *Hendrick* has determined that the guidelines apply to sentences imposed after probation revocation,* proposed scoring of the guidelines must accompany the presentence report of a defendant being sentenced after probation revocation. MCR 6.425(D).

*When the offense for which probation was first granted occurred on or after January 1, 1999.

After probation revocation, the court must sentence the offender "within a reasonably prompt time[.]" MCR 6.445(G); MCR 6.425(E)(1). On the record at the sentencing hearing, the court must establish that the parties "have had an opportunity to read and discuss the presentence report[.]" MCR 6.425(E)(1)(a).

Each party must be given the chance to explain information found in the PSIR or to challenge the accuracy or relevancy of information in the PSIR, and if any challenges are raised, the court must resolve them. MCR 6.425(E)(1)(b). MCR 6.425(E)(2) sets forth the procedure by which the court is to resolve any challenges to information in a PSIR:

> "*Resolution of Challenges*. If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to
>
> > "(a) correct or delete the challenged information in the report, whichever is appropriate, and
> >
> > "(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections."

In addition to the opportunity to challenge information in the PSIR at sentencing, the defendant, the defendant's lawyer, the prosecutor, and the

victim must be permitted to inform the court of any circumstances they believe it should consider in imposing sentence. MCR 6.425(E)(1)(c).

The court must announce the sentence being imposed, state the minimum and maximum terms if applicable, and indicate whether the defendant is entitled to any credit for time served. MCR 6.425(E)(1)(d).

Time served in jail toward a term imposed as a condition of probation is not the equivalent of time served toward a jail term had a defendant been sentenced to jail rather than probation. *People v McKeown*, 228 Mich App 542, 545 (1998). Therefore, a defendant is not entitled to credit for any time he or she spent in jail as a condition of probation when the defendant is sentenced to incarceration after probation revocation. *McKeown, supra* at 545.

In determining that the sentencing guidelines apply to sentences imposed after probation revocation, the *Hendrick* Court emphasized that MCL 771.4 does not limit a sentencing court to imposing only a sentence that could have been imposed immediately after the defendant's conviction. A sentence imposed pursuant to MCL 771.4

> "is clearly permissive, not mandatory. It states that 'if' probation is revoked, the court 'may' sentence the defendant as if probation had never been granted. While the sentencing court *may* sentence the probationer in the same manner and to the same penalty, nothing in the statute requires it to do so." *Hendrick, supra* at 561–562.

Because MCL 771.4 does not mandate a particular sentence, a sentencing court may depart from the range recommended under the guidelines. In so doing, "it is perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative sentencing guidelines." *Hendrick, supra* at 562–563 (footnote omitted).

> **Note:** The *Hendrick* Court's holding is retroactive because the resulting rule of law—that the legislative guidelines apply to sentences imposed after probation revocation when the initial crime was committed on or after January 1, 1999—"was clearly foreshadowed" by the unambiguous language in MCL 769.34(2) and MCL 771.4. *People v Parker*, ___ Mich App ___, ___ (2005).

As with a sentence imposed immediately after a defendant's conviction, when a court departs from the guidelines when sentencing a defendant after a probation revocation, the court must "articulate the substantial and compelling reasons justifying that specific departure[.]" MCR 6.425(E)(1)(e).

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and

compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

> "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

The final court rule provision to which MCR 6.445(G) refers is MCR 6.425(E)(2)(f), which requires the sentencing court to "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."

*See Section 8.37 for more information on restitution.